

## CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007<sup>1</sup>

[ASSENTED TO 13 DECEMBER 2007]

[DATE OF COMMENCEMENT: 16 DECEMBER 2007]

(Unless otherwise indicated)

You are currently viewing the full Act.

*(English text signed by the President)*

### published in

GG 30599 of 14 December 2007

### commencements

(see s. 72 of this Act)

provisions	date	refer to
whole Act except ss. 27–53	16 December 2007	s. 72 (1) of this Act
Chapter 5 (ss. 27–39)	21 March 2008	s. 72 (2) (a) of this Act
Chapter 6 (ss. 40–53)	16 June 2008	s. 72 (2) (b) of this Act

### as amended

by	with effect from	refer to
Judicial Matters Amendment Act 66 of 2008	17 February 2009	s. 40 of Act 66 of 2008
Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 6 of 2012	26 June 2012	s. 6 of Act 6 of 2012
Prevention and Combating of Trafficking in Persons Act 7 of 2013	9 August 2015	s. 50 of Act 7 of 2013; Proc R32 in GG 39078 of 7 August 2015
Judicial Matters Amendment Act 42 of 2013	22 January 2014	s. 43 of Act 42 of 2013
Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015	7 July 2015	s. 14 of Act 5 of 2015
Judicial Matters Amendment Act 24 of 2015	8 January 2016	s. 23 of Act 24 of 2015

	a date to be proclaimed	s. 23 of Act 24 of 2015
Judicial Matters Amendment Act 8 of 2017	2 August 2017	s. 43 (1) of Act 8 of 2017
	a date to be proclaimed	s. 43 (2) of Act 8 of 2017

**also amended**

<b>by</b>	<b>with effect from</b>	<b>refer to</b>
Judicial Matters Second Amendment Act 43 of 2013	a date to be proclaimed - see PENDLEX	s. 6 of Act 43 of 2013

**Regulations under this Act — Legislation Judicially Considered**

**ACT**

**To comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute, by-**

- \* **repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender;**
- \* **repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent;**
- \* **creating new statutory offences relating to certain compelled acts of penetration or violation;**
- \* **creating new statutory offences, for adults, by criminalising the compelling or causing the witnessing of certain sexual conduct and certain parts of the human anatomy, the exposure or display of child pornography and the engaging of sexual services of an adult;**
- \* **repealing the common law offences of incest, bestiality and violation of a corpse, as far as such violation is of a sexual nature, and enacting corresponding new statutory offences;**
- \* **enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation;**
- \* **eliminating the differentiation drawn between the age of consent for different consensual sexual acts;**  
[Item substituted by s. 12 of Act 5 of 2015 (wef 7 July 2015).]
- \* **criminalising any attempt, conspiracy or incitement to commit a sexual**

**offence;**

- \* **creating a duty to report sexual offences committed with or against children or persons who are mentally disabled;**
- \* **providing the South African Police Service with new investigative tools when investigating sexual offences or other offences involving the HIV status of the perpetrator;**
- \* **providing our courts with extra-territorial jurisdiction when hearing matters relating to sexual offences;**
- \* **providing certain services to certain victims of sexual offences, *inter alia*, to minimise or, as far as possible, eliminate secondary traumatisation, including affording a victim of certain sexual offences the right to require that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances;**
- \* **establishing and regulating a National Register for Sex Offenders;**
- \* **further regulating procedures, defences and other evidentiary matters in the prosecution and adjudication of sexual offences;**
- \* **making provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation, enforcement and administration of this Act in order to achieve the objects of the Act;**
- \* .....

[Item deleted by s. 48 of Act 7 of 2013 (wef 9 August 2015).]

**and to provide for matters connected therewith.**

[NB: The long title has been amended by s. 5 of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

**Preamble**

WHEREAS the commission of sexual offences in the Republic is of grave concern, as it has a particularly disadvantageous impact on vulnerable persons, the society as a whole and the economy;

WHEREAS women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children;

WHEREAS the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary;

WHEREAS the South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences, and a uniform and co-ordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in Government; and thereby which, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatisation;

WHEREAS several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children;

AND WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance,

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

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[Index amended by s. 34 of Act 42 of 2013 (wef 22 January 2014), by s. 13 of Act 5 of 2015 (wef 7 July 2015) and by s. 48 of Act 7 of 2013 (wef 9 August 2015).]

**[NB:** The Index has been amended by s. 1 of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDING.]

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**CHAPTER 1  
DEFINITIONS AND OBJECTS (ss 1-2)**

**1 Definitions and interpretation of Act**

(1) In this Act, unless the context indicates otherwise-

**'care giver'** means any person who, in relation to a person who is mentally disabled, takes responsibility for meeting the daily needs of or is in substantial contact with such person;

**'child'** means a person under the age of 18 years and **'children'** has a corresponding meaning;

[Definition of 'child' substituted by s. 1 of Act 5 of 2015 (wef 7 July 2015).]

**'child pornography'** means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person-

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person's breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person-
  - (i) participating in, or assisting or facilitating another person to participate in; or
  - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or
- (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

**'complainant'** means the alleged victim of a sexual offence;

**'Director of Public Prosecutions'** means a Director of Public Prosecutions contemplated in section 179 (1) (b) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 13 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), acting in accordance with any directives issued under this Act by the National Director of Public Prosecutions, where applicable, or in accordance with any other prosecution policy or policy directives contemplated in section 21 of the National Prosecuting Authority Act, 1998;

**'genital organs'** includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

**'Minister'** means the cabinet member responsible for the administration of justice;

**'National Director of Public Prosecutions'** means the person contemplated in section 179 (1) (a) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998);

**'person who is mentally disabled'** means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was-

- (a) unable to appreciate the nature and reasonably foreseeable consequences of

a sexual act;

- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

**'pornography'** means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person-

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;

**'Republic'** means the Republic of South Africa;

**'sexual act'** means an act of sexual penetration or an act of sexual violation;

**'sexual offence'** means any offence in terms of Chapters 2, 3 and 4 and section 55 of this Act and any offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes;

[Definition of 'sexual offence' substituted by s. 48 of Act 7 of 2013 (wef 9 August 2015).]

**[NB:** A definition of 'sexual offences court' has been inserted by s. 35 of the Judicial Matters Amendment Act 8 of 2017, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

**'sexual penetration'** includes any act which causes penetration to any extent whatsoever by-

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and **'sexually penetrates'** has a corresponding meaning;

**'sexual violation'** includes any act which causes-

- (a) direct or indirect contact between the-
  - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

- (ii) mouth of one person and-
  - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
  - (bb) the mouth of another person;
  - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could-
    - (aaa) be used in an act of sexual penetration;
    - (bbb) cause sexual arousal or stimulation; or
    - (ccc) be sexually aroused or stimulated thereby; or
  - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and **'sexually violates'** has a corresponding meaning; and

**'this Act'** includes any regulations made under this Act, including the regulations made under sections 39, 53 and 67.

