

Portfolio Committee on Social Development

12 August 2015

**Proposed amendments to the
Children's Act 38 of 2005**

Mr M Waters, MP

Children's Act 38 of 2005

To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create certain new offences relating to children; and to provide for matters connected therewith.

Children's Amendment Bill

To amend the Children's Act, 2005, to provide for 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.

Children's Amendment Bill

- 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.

Children's Amendment Bill

- To deem persons convicted of any offence 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 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 a person was a child at the time of the commission of the offence

Children's Amendment Bill

- 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.

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 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.

One notable crime that was inadvertently omitted from the Act and ought to have been added to the crimes listed in the Act was that of “attempted rape”.

Background

- In addition the Act does not make provision for the offences against children which are contained in the Sexual Offences Act 1957 and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 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.

Background

- Section 120 of the Children's Act came into operation on 1 April 2010. Section 120 (5) states that any person who has been convicted of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regards to a child during the five years preceding the commencement of this section is deemed to have been found unsuitable to work with children.
- As the section came into operation on 1 April 2010, convictions with regards to crimes committed above from 1 April 2005 should be included. And as the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 only came into operation on 16 December 2007, the period 1 April 2005 – 15 December 2007 is covered by the Sexual Offences Act 1957 and would include common law crimes of rape and indecent assault that existed then – hence the PMB in (5) and (5A) refers to the common law crimes.

Background

- 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 findings in *J v NDPP and another*, 2014 CCT 114/13.

Objective of the Bill

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 or any offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, against a child to be **deemed** to be found unsuitable to work with children

Objective of the Bill

- And to deem persons convicted of any offence in terms of the Sexual Offences Act 1957, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 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 a person was a child at the time of the commission of the offence.

Objective of the Bill

- 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.

Current section 120 (4) and (5)

(4) In criminal proceedings, a person must be found unsuitable to work with children—

(a) on conviction of **murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to 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 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.

(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** during the five years preceding the commencement of this Chapter, is deemed to have been found unsuitable to work with children.

Proposed amended section 120 (4) and (5)

(4) In criminal proceedings, a person must, except when such a person is a child, be deemed to be found unsuitable to work with children—

(a) on conviction of

(a) (aa) murder,

(bb) attempted murder,

(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

Proposed amended section 120 (4) and (5)

of 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 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 any offence referred to in paragraph (a);

Proposed amended section 120 (4) and (5)

- Insertion of the following subsection
- 4A (a) In criminal proceedings, where a child is convicted of any of the offences referred 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 the court, for whatever reason, fails to make a finding in terms of paragraph (a), any person contemplated in subsection (2)(a), (b) and (c) must bring this omission to the attention of the court and the court must make such finding.

Proposed amended section 120 (4) and (5)

- (5) Any person who has been 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 the 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

- (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 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.

Thank you