



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 601 Cape Town,
Kaapstad, 7 July 2015

No. 38977

THE PRESIDENCY

No. 593 7 July 2015

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

Act No. 5 of 2015: Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015

DIE PRESIDENSIE

No. 593 7 Julie 2015

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

Wet No 5 van 2015: Wysigingswet op Wysigingswet op die Strafreg (Seksuele Misdrywe en Verwante Aangeleenthede), 2015



AIDS HELPLINE: 0800-0123-22 Prevention is the cure

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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(English text signed by the President)
(Assented to 3 July 2015)

ACT

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as 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 National Register for Sex Offenders or not; 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; to provide for the removal of the particulars of children who were convicted for 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; and to provide for matters connected therewith.

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 and democratic society,

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

Amendment of section 1 of Act 32 of 2007

1. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (hereinafter referred to as the “principal Act”), is hereby amended by the substitution for the definition of “child” of the following definition: 5
“ ‘child’ means[—]
[(a)] a person under the age of 18 years[; or
(b) **with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,**]
and ‘children’ has a corresponding meaning.”. 10

Substitution of section 15 of Act 32 of 2007

2. The following section is hereby substituted for section 15 of the principal Act:

“Acts of consensual sexual penetration with certain children (statutory rape) 15

15. (1) A person (‘A’) who commits an act of sexual penetration with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was— 20
(a) 12 years of age or older but under the age of 16 years; or
(b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the [National] Director of Public Prosecutions if [both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years: **Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).** 25 30

(b) The [National] Director of Public Prosecutions concerned may [not] delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”.

Substitution of section 16 of Act 32 of 2007 35

3. The following section is hereby substituted for section 16 of the principal Act:

“Acts of consensual sexual violation with certain children (statutory sexual assault)

16. (1) A person (‘A’) who commits an act of sexual violation with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission of such an act, was— 40
(a) 12 years of age or older but under the age of 16 years; or
(b) either 16 or 17 years of age and the age difference between A and B was not more than two years. 45

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if [both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the 50

age difference between A and B was more than two years[: **Provided that, in the event that the Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1)**].

(b) The Director of Public Prosecutions concerned may [not] delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.” 5

Amendment of section 46 of Act 32 of 2007

4. Section 46 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 10

“(1) An employee in the employ of an employer at the commencement of this Chapter, who is or was convicted of a sexual offence against a child or a person who is mentally disabled, or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, irrespective of whether or not such offence was committed or allegedly committed during the course of his or her employment, and whose particulars are included or are to be included in the Register, must without delay disclose such conviction or finding to his or her employer.”; and 15 20

(b) by the substitution for subsection (2) of the following subsection: 20

“(2) An employee who, after the commencement of this Chapter, applies for employment, must, if he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, and whose particulars are included or are to be included in the Register, disclose such conviction or finding when applying for employment.”. 25 30

Amendment of section 47 of Act 32 of 2007 30

5. Section 47 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) A person who, after the commencement of this Chapter, applies for a licence contemplated in subsection (1) to a licensing authority, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.”. 35 40

Amendment of section 48 of Act 32 of 2007 40

6. Section 48 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) A person who, after the commencement of this Chapter, applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or a curator, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.”. 45 50

Amendment of section 50 of Act 32 of 2007 50

7. Section 50 of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:

- “(a) A court that has in terms of this Act or any other law—
- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or
 - (ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person, must, subject to paragraph (c), make an order that the particulars of the person be included in the Register.”;
- (b) by the insertion after paragraph (b) of subsection (2) of the following paragraphs:
- “(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 report 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
- (c) by the substitution for subsection (4) of the following subsection:
- “(4) Where a court, for whatever reason, fails to make an order under subsection (2)(a), in respect of any person other than a person referred to in subsection (2)(c), the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court and the court must make such order.”.

Amendment of section 51 of Act 32 of 2007

8. Section 51 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
“(1) Subject to subsections (2), (2A) and (3), the particulars of a person—”; and
 - (b) by the insertion after subsection (2) of the following subsection:
“(2A) A person falling into the categories contemplated in subsection (1), who was a child at the time of the commission of the offence concerned 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.”.

Amendment of section 56 of Act 32 of 2007

9. Section 56 of the principal Act is hereby amended by the deletion in subsection (2) of paragraph (b).

Substitution of section 67 of Act 32 of 2007

10. The following section is hereby substituted for section 67 of the principal Act:

“Regulations

67. (1) The Minister, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, may make regulations regarding—

- (a) any matter which is required or permitted by this Act to be prescribed by regulation;
- (b) the inter-sectoral implementation of this Act; and
- (c) any other matter which is necessary or expedient to be prescribed in order to achieve or promote the objects of this Act.

(2) The Minister may make regulations regarding the procedure to be followed in respect of the applications referred to in section 51(2A) of this Act.”.

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 5
- (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). 10

(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 convicted person was 16 years or younger at the time of the commission of the offence; 15
- (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 convicted person was 19 years or younger at the time of the commission of the offence; and 15
- (iii) a contravention of section 15 or 16 of this Act if the convicted person was 12 years or older, but under the age of 16 years at the time of the commission of the offence. 20

(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, 25

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). 30

(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 35
- (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.”. 40

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: 50

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

Short title

14. This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015. 55