

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SENTENCING) AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 29908 of 22 May 2007)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 15—2007]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To amend the Criminal Law Amendment Act, 1997, so as to further regulate the imposition of discretionary minimum sentences for certain serious offences; to give a regional court jurisdiction to convict and sentence a person found guilty of an offence referred to in Part I of Schedule 2 to imprisonment for life; to provide that certain circumstances shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when a sentence must be imposed in respect of the offence of rape; to repeal all sections dealing with the committal of an accused for the purposes of sentencing by a High Court after conviction in a regional court of an offence referred to in Schedule 2; to amend the Criminal Procedure Act, 1977, so as to provide for an automatic right of appeal if a person is sentenced to life imprisonment by a regional court; to amend the National Prosecuting Authority Act, 1998, so as to provide for policy directives indicating in which instances prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997, must be instituted in the High Court as a court of first instance; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 51 of Act 105 of 1997, as amended by section 33 of Act 62 of 2000 and section 36 of Act 12 of 2004

1. The following section is hereby substituted for section 51 of the Criminal Law Amendment Act, 1997:

“[Minimum] Discretionary minimum sentences for certain serious offences

51. (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person[—

(a) if it has convicted [a person] of an offence referred to in Part I of Schedule 2]; or

(b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2,

sentence the person] to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court[, **including a High Court to which a matter has been referred under section 52(1) for sentence,**] shall **[in respect of]** sentence a person who has been convicted of an offence referred to in—

- (a) Part II of Schedule 2, **[sentence the person,]** in the case of—
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) Part III of Schedule 2, **[sentence the person,]** in the case of—
 - (i) a first offender, to imprisonment for a period not less than 10 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, **[sentence the person,]** in the case of—
 - (i) a first offender, to imprisonment for a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum **[sentence]** term of imprisonment that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum **[sentence]** term of imprisonment that it may impose in terms of this subsection.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and **[may]** must thereupon impose such lesser sentence.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an accused person's cultural or religious beliefs about rape; or
- (iii) any relationship between the accused person and the complainant prior to the offence being committed.

[(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.]

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.]

(5) (a) **[The]** Subject to paragraph (b), the operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(b) If a sentence is imposed in terms of subsection (2)(c), not more than half of that sentence may be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(6) **[The provisions of this]** This section **[shall]** does not **[be applicable]** apply in respect of a **[child]** person who was under the age of—

- (a) 16 years at the time of the commission of **[the act which constituted the offence in question]** an offence contemplated in subsection (1) or (2)(a) or (b); or
- (b) 18 years at the time of the commission of an offence contemplated in subsection (2)(c).

(7) If in the application of this section the age of a **[child]** person is placed in issue, the onus shall be on the State to prove the age of the **[child]** person beyond reasonable doubt.

(8) For the purposes of this section and Schedule 2, ‘law enforcement officer’ includes—

- (a) a member of the National Intelligence Agency or the South African Secret Service **[established under]** referred to in section 3 of the Intelligence Services Act, **[1994 (Act No. 38 of 1994)] 2002 (Act No. 65 of 2002)**; and
- (b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act No. 111 of 1998).

(9) The amounts mentioned in respect of the offences referred to in **[PART] Part II** of Schedule 2 to the Act, may be adjusted by the Minister from time to time by notice in the *Gazette*.”.

Repeal of sections 52, 52A and 52B of Act 105 of 1997

2. Sections 52, 52A and 52B of the Criminal Law Amendment Act, 1997, are hereby repealed.

Amendment of section 53 of Act 105 of 1997, as substituted by section 36 of Act 62 of 2000 and amended by section 16 of Act 42 of 2001

3. Section 53 of the Criminal Law Amendment Act, 1997, is hereby amended—

- (a) by the deletion of subsections (1) and (2); and
- (b) by the deletion of subsection (2A).

Amendment of section 309 of Act 51 of 1977, as amended by section 17 of Act 105 of 1982, section 8 of Act 107 of 1990, section 51 of Act 129 of 1993, section 13 of Act 75 of 1995, section 2 of Act 33 of 1997, section 2 of Act 76 of 1997, section 38 of Act 105 of 1997 and section 2 of Act 42 of 2003

4. Section 309 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that—

(i) if that person was, at the time of the commission of the offence—

[(i)](aa) below the age of **[14] 16** years; or

[(ii)](bb) at least **[14] 16** years of age but below the age of **[16] 18** years and was not assisted by a legal representative at the time of conviction in a regional court; and

[(iii)](cc) **[was]** sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended; or

(ii) if that person was sentenced to life imprisonment by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997),

he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a); and”.

