SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

on

THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B — 2012]

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INTRODUCTION

We would firstly like to commend the Portfolio Committee on Justice and Constitutional Development ["the Committee"] for facilitating written submissions on the proposed amendments to the Criminal Law (Sexual Offences And Related Matters) Amendment Act Amendment Bill ["the Bill"].

We further support the action of the Committee to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act [herein referred to as "the Act"] in order to address the penalty clauses as a matter of urgency and specifically applaud the Committee on taking prompt action in addressing the impact of the Western Cape High Court's judgment, in the case of the *Director of Public Prosecutions, Western Cape v Arnold Prins*, on the Act handed down on 11 May 2012 by declaring certain sexual offences contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (herein referred to as the "SOA" or "the Act") legally uncertain due to the lack of disclosure of criminal offences.

The Bill (B – 2012) proposes substantive amendments to the Act. Section 11 [Engaging the sexual services of persons 18 years or older]; section 17(1) [The unlawful and intentional engagement of the services of a child complainant, for financial or other reward, favour of compensation]; section 23(1) [The unlawful and intentional engagement of the services of a complainant who is mentally disabled for financial or other reward, favour of compensation]; and section 56 [Defences and sentencing].

In this submission we will comment on the proposed amendments, the emphasis of which lies with the amendment to Section 56 of the Act. However, we would also like to draw the attention of the Committee to a number of challenges facing the implementation of the Act. It is not our intention, in raising these other areas of concern, to delay the process of amending the Act to address the immediate issues surrounding defences and sentencing. Rather we hope to alert the Committee to these additional issues and to appeal to the Committee to put in place a strategy to address with these, and other weaknesses, of the Act.

We separate our submission into two parts:

PART I: Submissions Relating to the Proposed Amendments; and

PART II: Other Proposals for Sexual Offences Law Reform

PART I: SUBMISSIONS RELATING TO THE PROPOSED AMENDMENTS

Save for the recommendations set out hereunder, we support the balance of the provisions and the general purpose of the Bill.

(A) SECTION 56: DEFENCES [AND SENTENCING]

Response to the Proposed Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill (B-2012)

1. The proposed amendments to the Act confirm the legal position on sentencing as understood, (with the exception of the *Prins* Court) by academics and courts in and are thus, in our opinion, uncontroversial.

2. It could be argued, however, that for the sake of the clarity of the legislation, specific penal provisions should be listed in the Act for all the offences created by it. However, given the relevant findings of the courts to date, and the text of the Constitution, we are of the opinion that the proposed amendments in the Bill are indeed constitutionally compliant and that the inclusion of specific penal provisions in relation to *all* offences in the Act is preferred, but not necessary. The requirements of the principle of legality are outlined below, and justify, in our opinion, the assertion that the proposed amendments to the Act are constitutionally compliant.

3. The principle of legality requires that crimes and their punishments must be created by a properly made law and in terms that explicitly describe particular crimes. This means that punishment may only be inflicted for the contravention of a common-law or statutory crime.[1]

4. Importantly, however, the failure to specify the penalty attached to a certain contravention "is not regarded as a serious flaw in the legislation."[2] Rather, in such cases, it is presumed that "the determination of the appropriate punishment has been left to the courts."[3] In *Rex v Forlee*,[4] the Court stated:

[1] *See* Burchell and Milton "Principles of Criminal Law," (2nd Ed.) pg 59. The Constitution articulates certain aspects of this principle in sections 35(3)(l) and (n). The former states that one cannot be convicted for an act or omission which was not prescribed in law as an "offence" at the time of the act. The latter requires that one is entitled to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.
[2] Burchell "Principles of Criminal Law" (3rd Ed.) pg 99,
[3] Id.
[4] 1917 TPD 52. This position taken in this case was confirmed in *S v Booi* 14/2010 Free State High Court.

