

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO**

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

[B 18—2014]

(Portfolio Committee on Justice and Correctional Services)

[B 18A—2015]

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AMENDMENTS TO

**CRIMINAL LAW (SEXUAL
OFFENCES AND RELATED MATTERS)
AMENDMENT ACT AMENDMENT BILL**
[B 18—2014]

LONG TITLE

1. On page two, in the Long Title, in line 7 after “Offenders;” to insert the following:

“to 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;”.

NEW CLAUSE

1. That the following be a new clause:

“PREAMBLE

BEARING IN MIND that the Constitutional Court found, in the case of *Teddy Bear Clinic for Abused Children and Others v the Minister of Justice and Constitutional Development and Others [2013] ZACC 35*, that sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), are unconstitutional insofar as they criminalise consensual sexual conduct between adolescents;

AND BEARING IN MIND that the primary objective of sections 15 and 16 of the Act, namely to protect children, who are 12 years or older but under the age of 16 years, from adult sexual predators remains unaffected by the Constitutional Court judgment and consequently also does not lower the age of consent in respect of sexual acts to 12 years;

AND BEARING IN MIND that the purposes of discouraging adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct materialising, are legitimate and important;

AND BEARING IN MIND that the Constitutional Court, in the case of *J v the National Director of Public Prosecutions and Others [2014] ZACC 13*, found that the automatic inclusion of the particulars of persons, who were children at the time of the commission of sexual offences, in the National Register for Sex Offenders is contrary to the “best interest of the child” principle and therefore not justified in an open an democratic society,

Parliament of the Republic of South Africa therefore enacts as follows:—

CLAUSE REJECTED

1. On page 2, in lines 1 and 2, to omit all the words from “**BE**” up to and including “follows:—”.

CLAUSE 2

1. On page 2, in line 13, to omit “**Amendment**” and to substitute “**Substitution**”.
2. On page 2, in line 14, to omit “Section” and to substitute “The following section is hereby substituted for section”.
3. On page 2, in lines 14 and 15, to omit everything after “Act” up to and including “section”.

CLAUSE 3

1. On page 3, in line 17, to omit “**Amendment**” and to substitute “**Substitution**”.
2. On page 3, in line 18, to omit “Section” and to substitute “The following section is hereby substituted for section”.
3. On page 3, in lines 18 and 19, to omit everything after “Act” up to and including “section”.

CLAUSE 7

1. On page 4, in line 43, to omit “and”.
2. On page 4, in line 45, to omit “paragraph” and to substitute “paragraphs”.
3. On page 4, from line 46, to omit paragraph (c) and to substitute:

‘ “(c) If a court has, in terms of this Act or any other law, convicted a person (“A”) of a sexual offence referred to in paragraph (a)(i) and A was a child at the time of the commission of such offence, or if a court has made a finding and given a direction referred to in paragraph (a)(ii) in respect of A who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in paragraph (a) unless—

- (i) the prosecutor has made an application to the court for such an order;
- (ii) the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of A committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future;
- (iii) A has been given the opportunity to address the court as to why his or her particulars should not be included in the Register; and
- (iv) the court is satisfied that substantial and compelling circumstances exist based upon such assessment and any other evidence, which justify the making of such an order.

(d) In the event that a court finds that substantial and compelling circumstances exist which justify the making of an order as contemplated in paragraph (a), the court must enter such circumstances on the record of the proceedings.”; and’.

4. On page 5, in line 1, to omit “(i)”.

CLAUSE 8

1. On page 5, in line 13, to omit everything after “concerned” and to substitute:

“and who was convicted of such offence or a person who was a child at the time of the alleged commission of the offence and in respect of whom a court has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977—

- (a) before the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to a court for an order that his or her particulars must be removed from the Register by—
 - (i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and
 - (ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her; or
- (b) after the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)(c) for an order that his or her particulars must be removed from the Register by—
 - (i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and
 - (ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her.”.

CLAUSE 10

1. On page 5, in line 28, to omit “**Amendment**” and to substitute “**Substitution**”.
2. On page 5, in line 29, to omit “Section” and to substitute “The following section is hereby substituted for section”.
3. On page 5, in lines 29 and 30, to omit everything after “Act” up to and including “section”.

NEW CLAUSES

1. That the following be new clauses:

Insertion of section 69A in Act 32 of 2007

11. The following section is hereby inserted in the principal Act after section 69:

“Removal of particulars from Register and expungement of certain criminal records under the Sexual Offences Act, 1957, and this Act

- 69A.** (1) (a) Where a court has convicted a person of any of the offences referred to in paragraph (b), the—
- (i) particulars of that person in respect of that offence must be

removed automatically from the Register by the Registrar;
and

- (ii) criminal record, containing the conviction and sentence in question, of that person in respect of that offence must be expunged automatically by the Criminal Record Centre of the South African Police Service,
as provided for in subsection (2).

(b) The offences contemplated in paragraph (a) are the following:

- (i) A contravention of section 14(1)(a) or 14(3)(a) of the Sexual Offences Act, 1957 (Act No. 23 of 1957), if the person was 16 years or younger at the time of the commission of the offence;
- (ii) a contravention of section 14(1)(b), 14(1)(c), 14(3)(b) or 14(3)(c) of the Sexual Offences Act, 1957, if the person was 19 years or younger at the time of the commission of the offence; and
- (iii) a contravention of section 15 or 16 of this Act if the person was 12 years or older, but under the age of 16 years at the time of the commission of the offence.

(2) (a) The—

- (i) Registrar must remove the particulars from the Register;
and
- (ii) head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a person,
if that person qualifies for the automatic removal of his or her particulars from the Register, and the automatic expungement of his or her criminal record, as provided for in subsection (1).

(b) The—

- (i) Registrar must, on the written request of a person who qualifies to have his or her particulars removed automatically in terms of subsection (1), in writing, confirm that the particulars in question have been removed; and
- (ii) head of the Criminal Record Centre of the South African Police Service must, on the written request of a person who qualifies to have his or her criminal record expunged automatically in terms of subsection (1), in writing, confirm that the criminal record in question has been expunged.”.

Amendment of long title of Act 32 of 2007

12. The long title of the principal Act is hereby amended by the substitution for the seventh bullet of the following bullet:

“* eliminating the differentiation drawn between the age of consent for different consensual sexual acts [**and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years**];”.

Amendment of Index to Act 32 of 2007

13. The index of the principal Act is hereby amended by the insertion after item 69 of the following item:

“69A. Removal of particulars from Register and expungement of certain criminal records under the Sexual Offences Act, 1957, and this Act”.

CLAUSE 11

1. On page 5, in line 46, to omit “2014” and to substitute “2015”.