(2) For the purposes of sections 3, 4, 5 (1), 6, 7, 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22, **'consent'** means voluntary or uncoerced agreement.

(3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-
  - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
  - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-
  - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
  - (ii) such a sexual act is something other than that act; or
- (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 years; or

- (v) a person who is mentally disabled.

## **2 Objects**

The objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic by:

- (a) Enacting all matters relating to sexual offences in a single statute;
- (b) criminalising all forms of sexual abuse or exploitation;
- (c) repealing certain common law sexual offences and replacing them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender;
- (d) protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;
- (e) promoting the spirit of *batho pele* ('the people first') in respect of service delivery in the criminal justice system dealing with sexual offences by-
  - (i) ensuring more effective and efficient investigation and prosecution of perpetrators of sexual offences by clearly defining existing offences, and creating new offences;
  - (ii) giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution;
  - (iii) facilitating a uniform and co-ordinated approach by relevant Government departments in dealing with sexual offences;
  - (iv) entrenching accountability of government officials; and
  - (v) minimising disparities in the provision of services to victims of sexual offences;
- (f) providing certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances; and
- (g) establishing a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of sexual offences against children and persons who are mentally disabled so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of children or persons who are mentally disabled.

## **CHAPTER 2 SEXUAL OFFENCES (ss 3-14)**

### **Part 1 Rape and compelled rape (ss 3-4)**

#### **3 Rape**

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

#### **4 Compelled rape**

Any person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of compelled rape.

## **Part 2**

### **Sexual assault, compelled sexual assault and compelled self-sexual assault (ss 5-7)**

#### **5 Sexual assault**

(1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.

(2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.

#### **6 Compelled sexual assault**

A person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual violation with a complainant ('B'), without the consent of B, is guilty of the offence of compelled sexual assault.

#### **7 Compelled self-sexual assault**

A person ('A') who unlawfully and intentionally compels a complainant ('B'), without the consent of B, to-

- (a) engage in-
  - (i) masturbation;
  - (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
  - (iii) sexually suggestive or lewd acts, with B himself or herself;
- (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or
- (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus,

is guilty of the offence of compelled self-sexual assault.

## **Part 3**

### **Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts ('flashing'), child pornography to persons 18 years or older or engaging sexual services of persons 18 years or older (ss 8-11)**

#### **8 Compelling or causing persons 18 years or older to witness a sexual offences, sexual acts or self-masturbation**

(1) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a complainant 18 years or older ('B'), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual offence.

(2) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a complainant 18 years or older ('B'), without the consent of B, to be in the presence of or watch-

- (a) A while he or she engages in a sexual act with C or another person ('D'); or
- (b) C while he or she engages in a sexual act with D,

is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual act.

(3) A person ('A') who unlawfully and intentionally, whether for the sexual

gratification of A or of a third person ('C') or not, compels or causes a complainant 18 years or older ('B'), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a person 18 years or older to witness self-masturbation.

**9 Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ('flashing')**

A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a complainant 18 years or older ('B'), without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a person 18 years or older.

**10 Exposure or display of or causing exposure or display of child pornography to persons 18 years or older**

A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, exposes or displays or causes the exposure or display of child pornography to a complainant 18 years or older ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography to a person 18 years or older.

**11 Engaging sexual services of persons 18 years or older**

A person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C')-

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B,

is guilty of the offence of engaging the sexual services of a person 18 years or older.

[S. 11 substituted by s. 1 of Act 6 of 2012 (wef 26 June 2012).]

**Part 4**

***Incest, bestiality and sexual acts with corpse (ss 12-14)***

**12 Incest**

(1) Persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other, are, despite their mutual consent to engage in such act, guilty of the offence of incest.

(2) For the purposes of subsection (1)-

- (a) the prohibited degrees of consanguinity (blood relationship) are the following:
  - (i) Ascendants and descendants in the direct line; or
  - (ii) collaterals, if either of them is related to their common ancestor in the first degree of descent;
- (b) the prohibited degrees of affinity are relations by marriage in the ascending and descending line; and
- (c) an adoptive relationship is the relationship of adoption as provided for in any other law.

(3) (a) The institution of a prosecution of a person who is a child at the time of the alleged commission of the offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions.

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

**13 Bestiality**

A person ('A') who unlawfully and intentionally commits an act-

- (a) which causes penetration to any extent whatsoever by the genital organs of-
  - (i) A into or beyond the mouth, genital organs or anus of an animal; or
  - (ii) an animal into or beyond the mouth, genital organs or anus of A; or
- (b) of masturbation of an animal, unless such act is committed for scientific reasons or breeding purposes, or of masturbation with an animal,

is guilty of the offence of bestiality.

**14 Sexual act with corpse**

A person who unlawfully and intentionally commits a sexual act with a human corpse, is guilty of the offence of committing a sexual act with a corpse.

**CHAPTER 3  
SEXUAL OFFENCES AGAINST CHILDREN (ss 15-22)**

**Part 1**

***Consensual sexual acts with certain children (ss 15-16)***

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

(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-

- (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 Director of Public Prosecutions if A 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.

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

[S. 15 substituted by s. 2 of Act 5 of 2015 (wef 7 July 2015).]

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

(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-

- (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 relevant Director of Public Prosecutions if A 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.

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

[S. 16 substituted by s. 3 of Act 5 of 2015 (wef 7 July 2015).]

**Part 2**

***Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child pornography or pornography to children and using children for pornographic purposes or benefiting from child pornography (ss 17-20)***

**17 Sexual exploitation of children**

(1) A person ('A') who unlawfully and intentionally engages the services of a child complainant ('B'), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ('C')-

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B,

is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a child.

[Sub-s. (1) substituted by s. 2 of Act 6 of 2012 (wef 26 June 2012).]

(2) A person ('A') who unlawfully and intentionally offers the services of a child complainant ('B') to a third person ('C'), with or without the consent of B, for financial or other reward, favour or compensation to A, B or to another person ('D')-

- (a) for purposes of the commission of a sexual act with B by C;
- (b) by inviting, persuading or inducing B to allow C to commit a sexual act with B;
- (c) by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with B by C;
- (d) by making available, offering or engaging B for purposes of the commission of a sexual act with B by C; or
- (e) by detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with B by C,

is guilty of an offence of being involved in the sexual exploitation of a child.

