



3 June 2015

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B18A – 2014] – KEY PORTFOLIO COMMITTEE AMENDMENTS

1. INTRODUCTION – BACKGROUND TO THE SEXUAL OFFENCES ACT, 2007

June 2015 marks seven and a half years since the passing of the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (“Sexual Offences Act”). The primary objective of the Sexual Offences Act is to provide victims of sexual offences the “maximum and least traumatising protection that the law can provide”.¹ The Sexual Offences Act:

Provides for:

- **A new expanded statutory offence of rape** (applicable to all forms of sexual penetration without consent irrespective of the gender of the perpetrator);
- **A gender neutral definition of rape** (anyone irrespective of gender can be a victim of rape);
- **A new statutory offence of sexual assault**, applicable to all forms of unlawful and intentional sexual violation without consent;
- **Specific offences against children** (statutory rape and sexual assault; sexual exploitation and grooming) and **people who are mentally disabled**.
- **Specific services to victims of sexual offences**, including affording victims the right to receive post-exposure prophylaxis (PEP) to prevent the possible transmission of HIV after rape and for HIV testing of an accused.¹

Includes requirements for:

- Governance structures to encourage **coordinated planning, resourcing, implementation, monitoring and evaluation** of all initiatives aimed at uprooting sexual offences
- A **National Policy Framework** to guide implementation
- **Directives and national instructions and training programmes** (from the NPA, SAPS and DOH)
- A high level of Parliamentary oversight through **annual reporting** on implementation.
- A **National Register for Sex Offenders (NRSO)**.

2. CONSTITUTIONAL CHALLENGES TO THE SEXUAL OFFENCES ACT

In 2013 and 2014, respectively, the Constitutional Court (CC) declared the following provisions invalid:

Sections 15 and 16: In the case of *Teddy Bear Clinic for Abused Children and Others v the Minister of Justice and Constitutional Development*² the CC declared that the criminalisation of consensual sexual conduct between teenagers was unconstitutional.

Section 50(2)(a): In the case of *J v the National Director of Public Prosecutions and Others*³ (“J case”) the CC held that the inclusion in the National Register for Sex Offenders (NRSO) of the particulars of children who are child sex offenders was not in the best interest of the child; and that the limitation of the right of child offenders in s 50(2)(a) was not justified in an open and democratic society.

¹ See ‘Objects’, s 2 of the Sexual Offences Act 32 of 2007.

² [2013] ZACC 35

³ [2014] ZACC 13



The NRSO came into operation on 30 June 2009 in terms of Chapter 6 of the Sexual Offences Act. It is a **database containing the details of individuals who have been convicted of a sexual offence against a child or mentally disabled person.** The register gives employers in the public or private sectors such as schools; crèches and hospitals the right to check that the person being hired is fit to work with children or mentally disabled people. The register also contains 'historical convictions' i.e. the names of sex offenders found guilty before the Act's enactment. The contents of the National Register is not available to the public. However, those entitled to apply for a clearance certificate can access the information contained therein (e.g. an employer, licensing authority or a person applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent.)

3. IMPACT OF CONSTITUTIONAL COURT ORDERS AND KEY EVENTS TO DATE

The orders of invalidity were suspended to allow Parliament time to rectify the offending provisions in line with the Constitution and the CC's judgements. In the interim "a moratorium was placed on investigations, arrests, prosecutions and proceedings in relation to [sections 15 and 16] and the Minister of Justice was required to remove all details of children convicted [in terms thereof] from the [NRSO] and expunge their records, at the cost of the state".⁴

The following key events should be noted:

- Originally the invalidity orders were suspended until 30 April 2015, meaning that Parliament had to comply with the CC order by this date, failing which the said sections would become invalid.
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B18 – 2014] was introduced in 2014 as a **section 75 Bill**.
- The Portfolio Committee on Justice and Correctional Services only dealt with the Bill in 2015.
- Parliament was unable to meet the 30 April 2015 deadline and applied to the CC for an extension until 15 August 2015.⁵
- The matter was heard on 7 May 2015, but the CC reserved judgment until 4 August 2015.⁶
- On 28 May 2015 the Portfolio Committee on Justice and Correctional Services reported the Bill with amendments.⁷
- The Bill is now before the Select Committee on Security and Justice for consideration.

4. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B18A – 2014] ("Sexual Offences Amendment Bill")

The Bill seeks to amend section 15, 16 and 50(2)(a) of the Sexual Offences Act in order to give effect to the CC judgments in the "Teddy Bear" and "J" cases.