Amendment of section 21 of Act 32 of 1998

5. Section 21 of the National Prosecuting Authority Act, 1998, is hereby amended by the addition of the following subsections:

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| “(3) The prosecution policy or amendments to such policy must include directives indicating in which instances prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), must be instituted in a High Court as a court of first instance. | 5 |
| (4) The policy directives contemplated in subsection (3) must be issued within three months of the date of commencement of the Criminal Law (Sentencing) Amendment Act, 2007.”. | 10 |

Transitional provision

6. If a regional court has, prior to the commencement of this Act, committed an accused for sentence by a High Court under the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), and—

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|---|----|
| (a) the High Court has not heard the matter, then the High Court must refer the matter back to the regional court for sentencing in terms of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997); or | 15 |
| (b) the High Court has heard the matter, then the High Court must dispose of the matter as if this Act had not been passed. | |

Short title and commencement

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7. This Act is called the Criminal Law (Sentencing) Amendment Act, 2007, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW (SENTENCING) AMENDMENT BILL, 2007

1. BACKGROUND

1.1 The Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) (hereinafter referred to as the Act), which came into operation on 1 May 1998, dealt with the abolition of the death penalty and created a legal regime of discretionary minimum sentences in respect of certain serious offences. Sections 51 and 52 of the Act make provision for the imposition of minimum sentences in respect of serious offences. These offences are categorised in terms of their degree of seriousness and are listed in Parts I-IV of Schedule 2 to the Act. In terms of section 51(3), a High Court or regional court is given a discretionary power to impose a lesser sentence, if that court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed minimum sentence.

1.2 The constitutional validity of both sections 51 and 52 of the Act was tested in 2000 (*State v Dzukuda*) and 2001 (*State v Dodo*), respectively. These cases dealt with two major challenges on two different grounds, namely an accused's right to a fair trial and the independence of the judiciary. The Constitutional Court rejected both these challenges. The Constitutional Court in *Dzukuda* held that "it had not been established, either for the reasons furnished in the High Court judgment, or for any other reason, whether taken individually or collectively that the provisions of section 52 of the Act limited an accused's right to a fair trial under section 35(3) of the Constitution". The Constitutional Court in *Dodo*, in interpreting the words "substantial and compelling circumstances" in section 51(3) of the Act endorsed the step-by-step sentencing procedure set out in *S v Malgas* (2001). The Court held in this regard that the interpretation of the Supreme Court of Appeal "steers an appropriate path, which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51 and at the same time promoting 'the spirit', purport and objects of the Bill of Rights". In dealing with the issue of the separation of powers and the court's role in sentencing, the Court concluded as follows: "While our Constitution recognises a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons. Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences". The Constitutional Court in both instances dismissed the constitutional challenges against these provisions and upheld the constitutional validity of the Act. Despite the fact that the legislation has been found to be constitutionally sound, certain practical problems experienced with the application of sections 51 and 52 have been identified, based on inputs by the Judiciary, the National Prosecuting Authority and other stakeholders. The Bill aims to address these practical problems, whilst retaining the principles underlying the Act.

2. OBJECTS

2.1 The Bill aims to expedite the finalisation of serious criminal cases, to punish offenders of certain serious offences appropriately and to avoid secondary victimisation of complainants, which, *inter alia*, occurs when vulnerable witnesses have to repeat their testimony in more than one court.

2.2 The provision requiring a regional court to refer an accused for sentencing to a High Court is repealed. Regional courts are granted jurisdiction to impose life sentences in cases where this is prescribed. Provision is made for an automatic right of appeal in cases where a person is sentenced by a regional court to life imprisonment. The National Director of Public Prosecutions is required to adopt policy directives that set out which prosecutions must from the outset be instituted in the High Courts and not in the regional courts.

2.3 When a sentence must be imposed in respect of the offence of rape, none of the following shall constitute substantial and compelling circumstances, justifying the imposition of a lesser sentence, namely:

- (a) any previous sexual history of the complainant;
- (b) an accused person's cultural or religious beliefs about rape; or

- (c) any relationship between the accused person and the complainant prior to the offence being committed.

2.4 The Act is not applicable to a person under the age of 16 years at the time of the commission of an offence referred to in sections 51(1) or 51(2)(a) or (b). In terms of the Bill the Act will also not apply to a person who was under the age of 18 years at the time of the commission of an offence referred to in section 51(2)(c).

2.5 A presiding officer may, when imposing a sentence under the Act, under the new provisions, take into account the time that an accused was incarcerated as an awaiting trial prisoner.

2.6 The Bill allows for up to half of a sentence imposed under section 51(2)(c) to be suspended.

2.7 The provision in terms of which sections 51 and 52 shall lapse after two years is repealed.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Bill was developed in response to problems identified with the practical application of the Act by the Judiciary, the National Prosecuting Authority, the Western Cape Consortium on Violence Against Women and other stakeholders who made submissions to the Department.

4. IMPLICATIONS FOR PROVINCES

None.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None.

6. FINANCIAL IMPLICATIONS FOR STATE

None.

7. COMMUNICATION IMPLICATIONS

None.

8. PARLIAMENTARY PROCEDURE

8.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill must be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

8.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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