"Where the act is definitely prohibited in a manner which renders it clear that the legislature was not extorting or advising, then it is punishable at the discretion of the judge where the law has not itself attached any penalty."

5. Circumstances in which a penalty has not been attached to an offence cannot be equated to a failure by the legislature to criminalise conduct, for "it is generally accepted that if the legislature intends to criminalize conduct, it must say so in express words." But "creating crimes without declaring that the act specified is in itself an offence, by providing that such act shall entail particular punishment, is in order."[5]

6. It is also important to note that section 276(1) of the Criminal Procedure Act 51 of 1977 (the CPA) provides that a range of sentences (listed in that section) "may be passed upon a person convicted of an offence…" Accordingly, it provides a "penalty," so to speak, for any offence to which a specific penalty is not explicitly attached.

7. As already mentioned, the proposed amendment, in our view, simply affirms the position on sentencing already in the law. Although the Constitutional Court has not yet expressed its opinion or judgment on section 35(3)(l) of the Constitution, it is extremely unlikely, based on case law already in existence and academic legal scholarship, that it would find the Act unconstitutional for failing to comply with it. Section 35(3)(l), as its own text suggests, is a prohibition of the retroactive application of offences, and not, as the *Prins* Court found, an implicit requirement that legislation contain specific penal provisions for all offences created.

8. ***The Prins judgment:*** The *Prins* judgment purported to apply the *nullen crimen sine lege* principle (principle of legality), which requires that one cannot be punished for doing something that is not prohibited by law. The High Court found that section 5(1) of the Act was, in effect, unconstitutional for failing to disclose a penalty provision. This finding was based on an incorrect interpretation of the principle of legality, and the judgment, will, no doubt, be overturned on appeal based on the fact that it failed to take into account the following:

   8.1 that section 5(1) of the Act, as well as other offences created in chapters 2, 3 and 4 of the Act for which no punishments are specifically provided, clearly and

[5] *S v Booi* 14/2010 Free State High Court at para 4.

unambiguously constitute punishable criminal offences, for the Act expressly declares to be such;

8.2 that, to the extent that sentences are not specified in any other statute, a court may, in its discretion, impose any sentence for an offence created in section 5(1) of the Act. Section 276(1) of the Criminal Procedure Act 51 of 1977 provides that a range of sentences (listed in that section) "may be passed upon a person convicted of an offence…"

8.3 that there are a number of sections in the Act which refer to punishments for all the offences in sections 4 – 26, thereby indicating that the legislature indeed intended that the offence in section 5(1) be punishable. In particular:[6]

a) section 55 of the Act provides that a person convicted of attempt, conspiracy or assisting to commit any of the offences in the Act "may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable." The section therefore contemplates punishment for those convicted of any of the offences in the Act.

b) sections 49(iv), 50(1)(a)(iii), 50(2)(a)(i), 51(1)(a)(i) and (ii), 51(1)(b), 51(2)(a), 53(1)(c) refer to punishments for the offences created in Chapters 3 and 4 of the Act. These sections deal with the placement and removal of people on the National Sex Offenders Register. The offences in Chapters 3 and 4, like the offence in section 5(1), do not have associated penalty provisions set out in the Act. These sections therefore indicate that the Legislature intended that a person convicted of the offence of sexual assault in section 5(1) could be punished.

c) section 51(1) of the Act refers to four of the possible punishments listed in section 276 of the CPA ("imprisonment, periodical imprisonment, correctional supervision or imprisonment as contemplated in section 276(1)(i)") as possible punishments for committing the offences in Chapters 3 and 4 of the Act. The section indicates that the Legislature intended that

[6] These are set out in the DPP's application for leave to appeal the *Prins* decision.

all the offences in sections 4-26 of the Act should be punishable according to the magistrate's or judge's discretion.

