

CRIMINAL LAWS AMENDMENT (PROTECTION OF CHILDREN AND YOUNG PERSONS)

**CRIMINAL LAWS AMENDMENT (PROTECTION OF CHILDREN
AND YOUNG PERSONS) BILL, 2024**

MEMORANDUM

This Bill will confirm amendments made by a Presidential emergency decree that was necessitated by the implementation of the Constitutional Court's judgment in *Kawenda v Minister of Justice & Ors*. The President's intervention was rendered more urgent by a court-ordered release of all offenders convicted of statutory rape.

The Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (commonly called the Criminal Law Code) contains several sections that protect children from sexual exploitation. The sections call children "young persons", and that term is defined as meaning boys and girls under the age of 16 years. The Constitution, on the other hand, fixes 18 years as the age at which children become adults, so although the Criminal Law Code protects children under the age of 16 it does not provide protection for children between the ages of 17 and 18. As a result the Constitutional Court has declared the definition of "young person" in section 61, as well as sections 70, 76, 83 and 86 of the Code, to be unconstitutional and void.

The main purpose of this Bill is to amend the Criminal Law Code by replacing those sections and extending the Code's protection to all children up to the age of 18 years, as required by the Constitution. The Bill will also amend the Criminal Procedure and Evidence Act to make it possible for children and other witnesses who cannot talk to give evidence in other ways such as through written statements, signs and other augmentative and alternative communications.

In more detail this Bill provides as follows:

Clause 1

This clause sets out the Bill's short title.

Clause 2

Provides for shortened references to Chapter 9:07 and 9:23, which will be amended by this Bill.

Clause 3

This clause will alter two definitions in section 61 of the Criminal Law Code. (a) The amendment of the definition of "extra-marital sexual intercourse" will make it clear that child marriages are not recognised as valid marriages; in other words, sexual intercourse between a child and an adult will not be legal even if they have gone through a form of marriage. (b) The new definition of "young person" will extend the Code's protection to cover all children, i.e. boys and girls under the age of 18 years.

Clause 4

This clause will replace section 70 of the Criminal Law Code, which makes it a crime to have sexual intercourse or engage in other sexual activity with a young person. The new section will differ from the existing one in the following ways:

It will extend the protection provided by the section to cover boys and girls up to the age of 18 years.

It will add a provision stating that if the persons who engage in sexual activity are of a similar age – specifically where the difference in their ages is three years or less – the Prosecutor-General will have to authorise their prosecution before they can

be charged under the section. Before authorising a prosecution, the Prosecutor-General will have to consider a report from a probation officer but will not be obliged to follow the probation officer's advice.

It will add another provision making it clear that the section does not limit the provisions of other laws, for example the Children's Act, which deal with the prosecution of children.

Clause 5

The amendments this clause will make to section 73 of the Code are consequential on the new definition of "young person".

Clause 6

Section 75 of the Criminal Law Code prohibits incest, i.e. sexual intercourse between persons who are closely related. This section will update references in the section to marriage laws, taking into account the new Marriages Act of 2022.

Clause 7

This clause will replace section 76 of the Criminal Law Code, which is one of the sections the Court declared to be unconstitutional. The new section will conform to the Constitution.

Clause 8

Deliberately infecting persons with sexually-transmitted diseases was originally dealt with in two sections of the Criminal Law Code. Section 78 makes it a crime for anyone to deliberately infect another person with a sexually-transmitted disease other than HIV; section 79 made the same provision for those who infected others with HIV, but provided for a much heavier sentence to be imposed. Section 79 was repealed by the Marriages Act in 2022, which means that it is no longer a crime to infect other persons with HIV (because section 78 specifically excludes HIV).

This section will amend section 78 of the Code to include HIV among the sexually-transmitted diseases covered by the section.

Clauses 9 and 10

These clauses will replace sections 83 and 86 of the Criminal Law Code, which are two of the sections the Court declared unconstitutional. The new sections will conform to the Constitution, specifically by protecting young persons under the age of 18.

Clause 11

Part XIVA of the Criminal Procedure and Evidence Act provides for the taking of special measures to enable vulnerable witnesses to give evidence in court without undue emotional distress or fear of intimidation. This clause will extend the Part to cover children and other persons who cannot give evidence orally in the normal way, whether through inability to speak or hear or for any other reason, and will allow them to give evidence in writing or by signs or by augmentative and alternative communications. The amendments will permit these incapacitated witnesses to give their evidence through intermediaries – persons who are able interpret or translate what the witnesses are trying to say – and will enable courts to appoint support persons – relatives or friends to sit with the witnesses and provide them with support and comfort. Intermediaries who are not professional court interpreters will have to take an oath to interpret truthfully what the witnesses are saying.

BILL

To amend the Criminal Law Code and the Criminal Procedure and Evidence Act [*Chapter 9:07*]; and to provide for matters connected with or incidental to the foregoing

5 ENACTED by the Parliament and President of Zimbabwe.

PART I

PRELIMINARY

1 Short title

10 This Act may be cited as the Criminal Laws Amendment (Protection of Children and Young Persons) Act, 2024.

2 Interpretation

In this Act—

“Criminal Law Code” means the Criminal Law (Codification and Reform) Act [*Chapter 9:23*];

15 “Criminal Procedure Act” means the Criminal Procedure and Evidence Act [*Chapter 9:07*].

