

REPUBLIC OF SOUTH AFRICA

**CRIMINAL LAW (SEXUAL
OFFENCES AND RELATED
MATTERS) AMENDMENT ACT
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 38243 of 24 November 2014)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 18—2014]

ISBN 978-1-4850-0197-3

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to ensure that children of certain ages are not held criminally liable for engaging in consensual sexual acts with each other; to give presiding officers a discretion in order to decide in individual cases whether the particulars of children should be included in the National Register for Sex Offenders or not; to provide for a procedure in terms of which certain persons may apply for the removal of their particulars from the National Register for Sex Offenders; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 32 of 2007

1. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), (hereinafter referred to as the “principal Act”), is hereby amended by the substitution for the definition of “child” of the following definition: 5

“ ‘**child**’ means[—]
[(a)] a person under the age of 18 years[; or
(b) **with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,**]
and “**children**” has a corresponding meaning;” 10

Amendment of section 15 of Act 32 of 2007

2. Section 15 of the principal Act is hereby amended by the substitution of the following section: 15

“Acts of consensual sexual penetration with certain children (statutory rape)

15. (1) A person (“A”) who commits an act of sexual penetration with a child (“B”) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the 20

offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was—
 (a) 12 years of age or older but under the age of 16 years; or
 (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the [National] relevant Director of Public Prosecutions if [both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years[: **Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).**]

(b) The [National] Director of Public Prosecutions concerned may [not] delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”

Amendment of section 16 of Act 32 of 2007

3. Section 16 of the principal Act is hereby amended by the substitution of the following section:

“Acts of consensual sexual violation with certain children (statutory sexual assault)

16. (1) A person (“A”) who commits an act of sexual violation with a child (“B”) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission of such an act, was—
 (a) 12 years of age or older but under the age of 16 years; or
 (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if [both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years[: **Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).**]

(b) The Director of Public Prosecutions concerned may [not] delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”

Amendment of section 46 of Act 32 of 2007

4. Section 46 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) An employee in the employ of an employer at the commencement of this Chapter, who is or was convicted of a sexual offence against a child or a person who is mentally disabled, or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, irrespective of whether or not such offence was committed or allegedly committed during the course of his or her employment, and whose particulars are included or are to be included in the Register, must without delay disclose such conviction or finding to his or her employer.”; and

(b) by the substitution for subsection (2) of the following subsection:

“(2) An employee who, after the commencement of this Chapter, applies for employment, must, if he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or is alleged

to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, and whose particulars are included or are to be included in the Register, disclose such conviction or finding when applying for employment.”.

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Amendment of section 47 of Act 32 of 2007

5. Section 47 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) A person who, after the commencement of this Chapter, applies for a licence contemplated in subsection (1) to a licensing authority, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.”.

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Amendment of section 48 of Act 32 of 2007

6. Section 48 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) A person who, after the commencement of this Chapter, applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or a curator, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.”.

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Amendment of section 50 of Act 32 of 2007

7. Section 50 of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:

“(a) A court that has in terms of this Act or any other law—

- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or
- (ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person, must, subject to paragraph (c), make an order that the particulars of the person be included in the Register.”; and

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(b) by the insertion after paragraph (b) of subsection (2) of the following paragraph:

“(c) Before making an order in terms of paragraph (a), the court must—

- (i) inform a person, who was a child at the time of the commission of the offence, of the court’s power to make an order in terms of paragraph (a); and
- (ii) afford the person referred to in subparagraph (i) an opportunity to address the court as to why such an order should not be made, whereafter the court may direct that the particulars of such a person shall not be included in the Register.”; and

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(c) by the substitution for subsection (4) of the following subsection:

“(4) Where a court, for whatever reason, fails to make an order under subsection (2)(a), in respect of any person other than a person referred to

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in subsection (2)(c)(i), the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court and the court must make such order.”.

