

# **BRIEFING: PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES:**

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

The Bill aims to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, by giving effect to two separate judgments of the Constitutional Court, namely, the —

- The *Teddy Bear* case dealing with sections 15 and 16 of the Act; and
- The *J* case in connection with section 50(2)(a) of the Act.

## THE AMENDMENT BILL

## **TWO SEPARATE COMPONENTS OF BILL**

- The primary aim of sections 15 and 16 (statutory rape and statutory sexual assault, respectively) is to protect children (between the ages of 12 and 16 years) from exploitation by adults.
- Section 50(2)(a) 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, must be included in the National Register for Sex Offenders.

- Sections 15(1) and 16(1), respectively provide that statutory rape or statutory sexual assault is committed if—
  - (i) an adult or a child who is 16 years or older engages in consensual sexual penetration or consensual sexual violation with an adolescent; or
  - (ii) two adolescents (children who are 12 years or older but under the age of 16 years) engage in consensual sexual penetration or consensual sexual violation with each other.

## **Sections 15 and 16 of Act**

## **TEDDY BEAR CASE**

- The Constitutional Court found that sections 15 and 16 of the Act infringe the rights of adolescents in terms of section 10 (*right to human dignity*), section 14 (*right to privacy*) and section 28(2) (*best interest of the child principle*) of the Constitution.
- The main aim of sections 15 and 16, namely to protect children (12 years or older but younger than 16 years) against predatory adults, remains unaffected by the judgment.

The proposed amendments (clauses 1, 2, 3 and 9) aim to amend sections 15, 16 and 56 in order to provide that—

- adolescents who engage in consensual sexual acts with each other may not be prosecuted;
- 16 or 17 year olds who engage in the same consensual sexual acts with adolescents can be prosecuted if the age difference between the 16 or 17 year old and the adolescent is more than two years;
- where a 16 or 17 year old engages in a consensual sexual act with an adolescent and the age gap between them is more than 2 years, the DPP must decide whether prosecution should be instituted or not; and
- where an adult engages in such consensual sexual acts it remains statutory rape or statutory sexual violation, as the case may be.

## PROPOSED AMENDMENT OF SECTIONS 15 AND 16

## CLAUSES 1, 2, 3 AND 9

- **Clause 1** omits the reference to an adolescent person from the definition of “child”. **Clause 2** amends section 15 by -
  - (i) inserting a reference to an adolescent person in subsection (1) for purposes of clarity;
  - (ii) decriminalising consensual sexual acts between two adolescent persons ((the proposed new subsection (1)(a)), in line with the Constitutional Court’s finding;
  - (iii) 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
  - (iv) by retaining the requirement that a decision whether to prosecute a 16 or 17 old person or not should be taken by the relevant Director of Public Prosecutions (subsection (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 difference as reflected in section 56(2)(b), should be omitted from that section. Clause 9 of the Bill reflects the required consequential amendment.

## **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, must be included in the National Register for Sex Offenders.
- The Court found that the limitation of the right of child offenders contained in section 50(2)(a) of the Act, namely that they are not afforded an opportunity to be heard regarding the placement of their names in the Register, is not justified in an open and democratic society.

**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.

**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.

## CLAUSES 4 TO 8 AND 10

- **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.
- **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 for the removal of the particulars from the Register, envisaged in clause 8, should it become necessary to make such regulations.

It must be stressed that the amendments contained in clauses 1, 2, 3 and 9 decriminalise consensual sexual conduct between persons 12 years and older but under the age of 16 years. They do not lower the age of consent to engage in consensual sexual conduct. This is in line with the clear parameters set by the Constitutional Court in the Teddy Bear case.

### Concluding remarks