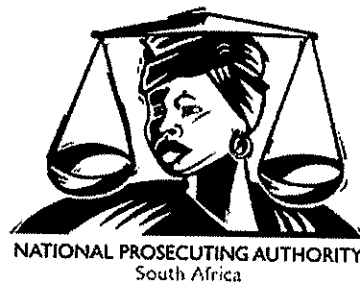


**Office of the
National Director of Public
Prosecutions**



Reference Number: 3/2/P (NDPP)

Enquiries: Adv SG Nel (012-8456747)

28 May 2012

Mr Luwellyn Landers, MP
Chairperson: Portfolio Committee
on Justice and Constitutional Development

Dear Mr Landers

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

I wish to thank the Portfolio Committee on Justice and Constitutional Development for affording the National Prosecuting Authority (NPA) the opportunity to comment on the abovementioned Bill.

The purpose of the Bill is to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (Sexual Offence Act), so as to expressly provide that the imposition of penalties in respect of certain offences contained in the Act is left to the discretion of the courts.

Background Information

A certain Mr Prins (respondent) was indicted in the regional court at Riversdale on a charge of contravening the provisions of section 5(1) of the Sexual Offences Act. Prior to the commencement of the trial the respondent objected to the charge sheet in terms of section 85 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). It was contended on his behalf that the charge does not disclose an offence as section 5(1) of the Sexual Offences Act does not contain any penalty for the alleged offence.

Tel: +27 12 845 6000
Fax: +27 12 845 7291

Victoria & Griffiths
Mxenge Building
123 Westlake
Avenue
Weavind Park
Silverton
Pretoria

P/Bag X752
Pretoria
0001
South Africa

www.npa.gov.za

The regional magistrate upheld respondent's objection and quashed the charge. The Director of Public Prosecutions, Western Cape, thereupon appealed to the Western Cape High Court against the decision of the regional magistrate. A full Court was constituted to hear the appeal.

On 11 May 2012, the High Court held that the *nulla poena sine lege* principle (no punishment without a law), as an integral element of the legality doctrine, is firmly established as part of the South African legal system. The Court further held that the provisions of sections 35(3)(l) and (n) of the Constitution also support an interpretation that the *nulla poena sine lege* principle is an implied provision of the Constitution. In conclusion, the Court held that the regional magistrate was correct in deciding that the charge against respondent did not disclose an offence.

The NPA approached the High Court for leave to appeal. On 24 May 2012, a full bench of the Western Cape High Court found that the NPA had a reasonable chance of success in another court and granted the NPA leave to approach the Supreme Court of Appeal.

In the meantime the Department of Justice and Constitutional Development has prepared a draft Bill, which Bill envisages to expressly provide that the imposition of penalties in respect of certain offences contained in the Sexual Offences Act is left to the discretion of the courts. The NPA has been informed that the Portfolio Committee wishes to deal with this Bill on an urgent basis and will discuss the Bill on 29 May 2012.

As indicated above, the NPA will appeal the decision of the Western Cape High Court. The **Prins judgment** has major implications for the State and may negatively influence decisions in other jurisdictions, part heard matters, pending prosecutorial decisions and awaiting trial prisoners. Although the NPA is positive that there is a reasonable prospect of a successful appeal, the NPA in principle supports the introduction and objective of the Bill in order to remove any uncertainty regarding the intention of the Legislature. Furthermore, such action may possibly remedy the situation in a swifter manner than the appeal process.

Desirability of amending the Sexual Offences Act or inclusion of general sentencing provision in the Criminal Procedure Act

It is important to note that a similar position exists in respect of section 24B of the Films and Publication Act, 1996 (Act No. 65 of 1996). Section 24B, which makes, *inter alia*, child pornography an offence, was inserted without a penalty clause. Therefore, the **Prins judgment** may also have a negative effect on prosecutions for contravention of section 24B

of the Films and Publication Act. The existence of similar challenges in respect of other legislation and future legislation is not excluded.

Therefore, the question arises whether it is desirable to amend only the Sexual Offences Act rather than to amend the Criminal Procedure Act and to address similar challenges in other pieces of legislation or future legislation. For example, the Portfolio Committee may consider amending section 276 of the Criminal Procedure Act (general punishment provision), by inserting the following general sentencing provision:

"Where a law creates an offence and no penalty is prescribed for that offence—

- (a) a court convicting an accused person of that offence; or
- (b) a court to which an accused person has been committed or arraigned for sentence in terms of this Act,

may impose a sentence which that court considers appropriate and which is within that court's penal jurisdiction."

