

**SECTION 57: CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS)
AMENDMENT ACT, 2007 (ACT 32 OF 2007): AND OTHER PROVISIONS**

1. Introduction

1.1 The question is raised whether sections 15 and 16 should not be scrapped. Section 57(1) would then have to be amended in order to determine that children under the age of 16 years, subject to the exception created in the Teddy Bear case (normative adolescent experimentation), are incapable of consenting to sexual acts.

1.2 The consequences/implications of such an amendment can be summarised as follows:

- (i) The ambit and impact of section 57(1), as a protective measure and evidentiary aid in favour of the prosecution, will be hugely increased;
- (ii) provision will be made for children under the age of 16 years in respect of normal sexual behavior among peers in line with the Teddy Bear case;
- (iii) the protection of a vulnerable group, namely, children will be extended to include children under the age of 16 years;
- (iv) the strongest possible message will be sent to predatory adults who interfere with children under the age of 16 years, to the extent that there will only be two crimes in respect of which they can be convicted, namely "rape" or "sexual assault" and not the softer "statutory rape" or "statutory sexual assault" anymore, the penalties for which have always been less severe than those in respect of the main charges; and
- (v) the provisions of the Criminal Law Amendment Act, 1997 (minimum sentences regime), will be made applicable to a larger number of convictions insofar as the sentencing of offenders is concerned. (The minimum sentences regime is, however, not applicable to persons under the age of 18 years).

2. Proposed amendments

The following proposed amendments aim to give effect to the above possibility:

Amendment of section 1 of Act 32 of 2007

XX. Section 1 of the principal Act is hereby amendment for the substitution of paragraph (d) of subsection (3) of the following paragraph:

- “(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
- (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of **[12]** 16 years; or
 - (v) a person who is mentally disabled.”.

Repeal of sections 15 and 16 of Act 32 of 2007

XX. Sections 15 and 16 of the principal Act is hereby repealed.

Amendment of section 56 of Act 32 of 2007

XX. Section 56 of the principal Act is hereby amended—

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

“(2) Whenever an accused person is charged with an offence under[—

(a)] section **[15]** 3 or **[16]** 5, it is, subject to subsection (3), a valid defence to such a charge to contend that the child, who was 12 years of age or older but under the age of 16 years, deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older[;

or

(b) **section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence].**”; and

(b) by the substitution for subsection (3) of the following subsection:

“(3) The provisions of subsection (2)**[(a)]** do not apply if the accused person is related to the child within the prohibited incest degrees of blood, affinity or an adoptive relationship.”

Amendment of section 57 of Act 32 of 2007

XX. Section 57 of the principal Act is hereby amended—

(a) by the substitution of the heading for the following heading:

"Inability of certain children [**under 12 years**] and persons who are mentally disabled to consent to sexual acts"; and

(b) by the substitution for subsection (1) of the following subsection:

"(1) Notwithstanding anything to the contrary in any law contained, a [**male or female person under the age of 12 years**] child is incapable of consenting to a sexual act, if that child is—

(a) under the age of 12 years; or

(b) 12 years or older, but under the age of 16 years and the age difference between the child and the other person is more than three years.

Amendment of section 69 of Act 32 of 2007

XX. Section 69 of the principal Act is hereby amended by the addition after subsection (3) of the following subsection:

"(4) Any investigation or prosecution or other legal proceedings in respect of an alleged statutory rape or statutory sexual assault which was committed before the repeal of sections 15 and 16 of this Act must be concluded, instituted and continued as if the provisions concerned had not been repealed."

Amendment of section 261 of Act 51 of 1977

XX. Section 261 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), is hereby amended—

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

"(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

(a) assault with intent to do grievous bodily harm;

(b) common assault;

(c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(f) incest as contemplated in section 2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

[(g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007],

the accused may be found guilty of the offence so proved.”; and

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

“(2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of[---

(a)] common assault[; or

(b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,]

the accused may be found guilty of the offence so proved.”.