

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL  
SERVICES ON THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS)  
AMENDMENT BILL [B16 – 2020]**

**Attention:** Mr V Ramaano

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**9 October 2020**

**THE WOMEN'S LEGAL CENTRE**

**WLC requests the opportunity to make oral submissions to the Portfolio Committee at the public hearings on the Bill.**

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## **A. INTRODUCTION**

1. The Women's Legal Centre is an African feminist legal centre that advances women's rights and equality through strategic litigation, the provision of free legal services and advice, advocacy, education and training. We aim to develop feminist jurisprudence that recognizes and advances women's rights.
2. The Women's Right to be Free from Violence is one of the WLC's four strategic programmes. The programme's vision is the recognition and implementation of an accessible and responsive justice system that takes account of, and supports, the particular needs of women who are survivors of violence, and which provides optimal services and protection.
3. Its core objectives include ensuring that there is a legislative framework to address violence against women which is compliant with international and constitutional obligations; ensuring that the state has implementation plans in place to action legal frameworks and policies; holding the state and private entities accountable in the implementation of laws and policies; and in the development of due diligence standards relating to violence against women.
4. WLC runs a Legal Advice Unit which provides legal advice to women on a wide range of issues. WLC welcomes the opportunity to make submissions on the Criminal Matters Amendment Bill 2020.

## **B. GENERAL COMMENTS**

5. The purpose of this Bill is to regulate the management and administration of the National Register for Sex Offenders, as well as extend the offence of incest and introduce a new offence of sexual intimidation.
6. Following the national public outcry and marches held on 1 August 2018 in protest against the high levels of violence against women, President Ramaphosa held a Presidential Summit on Gender Based Violence and Femicide in November 2018. One of the outcomes of the Summit was the Declaration which set out government commitments to address gender based violence and femicide. Article 5 of the Declaration states *'The existing laws and policies applicable to gender-based violence*

*and femicide are to be reviewed to ensure that they are more victim-centred and responsive, and that the identified legislative gaps are addressed without delay’.*

7. Another of the outcomes of the Summit was the establishment of the Interim Steering Committee on Gender Based Violence and Femicide (GBVF) which was tasked with the development of the National Strategic Plan on GBVF (2020 – 2030)<sup>1</sup>. This plan sets out the national response to the crisis facing South Africa. The President also announced the roll out of immediate measures to fast track medium term interventions which are detailed in the Emergency Response Action Plan (ERAP October 2019).
8. The ERPA contains specific objectives relating to the amendment of legislation relating to gender based violence and femicide. WLC commends the Department of Justice and Correctional Services for the development and drafting of Bills to actively address violence against women in a more comprehensive manner.
9. However, WLC is of the opinion that more extensive amendments to legislation that regulate the investigation and prosecution of sexual offences is necessary to decisively and comprehensively manage the levels of sexual and domestic violence in South Africa.
10. While WLC will restrict its comments to the content of the proposed amendments in the Bills currently out for public comment, we encourage the Portfolio Committee to further engage with civil society to explore more comprehensive ways of ensuring the effective prevention, detection, investigation and prosecution of both sexual and domestic violence matters.
11. In addition, WLC is concerned that the commitments contained in Article 7 of the Declaration on Gender Based Violence and Femicide have not been fulfilled to date: *‘The finalisation of outstanding legislative measures and policies that relate to gender-based violence and femicide, as well as the protection of the rights of women and gender non-conforming persons, be fast-tracked, in particular the Prevention and Combating of Hate Crimes and Hate Speech Bill, the Victim Support Services Bill, and the policy relating to the decriminalisation of sex work’.* WLC encourages the Department to specifically expedite the release of the policy on the decriminalisation of sex work and draft legislation related thereto. While we commend the Department for developing draft

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<sup>1</sup> The NSP was approved by Cabinet in December 2019

Bills to address violence against women, it is our submission that the Department and the Portfolio Committee cannot adequately address violence against women and femicide if it does not include the rights of sex workers and the decriminalisation of sex work itself.