(3) A person ('A') who-

- (a) intentionally allows or knowingly permits the commission of a sexual act by a third person ('C') with a child complainant ('B'), with or without the consent of B, while being a primary care-giver defined in section 1 of the Social Assistance Act, 2004 (Act 13 of 2004), parent or guardian of B; or
- (b) owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with B by C, with or without the consent of B,

is guilty of the offence of furthering the sexual exploitation of a child.

(4) A person ('A') who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a child complainant ('B'), with or without the consent of B, by a third person ('C'), is guilty of an offence of benefiting from the sexual exploitation of a child.

(5) A person ('A') who intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a child complainant ('B'), with or without the consent of B, by a third person ('C'), is guilty of an offence of living from the earnings of the sexual exploitation of a child.

(6) A person ('A'), including a juristic person, who-

- (a) makes or organises any travel arrangements for or on behalf of a third person ('C'), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a child complainant ('B'), with or without the consent of

B, irrespective of whether that act is committed or not; or

- (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B,

is guilty of an offence of promoting child sex tours.

### **18 Sexual grooming of children**

(1) A person ('A') who-

- (a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child ('B');
- (b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by 'B';
- (c) supplies, exposes or displays to a third person ('C')-
- (i) an article which is intended to be used in the performance of a sexual act;
  - (ii) child pornography or pornography; or
  - (iii) a publication or film,

with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or

- (d) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B,

is guilty of the offence of promoting the sexual grooming of a child.

(2) A person ('A') who-

- (a) supplies, exposes or displays to a child complainant ('B')-
- (i) an article which is intended to be used in the performance of a sexual act;
  - (ii) child pornography or pornography; or
  - (iii) a publication or film,

with the intention to encourage, enable, instruct or persuade B to perform a sexual act;

- (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to-
- (i) perform a sexual act with A or a third person ('C');
  - (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;
  - (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
  - (iv) be exposed to child pornography or pornography;
  - (v) be used for pornographic purposes as contemplated in section 20 (1); or
  - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;

- (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;

- (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B-

- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
- (ii) during such meeting or communication or any subsequent meeting or communication to-
  - (aa) commit a sexual act with A;
  - (bb) discuss, explain or describe the commission of a sexual act; or
  - (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person; or
- (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B,

is guilty of the offence of sexual grooming of a child.

### **19 Exposure or display of or causing exposure or display of child pornography or pornography to children**

A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of-

- (a) any image, publication, depiction, description or sequence of child pornography or pornography;
- (b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act 65 of 1996), or in terms of any other legislation; or
- (c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law,

to a child ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

### **20 Using children for or benefiting from child pornography**

(1) A person ('A') who unlawfully and intentionally uses a child complainant ('B'), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person ('C') or not-

- (a) for purposes of creating, making or producing;
- (b) by creating, making or producing; or
- (c) in any manner assisting to create, make or produce,

any image, publication, depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of using a child for child pornography.

(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child pornography.

### **Part 3**

#### ***Compelling or causing children to witness sexual offences, sexual acts or self-masturbation and exposure or display of or causing exposure or display of genital organs, anus or female breasts ('flashing') to children (ss 21-22)***

## **21 Compelling or causing children to witness sexual offences, sexual acts or self-masturbation**

(1) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a child complainant ('B'), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence.

(2) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a child complainant ('B'), without the consent of B, to be in the presence of or watch-

- (a) A while he or she engages in a sexual act with C or another person ('D'); or
- (b) C while he or she engages in a sexual act with D,

is guilty of the offence of compelling or causing a child to witness a sexual act.

(3) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, compels or causes a child complainant ('B'), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a child to witness self-masturbation.

## **22 Exposure or display of or causing exposure or display of genital organs, anus or female breasts to children ('flashing')**

A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a child complainant ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a child.

### **CHAPTER 4**

## **SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED (ss 23-26)**

### **Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of child pornography or pornography to persons who are mentally disabled and using persons who are mentally disabled for pornographic purposes or benefiting therefrom**

## **23 Sexual exploitation of persons who are mentally disabled**

(1) A person ('A') who unlawfully and intentionally engages the services of a complainant who is mentally disabled ('B'), for financial or other reward, favour or compensation to B or to a third person ('C')-

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B,

is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a person who is mentally disabled.

[Sub-s. (1) substituted by s. 3 of Act 6 of 2012 (wef 26 June 2012).]

(2) A person ('A') who unlawfully and intentionally offers the services of a person who is mentally disabled ('B') to a third person ('C'), for financial or other reward, favour or compensation to A, B or to another person ('D')-

- (a) for purposes of the commission of a sexual act with B by C;
- (b) by inviting, persuading or inducing B to allow C to commit a sexual act with B;
- (c) by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with B by C;

- (d) by making available, offering or engaging B for purposes of the commission of a sexual act with B by C; or
- (e) by detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with B by C,

is guilty of an offence of being involved in the sexual exploitation of a person who is mentally disabled.

(3) A person ('A') who-

- (a) intentionally allows or knowingly permits the commission of a sexual act by a third person ('C') with a person who is mentally disabled ('B') while being a care-giver, parent, guardian, curator or teacher of B; or
- (b) owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with B by C,

is guilty of the offence of furthering the sexual exploitation of a person who is mentally disabled.

(4) A person ('A') who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a person who is mentally disabled ('B') by a third person ('C'), is guilty of an offence of benefiting from the sexual exploitation of a person who is mentally disabled.

(5) A person ('A') who intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a person who is mentally disabled ('B') by a third person ('C'), is guilty of an offence of living from the earnings of the sexual exploitation of a person who is mentally disabled.

(6) A person ('A'), including a juristic person, who-

- (a) makes or organises any travel arrangements for or on behalf of a third person ('C'), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a person who is mentally disabled ('B'), irrespective of whether that act is committed or not; or
- (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B,

is guilty of an offence of promoting sex tours with persons who are mentally disabled.

## **24 Sexual grooming of persons who are mentally disabled**

(1) A person ('A') who-

- (a) supplies, exposes or displays to a third person ('C')-
  - (i) an article which is intended to be used in the performance of a sexual act;
  - (ii) child pornography or pornography; or
  - (iii) a publication or film,

with the intention to encourage, enable, instruct or persuade C to perform a sexual act with a person who is mentally disabled ('B'); or

- (b) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B,

is guilty of the offence of promoting the sexual grooming of a person who is mentally disabled.