⁴ Dano, M (2015). Summary and Analysis: Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B18-2014]. Research Unit. Information and Knowledge Division. Parliament of South Africa.

⁵ *The Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* CCT 54/15.

⁶ The DoJD must confirm the dates of compliance / extensions / reserved judgement when it briefs the Committee.

⁷ Parliament of South Africa (2015). Announcements, Tablings and Committee Reports No 64 - 2015. 28 May 2014. pp2017-2019.



Following is a summary of selected clauses relating to the above judgements, including the main Portfolio Committee amendments.

4.1 LONG TITLE

The Long Title of the Bill provided for the amendment of the Sexual Offences Act '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 [NRSO]; 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.

The Portfolio Committee amended the Long Title to now also 'provide for the removal of the particulars of children who were convicted of having engaged in consensual sexual acts with each other, from the National Register for Sex Offenders; to provide for the expungement of the criminal records of certain persons'.

4.2 NEW CLAUSE: PREAMBLE

This provision sets out the findings of the CC in the Teddy Bear and J cases. In the first instance it was felt necessary to convey the importance of discouraging premature sexual conduct between adolescents (Teddy Bear case); and secondly that the automatic inclusion of child offenders in the NRSO was not in the best interest of the child "and therefore not justified in an open and democratic society" (J case).

4.3 CLAUSE 1: AMENDMENT OF DEFINITION OF "CHILD"

In terms of Section 1 of the Act a "child" is someone under the age of 18. Section 1 of the SOA is amended to make reference to sections 15 and 16 specifically- in other words consensual sexual behaviour between adolescents. Thus "child" and "children" for the purposes of sections 15 and 16 in this context are those between the ages of 12 and 16 years of age.

4.4 CLAUSE 2: AMENDMENT OF SECTION 15

Section 15 of the SOA was amended by inserting a proviso into the section which provides that consensual sexual penetration of a child between the ages of 12 and 16 is a criminal offence (i.o.w sex with a minor or statutory rape), **unless** the child who committed the act of sexual penetration was (a) between the ages of 12 and 16 years or (b) 16 or 17 years of age and the difference in the ages both children was no more than two years.

The provision for the prosecution of both children for the crime of consensual sexual penetration of a child between the ages of 12 and 16 was deleted.



4.5 CLAUSE 3: AMENDMENT OF SECTION 16

Section 16 of the SOA was amended by inserting a proviso into the section which provides that consensual sexual violation (includes e.g. kissing) of a child between the ages of 12 and 16 is a criminal offence, **unless** the child who committed the act of sexual violation was (a) between the ages of 12 and 16 years or (b) 16 or 17 years of age and the difference in the ages both children was no more than two years.

The provision for the prosecution of both children for the crime of consensual sexual violation of a child between the ages of 12 and 16 was deleted.

4.6 CLAUSE 7: AMENDMENT OF SECTION 50

A new subsection “c” was added to Section 50(2) of the SOA. The amended s50(2)(c) now provides that, in respect of a child who committed a sexual offence, the court can only make an order to enter the particulars of such child offender into the NRSO if ‘(i) the prosecutor has made an application to the court for such an order; (ii) the court has considered a [probation] report...which deals with the probability of [him or her] committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future; (iii) [he or she was] given the opportunity to... address the court as to why his or her particulars should not be included in the Register...and the court [was satisfied that there were] substantial and compelling circumstances...[justifying such an order]’.

The CC did not prohibit the entry of the particulars of children as sexual offenders in the NRSO. At the time of the judgement in the J case the CC was not satisfied the conditions listed above had been complied with. Because of this the court felt that it would not be justified to include the details of child offenders in the NRSO.

4.7 CLAUSE 8: AMENDMENT OF SECTION 51

Section 51 of the SOA was amended by the insertion of subsection “2A” which provides for the removal from the NRSO of the particulars of persons (a) whose details were entered into the NRSO before Chapter 6⁸ of the SOA came into operation and (b) who were children at the time of the commission of the sexual offence.

4.8 CLAUSE 11: AMENDMENT OF SECTION 69

Section 69 was amended by the insertion of section “69A” which provides for the removal of particulars from the NRSO and expungement of certain criminal records under the Sexual Offences Act, 1957 and the SOA 32 of 2007 if (a) the person was 16 years or younger at the time in respect of certain offences and 19 years or younger in respect of specified offences under the 1957 SOA and (b) between 12 and 16 years in terms of s15 and 16 of the 2007 SOA and he or she qualifies for automatic removal of his or her particulars or expungement of his or her criminal record.

⁸ Chapter 6 of the SOA deals with the NRSO.