

REPUBLIC OF SOUTH AFRICA

CHILDREN'S AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 38703 of 17 April 2015)
(The English text is the official text of the Bill)*

(MINISTER OF SOCIAL DEVELOPMENT)

[B 13—2015]

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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, so as to insert certain definitions; to provide that a person convicted of a sexual offence, or an offence for the possession of child pornography, be deemed unsuitable to work with children; to afford a child offender an opportunity to make representations as to why a finding of unsuitability to work with children should not be made; to provide that the National Commissioner of the South African Police Service must forward to the Director-General all the particulars of persons found unsuitable to work with children; to provide for a child offender to apply in the prescribed manner to have their particulars removed from the Register; to provide for the review of a decision to remove a child without a court order; to extend the circumstances as to when a child is adoptable; to extend the effects of an adoption order by providing that an adoption order does not automatically terminate all parental responsibilities and rights of a parent of a child when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 38 of 2005, as amended by section 3 of Act 41 of 2007

1. Section 1 of the Children’s Act, 2005 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of “commissioning parent” of the following definition:

“**‘Constitution’** means the Constitution of the Republic of South Africa, 1996;” and

(b) by the insertion after the definition of “sexual abuse” of the following definition:

“**‘sexual offence’** means sexual offence as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);”.

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Amendment of section 120 of Act 38 of 2005

2. Section 120 of the principal Act is hereby amended—

(a) by the substitution for subsection (4) of the following subsection:

“(4) In criminal proceedings, subject to the provisions of subsection (4A), a person must be [found] deemed unsuitable to work with children— 5

(a) on conviction of murder, **[attempted murder, rape, indecent assault or]** any sexual offence contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), assault with the intent to do grievous bodily harm, [with regard to a child] where a child is the victim of any such offence, or any attempt to commit any such offence, or possession of child pornography as contemplated in section 24B of the Films and Publications Act, 1996 (Act No. 65 of 1996); or 10

(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]** an offence contemplated in paragraph (a).”; 20

(b) by the insertion after subsection (4) of the following subsection:

“(4A) Before making an order contemplated in subsection (1), in respect of a child who was under the age of 18 years when he or she committed the offence, the court must— 25

(a) afford the child offender an opportunity to make representations as to why such an order should not be made;

(b) have the best interest of the child offender considered of paramount importance; and 30

(c) on good cause shown, make an order that the particulars of the child offender not be included in the Register.”; and

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

“(5) Any person who has been convicted of an offence contemplated in subsection (4)(a), whether committed in or outside the Republic during the five years preceding the commencement of this Chapter, is deemed to be unsuitable to work with children.”. 35

Amendment of section 122 of Act 38 of 2005

3. Section 122 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection: 40

“(1A) The National Commissioner of the South African Police Service must, in the prescribed manner, forward to the Director-General all the particulars of persons referred to in section 120(4) and (5).”.

Amendment of section 128 of Act 38 of 2005 45

4. Section 128 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A person whose name appears in Part B of the Register, or a person who was under the age of 18 years when he or she committed the offence in respect of which the finding was made, may in terms of subsection (2) apply for the removal of his or her name and any information relating to that person from the Register.”. 50

Amendment of section 150 of Act 38 of 2005

5. Section 150 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 55

- “(1) A child is in need of care and protection if **[the] such a child—**”;
and
(b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
“(a) has been abandoned or orphaned and **[is without any visible means of support]** does not ostensibly have the ability to support himself or herself;”.

Insertion of section 152A in Act 38 of 2005

6. The following section is hereby inserted in the principal Act after section 152:

“Review of decision to remove child without court order”

- 152A.** (1) When a matter contemplated in section 152(2)(c) is brought before court the presiding officer may—
(a) if he or she is satisfied, after considering all relevant information, that the police official or designated social worker, in removing the child, has satisfied the provisions of section 152(1), issue an order confirming the removal of the child; or
(b) if he or she is not satisfied that the police official or designated social worker, in removing the child, has satisfied the provisions of section 152(1), issue an order setting aside the removal and placement of the child.
(2) Where the court has issued an order contemplated in—
(a) subsection (1)(a) the presiding officer may, in addition, issue an order contemplated in section 151(2); or
(b) subsection (1)(b) the presiding officer may, in addition, order that the child be returned to its parent, guardian or care giver, as the case may be, or order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2).”.