(2) A person ('A') who-

- (a) supplies, exposes or displays to a person who is mentally disabled ('B')-
  - (i) an article which is intended to be used in the performance of a

- sexual act;
- (ii) child pornography or pornography; or
  - (iii) a publication or film,
- with the intention to encourage, enable, instruct or persuade B to perform such sexual act;
- (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to reduce or diminish any resistance or unwillingness on the part of B to-
- (i) perform a sexual act with A or a third person ('C');
  - (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;
  - (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
  - (iv) be exposed to child pornography or pornography;
  - (v) be used for pornographic purposes as contemplated in section 26 (1); or
  - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;
- (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;
- (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B-
- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
  - (ii) during such meeting or communication or any subsequent meeting or communication to-
    - (aa) commit a sexual act with A;
    - (bb) discuss, explain or describe the commission of a sexual act; or
    - (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of pornography of B himself or herself or any other person; or
- (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B,

is guilty of the offence of sexual grooming of a person who is mentally disabled.

## **25 Exposure or display of or causing exposure or display of child pornography or pornography to persons who are mentally disabled**

A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of any image, publication, depiction, description or sequence of child pornography or pornography to a complainant who is mentally disabled ('B'), is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a person who is mentally disabled.

## **26 Using persons who are mentally disabled for pornographic purposes or benefiting therefrom**

(1) A person ('A') who unlawfully and intentionally uses a complainant who is mentally disabled ('B'), whether for financial or other reward, favour or compensation to B or to a third person ('C') or not-

- (a) for the purpose of creating, making or producing;

- (b) by creating, making or producing; or
- (c) in any manner assisting to create, make or produce,

any image, publication, depiction, description or sequence in any manner whatsoever, of pornography or child pornography, is guilty of the offence of using a person who is mentally disabled for pornographic purposes.

(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from using a person who is mentally disabled for pornographic purposes.

## **CHAPTER 5 SERVICES FOR VICTIMS OF SEXUAL OFFENCES AND COMPULSORY HIV TESTING OF ALLEGED SEX OFFENDERS (ss 27-39)**

[Date of commencement of Chapter 5: 21 March 2008.]

### **Part 1**

#### **Definitions and services for victims of sexual offences (ss 27-29)**

#### **27 Definitions**

For the purposes of this Chapter, and unless the context indicates otherwise-

**'application'** means an application in terms of section 30 or 32;

**'body fluid'** means any body substance which may contain HIV or any other sexually transmissible infection, but does not include saliva, tears or perspiration;

**'body specimen'** means any body sample which can be tested to determine the presence or absence of HIV infection;

**'HIV'** means the Human Immuno-deficiency Virus;

**'HIV test'** means any validated and medically recognised test for determining the presence or absence of HIV infection in a person;

**'interested person'** means any person who has a material interest in the well-being of a victim, including a spouse, same sex or heterosexual permanent life partner, parent, guardian, family member, care giver, curator, counsellor, medical practitioner, health service provider, social worker or teacher of such victim;

**'investigating officer'** means a member of the South African Police Service responsible for the investigation of an alleged sexual offence or any other offence or any member acting under his or her command;

**'medical practitioner'** means a person registered as a medical practitioner in terms of the Health Professions Act, 1974 (Act 56 of 1974), and who, for purposes of section 33, is authorised to take body specimens as contemplated in this Chapter;

**'nurse'** means a person registered as such in terms of any relevant legislation and who, for purposes of section 33, is authorised to take body specimens as contemplated in this Chapter;

**'offence'** means any offence, other than a sexual offence, in which the HIV status of the alleged offender may be relevant for purposes of investigation or prosecution;

**'PEP'** means Post Exposure Prophylaxis;

**'sexual offence'** means a sexual offence in terms of this Act in which the victim may have been exposed to body fluids of the alleged offender; and

**'victim'** means any person alleging that a sexual offence has been perpetrated against him or her.

[Date of commencement of s. 27: 21 March 2008.]

#### **28 Services for victims relating to Post Exposure Prophylaxis and compulsory HIV testing of alleged sex offenders**

(1) If a victim has been exposed to the risk of being infected with HIV as the result

of a sexual offence having been committed against him or her, he or she may-

- (a) subject to subsection (2)-
  - (i) receive PEP for HIV infection, at a public health establishment designated from time to time by the cabinet member responsible for health by notice in the *Gazette* for that purpose under section 29, at State expense and in accordance with the State's prevailing treatment norms and protocols;
  - (ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and
  - (iii) be supplied with a prescribed list, containing the names, addresses and contact particulars of accessible public health establishments contemplated in section 29 (1) (a); and
- (b) subject to section 30, apply to a magistrate for an order that the alleged offender be tested for HIV, at State expense.

(2) Only a victim who-

- (a) lays a charge with the South African Police Service in respect of an alleged sexual offence; or
- (b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in subsection (1) (a) (i),

within 72 hours after the alleged sexual offence took place, may receive the services contemplated in subsection (1) (a).

(3) A victim contemplated in subsection (1) or an interested person must-

- (a) when or immediately after laying a charge with the South African Police Service or making a report in respect of the alleged sexual offence, in the prescribed manner, be informed by the police official to whom the charge is made or by a medical practitioner or a nurse to whom the incident is reported, as the case may be, of the-
  - (i) importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence took place;
  - (ii) need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections; and
  - (iii) services referred to in subsection (1); and
- (b) in the case of an application contemplated in section 30, be handed a notice containing the prescribed information regarding the compulsory HIV testing of the alleged offender and have the contents thereof explained to him or her.

[Date of commencement of s. 28: 21 March 2008.]

## **29 Designation of public health establishments for purposes of providing Post Exposure Prophylaxis and carrying out compulsory HIV testing**

(1) The cabinet member responsible for health must, by notice in the *Gazette*, designate any public health establishment for the purposes of-

- (a) providing PEP to victims; and
- (b) carrying out compulsory HIV testing,

and may, by notice in the *Gazette*, withdraw any designation under this section, after giving 14 days' prior notice of such withdrawal in the *Gazette*.

(2) The first notice in terms of subsection (1) must be published within two months of the implementation of this section, and at least at intervals of six months thereafter.

(3) The Director-General: Justice and Constitutional Development must, within 14 days of publication of each designation or withdrawal thereof contemplated in subsection (1), provide a copy of the notice to-

- (a) the relevant role-players falling under his or her jurisdiction; and

- (b) the National Commissioner of the South African Police Service, the National Commissioner of Correctional Services and the Director-General of Health.

(4) The National Commissioner of the South African Police Service, National Commissioner of Correctional Services and Director-General of Health must distribute the notice referred to in subsection (1) to all relevant role-players falling under his or her jurisdiction.

[Date of commencement of s. 29: 21 March 2008.]

## **Part 2**

### **Application for compulsory HIV testing of alleged sex offender by victim (ss 30-31)**

#### **30 Application by victim or interested person for HIV testing of alleged sex offender**

(1) (a) Within 90 days after the alleged commission of a sexual offence any victim or any interested person on behalf of a victim, may apply to a magistrate, in the prescribed form, for an order that-

- (i) the alleged offender be tested for HIV and that the results thereof be disclosed to the victim or interested person, as the case may be, and to the alleged offender; or
- (ii) the HIV test results in respect of the alleged offender, obtained on application by a police official as contemplated in section 32, be disclosed to the victim or interested person, as the case may be.