H.B. 4, 2024.]

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PART II

3 Amendments to Criminal Law Code

Section 61 (“Interpretation in Part III of Chapter V”)(1) of the Criminal Law Code is amended—

- (a) in the definition of “extra-marital sexual intercourse” by the insertion after “spouses” of “both of whom are of or over the age of eighteen years”; 5
- (b) by the repeal of the definition of “young person” and the substitution of—
 ““young person” means a boy or girl under the age of eighteen years.”.

4 New section substituted for section 70 of Cap. 9:23

Section 70 (“Sexual intercourse or performing indecent acts with young persons”) 10
of the Criminal Law Code is repealed and the following is substituted—

“70 Sexual intercourse or performing indecent acts with young persons

(1) Subject to this section, any person who—

- (a) has extra-marital sexual intercourse with a young person; 15
or
- (b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or
- (c) solicits or entices a young person to have extra-marital sexual 20
intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act;

shall be guilty of sexual intercourse or performing an indecent act with a 25
young person, as the case may be, and liable to a fine not exceeding level 12 or imprisonment for a period not exceeding 10 years or both.

(2) It shall be no defence to a charge of sexual intercourse or performing an indecent act with a young person to prove that he or she consented to such sexual intercourse or indecent act.

(3) Where sexual intercourse or an indecent act takes place 30
between—

- (a) young persons between whom the difference in age is not more than three years; or
- (b) a young person and an adult who is not more than three 35
years older than the young person;

neither of them shall be charged with sexual intercourse or performing an indecent act with a young person unless the Prosecutor-General, after considering a report by a probation officer appointed in terms of the Children’s Act [*Chapter 5:06*], has authorised the charge.

(4) The requirements of subsection (3) shall be additional to the 40
requirements of any other law relating to the prosecution and charging of young persons.

(5) It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause

to believe that the young person concerned was of or over the age of eighteen years at the time of the alleged crime:

Provided that the apparent physical maturity of the young person concerned shall not, on its own, constitute reasonable cause for the purposes of this subsection.

(6) For the avoidance of doubt—

(a) the competent charge against a person who—

(i) has sexual intercourse with a female person below the age of twelve years, shall be rape; or

(ii) commits upon a female or male person below the age of twelve years any act referred to in section 66(1), shall be aggravated indecent assault; or

(iii) commits upon a female or male person below the age of twelve years any act involving physical contact (other than an act referred to in section 66(1)) that would be regarded by a reasonable person to be an indecent act, shall be indecent assault; or

(iv) without the consent of a female person of or above the age of twelve years but below the age of eighteen years, has sexual intercourse with that female person, shall be rape; or

(v) without the consent of a female or male person of or above the age of twelve years but below the age of eighteen years, commits upon that female or male person any act referred to in section 66(1) shall be aggravated indecent assault;

(vi) without the consent of a female or male person of or above the age of twelve years but below the age of eighteen years, commits upon that female or male person any act involving physical contact (other than an act referred to in section 66(1)) that would be regarded by a reasonable person to be an indecent act, shall be indecent assault;

and not sexual intercourse or performing an indecent act with a young person;

(b) a young person shall be deemed not to have consented to sexual intercourse, or to any act involving physical contact that would be regarded by a reasonable person to be an indecent act, in any of the circumstances referred to in section 69, in which event the person accused of having sexual intercourse or performing an indecent act with the young person shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be.”.

5 Amendment of section 73 of Cap. 9:23

Section 73 (“Sodomy”)(3) of the principal Act is amended by the deletion from paragraphs (b) and (c) of “but below the age of sixteen years”.

6 Amendment of section 75 of Cap. 9:23

Section 75 (“Sexual intercourse within a prohibited degree of relationship”) of the principal Act is amended—

- (a) in subsection (2) by the deletion from paragraphs (b) and (j) of “Marriages Act, 2022” and the substitution of “Marriages Act [*Chapter 5:15*] (No. 1 of 2022)”; 5
- (b) in subsection (4)(b)—
 - (i) by the repeal of subparagraphs (i) and (ii) and the substitution of—
 - “(i) whether or not the natural parents of the person were married in a customary law marriage solemnised, registered or recognised under the Marriages Act [*Chapter 5:15*] or an enactment repealed by that Act; or 10
 - (ii) whether or not the person lives among other members of such a community and is regarded by such other members as belonging to that community, notwithstanding that the person’s natural parents were not married to each other, or were married in a civil marriage under the Marriages Act [*Chapter 5:15*] or an enactment repealed by that Act;”. 15

7 New section substituted for section 76 of Cap. 9:23

Section 76 of the principal Act is repealed and substituted by— 20

“76 Complicity in sexual crimes

For the avoidance of doubt it is declared that any person who—

- (a) being the owner or occupier of any premises, knowingly permits another person on the premises to commit rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person, sodomy, bestiality or sexual intercourse within a prohibited degree of relationship; or 25
- (b) detains a person with the intention that a crime referred to in paragraph (a) should be committed by another person against the person so detained; 30

may be charged with being an accomplice or accessory to the commission of the crime concerned, or with kidnapping or unlawful detention, or both.”.