Amendment of section 155 of Act 38 of 2005

7. Section 155 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) A children’s court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 152, 152A or 154 is in need of care and protection.”.

Amendment of section 159 of Act 38 of 2005

8. Section 159 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
“An order made by a children’s court in terms of section 156, except an order contemplated in section 46(1)(c)—”; and
(b) by the substitution for subsection (3) of the following subsection:
“(3) **[No]** Subject to section 176(2), a court order referred to in subsection (1) [extends] may not extend beyond the date on which the child in respect of whom it was made reaches the age of 18 years.”.

Amendment of section 230 of Act 38 of 2005

9. Section 230 of the principal Act is hereby amended by the deletion in subsection (3) of the word “or” at the end of paragraph (d) and the addition of the following paragraphs:

- “(f) the child is the stepchild of the person intending to adopt; or
(g) the child’s parent or guardian has consented to the adoption unless consent is not required.”.

Amendment of section 242 of 38 of 2005

10. Section 242 of the principal Act is hereby amended by the deletion in subsection (2) of the word “and” at the end of paragraph (c), the insertion of the word “and” at the end of paragraph (d) and the addition of the following paragraph:

“(e) does not automatically terminate all parental responsibilities and rights of the parent of a child, when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent.”. 5

Amendment of Table of Contents of Act 38 of 2005

11. The Table of Contents after the long title of the principal Act is hereby amended by the insertion after “152. Removal of child to temporary safe care without court order” of the following: 10

“152A. Review of decision to remove child without court order”.

Short title and commencement

12. This Act is called the Children’s Amendment Act, 2015, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 15

MEMORANDUM ON THE OBJECTS OF THE CHILDREN'S AMENDMENT BILL, 2015

1. BACKGROUND

- 1.1 The Children's Amendment Bill ("the Bill") seeks to amend the Children's Act, 2005 (Act No. 38 of 2005) ("the Act"), so as to give effect to recent Court judgments and to insert certain definitions; to provide that a person convicted of a sexual offence, or an offence for the possession of child pornography, be deemed unsuitable to work with children; before making a finding that a child is unsuitable to work with children, afford a child offender an opportunity to make representations as to why such an order should not be made, have the best interest of the child considered and on good cause shown, make an order that the particulars of that child not be included in the register; to provide that the National Commissioner of the South African Police Service must forward to the Director-General all the particulars of persons found unsuitable to work with children; to provide for a child offender to apply in the prescribed manner, to have their particulars removed from the Register; to provide for the review of a decision to remove a child without a court order; to extend the circumstances as to when a child is adoptable; to extend the effects of an adoption order by providing that an adoption order does not automatically terminate all parental responsibilities and rights of a parent of a child when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent; and to provide for matters connected therewith.

2. OBJECTS OF BILL

- 2.1 In the case of **J v National Director of Public Prosecutions and Another [2014] ZACC 13**, the Constitutional Court handed down a judgment declaring section 50(2)(a) of the Criminal Law Sexual Offences and Related Matters Amendment Act, 2007 (Act No. 32 of 2007) ("Sexual Offences Act"), unconstitutional because the impugned provision limits the child offender's rights in terms of section 28(2) of the Constitution. Section 50(2) provides that when a person is convicted of a sexual offence against a child or person who is mentally disabled, a court must make an order to include the offender's particulars in the National Register for Sex Offenders ("Register"). The Constitutional Court said that section 50(2) of the Sexual Offences Act does not distinguish between adult and child offenders and that the "best-interests of the child standard should be flexible because individual circumstances will determine which factors secure the best interests of a particular child."¹ The Constitutional Court said the wording of section 50 of the Sexual Offences Act is preemptory in that it does not give the court any discretion regarding whether or not to include an offender's details in the Register.
- 2.2 The Constitutional Court's declaration of section 50(2)(a) of the Sexual Offences Act as unconstitutional and invalid was suspended in order to give the legislature 15 months to remedy the defect.

The Court highlighted the following factors, which it said Parliament should be mindful of:

- The operation of the Sexual Offences Act as a whole;²
- the disclosure provisions;
- the definition of 'employer' in particular; and

1. At paragraph 38

2. Para 56

- to consider the creation of a provision for child offenders included in the Register to have the opportunity to motivate that their particulars be expunged upon application.