(b) If the application is brought by an interested person, such application must be brought with the written consent of the victim, unless the victim is-

- (i) under the age of 14 years;
- (ii) a person who is mentally disabled;
- (iii) unconscious;
- (iv) a person in respect of whom a curator has been appointed in terms of an order of court; or
- (v) a person whom the magistrate is satisfied is unable to provide the required consent.

(2) (a) Every application must-

- (i) state that a sexual offence was committed against the victim by the alleged offender;
- (ii) confirm that the alleged offence has been reported as contemplated in section 28 (2);
- (iii) state that the victim may have been exposed to the risk of being infected with HIV as a result of the alleged sexual offence;
- (iv) if it is brought by an interested person, state the nature of the relationship between the interested person and the victim, and if the interested person is not the spouse, same sex or heterosexual permanent life partner or a parent of the victim, the reason why the application is being made by such interested person; and
- (v) state that less than 90 days have elapsed from the date on which it is alleged that the offence in question took place.

(b) The matters referred to in paragraph (a) must be verified by the victim or the interested person, as the case may be, by affidavit or solemn declaration.

(3) The application must be made as soon as possible after a charge has been laid, and may be made before or after an arrest has been effected.

(4) The application must be handed to the investigating officer, who must, as soon as is reasonably practicable, submit the application to a magistrate of the magisterial district in which the sexual offence is alleged to have occurred.

[Date of commencement of s. 30: 21 March 2008.]

**31 Consideration of application by magistrate and issuing of order**

(1) The magistrate must, as soon as is reasonably practicable, consider the application contemplated in section 30, in chambers and may call for such additional evidence as he or she deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings.

(2) (a) For the purpose of the proceedings contemplated in subsection (1), the magistrate may consider evidence by or on behalf of the alleged offender if, to do so, will not give rise to any substantial delay.

(b) Evidence contemplated in paragraph (a) may be adduced in the absence of the victim, if the magistrate is of the opinion that it is in the best interests of the victim to do so.

(3) If the magistrate is satisfied that there is *prima facie* evidence that-

- (a) a sexual offence has been committed against the victim by the alleged offender;
- (b) the victim may have been exposed to the body fluids of the alleged offender; and
- (c) no more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place,

the magistrate must-

- (i) in the case where the alleged offender has not been tested for HIV on application by a police official as contemplated in section 32, order that the alleged offender be tested for HIV in accordance with the State's prevailing norms and protocols, including where necessary-
  - (aa) the collection from the alleged offender of two prescribed body specimens; and
  - (bb) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender,
 and that the HIV test results be disclosed in the prescribed manner to the victim or interested person, as the case may be, and to the alleged offender; or
- (ii) in the case where the alleged offender has already been tested for HIV on application by a police official as contemplated in section 32, order that the HIV test results be disclosed in the prescribed manner to the victim or interested person, as the case may be.

(4) An order referred to in subsection (3) must be made in the prescribed manner and handed to the investigating officer.

(5) The investigating officer must, as soon as is reasonably practicable, after an application has been considered-

- (a) inform the victim or interested person, as the case may be, of the outcome of the application; and
- (b) if an order has been granted in terms of subsection (3), inform the alleged offender thereof by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.

[Date of commencement of s. 31: 21 March 2008.]

**Part 3****Application for compulsory HIV testing of alleged offender by investigating officer (s 32)****32 Application by investigating officer for HIV testing of alleged offender**

(1) An investigating officer may, subject to subsection (2), for purposes of

investigating a sexual offence or offence apply in the prescribed form to a magistrate of the magisterial district in which the sexual offence or offence is alleged to have occurred, in chambers, for an order that-

- (a) the alleged offender be tested for HIV; or
  - (b) the HIV test results in respect of the alleged offender, already obtained on application by a victim or any interested person on behalf of a victim as contemplated in section 30 (1) (a) (i), be made available to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.
- (2) An application contemplated in subsection (1) must-
- (a) set out the grounds, on the strength of information taken on oath or by way of solemn declaration, in which it is alleged that a sexual offence or offence was committed by the alleged offender; and
  - (b) be made after a charge has been laid, and may be made before or after an arrest has been effected, or after conviction.
- (3) If the magistrate is satisfied that there is *prima facie* evidence that-
- (a) a sexual offence or offence has been committed by the offender; and
  - (b) HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence,

the magistrate must, in the case of an application contemplated in subsection (1) (a), order that the alleged offender be tested for HIV in accordance with the State's prevailing norms and protocols, including, where necessary-

- (i) the collection from the alleged offender of two prescribed body specimens; and
- (ii) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender,

and that the HIV test results be disclosed in the prescribed manner to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings and to the alleged offender, if the results have not already been made available to such offender as contemplated in section 30 (1) (a) (i).

(4) An order contemplated in subsection (3) must be made in the prescribed manner and handed to the investigating officer.

(5) The investigating officer must, as soon as is reasonably practicable, after an application has been granted in terms of subsection (3), inform the alleged offender by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.

[Date of commencement of s. 32: 21 March 2008.]

#### **Part 4**

### **Execution of orders for compulsory HIV testing and results of HIV tests (ss 33-34)**

#### **33 Execution of order and issuing of warrant of arrest**

(1) As soon as an order referred to in section 31 (3) or section 32 (3) has been handed to an investigating officer-

- (a) the investigating officer must request any medical practitioner or nurse to take two prescribed body specimens from the alleged offender, and the investigating officer must make the alleged offender available or cause such person to be made available for that purpose;
- (b) the medical practitioner or nurse concerned must take two prescribed body specimens from the alleged offender;

- (c) the investigating officer must deliver the body specimens to the head of a public health establishment designated in terms of section 29 or to a person designated in writing by the head of such establishment;
- (d) the head of the establishment or the person referred to in paragraph (c) must-
  - (i) perform one or more HIV tests on the body specimens of the alleged offender as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender;
  - (ii) record the results of the HIV test in the prescribed manner;
  - (iii) provide the investigating officer with duplicate sealed records of the test results; and
  - (iv) retain one sealed record of the test results in the prescribed manner and place; and
- (e) the investigating officer must-
  - (i) in the case of an order contemplated in section 31 (3), hand over to the victim or to the interested person, as the case may be, and to the alleged offender the sealed record of the test results and a notice containing prescribed information on the confidentiality of and how to deal with the HIV test results, and if necessary explain the contents of the notice; or
  - (ii) in the case of an order contemplated in section 32 (3), hand over to the alleged offender a sealed record of the test results and a notice containing prescribed information on how to deal with the test results, and if necessary explain the contents of the notice, and retain the other record of the test results as prescribed or, where applicable, make the record of the test results available to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.