9. **Section 54 of the Act – Obligation to report commissions of sexual offences against children or persons who are mentally disabled.** In addition to our comments in part II of this submission below regarding conceptual gaps in section 54 of the Act, we raise the following in relation to creating consistency across the Act. In order to avoid future litigation that may impact on the operation of the Act due to legal uncertainty based on the Act's omission to disclose an offence, specific offences should be named and inserted into the provisions. The provisions could for example be amended to state the following:

9.1. Section 54(1)(b) "(b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of the offence of failing to report the commission of a sexual offence against a child and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."

9.2. **Section 54(2)(b)** *"(b)* A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in paragraph *(a)*, is guilty of the offence of failing to report knowledge, reasonable belief or suspicion of the commission of a sexual offence against mentally disabled person and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."

10. **Section 5 of the Bill.** We recommend the removal of Section 56A(2) in its entirety. This recommendation is made in consideration of the fact that it will disproportionally impact on sex workers, majority of whom are women, and perpetuates the marginalisation of sex workers whose access to justice and legal representation is often limited due to socio-economic disadvantage.

The provision as it stands strengthens the criminalisation of sex work indirectly. Even though we recognise the current illegal status of sex work in South Africa, the provision can be viewed as premature taking into account the South African Law Reform Commission's investigation into the possible legalisation or decriminalisation of sex work as evidenced in its discussion paper 0001/2009 under project 107 titled 'Sexual Offences – Adult Prostitution'. The Law Reform

Commission's investigation in itself is indicative of contentious nature of the legal status of sex work in South Africa and the public's conflicting views thereon.

(B) GENERAL PROPOSALS FOR SENTENCING REFORM

Although the issue of sentencing reform in general is not before the Committee, we have nevertheless taken this opportunity to raise the issue out of concern for the vast disparities in the sentencing process, which, we think, indicates the need to revisit the topic.

Minimum Sentences and Sentencing Guidelines:

1. In most legal systems the sentence to be imposed for a specific offence is determined by a court within a range set by the legislature.[7] The wider the range, the greater scope there is for the sentencing court to exercise discretion and the less certainty the individual offender has about the sentence to expect for a particular offence. Very wide ranges may be justified by the argument that the narrower the range, the greater the risk that a sentence which is disproportionate to the gravity of the offence and the guilt of the individual offender may have to be imposed.

2. In a purported effort to "deal effectively with crime," (as opposed to reduce sentencing disparity which is frequently the justification behind minimum sentencing legislation) the legislature enacted the Criminal Law Amendment Act in 1997.[8]

3. This piece of legislation created a range of minimum sentences for a long list of 'serious offences'[9] and was enacted despite the South African Law Reform Commission having recommended that there be a thorough debate before a new sentencing regime be introduced.[10]

4. The swiftness with which this legislation was passed is largely attributed to the government's aspiration to be seen as 'tough on crime,' at a time when crime was reportedly on the increase

[7] In England, for example, the Criminal Justice Act 2003 specifies various "starting points" to which a sentencing court "must have regard" when setting the minimum term of imprisonment in any given case. See Ashworth *Sentencing and Criminal Justice* (4th ed) at 32.In the United States, federal cases are regulated by a set of guidelines created by the United States Sentencing Commission, established by the Sentencing Reform Act 1985. Many states in the United States have established similar commissions which have drafted and promulgated sentencing guidelines for state courts. See in general S Terblanche "Sentencing Guidelines for South Africa: Lessons from elsewhere" 3002 SALJ 858.

[8] Act 105 of 1997.

[9] The heading to s 51 refers to 'Minimum sentences for certain serious offences'.

[10] South African Law Reform Commission Issue Paper No. 11 (Project 82) "Sentencing: Mandatory minimum sentences in 1997."

and public tensions high.[11] And interestingly, similar legislative developments occurred in other jurisdictions during that decade.[12]

5. Importantly, the Act was not intended to be a permanent feature on the statute books. However, it was, over the years, continuously renewed and is now a permanent piece of legislation.