Amendment of section 51 of Act 32 of 2007

- 8.** Section 51 of the principal Act is hereby amended— 5
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 5
- “(1) Subject to subsections (2), (2A) and (3), the particulars of a person—”; and
- (b) by the insertion after subsection (2) of the following subsection: 10
- “(2A) A person falling into the categories contemplated in subsection (1), who was a child at the time of the commission of the offence concerned, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)(c) for an order that his or her particulars must be removed from the Register by— 15
- (a) addressing the court on the reasons for such application and showing good cause why he or she has been rehabilitated and is unlikely to commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and 20
- (b) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her.”. 20

Amendment of section 56 of Act 32 of 2007 25

9. Section 56 of the principal Act is hereby amended by the deletion in subsection (2) of paragraph (b).

Amendment of section 67 of Act 32 of 2007

10. Section 67 of the principal Act is hereby amended by the substitution of the following section: 30

“Regulations

- 67. (1)** The Minister, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, may make regulations regarding— 35
- (a) any matter which is required or permitted by this Act to be prescribed by regulation;
- (b) the inter-sectoral implementation of this Act; and
- (c) any other matter which is necessary or expedient to be prescribed in order to achieve or promote the objects of this Act. 40
- (2) The Minister may make regulations regarding the procedure to be followed in respect of the applications referred to in section 51(2A) of this Act.”.

Short title

11. This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2014. 45

**MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT
ACT AMENDMENT BILL, 2014**

1. PURPOSE OF BILL

- 1.1 The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, 2014 (“the Bill”), aims to give effect to two separate judgments of the Constitutional Court in the case of *Teddy Bear Clinic for Abused Children v the Minister of Justice and Constitutional Development and Others [2013] ZACC 35* (the “*Teddy Bear case*”), and the case of *J v the National Director of Public Prosecutions and Others [2014] ZACC 13* (the “*J case*”).
- 1.2 *The Teddy Bear case*: The primary objective of sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)(the “Act”), is to protect children, who are 12 years or older but under the age of 16 years (“adolescents”), from sexual exploitation by adults. This objective remains unaffected by the judgment of the Constitutional Court. Section 15(1) provides that statutory rape is committed if—
- (a) an adult or a child who is 16 years or older engages in consensual sexual penetration with an adolescent; or
 - (b) two adolescents engage in consensual sexual penetration with each other.
- 1.3 Section 16(1) of the Act provides that statutory sexual assault is committed if—
- (a) an adult or a child who is 16 years or older engages in consensual sexual violation with an adolescent; or
 - (b) two adolescents, where the age difference between them is more than two years, engage in consensual sexual violation with each other.
- 1.4 The Constitutional Court found that sections 15 and 16 of the Act infringe the rights of adolescents in terms of sections 10 (human dignity), 14 (privacy) and 28(2) (best interest of a child) of the Constitution of the Republic of South Africa, 1996. The Court determined that sections 15 and 16 are unconstitutional insofar as they criminalise consensual sexual conduct between adolescents.
- 1.5 *The J case*: Section 50(2)(a) of the Act places an obligation on a court to order that the particulars of a convicted person or a person in respect of whom the court has given a direction, in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), must be included in the National Register for Sex Offenders. The provisions of section 50(2)(a) are also applicable to persons who were children at the time of the commission of the sexual offences. The Constitutional Court questioned the constitutional validity of section 50(2)(a) of the Act, with specific reference to the “best interest of the child” principle, as reflected in section 28(2) of the Constitution. The Court found that the limitation of the right of child offenders in section 50(2)(a) of the Act is not justified in an open and democratic society.

2. OBJECTS OF BILL

- 2.1 *The Teddy Bear case*: Clause 1 of the Bill aims to amend section 1 of the Act by omitting the reference to an adolescent person, namely a “person who is 12 years or older but under the age of 16”, from the definition of “child”. Clause 2 of the Bill aims to effect the following amendments to section 15 of the Act, dealing with statutory rape:
- (a) Inserting a reference to an adolescent person in subsection (1) for purposes of clarity;
 - (b) decriminalising consensual sexual acts between two adolescent persons [the proposed new subsection (1)(a)] in line with the Constitutional Court’s finding;

- (c) decriminalising consensual sexual acts between a 16 or 17 year old person and an adolescent person where the age gap between the two persons is not more than two years [the proposed new subsection (1)(b)]; and
- (d) insofar as subsection (2) is concerned, by retaining the requirement that a decision whether to prosecute a 16 or 17 year old person (where the age gap between such person and the adolescent person is more than two years) or not, should be taken by the relevant Director of Public Prosecutions.

