

REPUBLIC OF SOUTH AFRICA

CHILDREN'S AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75 Bill)
(Bill and prior notice of its introduction published in Government Gazette No 38222 of 19
November 2014)
(The English text is the official text of the Bill)*

(Michael Waters MP)

[PMB2 – 2015]

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 Children’s Act, 2005 (No. 38 of 2005) so as to provide that a person, other than a child, convicted of any offence against a child in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957) or the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), be deemed to be found unsuitable to work with children; to provide that in respect of a child convicted of certain offences against a child, a finding of unsuitability may be made only after representations have been heard and the best interests of the child have been considered; to deem persons convicted of any offence in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or certain common law offences against a child during the five years preceding the commencement of section 120 of the Children’s Act, 2005, unsuitable to work with children unless such person was a child at the time of the commission of the offence; to provide that where a child was convicted of certain offences five years preceding the commencement of section 120, application can be made to a court to make a finding of unsuitability to work with children; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 120 of Act 38 of 2005

1. Section 120 of the Children’s Act, 2005, is hereby amended—
 - (a) by the substitution for subsection (4) of the following subsection:
 - “(4) In criminal proceedings, a person must, except when such person is a child, be deemed to be found unsuitable to work with children—
 - (a) on conviction of—
 - (i) (aa) murder[,];

- (*bb*) attempted murder;[, **rape, indecent assault**] or
 - (*cc*) assault with the intent to do grievous bodily harm, with regard to a child;
 - (*ii*) any offence referred to in the Sexual Offences Act, 1957 (Act No. 23 of 1957), that has been committed against a child or any attempt to commit such an offence in respect of a child; or
 - (*iii*) a sexual offence as referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), that has been committed against a child or any attempt to commit such an offence in respect of a child; or
- (*b*) if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 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 **[murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child]** any offence referred to in paragraph (*a*).”;
- (*b*) by the insertion after subsection (4) of the following subsection:
- “(4A) (*a*) In criminal proceedings, where a child is convicted of any of the offences referred to in subsection (4)(*a*), the court must make a finding as to whether or not the child is unsuitable to work with children.
- (*b*) Before a finding as contemplated in paragraph (*a*) is made, the court must —
- (*i*) explain the contents and implications of such a finding to the child;
 - (*ii*) afford the child an opportunity to make representations as to why such a finding should not be made; and
 - (*iii*) have regard to the best interests of the child.
- (*c*) Where a court, for whatever reason, fails to make a finding in terms of paragraph (*a*), any person contemplated in subsection (2)(*a*), (*b*) or (*c*) must bring this omission to the attention of the court and the court must make such finding.”;

- (c) by the substitution for subsection (5) of the following subsection:

“(5) Any person who has been convicted of— **[murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child]**

- (a) any offence referred to in subsection (4)(a); or
(b) any common law offence of rape or of indecent assault or any attempt to commit these common law offences against a child,

during the five years preceding the commencement of this **[Chapter]** section, is deemed to have been found unsuitable to work with children, unless such person was a child at the time of the commission of the offence.”; and

- (d) by the insertion after subsection (5) of the following subsection:

“(5A) Where a child was convicted of—

- (a) any offence referred to in subsection (4)(a); or
(b) any common law offence of rape or of indecent assault or any attempt to commit these common law offences against a child,

during the five years preceding the commencement of this section, any person contemplated in subsection (2)(a) or (c) may apply to the court to make a finding as to whether such person is unsuitable to work with children.”

Short title and commencement

2. This Act is called the Children’s Amendment Act, 2014, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTIVES OF THE CHILDREN'S AMENDMENT BILL, 2014

1. BACKGROUND

Part B of the Child Protection Register was introduced to protect children from people who have been found unsuitable to work with them. At present, the Children's Act, 2005, (Act No. 38 of 2005) ("the Act"), determines that such people include those convicted of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regards to a child.

The Act, however, does not make provision for the offences against children which are contained in the Sexual Offences Act, 1923 (Act No. 23 of 1957) and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007). These offences ought to be added to the offences listed in the Act that constitute a disqualification when it comes to working with children.

In addition, differentiation must also be made between adult and child offenders when criminal courts make findings of unsuitability to work with children, so as to bring the Act in line with the recent Constitutional Court finding in *J v NDP and another*, 2014, CCT 114/13.

2. OBJECTIVE OF THE BILL

The objective of the Children's Amendment Bill, 2014 ("the Bill") is to amend sections 120(4) and (5) of the Act so as to provide that a person, other than a child, convicted of any offence in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957) or any offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) against a child, be deemed to be found unsuitable to work with children; and to deem persons convicted of any offence in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or any common law offence of rape or indecent assault against a child during the five years preceding the commencement of section 120 of the Children's Act unsuitable to work with children, unless such person was a child at the time of the commission of the offence. A further objective of the Bill is to ensure that a child who is convicted of certain offences in criminal proceedings be given an opportunity to make representations as to why a finding of unsuitability to work with children should not be made in respect of him or her and for the court to have regard to his or her best interests.

3. CONTENT OF THE BILL

Clause 1 of the Bill amends section 120(4) of the Act to provide that a person, other than a child, convicted of any offence against a child in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957) or in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), be deemed to be found unsuitable to work with children.

Clause 1 of the Bill further inserts subsection (4A) into the Act to provide that before a finding of unsuitability to work with children is made in respect of a child who is convicted of certain offences in criminal proceedings, the court must afford the child an opportunity to make representations as to why such a finding should not be made and the court must have regard to the best interests of the child.

Clause 1 also amends section 120(5) of the Act so as to deem persons convicted of any offence in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or certain common law offences against a child during the five years preceding the commencement of section 120 of the Act unsuitable to work with children, unless such person was a child at the time of the commission of the offence.

Clause 1 also inserts subsection (5A) into the Act to provide for certain persons to apply to court to make a finding as to whether a person is unsuitable to work with children, where such person was a child who was convicted of committing certain offences five years preceding the commencement of section 120.

Clause 2 of the Bill provides for the short title of the Act and the date of commencement of the Act.

4. FINANCIAL IMPLICATIONS FOR THE STATE

None, as the Child Protection Register already exists.

5. CONSULTATION

A prior version of the Children's Amendment Bill, 2013, (the Amendment Bill, 2013) was published for comment on 27 February 2013 and was introduced in the Fourth Parliament. The Children's Amendment Bill, 2013, was debated by the Portfolio Committee on Social Development during June and August 2013. The portfolio committee received a briefing from the Department of Social Development and also from the Department of Justice and Constitutional Development. The current version has been revised, taking those briefings and the recent Constitutional Court finding in *J v NDPP and another*, CCT 114/13 into account.

6. PARLIAMENTARY PROCEDURE

It is proposed that the Bill be dealt with in accordance with the procedure established by section 75 of the Constitution.

It is further proposed that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), as it does not contain provisions pertaining to customary law or customs of traditional communities.