### **C. SPECIFIC COMMENTS ON THE BILL**

#### **Amendment of section 2 of Act 32 of 2007**

12. WLC supports this amendment.

#### **Amendments of section 5 and 12 of Act 32 of 2007**

13. WLC supports these amendments.

#### **Insertion of new Part in Act 32 of 2007: sexual intimidation**

14. WLC broadly supports the insertion of the new offence of 'sexual intimidation'.
15. However, we do not support the inclusion of one of the elements of the offence, that of 'imminent harm'. A reasonable belief on the part of B that she will be raped, compelled to rape someone else etc. is sufficient to prove the offence (together with the other elements of unlawfulness and intention). The added element of 'imminent harm' is unnecessary and burdensome.
16. WLC therefore recommends that the clause be amended as follows:

14A. A person ("A") who unlawfully and intentionally utters or conveys, whether directly or indirectly, a threat to a complainant ("B") that inspires a reasonable belief **[of imminent harm]** in B that B, or a third party ("C"), shall be—

### **Amendments of sections 40 – 51, and 53 of Act 32 of 2007**

17. WLC broadly supports the amendment to the above sections to expand the scope of the NSRO to include the particulars of all sex offenders, and secondly, to expand the list of persons who are protected to include vulnerable persons in addition to children and people with mental disabilities.
18. WLC supports the inclusion in the list of vulnerable persons to persons with physical, mental or intellectual disabilities and persons over the age of 60 years who receive community based care and support services, live in a structure used primarily as a residence, or are cared for in a facility providing 24 hour care.
19. Concern however is raised regarding the inclusion in the list of vulnerable persons to a 'female' under the age of 25 years. While it is appreciated that the intention of the clause is to protect women who are under the age of 25 years as they are as considered vulnerable, the age distinction of 25 years appears arbitrary as women are generally vulnerable, and do not necessarily become less vulnerable over the age of 25 years.
20. It is therefore recommended that the age limit of 25 years be removed, and that persons whose names are entered into the NRSO are not permitted to work with women, irrespective of the age of women.
21. The definition of "sexual offence" is too limited; it is recommended that the definition include all sexual offences, whether in terms of statute or common law. This will automatically include all the offences listed in the amendment as well as any other statutory or common law sexual offences.

### **Amendment of section 40**

22. WLC recommends the amendment of the definition of a person who is vulnerable:

“person who is vulnerable’ means a -

(a) child;

(b) female [**under the age of 25 years**]

23. WLC recommends the amendment of the definition of sexual offence”

“sexual offence” means any – [

**(a) sexual offence in terms of the law as it existed between 16 June 2003 and 15 December 2007;**

**(b) offence referred to in Chapters 2, 3 and 4 and sections 55 and 71 of this Act;**

**(c) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and**

**(d) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996);”]**

sexual offence in terms of the common law or statute

#### **Amendment of section 42**

24. WLC does not support the amendment of section 42 that provides for the Registrar to make the full details of persons who have been included in the Register available publically on the website of the Department of Justice and Constitutional Development.

25. The public availability of the details of persons in the Register serves no legitimate government purpose.

26. If the provisions of the Act relating to the Register are properly implemented, both employers and employees can access the necessary certificates as prescribed, and will not need to consult the (public) Register themselves to determine if a prospective employee is included in Register. In terms of the Act, only prospective employers and employees need information about the details of persons on the Register, for the purposes of employment.

27. By making the Register public obscures the objectives of the Register: for what purpose, other than for employment, would someone need to access the details of persons on the Register? Access of this information to the general public may result in vigilante action against those who are on the Register, beyond employment issues.
28. WLC therefore recommends the deletion of clause 7(c) in its entirety:

**[“(4) The Registrar must make the full names, surname, identity number and the sexual offence, of every person whose particulars have been included in the Register, available on the website of the Department of Justice and Constitutional Development.”.]**

#### **Substitution of section 54 of Act 32 of 2007**

29. WLC supports the amendment to section 54 of the Act.

#### **Amendment of section 56 of Act 32 of 2007**

30. WLC supports the amendment to section 54 of the Act.

#### **Additional amendments**

31. WLC recommends an additional amendment to the Act be considered by the Portfolio Committee.

#### **The automatic provision of reasons to complainants in sexual offences by the NPA for the decision not to prosecute**

32. The current NPA Policy Directives require the NPA to provide reasons to victims for the decision not to prosecute, but only if the victim requests said reasons. There is currently no automatic right for victims to receive reasons from the NPA, nor is there any requirement stipulating the extent or detail for said reasons to which a victim is entitled.

33. The practice of the NPA is to simply state that the reason they are not proceeding with a prosecution is because there is no reasonable prospect of a successful prosecution, even when reasons are requested by victims.
34. This lack of detail provided to victims severely limits victims' rights to access to justice and / or to challenge or review the decision of the NPA. It is therefore recommended that victims are automatically provided with reasons by the NPA for a decision not to prosecute, and that the reasons are provided in writing. The reasons must be detailed and apply to the specific merits of the case in question.
35. It is recommended that the NPA must notify the victim of a decision to prosecute, or not to prosecute, and provide detailed reasons therefore in writing, applicable to the specific merits of the case, should the latter apply.