

# ACCOUNTABILITY UNIT

Promoting, protecting and enforcing rights

## AN OPEN LETTER TO THE TURKISH PARLIAMENT

9 November 2016

On 22 October 2016 the Ministry of Justice proposed an amendment to Article 103 of the Turkish Criminal Code<sup>1</sup> that regulates the crime of sexual abuse of children ("Proposal"). According to Article 103, as currently formulated, 'sexual abuse' comprises any sexual activity with children under the age of 15 and sexual activity with children between the ages of 15 and 18 through threat, coercion, force or any other factor affecting their decision-making capacity.<sup>2</sup> Article 103 prohibits sexual abuse and further regulates the modes of liability, considers aggravating factors, and prescribes punishment for different forms of sexual abuse. The Proposal, however, annuls the express prohibition on any sexual activity with children under the age of 15, whether consensual or non-consensual, by removing the current definition of 'sexual abuse' from Article 103. The result, is that all children under the age of 18 would now be subject to a discretionary interpretation by the domestic courts of whether sexual activity is prohibited or not. As currently drafted, the Proposal introduces the possibility that consent could be used as a possible defence by a person who engages in sexual activity with children under the age of 15. The Proposal does increase the severity of the punishment for offenders convicted of sexual abuse of children under the age of 12.

The Proposal from the Ministry of Justice follows from two Constitutional Court decisions in 2015<sup>3</sup> and 2016<sup>4</sup>, which required the annulment of Article 103 of the Turkish Criminal Code so that sexual activity with children under 15 was not considered "sexual abuse" within the meaning of Article 103. Those decisions were made with a view to give a margin of appreciation to courts so that they can take into consideration a range of factors when looking at the severity of the sexual act (including consent and mental state of the perpetrator) and the age of the child victim decide, accordingly, on the appropriate levels of punishment. The Constitutional Court decisions arguably sought to delineate between sexual acts involving young teenagers and much younger children.

### Sexual Abuse of Children in Turkey

According to a Girls Not Brides study, Turkey has one of the highest rates of child marriage in Europe, with an estimated 15% of girls married before the age of 18. Although the minimum age of marriage is 17 years for both men and women the Civil Code allows for marriage at the age of 16 with the consent of the court in 'exceptional circumstances'.

Sexual abuse of children has increased at an ominous rate in the recent years.<sup>5</sup> The Proposal comes at a time when NGOs and lawyers across Turkey have been calling out for an effective national policy to address child abuse and legislative reform to fight against sexual abuse of children, including the forced marriages of girls.

### Concerns

Whilst we appreciate that the Proposal's avowed purpose is to fight 'sexual abuse' of children we note that, currently, this is solely limited to increasing punishment for the crime for child victims below the age of 12.

Critically, the Proposal falls far short of seeking the best interests of children, in line with Turkey's international obligations, by providing full protection for children from various forms of sexual abuse. We express our concern that annulling the current prohibition of all sexual acts with children under 15 years of age without further legislation prohibiting such acts, nor defining the crime of sexual abuse of children, the

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<sup>1</sup> Article 103 of the Turkish Criminal Code No. 5237.

<sup>2</sup> Article 104 of the Turkish Criminal Code No. 5237 further provides that any sexual activity with children older than 15 which is consensual can be punished upon complaint.

<sup>3</sup> Turkish Constitutional Court, Docket No. 2015/43, Decision No. 2015/101, 12 November 2015.

<sup>4</sup> Turkish Constitutional Court, Docket No. 2015/108, Decision No. 2016/46, 26 May 2016.

<sup>5</sup> Hurriyet Daily News, "Ominous rise in number of child victims of sexual abuse", available at (last visited on 8 November 2016) <http://www.hurriyetdailynews.com/study-ominous-rise-in-number-of-child-victims-of-sexual-abuse-.aspx?pageID=517&nID=99807&NewsCatID=339>.