2.3 In **C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208 (CC)**, the Constitutional Court confirmed the order of the High Court declaring sections 151 and 152 of the Act unconstitutional, which provides for the removal of a child to a form of temporary safe care with or without a court order, to the extent that it provides for a child to be removed from family care by state officials and placed in temporary safe care, but does not provide for the child to be brought before the children's court for automatic review. To give effect to this decision, the Bill seeks to amend the Act to provide that the removal of a child to a temporary safe care without a court order be placed before the children's court for review before the expiry of the next court day and that an interim order granted in respect of the removal of a child to temporary safe care be placed before the children's court before the expiry of the next court date and that the parents, guardians or care giver be present in court.

3. CLAUSE BY CLAUSE EXPLANATION

Ad Clause 1: Amendment of section 1

3.1 Clause 1 of the Bill seeks to amend section 1 of the Act in order to insert a definition for "Constitution", because it is not defined, even though it is used in the Act. Clause 1 also seeks to insert a definition for "sexual offence", in order to align the Act with the Sexual offences Act.

Ad Clause 2: Amendment of section 120

3.2 Clause 2 of the Bill seeks to amend section 120 of the Act, to provide that in criminal proceedings, subject to the proposed subsection (4A), a person must also be deemed unsuitable to work with children on conviction of any sexual offence contemplated in the Sexual Offences Act, an attempted offence, or possession of child pornography as contemplated in the Films and Publication Act, 1996 (Act No. 65 of 1996). Clause 2 further seeks to amend section 120(4)(a) by deleting the words "attempted murder, rape, indecent assault" and substituting it with a reference to any sexual offence contemplated the Sexual Offences Act, in order to ensure that all forms of sexual offences as defined in the Sexual Offences Act, including attempted rape, are included as a ground for deeming a person to be unsuitable to work with children.

3.3 Clause 2 also seeks to substitute the word "found" in subsection (4) with the word "deemed" in order to clarify the fact that, when a person is convicted of an offence referred to in section 120(4), such a person is by operation of the law considered and deemed unsuitable to work with children. The deeming provision is intended to simplify the process of finding a person unsuitable to work with children thereby strengthening child protection.

3.4 Clause 2 also seeks to amend section 120 by inserting a subsection (4A) to give effect to the judgment in the matter of **J v National Director of Public Prosecutions and Another [2014] ZACC 13**, to allow child offenders to make representations before their names are included in the Register in order to ensure that the Act does not unjustly limit the rights of child offenders.

3.5 Clause 2 seeks to substitute section 120(5) of the Act by extending the application to the offences committed in the proposed subsection (4)(a) and to such offences committed outside the Republic.

Ad Clause 3: Amendment of section 122

- 3.6 Clause 3 seeks to amend section 122 to insert subsection 1(A) to compel the National Police Commissioner to submit information to the Director-General. This amendment is intended to widen the pool of sources of information to reduce the heavy reliance on the Courts. The practical difficulty in obtaining the information has motivated this proposed amendment.

Ad clause 4: Amendment of section 128

- 3.7 Clause 4 seeks to amend section 128(1) of the Act in order to provide for a person who was under the age of 18 years when he or she committed the offence in respect of which a finding was made, and whose name appears in Part B of the Register, to apply for the removal of his or her name upon attaining the age of majority. This amendment is intended to enhance and protect the rights of child offenders in line with the judgment in the matter of **J v National Director of Public Prosecutions and Another [2014] ZACC 13**.

Ad Clause 5: Amendment of section 150

- 3.8 Clause 5 seeks to amend section 150(1)(a) of the Act by deleting the word “the” before “child” and inserting the words “such a”. The clause seeks to clarify that a child is in need of care and protection if such child has been orphaned and does not have the ability to support himself or herself and such inability is readily evident, obvious or apparent. The amendment herein seeks to give effect to the judgment in **Nono Cynthia Manana and Others v The Presiding Officer of the Children’s Court: District of Krugersdorp and Others (A3075/2011) [2013] ZA GPJHC 64** (12 April 2013).

Ad Clause 6: Insertion of section 152A

- 3.9 Clause 6 seeks to insert section 152A in order to provide for the review of a decision to remove a child without a court order. This seeks to give effect to the Constitutional Court judgment in **C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208 (CC)**, where the court found that the removal of the child without a court order must be brought before the children’s court for review.