Such a general provision has the following advantages:

- It will address the challenges identified in the Sexual Offences Act as well as the Films and Publication Act, 1996.
- It will address any similar challenges in respect of other legislation that we are not aware of.
- It will cater for future penal clauses.

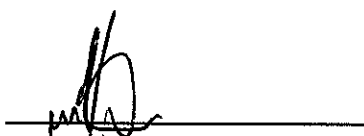
However, such a general penalty clause, which includes the proposal in the Bill, has certain disadvantages. The Legislature must endeavour to legislate for the man in the street and, therefore, legislation should be user-friendly. Since 1994, the new Government has emphasised the principles that legislation should be drafted in plain language and should be user-friendly. Therefore, it is desirable that the provision creating the offence should also prescribe the penalty. The man in the street should not be put in a position where the prescribed penalty is unclear or where he is referred to another piece of legislation to ascertain the applicable penalty. The man in the street does not always have access to these laws.

In view of the above, the NPA proposes that the penalty clause should be inserted in the Sexual Offences Act and that such penalty clause should clearly prescribe the sentences that may be imposed in respect of specific offences by the various courts having jurisdiction.

At the same time the Portfolio Committee may consider providing higher sentencing jurisdiction for the magistrate court in respect of the offences concerned. Such a provision will prevent the cumbersome and expensive procedure of referring cases to a higher court for sentencing purposes. Furthermore, it will enable the prosecutor to identify the correct forum for prosecution.

Comment on the Bill

The NPA does not have major issues with the Bill itself. However, there are minor technical issues to be considered. The NPA's proposals are indicated by way of track changes on the attached Bill.

A handwritten signature in black ink, appearing to be 'Adv N Jiba', is written over a solid horizontal line.

Adv N Jiba

Acting National Director of Public Prosecutions

24 May 2012

Bill2012A(Legality)

REPUBLIC OF SOUTH AFRICA

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

(.....)

(PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B — 2012]

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 expressly provide that the imposition of penalties in respect of certain offences contained in the Act is left to **the** discretion of the courts; and to provide for matters connected therewith.

Comment [s1]: Insert "the".

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 11 of Act 32 of 2007

1. Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (hereinafter referred to as the principal Act), is hereby amended by the substitution for the following section:

"Engaging sexual services of persons 18 years or older

11. A person ("A") who unlawfully and intentionally engages the services of a person 18 years or older ("B"), for financial or other reward, favour or compensation to B or to a third person ("C")—

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; **or**
- (b) by committing a sexual act with B,
- is guilty of the offence of engaging the sexual services of a person 18 years or older."

Comment [s2]: Insert "or".

Amendment of section 17 of Act 32 of 2007

2. Section 17 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) A person ("A") who unlawfully and intentionally engages the services of a child complainant ("B"), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ("C")—

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; ^[s3] or
- (b) by committing a sexual act with B,
- is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a child.”

Comment [s3]: Insert "or"

Amendment of section 23 of Act 32 of 2007

3. Section 23 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A person (“A”) who unlawfully and intentionally engages the services of a complainant who is mentally disabled (“B”), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person (“C”)—

Formatted: Underline

(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; ^[s4] or

Comment [s4]: Insert "or"

(b) by committing a sexual act with B,

is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a person who is mentally disabled.”

Amendment of section 56 of Act 32 of 2007

4. Section 56 of the principal Act is hereby amended by—

- (a) substituting the heading with the following heading:
 “Defences **[and sentencing]**”; and
- (b) the deletion of subsection (7).

Insertion of section 56A in Act 32 of 2007

5. The principal Act is hereby amended by the insertion after section 56 of the following section:

“Sentencing

56A. (1) A court shall, if—

- (a) that or another court has convicted a person of an offence in terms of this Act; and
- (b) a penalty is not prescribed in terms of this Act or any other Act in respect of that offence,

impose a sentence which that court considers appropriate and which is within that court's penal jurisdiction.

(2) If a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person—

(a) committed the offence with the intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or

(b) gained financially, or received any favour, benefit, reward, compensation or any other advantage,

from the commission of such offence.

Short title

6. This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2012.