6. The minimum sentences range from life imprisonment for specified aggravated forms of murder and rape[13] to set numbers of years for first offenders and recidivists for offences listed in the schedules to the Act.[14] The sentences have to be imposed on adult offenders unless '*substantial and compelling circumstances* exist which justify the imposition of lesser sentences',[15] and are therefore not fully mandatory.

7. Although courts have always been considered the primary role players when it comes to sentencing, particularly in the exercising of discretion, there can be no constitutional objection to the legislature indicating to the courts that it requires severe punishments for serious offences. However, in this instance, the legislature went further and restricted severely the ability of sentencing courts to deviate from specified minimum sentences.

8. However, the Supreme Court of Appeal, in *S v Malgas,*[16] removed any doubts about whether the provision was compatible with the principle of constitutional proportionality. This result was achieved by ruling that when a court is convinced that an 'injustice' would be done by imposing the mandatory sentence, that injustice constituted *substantial and compelling* circumstances that would allow the court to depart from the prescribed minimum.

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[11] J Redpath and M O'Donovan "The Impact of Minimum Sentencing in South Africa" (Report 2) Open Society Foundation for South Africa (2006), 10-1.

[12] S Terblanche and J Roberts "Sentencing in South Africa: Lacking in principle but delivering justice?" (2005) 18 S. Afr. J. Crim. Just. 187, at 191. In 1993 Washington State enacted the now famous "three strikes" statute. This led to the spread of similar legislation across much of the United States in the years that followed. In Canada, the "latest wave" of mandatory minimum sentences were introduced into the penal code in 1995 despite that fact that all Canadian sentencing commissions that have addressed the role of such sentences in the past "have recommended that they be abolished." (See JV Roberts "Mandatory Minimum Sentences of Imprisonment: Exploring the consequences for the sentencing process" 39 Osgoode Hall L.J. (2001) 305, 306-7) In England and Wales, three mandatory sentences were created by the Crimes (Sentences) Act of 1997 and in Australia, the Northern Territory created a mandatory penalty for various non-serious offences in 1997 and Western Australia enacted a "three strikes law" in 1996 in relation to third-time burglary convictions.

[13] Section 51(1) read with Part I of Schedule 2.

[14] Section 51(2) read with Parts II, III and IV of Schedule 2.

[15] Section 51(3)*(a)*.

[16] *S v Malgas* 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) ('*Malgas*').

9. In *S v Dodo,* the matter in which the Constitutional Court noted that the judgment in *Malgas* was 'undoubtedly correct,'[17] the Court commented that the interpretation that Supreme Court of Appeal had given to s 51(1) of the Criminal Law Amendment Act made it plain that 'the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross'.[18] It followed, the Constitutional Court explained, that the offender's rights in terms of s 12(1)(*e*) of Constitution were not infringed, as all that that section, with its prohibition on cruel, inhuman and degrading punishments, required was that there should not be a gross disproportionality between the punishment and the crime.

10. This formulation has yielded significant jurisprudential results. In particular, courts have emphasised that life imprisonment, the ultimate penalty in South Africa, which proportionality requires, may be imposed only for the worst category of crimes. Therefore, the ultimate penalty will not be imposed merely because the rape falls into a category where the prescribed minimum sentence is life imprisonment.[19] As Terblanche points out this means that since only a small proportion of rapes are in or near the 'worst category', 'the prescribed sentence will ordinarily be departed from'.[20]

11. Put differently, traditional proportionality requirements will succeed routinely in justifying departures from the minima where the minimum sentences are substantially higher for a particular form of crime than what would be imposed without the presence of significant aggravating circumstances.