Ad Clause 7: Amendment of section 155

- 3.10 Clause 7 seeks to provide for a consequential amendment, which seeks to include a reference to the proposed section 152A.

Ad Clause 8: Amendment of section 159

- 3.11 Section 159 of the Act provides for the duration and extension of orders in respect of when a child is found to be in need of care and protection. Clause 8 seeks to provide that the duration and extension of such orders contemplated in section 159 of the Act excludes adoption orders and inter-country adoption orders. Clause 8 also seeks to provide that duration and extension of orders in respect of a child must not extend beyond the age of 18 years, except in respect of a child remaining in alternative care, as contemplated in section 176(2) of the Act.

Ad Clause 9: Amendment of section 230

- 3.12 Clause 9 seeks to amend section 230 of the principal Act by the addition of paragraphs (f) and (g) to include additional categories of children who may be adopted. This is aimed at correcting the omission which has been identified through the implementation of the Act.

Ad Clause 10: Amendment of section 242

3.13 Clause 10 seeks to amend section 242(2) in order to correct the unintended consequence of an adoption. The addition of paragraph (e) seeks to provide that the effect of an adoption order does not automatically terminate parental responsibilities and rights of the parent of a child, when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent.

Ad Clause 11: Amendment of table of contents

3.14 Clause 11 seeks to provide for reference to the proposed section 152A.

4. PERSONS OR BODIES CONSULTED

The following is a list of bodies consulted:

LIST OF NON-GOVERNMENTAL ORGANISATIONS (“NGO”), NATIONAL AND PROVINCIAL DEPARTMENTS CONSULTED FOR THE REVIEW OF THE ACT NGO LIST

1. Working Group on Positive Discipline;
2. Wilna Malherbe Adoption;
3. Thakaneng Street Children;
4. SCALABRINI;
5. South African Montessori Association;
6. KwaZulu-Natal Adoption Coalition;
7. Operation Compassion South Africa;
8. National Council for Persons with Physical Disabilities;
9. Ikholwa Community Services, Rhema Hands of Compassion and Acres of Love;
10. Lawyers For Human Rights;
11. The Homestead Projects for Street Children;
12. Linda Biersteker on behalf of ACCESS, National ECD Alliance, S.A. Congress for ECD; Western Cape ECD Association; Western Cape Resource and Training Organisation Forum; Early Learning Resource Unit; Children’s Institute; Foundation for Community Work; Kotlehong Early Learning Resource Unit; Northlink College, Siyabhaba Trust- Caritas South Africa;
13. Abraham Kriel Childcare;
14. Child Welfare SA eMalahleni;
15. Childline Gauteng;
16. Child Welfare South Africa through submissions made by Child Welfare member organisations, Mpumalanga, Eastern Cape and KZN;
17. Policy and Legislative Analysis sub-group of the Campaign on the Right to Education for Children with Disabilities;
18. Black Sash Trust;

19. ANEX;
20. South African Council for Social Service professions — PBSW;
21. Resources Aimed At the Prevention Of Child Abuse And Neglect;
22. Ons Plek;
23. National Alliance for Street Children;
24. Jo'burg Child Welfare;
25. Ilifa Labantwana;
26. Family Life Centre, Parkwood, Johannesburg;
27. Cmr Uitenhage En Port Elizabeth;
28. ACVV National Council; and
29. National Adoption Coalition.

National Departments

1. Department of Justice and Constitutional Development;
2. Department of Women, Children and People with Disabilities;
3. Department of Home Affairs;
4. Department of Human Settlements;
5. Department of Traditional Affairs;
6. Department of Labour;
7. Department of Basic Education;
8. Department of Correctional Services;
9. Department of Health;
10. Department of Cooperative Governance;
11. Department of Transport;
12. Department of National Treasury;
13. Department of Public Service and Administration;
14. Department of Rural Development and Land Reform;
15. Department of Sport and Recreation; and
16. Department of Public Works.

Provincial Departments

The nine Provincial Departments of Social Development.

5. FINANCIAL IMPLICATIONS FOR THE STATE

Provinces will utilise their existing budget allocations.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Social Development are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this 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), since it does not contain provisions pertaining to customary law or customs of traditional communities.

