
MEMORANDUM
IN RE: DRAFT CRIMINAL LAW (SEXUAL OFFENCES AND RELATED
MATTERS) AMENDMENT BILL

INTRODUCTION

1. Whilst the GCB's Parliamentary Committee, is encouraged by the proposed Amendments, we respectfully point out that it may still create uncertainty and ambiguity which may ultimately again lead to Constitutional Court challenges. It is not our intention to opine on each and every aspect save to highlight those issues which we believe need clarification and, perhaps, further ventilation. We deal with this *seriatim* hereunder.

AMENDMENT OF SECTION 15 OF ACT 32 OF 2007

2. We respectfully point out that the proposed amendment bill clearly avoids the admittedly broad amendment suggested by the North Gauteng High Court in the ***Teddy Bear Clinic case***¹. Whilst it is the prerogative of the legislature to determine what acts it chooses to criminalise, the wording of the amendment could lead to undesirable practical results. Hereunder are the possible scenarios which we respectfully submit may be problematic:

Scenario 1: Person (A) can be younger than child (B):

- 2.1. "*Person*" is not defined. Thus Person A, could possibly, be younger than the child B, yet remain the accused in a prosecution. For instance, a child between ages 10 – 12 years could sexually penetrate a child more than 2 years older and be prosecuted

¹ ***Teddy Bear Clinic for the Abused Children and Another v Minister of Justice and Constitutional Development and Another*** (73300/10) [2013] ZAGPPHC 1

under the proposed amendment bill as it is formulated. However if the second child was within 2 years of the other child, the first child would escape prosecution. Perhaps this warrants further clarification, as the teleological purpose is to protect the younger and more vulnerable individuals.

Scenario 2: Artificial distinction between “accused/complainant”:

- 2.2. In theory it permits the scenario whereby two boys below 16 years of age, with an age gap exceeding two years, consent to homosexual penetration, yet only the one performing the penetration will get prosecuted. This is an arbitrary distinction.

Scenario 3: Arbitrary 2 year age difference and consequences.

- 2.3. It permits two 12 year old children to perform sexual penetration together, but criminalises sexual penetration between a child aged 1 day shy of 14 years and 1 shy of 15 years.
3. The amendment suggested in **Teddy Bear Clinic** by the High Court doesn’t criminalise consensual sexual penetrative acts between children. However the proposed amendment bill creates a wide scope for a plethora of possible untenable scenarios. Essentially the *de facto* age of consent will be reduced to 12 years of age so long provided the partner is not older or younger by 24 months.
4. Furthermore it is respectfully submitted that the proposed amendment bill is *prima facie* not in line with the judgment of the Constitutional Court in the **Teddy Bear Clinic II** case² and the possibility remains that it will be open to constitutional challenge.

² **Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another** 2013 (12) BCLR 1429 (CC)

AMENDMENT OF SECTION 16 OF ACT 32 OF 2007

5. The comments above in respect of the section 15 amendments apply mutatis mutandis to section 16 of the proposed amendment bill.
6. It must be noted that since the term sexual violation envisages a far wider spectrum of actions than sexual penetration it compounds the existence of possible untenable circumstances.

AMENDMENT OF SECTION 46/47/48 OF ACT 32 OF 2007

7. We are in agreement with the proposed amendment.

AMENDMENT OF SECTION 50 OF ACT 32 OF 2007

8. The proposed amendment bill at (2)(c)(iii) affords a convicted person under this subsection the opportunity to make “representations” why such an order should not be made.
9. It is suggested that the term ‘representations’ is inappropriate from a practical point of view. In criminal law nomenclature ‘representations’ presupposes a written document from an accused to the office of the Director of Public Prosecutions. In this scenario it clearly isn’t the same and may cause confusion. If the intention is that the convicted person should give oral evidence then that should be stated. If this is not the intention then it should be clarified in the legislation.
10. The use of the word ‘representations’ is confusing and should perhaps be reconsidered. We also submit that guidelines as to what the nature of the representations should entail for it to be given due and proper consideration would be useful. By analogy, such as those set out in the Criminal Procedure Act 51 of 1977 relating to the granting of bail.

AMENDMENT OF SECTION 51 OF ACT 32 OF 2007

11. A common theme in criminal law is that an adult shouldn't be prejudiced by criminal actions they committed whilst a juvenile. In bail applications, sentencing hearings, and even where a prosecutor exercises a discretion to prosecute, one will disregard or give little probative value to any brush an accused had with the law as a juvenile.
12. In accordance with the above it is suggested that a person being convicted as a juvenile and placed on the Registrar not have to endure the onerous wait of 10 years to apply to be removed, but rather be afforded the opportunity to bring the application upon attaining the age of majority and on good cause shown

AMENDMENT OF SECTION 56 OF ACT 32 OF 2007

13. We are in agreement with the amendment.

CONCLUSION

14. These submissions are made by the GCB's Parliamentary Committee so as to render the legislation constitutionally sound and so that it achieves the purpose for which it is sought to be enacted.
15. We advise accordingly.

ADV V PETE MIHALIK & JOSEPHINE LOSCH

on behalf of the

**CAPE BAR
PARLIAMENTARY COMMITTEE OF THE GCB**

31 October 2014