12. There have been some notable research findings since the *Malgas* decision. The first of these is that judges seem to depart from the mandatory minimums “in the majority of cases” and thus, according to Terblanche, minimum sentence legislation exacerbates disparities and inconsistencies in sentencing.[21] Second, offenders *not* benefitting from departures from the legislation receive harsher sentences since the minimum sentencing legislation.[22] Third, there is

[17] *Dodo* (supra) at para 40.
[18] Ibid.
[19] See *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA), [2002] 3 All SA 534 (A); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), [2001] 4 All SA 731 (SCA).
[20] S S Terblanche 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' 2003 *Acta Juridica* 194, 215.
[21] O'Donovan and Redpath (2006) and S Terblanche “Mandatory and minimum sentences: Considering section 51 of the Criminal Law Amendment Act” 2003 *Acta Juridica* 194.
[22] Sloth-Nielsen and Ehlers 2005

no reliable evidence with which to conclude that minimum sentence legislation reduced crime in any way.[23]

13. There is a wealth of comparative research confirming these findings. Tonry states the following in respect of international sentencing trends:

> "The evidence is clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or modest deterrent effect that soon wastes away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether that avoid their application."[24]

14. A sentencing regime that results in such vast disparities cannot be constitutionally acceptable, for the right to equal treatment under the law requires that like cases be treated similarly. The findings illustrated above might well be useful were the constitutionality of the minimum sentence legislation to be revisited. Given the Constitutional Court's findings in *Dodo*, however, judicial review is unlikely, leaving the possibility of revision solely in the hands of the legislature.

Sentencing Guidelines:

15. The Supreme Court of Appeal, has, in the past, indicated that broad sentencing guidelines were indeed "desirable." These, Conradie JA stated, could be adjusted gradually so that offenders who commit a particular offence, will know what to expect.[25]

16. The possibility of introducing sentencing guidelines in the form of legislation is not a new idea. The South African Law Reform Commission published discussion documents regarding such a regime as well as a draft Bill. These documents proposed the establishment of a sentencing council as well as a framework within which sentencing determinations could be made in a manner that promoted consistency. Unfortunately, little has been done since these documents were first released (in 2000) to take up the suggested initiatives.

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[23] Id.
[24] M Tonry, *Sentencing, judicial discretion and training*, 1992, quoted in SS Terblanche, Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997, *Acta Juridica* 194, 2003, p 137.
[25] *S v Gerber* 2006 (1) SACR 618 (SCA) at para 11.

17. It is our submission that Parliament revisit these documents in an attempt to remedy the current inconsistencies in sentencing practice.

(C) SUMMARY AND RECOMMENDATIONS

While the proposed Amendment Bill is constitutionally compliant, and the inclusion of specific penal provisions in relation to *all* offences in the Act is preferred, it is not necessary. We endorse the position taken in the Amendment Bill to create a 'catch all' sentencing provision in the Act, but we are also cognisant that in exercising their discretion in deciding sentences to be imposed, presiding officers in different courts hand down vastly different sentences for similar offences. We are also aware that attempts to mitigate against this through the prescription of maximum penalties and the enactment of 'minimum sentencing' legislation has had a limited impact on these discrepancies in sentencing. We believe that inconsistent sentencing, as well as sentences that radically depart from minimum sentencing, are a result of presiding officers' lack of information and understanding of the social context in which sexual offences occur.

PART II: OTHER PROPOSALS RELATING TO SEXUAL OFFENCES LAW REFORM

In addition to providing a submission to the proposed amendments to the Bill, we would also like to use this opportunity to highlight other problematic provisions relating to the Act. Many of these were identified during the parliamentary process preceding the coming into operation of the Act as well as through the systematic monitoring of the Act subsequent to its promulgation.

In addition to certain problematic provisions, the Act contains a number of important and progressive provisions. The value of these provisions is dependent on the efforts of the executive to implement these properly and of the legislature to monitor this.