- 2.2 Clause 3 of the Bill aims to amend section 16 of the Act, dealing with statutory sexual assault, in the same manner as clause 2 does in respect of section 15 of the Act. The proposed insertion of the two year age gap in respect of 16 or 17 year old persons and adolescents requires that the two year age gap defence as reflected in section 56(2)(b), should be omitted from that section. Clause 9 of the Bill reflects the required consequential amendment.
- 2.3 *The J case:* Clauses 4, 5 and 6 of the Bill aim to amend sections 46, 47 and 48 of the Act, respectively, in order to clarify the extent of the obligation in respect of a person whose particulars appear in the Register to disclose that fact in certain circumstances.
- 2.4 Clause 7 aims to amend section 50(2) of the Act by the introduction of a new paragraph (c), which will give the courts a discretion to order that the particulars of a person who was a child at the time of the commission of a sexual offence against another child or a person who is mentally disabled, may not be included in the Register. Such an order may only be made after the convicted person has been given the opportunity to address the court in this regard.
- 2.5 Clause 8 of the Bill aims to amend section 51 of the Act, which deals with the removal of the particulars of persons from the Register. The proposed new subsection (2A) introduces a procedure in terms of which an affected person may apply to the same court, which made the original order for the inclusion of that person's particulars in the Register, for an order to remove his or her particulars from the Register, on good cause shown.
- 2.6 Clause 10 aims to amend section 67 of the Act by providing that the Minister may make regulations regarding the procedure to be followed in respect of the applications referred to in paragraph 2.5, should it become necessary to make such regulations.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department made a draft Amendment Bill available to numerous key role-players and also made it available on the Department's website. The Gender, Health and Justice Research Unit of the University of Cape Town, the Centre for Child Law of the University of Pretoria (representing the views of 19 organisations and individuals), the Baptists Union of Southern Africa (Christian Citizenship Committee), the Southern African Catholic Bishops' Conference, the Legal Resources Centre, Cape Town, the General Council of the Bar, the South African Law Reform Commission and the Sexual Offences and Community Affairs Unit of the National Prosecuting Authority submitted comments in respect of the proposed amendment of the Act. An institution called "Groundbreakers" submitted a petition that was signed by 1001 persons for purposes of objecting to the lowering of the age of consent. A further 40 individuals submitted individual objections against the lowering of the age of consent.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

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

6.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)* (the “*Tongoane case*”) is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4.

6.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill as opposed to a single provision in the Bill and, thereafter, employing the term “substantially” when considering the impact of these provisions on the provinces. When considering if the Bill substantially affects the provinces this must be done in accordance with an assessment of all the relevant provisions of the Bill and thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial.

6.4 Other key points to consider as stated in the *Tongoane case* are as follows:

- The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.
- To apply the “pith and substance” test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) of the Constitution requires to be enacted in accordance with the section 76 procedure.

6.5 If we have to take into consideration the legal principles expounded by the *Tongoane case*, the following may be deduced from a reading of this Bill:

- The Act is amended to ensure compliance with the Court judgment handed down in the *Teddy Bear case* wherein sections 15 and 16 of the Act were declared inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years and the *J case* wherein the Court held that section 50(2)(a) of the Act infringed on the right of child offenders to have their best interests considered of paramount importance in terms of section 28(2) of the Constitution. The Register fulfils a vital function in protecting children and persons with mental disabilities from sexual abuse. However, the limitation of the child offender’s right is unjustifiable because a court has no discretion whether to make the order and because there is no related opportunity for child offenders to make representations.
- The purpose of this Bill is to ensure that the constitutional court judgements are complied with and thereby amend the applicable sections of the Act to remedy the current position of constitutional invalidity. It would seem that the Bill, in its current form, would not, in substantial measure, substantially affect the provinces. These provisions do not appear to affect the interests of

the provinces. The judiciary will be affected when implementing the proposed amendments however this will not impact on the provinces. The Bill therefore should be dealt with in terms of section 75 of the Constitution.

- 6.6 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.