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14 August 2007

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 - 2007]

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.
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B I L L

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 sentence 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 was 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 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] exceed** the minimum **[sentence] term of imprisonment** that it may impose in terms of this subsection by more than five years.

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(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; Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part I of Schedule 2, it shall, in the case of –

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- (i) a first offender, have jurisdiction to impose imprisonment for a period not exceeding 20 years;
- (ii) a second offender of any such offence, have jurisdiction to impose imprisonment for a period not exceeding 25 years; and
- (iii) a third or subsequent offender of any such offence, have jurisdiction to impose imprisonment for a period not exceeding 30 years.

OPTION 1

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

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

OPTION 2

(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.

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(b) If any court referred to in subsection (1) or (2) [decides to] imposes a minimum 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

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commission of the act which constituted the offence in question, it **[shall]** must make a finding that no substantial and compelling circumstances justifying the imposition of a lesser sentence exist, and enter the reasons for its **[decision]** finding on the record of the proceedings.

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

(5) (a) The operation of a minimum 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]** an accused person who was under the age of 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—

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

Insertion of section 53A in Act 105 of 1997

4. The following section is inserted in the Criminal Law Amendment Act, 1997:

"Pending proceedings

53A. If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007, (hereafter referred to as the fixed date) committed an accused for sentence by a High Court under this Act, and, prior to the fixed date—

(a) the case has not been allocated a court date in the High Court, the regional court has jurisdiction to impose sentence in terms of this Act as if it were the High Court.
of Act 62 of 2000 and section 27(1) of Act 33 of 2004

5. The following section is substituted for Part IV of Schedule 2 of the Criminal Law Amendment Act, 1997:

Section 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977)] Schedule 3, other than an offence referred to in Part I, II or III of this Schedule, if the accused had with him or her at the time a firearm, which was intended for

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6. The following Schedule is inserted in the Criminal Law Amendment Act, 1997:

"Schedule 3

(PART IV of Schedule 2)

Treason.

Sedition.

Public violence.

Robbery.

Kidnapping.

Assault, when a dangerous wound is inflicted with a firearm.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in Schedule 1 of the Criminal Procedure Act, 1977, or is in such custody in respect of the offence of escaping from lawful custody."

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 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 ~~or against any 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—
~~that the sentence or order 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 309R.~~ Provided further "502(1)(a)".

"(3) The prosecution policy or amendments to such policy must determine policy relating to the institution of prosecutions in the High Court as a court of first instance [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].

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(4) The NDPP must issue policy directives [contemplated in subsection (3) must be issued] pursuant to the policy contemplated in subsection (3), regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law (Sentencing) Amendment Act, 2007, within three months of the date of the commencement of the Act [Criminal Law (Sentencing) Amendment Act, 2007].

Amendment of section 3 of Act 121 of 1998

9. Section 3 of the Prevention of Organised Crime Act, 1998, is amended—

(a) by the deletion of subsection (2)(ii); and

(b) by the deletion of subsection (3).

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[Transitional provision

[6]10, 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
- (b) the High Court has heard the matter, then the High Court must dispose of the matter as if this Act has not been passed.]

Short title and commencement

[7]11. 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*.

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