(A) IMPLEMENTATION OF EXISTING PROVISIONS

A range of reports[26], including our own monitoring activities, have illustrated a lack of substantive knowledge and effective implementation of the Act at almost every level. While the Act was passed by Cabinet in 2007, the *Policy Framework*, along with critical directives and regulations has yet to be drafted. The operational structure envisaged by the Act has therefore not been fully realised. The *Policy Framework* and the directives

[26] In addition to the research on *Monitoring the Sexual Offences Act: A Qualitative Perspective of the Implementation of SOA* (2011) by UCT, RAPCAN, Rape Crisis, PATCH & Simelela (2011) see also the *Shukumisa Campaign Monitoring Report* (Shukumisa, 2011). Our research examined whether substantive shifts in law would make any difference in criminal justice practice, particularly where the Act is reliant on procedures that have always existed within the CPA. The UCT et al (2011) study will also be published as a series of articles for the *South African Journal for Human Rights*.

are seen, at least by state actors, as the operational and regulatory mechanisms that guide the implementation of the Act. Thus, until these policy directives are complete, the Sexual Offences Act can only be seen as partially implemented.

Other critical areas that have not been implemented after almost five years after the promulgation of the Act include:

1. **In terms of section 62(2)(a) of the Act**, the Minister of Justice and Constitutional Development must, within one year after the implementation of the Act, adopt and table a *Policy Framework on Sexual Offences* ('the NPF') in Parliament. After almost five years after the promulgation of the Act, there is still no policy framework to speak of. The NPF is also meant to be reviewed during December 2012 as required in terms of Section 62(2)(c) of the Act. As the provisions of the Act are so inextricably linked to its implementation through the NPF, the absence of this framework is extremely problematic. For many complainants, access to justice is confounded by a lack of collaboration between the range of departments on which effective investigation and prosecution depends. The NPF would create a mechanism to develop stronger responses to these. The failure of the Executive to finalise this more than four years after the implementation of the Act points, in our view, to a shift in political priorities.

2. **In terms of section 63(1) of the Act**, the government is meant to establish a Committee to be known as the 'Inter-Sectoral Committee for the Management of Sexual Offence Matters'. There has been no communication about the composition of this committee or its mandate, or indeed, whether this Committee has even been constituted.

3. **In terms of section 63(3)(a) of the Act**, the Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, within a year after implementation of the Act, submit reports to Parliament, by each Department or institution contemplated in section 63(2), on the implementation of this Act and *(b)* every year thereafter submit such reports to Parliament. This reporting has hardly been consistent and is largely ad hoc in nature. The first attempt to do so took place in 2010[27], three years after the promulgation of the Act. The quality of these *individual* departmental reports is unquestionably poor and there is no continuity in relation to what is being

[27] According to the Parliamentary Monitoring Group the Department Briefed the Committee on 16 August 2010. This was followed by a briefing on the National Policy Framework on 20 June 2011.

reported *across* departments (i.e. key performance indicators). As yet, there is no indication on the Parliamentary agenda that this will be followed up in 2012.

4. **In terms of section 66(2)(a) of the Act**, the National Director of Public Prosecutions must, in consultation with the relevant departments publish in the *Gazette* directives regarding all matters which are reasonably necessary ... for conducting of prosecutions in sexual offence cases. For instance, after four years, we only have one set of Directives from the NPA; an astonishingly abbreviated document that does not, in our opinion, even remotely cover the range of duties imposed (and implied) on prosecutors by the Act.

5. **In terms of section 66(5)(a) of the Act**, the training courses contemplated in this section must be tabled in Parliament within six months after the commencement of this Act. Although the NPA did institute training nationally *as soon as* the Act was passed, there is no evidence of training (materials or in practice) from other Departments.

6. **Regulation of procedures:** The Act is also vague on its commitment to 'further regulate procedures, defences and other evidentiary matters in the prosecution and adjudication of sexual offences' as set out in the *introduction* of the Act. While the Act does state that an Inter-Sectoral Committee must develop guidelines for "ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the national policy framework and this Act", there is no indication of whether non-compliance will result in sanctions, disciplinary proceedings or criminal charges. While it is disconcerting that the provisions included in the Act to ensure the effective implementation of the legislation, and to safeguard the interests of persons who have experienced sexual violence, have not materialised, it is even more concerning that accountability measures are also clearly failing.