8 Amendment of section 78 of Cap. 9:23

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Section 78 (“Deliberate infection of another with a sexually-transmitted disease”) (1) of the principal Act is amended by the repeal of the definition of “sexually-transmitted disease” and the substitution of—

““sexually-transmitted disease” includes HIV, syphilis, gonorrhoea, herpes, and all other forms of sexually-transmitted diseases.”. 40

9 New section substituted for section 83 of Cap. 9:23

Section 83 (“Procuring”) of the principal Act is repealed and the following section is substituted—

“83 Procuring

Any person who procures any other person—

- 5
- (a) for the purposes of engaging in unlawful sexual conduct with another person or with persons generally, whether inside or outside Zimbabwe; or
 - (b) to become a prostitute, whether inside or outside Zimbabwe; or
 - (c) to leave Zimbabwe with the intent that the other person may become a prostitute; or
 - 10 (d) to leave his or her usual place of residence, not being a brothel, with the intent that he or she may become an inmate of or frequent a brothel elsewhere;

shall be guilty of procuring and liable to a fine not exceeding level fourteen or—

- 15
- (i) in a case where the person procured is a young person, imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment;
 - (ii) in any other case, imprisonment for a period not exceeding two years, or to both such fine and such imprisonment.”.

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10 New section substituted for section 86 of Cap. 9:23

Section 86 of the principal Act is repealed and substituted by—

“86 Permitting young person to resort to place for purpose of engaging in unlawful sexual conduct

25 (1) If the owner of a place knowingly induces or allows a young person to enter or be in the place for the purpose of engaging in unlawful sexual conduct with another person or with other persons generally, the owner shall be guilty of permitting a young person to resort to a place for the purpose of engaging in unlawful sexual conduct and—

- 30
- (a) if the young person is under the age of twelve years, liable to a fine not exceeding level 11 or imprisonment for a period not exceeding ten years or both;
 - (b) if the young person is over the age of twelve years, liable to a fine not exceeding level ten or imprisonment for a period not exceeding seven years or both.

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(2) It shall be a defence to a charge under subsection (1) for the accused to prove that he or she had reasonable cause to believe that the young person was of or over the age of eighteen years:

40 Provided that the apparent physical maturity of the young person concerned shall not, on its own, constitute reasonable cause for the purposes of this subsection.”.

PART III

AMENDMENTS TO CRIMINAL PROCEDURE ACT

11 Amendment of Cap. 9:07

The Criminal Procedure Act is amended—

- (a) in section 319A (“Interpretation in Part XIVA”) by the repeal of the definition of “vulnerable witness” and the substitution of— 5

““vulnerable or incapacitated witness” means a person for whom any measure has been or is to be taken in terms of section 319B.”;

- (b) in section 319B (“Measures to protect vulnerable witnesses”) by the insertion of the following subsections, the existing section becoming subsection (1)— 10

“(2) If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is unable for any reason to give evidence orally, the court may, subject to this Part, do any one or more of the following, either on its own motion or on the application of a party to the proceedings— 15

- (a) permit the person to give their evidence in any other manner that makes it intelligible, for example by writing or by signs or other augmentative and alternative communications: 20

Provided that that the writing shall be written, and the signs and communications shall be made, in open court;

- (b) appoint an intermediary for the person;
- (c) appoint a support person for the person. 25

(3) For the avoidance of doubt it is declared that a court may take measures under both subsections (1) and (2) for a person who is vulnerable as described in subsection (1) and incapacitated as described in subsection (2).”;

- (c) in section 319C (“Factors to be considered in deciding whether or not to protect vulnerable witness”) by the insertion after “vulnerable” wherever it occurs of “or incapacitated”; 30

- (d) in section 319F (“Persons who may be appointed intermediaries or support persons”)—

- (i) in subsection (1) by the insertion of the following provisos—

“Provided that— 35

- (i) when appointing an intermediary for a vulnerable or incapacitated witness who is unable to give evidence orally, the court may appoint any person who can communicate with the witness and interpret the witness’s writing, signs, sounds or other forms of communication; 40

- (ii) an intermediary who is not employed by the State as an interpreter shall, before acting as intermediary, take the oath required of interpreters in the court concerned.”; 45

- (ii) in subsection (2) by the insertion after “vulnerable” of “or incapacitated”;
- (e) in section 319G (“Functions of intermediary or support person”) by the insertion after “vulnerable” wherever it occurs of “or incapacitated”;
- 5 (f) in section 319H by the insertion after “vulnerable” of “or incapacitated”;
- (g) in Part XIVA by the insertion after section 319H of the following section—
“319I Part XIVA additional to other laws protecting children and vulnerable or incapacitated persons

10 The provisions of this Part shall be additional to any other law relating to protecting and assisting witnesses who are children or vulnerable or incapacitated.”.