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Proposal effectively removes the age of consent for child victims. This gap in protection, due to a lack of an express prohibition, can open the way for forced marriages, child abuse and child exploitation aggravating an already prevalent situation in Turkey. It will further open the way for families, in particular families from disadvantaged groups including members of the refugee and asylum communities, to resort to marrying their daughters as early as possible without criminal sanction. If the proposed law is introduced it could formalise and sanction impunity for sexual abuse, sexual exploitation, kidnapping and trafficking of girls in Turkey and lessen accountability for these types of crimes.

A further shortcoming to the Proposal is that it does not regulate sexual activity between consenting children as opposed to non-consensual acts by a juvenile. Regarding consensual sexual activity between children, the norms around sexual freedom of children vary from society to society. According to the Article 104 of Turkish Criminal Code, consensual sexual activity with a child older than 15 can be punished upon complaint. There are no regulations regarding consensual sexual activity between two children and the Proposal lacks in suggesting a right balance between sexual liberty of children aged between 16 to 18 and their need for protection from abuse by adults. The Proposal also lacks any distinguishing criteria when assessing liability of juvenile as opposed to adult perpetrators. There are no provisions carved into the Proposal which would seek to rehabilitate children pushed to committing sexual crimes or a regime to assess punitive measures appropriate for children.<sup>6</sup>

Most importantly, during the drafting of the Proposal the Ministry of Justice, did not ask for consultation from specialist NGOs or lawyers in this field and did not take into consideration concerns expressed in various reports prior to the Proposal following the Constitutional Court decisions.

## Recommendations

We urge the Turkish Parliament to review the Proposal to amend Article 103 in light of many multi-disciplinary studies conducted on child abuse in Turkey and around the world and to consult lawyers and human rights practitioners working in this field when amending the law. We specifically request the Turkish Parliament to:

- Adopt the basic principle that everyone under the age of 18 is a child. Since the “exceptional” legal age for marriage is 16, at minimum, all sexual acts between an adult and a child under the age of 16 should be prohibited and considered sexual abuse. Any sexual act with children older than 16 without open and unequivocal consent and with threat, coercion or any other factor affecting their decision making-capacity should also be considered sexual abuse. Sexual activity between children above the age of 16 should be considered abuse if only there is not open and unequivocal consent of the children involved or if there is threat, coercion or any other factor affecting their decision making-capacity.
- The scope of the definition of ‘sexual activity’ with regards to the protection of children should be expanded to include displaying children’s bodies using mass media/social media/communication or technological devices.
- The modes of liability for the sexual abuse of children should be extended to include: third parties who record, share or display sexual activity with children, who facilitate sexual activity between children with adults or another child, who cover up sexual abuse of children at public or private institutions.

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<sup>6</sup> Article 104 of the Turkish Criminal Code No. 5237 provides that children having not attained the full age of twelve on the commission date of the offense, may not have criminal responsibility. In case a person who attained the age of twelve but not yet completed the age of fifteen on the commission date of the offense does not have the ability to perceive the legal meaning and consequences of the offense, or to control his actions, may not have criminal responsibility for such behavior. However, security precautions specific to children may be adopted for such individuals. If a person has the ability to apprehend the offense s/he has committed or to control his/her actions relating to this offense, then such person may be sentenced to imprisonment from nine years to twelve years if the offense requires heavy life imprisonment; from seven years to nine years if the offense requires life imprisonment. The Turkish Criminal Code or the Child Protection Act No. 5395 do not provide for alternative punishment and rehabilitation mechanisms for juveniles.

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- When a perpetrator of sexual abuse is a child, the approach should be to provide rehabilitation alongside appropriate punishment based on best practice and principles of juvenile justice.

We wish for an open and transparent discussion of the proposed law and appreciate any consideration given by the Turkish Parliament in respect of our concerns and recommendations. The Accountability Unit remains available to furnish upon the government further information in respect of the issues identified in our letter and our specific recommendations for dealing with these adequately.

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