7. **Chapter 6 of the Act** creates a National Register for Sex Offenders. The fact that the legislature has created a duplication in registers between this and 'part B' of the Child Protection Register, which is contained within the Children's Act no 38 of 2005, is extremely problematic. Currently both registers are being poorly implemented (if at all). Apart from the fact that they are extremely costly to establish and maintain, these registers have limited impact in protecting children from victimisation when existing the criminal justice and child protection systems are weak. In the context of low investment into improving the system as a whole – including processes such as training officials or the provision of psychosocial support to victims, which could positively impact on the detection and conviction rates – the Registers seem a poor use of limited resources.

8. **Sections 15 and 16 of the Act**: A further issue of concern has been the criminalisation of certain behaviours between consenting adolescents in section 15 and 16 of the Act. The range of acts for which consenting adolescents are criminalised in the Act is extremely wide which results in normal adolescent sexual behaviour being criminalised. It has exposed young people who engage in kissing and other 'heavy petting' with each other's consent to the distress and potential psychological harm of the early phases of the criminal justice system (questioning by police, health professionals and prosecutors). Efforts to extend the age of sexual debut amongst adolescents are of vital importance in a country with the high rates of poverty, adolescent parents and HIV infection that typify aspects of South African society. However, a more nuanced approach to the issue of addressing consenting sexual behaviour between adolescents is essential. Currently this matter is before the Constitutional Court.

9. **Section 54 of the Act** creates an obligation on 'any person' to report 'knowledge' of a sexual offence against a child to the police [section 54(1)] and to report 'knowledge, reasonable belief or suspicion' of a sexual offence against a mentally disabled person [section 54(2)]. At first reading, this seems to be an extremely positive provision; reporting knowledge of sexual offences is critical in a climate where sexual offences go unreported. The problem with this provision is that the report must be made to the SAPS where the quality of service at police stations in respect of reporting sexual offences is widely recognised as problematic. The *Children's Act* 2005 also creates an obligation to report child abuse. However, in that Act, the report is made to a designated Social Service Professional who in turn has the duty to report the commission of an offence to the Police. The system created in the Children's Act offers a higher level of protection to children from the failings that are often experienced at the front end of the criminal justice system. It also results in trained professionals working with these children in the complex circumstances of abuse. Moreover, retraction is a very common response from children who report their experience to the authorities and who are subsequently faced with blaming attitudes, ineptitude and at times punishment.[28] Retraction often results in the ongoing abuse of the child by the perpetrator. Research indicates that mandatory reporting in an under-resourced context can increase the risk to the child.[29]

10. **Protective measures:** Protective measures in court can mitigate the traumatic effect of testifying in court on some witnesses. The objects of the Act stress the importance of providing sexual offence complainants with the maximum and least traumatising protection that the law can provide.

[28] Summit, R. C. 1983. The Child Abuse Accommodation Syndrome. *Child Abuse and Neglect,* Vol. 7, p.182.
[29] Dawes, A. and Mushwana, M., Monitoring Child Abuse and Neglect, in Dawes, A., Bray, R. and Van Der Merwe, A. 2007. *Monitoring Child Well-Being: A South African Rights-Based Approach.* HSRC Press, p.274

Furthermore, to promote the right of sexual offence complainants to be free from all forms of violence, including freedom from psychological harm it is essential that protections be in place to protect victims from further harm and humiliation during the trial. In order to address this, the Act makes an important attempt to strengthen provisions in the Criminal Procedure Act No. 51 of 1977 (CPA). Notable are the amendments to section 158 of the CPA (dealing with witnesses providing evidence through CCTV system) and section 170A of the CPS (dealing with witnesses providing evidence with the assistance of intermediaries). Due to amendment in the Schedule to the Act, these sections now require, in matters where the witness is under the age of 14, the presiding officer must enter into the record reasons for not instituting the provisions. This should have the effect of making these measures more available than has previously been the case for children under 14 years old. However, the problem remains that for witnesses over the age of 18 these measures (particularly section 158 of the CPA which relates to both child and adult witnesses) continue to be extremely underutilised. The majority of adolescent and adult witnesses continue to face the full emotional onslaught of the trial process in the court environment in the presence of the accused in spite of the protective measures provided.