(2) (a) An order made in terms of section 31 (3) lapses if the charge is withdrawn by the prosecution at the request of the victim.

(b) Any specimens taken or results obtained prior to the lapsing of the order, if any, as contemplated in paragraph (a), must be destroyed in accordance with the Department of Health's prevailing norms and protocols or where relevant, in accordance with any national instructions issued by the National Commissioner of the South African Police Service in terms of section 66 (1) (c).

(3) The magistrate may, when or after issuing an order contemplated in section 31 (3) or 32 (3), issue a warrant for the arrest of the alleged offender if there is reason to believe that such offender may avoid compliance with such order or such offender has avoided compliance with such order.

[Date of commencement of s. 33: 21 March 2008.]

#### **34 Use of results of HIV tests**

The results of an HIV test, performed in terms of an order contemplated in sections 31 (3) and 32 (3), may only be used in the following circumstances:

- (a) to inform a victim or an interested person whether or not the alleged offender in the case in question is infected with HIV with the view to-
  - (i) reducing secondary trauma and empowering the victim to make informed medical, lifestyle and other personal decisions; or
  - (ii) using the test results as evidence in any ensuing civil proceedings as a result of the sexual offence in question; or
- (b) to enable an investigating officer to gather information with the view to using it as evidence in criminal proceedings.

[Date of commencement of s. 34: 21 March 2008.]

### **Part 5**

### **Miscellaneous (ss 35-39)**

#### **35 Register of applications and orders**

(1) The National Commissioner of the South African Police Service must cause all applications made, and all orders granted, in terms of this Chapter, to be recorded in a register and kept in the manner determined by the National Commissioner as prescribed.

(2) Access to the register must be limited as prescribed.

[Date of commencement of s. 35: 21 March 2008.]

#### **36 Confidentiality of outcome of application**

The fact that an order for HIV testing of an alleged offender has been granted as contemplated in section 31 or section 32 may not be communicated to any person other than-

- (a) the victim or an interested person referred to in section 30;
- (b) the alleged offender;
- (c) the investigating officer and, where applicable, to-
  - (i) a prosecutor; or
  - (ii) subject to section 35 (2), any other person who needs to know the test results for purposes of any criminal investigations or proceedings or any civil proceedings; and
- (d) the persons who are required to execute the order as contemplated in section 33.

[Date of commencement of s. 36: 21 March 2008.]

#### **37 Confidentiality of HIV test results obtained**

(1) The results of the HIV tests performed on an alleged offender in terms of this Chapter may, subject to subsection (2), be communicated only to-

- (a) the victim or the interested person referred to in section 30;
- (b) the alleged offender; and
- (c) the investigating officer and, where applicable, to-
  - (i) a prosecutor if the alleged offender is tested as contemplated in section 32; or
  - (ii) any other person who needs to know the test results for purposes of any civil proceedings or an order of a court.

(2) A presiding officer, in any proceedings contemplated in this Chapter or in any ensuing criminal or civil proceedings, may make any order he or she deems appropriate in order to give effect to this section, including the manner in which such results are to be kept confidential and the manner in which the court record in question is to be dealt with.

[Date of commencement of s. 37: 21 March 2008.]

#### **38 Offences and penalties**

(1) (a) Any person who, with malicious intent lays a charge with the South African Police Service in respect of an alleged sexual offence and makes an application in terms of section 30 (1), with the intention of ascertaining the HIV status of any person, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years.

(b) Any person who with malicious intent or who in a grossly negligent manner discloses the results of any HIV tests in contravention of section 37, is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding three years.

(c) The institution of a prosecution for an offence referred to in paragraph (a) or (b) must be authorised in writing by the relevant Director of Public Prosecutions.

(2) An alleged offender who, in any manner whatsoever, fails or refuses to comply with or avoids compliance with, or deliberately frustrates any attempt to serve on himself or herself, an order of court that he or she be tested for HIV, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years.

[Date of commencement of s. 38: 21 March 2008.]

### 39 Regulations

(1) The Minister, after consultation with the cabinet members responsible for safety and security and health, may make regulations regarding-

- (a) any form required to be prescribed in terms of this Chapter;
- (b) any matter necessary or required to be prescribed in terms of this Chapter; and
- (c) any other matter the Minister deems to be necessary or expedient to achieve the objects of this Chapter.

(2) Any regulation made in terms of subsection (1) must be-

- (a) submitted to Parliament at least 30 days before publication in the *Gazette*; and
- (b) made after consultation with the cabinet members responsible for safety and security and health, except for the matter prescribed in section 35, which must be made in consultation with the cabinet member responsible for safety and security.

[Date of commencement of s. 39: 21 March 2008.]

## CHAPTER 6 NATIONAL REGISTER FOR SEX OFFENDERS (ss 40-53)

[Date of commencement of Chapter 6: 16 June 2008.]

### 40 Definitions

For purposes of this Chapter, and unless the context indicates otherwise-

**'certificate'** means a certificate contemplated in section 44;

**'employee'** means-

- (a) any person who applies to work for or works for an employer, and who receives, or is entitled to receive, any remuneration, reward, favour or benefit; or
- (b) any person, other than a person contemplated in (a), who in any manner applies to assist or assists in carrying on or conducting the business of an employer, whether or not he or she is entitled to receive any remuneration, reward, favour or benefit;

**'employer'** means-

- (a) any-
  - (i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
  - (ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which-

- (aa) employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a child or in a position of authority, supervision or care of a child or will gain access to a child or places where children are present or congregate; or

- (bb) employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or
- (b) any person, organisation, institution, club, sports club, association or body who or which, as the case may be-
  - (i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a child or a person who is mentally disabled or working with or will gain access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate; or
  - (ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled or working with or who gains access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate,

and **'employ'**, **'employing'**, **'employed'** and **'employment relationship'** have corresponding meanings;

**'licensing authority'** means any authority which is responsible for granting licences or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled;

**'Register'** means the National Register for Sex Offenders established under section 42 (1);

**'Registrar'** means the Registrar of the National Register for Sex Offenders contemplated in section 42 (2);

**'relevant authority'** means any-

- (a) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which is tasked with considering applications from prospective foster parents, kinship care-givers, temporary safe care-givers, adoptive parents or curators; and

**'sexual offence against a child'** includes any contravention of section 24B (1) or (3) of the Films and Publications Act, 1996 (Act 65 of 1996).

[Definition of 'sexual offence against a child' added by s. 36 of Act 8 of 2017 (wef 2 August 2017).]

[Date of commencement of s. 40: 16 June 2008.]