11. **Evidence of previous sexual experience or conduct:** The Act also amends s227 of the CPA, introducing more stringent provisions to prevent the introduction of evidence of previous sexual history in the trial, this is important. However the practice in many courts remains that determined defence council raise the issue. Too often this evidence is permitted in court, often unchallenged by the prosecution. Training on the provisions of the Act seems to have had limited impact on the utilisation of this provision. Similarly cross examination of many sexual offence complainants is often excessively badgering and humiliating. Courts, necessarily, tend to err on the side of caution, allowing ample lee way for defence lawyers in this regard. Where prosecutors are inexperienced or weak, this badgering is generally unopposed by the prosecution. Exposing victims to extreme psychological harm through the trial process.

12. **Victim support and participation:** Noting the above regarding the implementation of procedural and evidentiary reforms in these matters, we believe that under our current system in which the complainant is a witness in the state's case, the complainant will continue to bear the brunt of the adversarial legal system as their needs and rights are often invisible during the trial. This is because the interests of the court, the prosecution and the accused are directly protected by the presiding officer, prosecutor and defence respectively. It bears mention that the interests of the prosecution do not automatically include those of the complainant.

13. Other Jurisdictions have put in place different models to achieve greater focus on the rights of victims and complainants. Some of these models require fundamental shifts in thinking about the nature of the criminal justice system. Thus to effectively address the protection of victim's rights during the trial (such as the possibility of legal representation for victims where the scope of that representation is clearly defined) would necessitate careful investigation and considerable debate. The core question is to ensure that we consider the most effective way to protect the constitutional rights of the complainant at the same time as protecting the right of the accused to a fair trial. This will undoubtedly be a lengthy and complex debate on which we will not expand in this submission. However, we urge the Committee to put in place a plan to consider these important questions of the effective protection of complainants' rights.

(B) CONCLUSION AND RECOMMENDATIONS

Civil society organisations have attempted both individually and as part of larger coalitions to bring to light the sluggish pace and inconsistent implementation of the Act through research, national monitoring efforts and public awareness campaigns. These have largely gone unnoticed. Government has either been non-responsive or defensive about the complexity of the Act's implementation. Attempts to secure information and discussions regarding the progress of (i) particular policies or directives related to the Act; (ii) the establishment, composition and objectives of the Inter-Sectoral Committee for the Management of Sexual Offence Matters; (iii) department specific training relating to the Act; (iv) the finalisation of the National Policy Framework; (v) plans for parliamentary monitoring and oversight and other critical operational issues have been met with silence or deferrals. This sends the message to civil society organisations that they have no meaningful role to play in the structural or institutional management or implementation of the Sexual Offences Act, apart from providing supplementary services to the state where it cannot itself deliver.

December 2012 will mark *5 years* of the passing of the Act and we believe that it is time for the hard questions to be asked and, of course, answered. Given that the NPF has not been established, and that a five year review of this Framework in December 2012 would therefore be fruitless, we recommend that the Committee consider a five year review of the Act in its entirety.

(C) ENDORSING ORGANISATIONS

1 Mosaic - Training Service and Healing Centre for Women
2 The Nisaa Institute for Women's Development
3 People Opposing Women Abuse (POWA)
4 Sex Workers Education and Advocacy Taskforce (SWEAT)
5 Triangle Project
6 Tshwaranang Legal Advocacy Centre (TLAC)
7 Women's Legal Centre (WLC)