#### **41 Prohibition on certain types of employment by certain persons who have committed sexual offences against children and persons who are mentally disabled**

(1) A person who has been convicted of the commission of a sexual offence against a child or is alleged to have committed a sexual offence against a child and has been dealt with in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register, may not-

- (a) be employed to work with a child in any circumstances;
- (b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child, or which, in any other manner, places him or her in a position of authority, supervision or care of a child or where he or she gains access to a child or places where children are present or congregate;
- (c) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or where children are present or congregate; or
- (d) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child.

(2) A person who has been convicted of the commission of a sexual offence against a person who is mentally disabled or is alleged to have committed a sexual offence against 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, whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register, may not-

- (a) be employed to work with a person who is mentally disabled in any circumstances;
- (b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in a position of authority, supervision or care of a person who is mentally disabled, or which, in any other manner, places him or her in a position of authority, supervision or care of a person who is mentally disabled or where he or she gains access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate;
- (c) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a person who is mentally disabled or where persons who are mentally disabled are present or congregate; or
- (d) become the curator of a person who is mentally disabled.

[Date of commencement of s. 41: 16 June 2008.]

#### **42 Establishment of National Register for Sex Offenders and designation of Registrar of Register**

(1) A National Register for Sex Offenders containing particulars of persons convicted of any sexual offence against a child or a person who is mentally disabled or are alleged to have committed a sexual offence against a child or a person who is mentally disabled and who have been dealt with in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic, must, before 30 June 2009, and, in accordance with the provisions of this Chapter and the regulations made thereunder, be established and maintained by the Minister.

[Sub-s. (1) substituted by s. 36 of Act 66 of 2008 (wef 17 February 2009).]

(2) The Minister must designate a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, as the Registrar of the National Register for Sex Offenders.

(3) The Registrar must exercise and perform his or her powers, duties and functions subject to the provisions of this Chapter and the regulations made thereunder.

[Date of commencement of s. 42: 16 June 2008.]

#### **43 Objects of Register**

The objects of the Register are to protect children and persons who are mentally disabled against sexual offenders by-

- (a) establishing and maintaining a record of persons who-

- (i) have been convicted of a sexual offence against a child or a person who is mentally disabled, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic; or
- (ii) are alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter-
  - (aa) in the Republic has made a finding and given a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977; or
  - (bb) outside the Republic has made a finding and given a direction contemplated in subparagraph (aa) in terms of the law of the country in question;
- (b) informing an employer applying for a certificate as contemplated in this Chapter whether or not the particulars of an employee contemplated in section 45 (1) (a) or (b) are contained in the Register;
- (c) informing a licensing authority applying for a certificate as contemplated in this Chapter whether or not the particulars of an applicant contemplated in section 47 are contained in the Register; and
- (d) informing the relevant authorities dealing with fostering, kinship care-giving, temporary safe care-giving, adoption or curatorship applying for a certificate as contemplated in this Chapter whether or not the particulars of an applicant, as contemplated in section 48, have been included in the Register.

[Date of commencement of s. 43: 16 June 2008.]

#### **44 Persons entitled to apply for certificate**

An application for a prescribed certificate, stating whether or not the particulars of a person mentioned in the application are recorded in the Register may, solely for the purpose of complying with any obligation under this Chapter, be made in the prescribed manner by-

- (a) an employer in respect of an employee as contemplated in section 45 (1);
- (b) a licensing authority in respect of an applicant as contemplated in section 47 (1);
- (c) a relevant authority in respect of an applicant as contemplated in section 48 (1);
- (d) an employee contemplated in section 46 (1) and (2) in respect of his or her own particulars;
- (e) a person contemplated in section 47 (2) applying for a licence or approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of children or persons who are mentally disabled in respect of his or her own particulars;
- (f) a person contemplated in section 48 (2) applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent in respect of his or her own particulars; or
- (g) any person whose particulars appear on the Register in respect of his or her own particulars.

[Date of commencement of s. 44: 16 June 2008.]

#### **44A Enquiries for purposes of expungement applications in terms of Criminal Procedure Act, 1977**

(1) For the purposes of section 271B of the Criminal Procedure Act, 1977 (Act 51 of 1977), the Director-General: Justice and Constitutional Development may enquire from the Registrar whether or not the particulars of a person are contained in the Register and whether or not that person's particulars have been removed from the Register in terms of section 51 (1) or (3) (c), as the case may be.

(2) Subject to section 52, the Registrar must respond to the enquiry contemplated in subsection (1) in writing within 21 working days and must indicate whether or not the particulars of the person concerned are contained in the Register or whether or not that person's particulars have been removed from the Register in terms of section 51 (1) or (3) (c), as the case may be.

[S. 44A inserted by s. 32 of Act 42 of 2013 (wef 22 January 2014).]

#### **45 Obligations of employers in respect of employees**

(1) Any employer who-

- (a) at the date of commencement of this Chapter, has in his or her employment any employee, may from the date of establishment of the Register, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the employee are recorded in the Register; or
- (b) from the date of establishment of the Register, intends employing an employee, must, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the potential employee are recorded in the Register.

(2) (a) An employer shall-

- (i) subject to paragraph (d) not continue to employ an employee contemplated in subsection (1) (a); or
- (ii) not employ an employee contemplated in subsection (1) (b),

whose particulars are recorded in the Register.

(b) An employer who, during the course of an employment relationship, ascertains that the particulars of an employee contemplated in subsection (1) (a) has been recorded in the Register, irrespective of whether such offence was committed during the course of his or her employment, must, subject to paragraph (d) immediately terminate the employment of such employee.

(c) Notwithstanding paragraph (d) an employer must immediately terminate the employment of an employee who fails to disclose a conviction 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 who has been dealt with in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977, as contemplated in section 41.

(d) An employer must take reasonable steps to prevent an employee whose particulars are recorded in the Register from continuing to gain access to a child or a person who is mentally disabled, in the course of his or her employment, including, if reasonably possible or practicable to transfer such person from the post or position occupied by him or her to another post or position: Provided that if any such steps to be taken will not ensure the safety of a child or a person who is mentally disabled, the employment relationship, the use of services or access, as the case may be, must be terminated immediately.

(3) An employer who fails to comply with any provision of this section, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding seven years or to both a fine and such imprisonment.

[Date of commencement of s. 45: 16 June 2008.]

#### **46 Obligations of employees**

(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.

[Sub-s. (1) substituted by s. 4 (a) of Act 5 of 2015 (wef 7 July 2015).]

(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.

[Sub-s. (2) substituted by s. 4 (b) of Act 5 of 2015 (wef 7 July 2015).]

(3) An employee who fails to comply with subsection (1) or (2), is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding seven years or to both a fine and such imprisonment.

[Date of commencement of s. 46: 16 June 2008.]

#### **47 Obligations in respect of licence applications**

(1) A licensing authority may not grant a licence to or approve the management or operation of any entity, business concern or trade in relation to the supervision over or care of a child or a person who is mentally disabled without having determined, by way of an application to the Registrar for a prescribed certificate, whether or not the particulars of such person have been recorded in the Register.

(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.

[Sub-s. (2) substituted by s. 5 of Act 5 of 2015 (wef 7 July 2015).]

(3) Any licensing authority or person who intentionally contravenes any provision of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding seven years or to both a fine and such imprisonment.

[Date of commencement of s. 47: 16 June 2008.]

#### **48 Obligations in respect of applications for fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship**

(1)<sup>2</sup> A relevant authority may not consider an application or approve the appointment of a person as a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or curator without having determined, by way of an application to the Registrar for a prescribed certificate, whether or not the particulars of such person have been recorded in the Register.

(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.

[Sub-s. (2) substituted by s. 6 of Act 5 of 2015 (wef 7 July 2015).]

(3) Any relevant authority or person who intentionally contravenes any provision of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding seven years or to both a fine and such imprisonment.

[Date of commencement of s. 48: 16 June 2008.]

<sup>2</sup> In the matter between the *Child Welfare South Africa and Registrar of the National Register for Sex Offenders and Another* (Case No. 68184/09), the North Gauteng High Court, Pretoria issued the following order:

'1. A relevant authority as defined in section 40 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 need not comply with section 48 (1) of that Act unless and until the National Register for Sex Offenders is fully operational and functional for purposes of section 48

(1).

2. When the National Register for Sex Offenders is fully operational and functional for purposes of section 48 (1), the second respondent shall publish a notice indicating such in the *Government Gazette* and shall notify all Children's Court Commissioners accordingly. ...'.  
See GenN 1670 in GG 32850 of 29 December 2009 for the order in its entirety.

#### **49 Contents of Register**

The Register must-

- (a) be established and maintained in the prescribed manner and format;
- (b) contain the following particulars of persons referred to in section 50:
  - (i) The title, full names and surname of the person, including any known alias or nickname and, where applicable, the profession or trade of the person;
  - (ii) the last known physical address of the person, and any other contact details, including a postal address, where applicable;
  - (iii) the identity number, passport number and driver's licence number of the person, where applicable;
  - (iv) the sexual offence against a child or a person who is mentally disabled in respect of which the person has been convicted, the sentence imposed, the date and place of conviction and sentence, as well as the relevant prisoner identification number, where applicable;
  - (v) the court in which the trial took place and the case number;
  - (vi) the name of the medical institution or medical practitioner of a person and details of the sexual offence allegedly committed by a person who has been dealt with in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977; and
  - (vii) any other particulars as may be prescribed by regulation; and
- (c) if the conviction and sentence took place in a foreign jurisdiction, contain as far as possible the equivalent information as is contemplated in paragraph (b), as obtained from the relevant country or any other legal source.

[Date of commencement of s. 49: 16 June 2008.]

#### **50 Persons whose names must be included in Register and related matters**

- (1) The particulars of the following persons must be included in the Register:
- (a) A person who in terms of this Act or any other law-
    - (i) has been convicted of a sexual offence against a child or a person who is mentally disabled;
    - (ii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled 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;
    - (iii) is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled; or
    - (iv) has a previous conviction for a sexual offence against a child or a person who is mentally disabled or who has not served a sentence of imprisonment for such offence; and
  - (b) any person-
    - (i) who, in any foreign jurisdiction, has been convicted of any offence equivalent to the commission of a sexual offence against a child or a person who is mentally disabled;
    - (ii) who, in any foreign jurisdiction, has been dealt with in a manner

equivalent to that contemplated in paragraph (a) (ii); or

- (iii) whose particulars appear on an official register in any foreign jurisdiction, pursuant to a conviction of a sexual offence against a child or a person who is mentally disabled or as a result of an order equivalent to that contemplated in paragraph (a) (ii),

whether committed before or after the commencement of this Chapter.

(2) (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.

[Para. (a) substituted by s. 7 (a) of Act 5 of 2015 (wef 7 July 2015).]

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.

(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.

[Para. (c) added by s. 7 (b) of Act 5 of 2015 (wef 7 July 2015).]

(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.

[Para. (d) added by s. 7 (b) of Act 5 of 2015 (wef 7 July 2015).]

(3) Where a court has made an order under subsection (2) (a), the Registrar of the High Court or clerk of the magistrate's court must, where possible notify the employer in the prescribed manner, of such order and must forthwith forward the order to the Registrar, together with all the particulars referred to in section 49 of the person in question, and the Registrar must immediately and provisionally, in the prescribed manner, enter the particulars of the person concerned in the Register, pending the outcome of any appeal or review and must, after-

- (a) the period for noting an appeal or taking the matter on review has expired; or
- (b) the appeal or review proceedings have been concluded in the case of an appeal or review,

either enter or remove such particulars from the Register, depending on the outcome of the appeal or review, if any.

(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.

[Sub-s. (4) substituted by s. 7 (c) of Act 5 of 2015 (wef 7 July 2015).]

(5) (a) The National Commissioner of Correctional Services must, in the prescribed manner and at least three months before the establishment of the Register referred to in section 42, forward to the Registrar the particulars referred to in section 49 of every prisoner or former prisoner which he or she has on record, who, at the commencement of this Chapter, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence, five years preceding the commencement of this Chapter, against a child, including an offence referred to in section 14 of the Sexual Offences Act, 1957 (Act 23 of 1957), and must, where possible, forward the available particulars of every prisoner or former prisoner which he or she has on record, who at the commencement of this Chapter, is serving a sentence of imprisonment or has served a sentence of imprisonment as a result of a conviction, five years preceding the commencement of this Chapter, for a sexual offence against a person who is mentally disabled, including an offence referred to in section 15 of the Sexual Offences Act, 1957, and the Registrar must forthwith enter those particulars in the Register.

[Para. (a) substituted by s. 37 (a) of Act 8 of 2017 (wef 2 August 2017).]

(b) The National Commissioner of Correctional Services must, in the prescribed manner and period, inform each serving prisoner whose particulars have been forwarded to the Registrar of the implications thereof.

[Sub-s. (5) substituted by s. 37 of Act 66 of 2008 (wef 17 February 2009).]

(6) The National Commissioner of the South African Police Service must, in the prescribed manner and at least three months before the establishment of the Register referred to in section 42, forward to the Registrar all the available particulars in his or her possession referred to in section 49 of every person, who, at the commencement of this Chapter, has a previous conviction for a sexual offence, five years preceding the commencement of this Chapter, against a child, including, as far as is possible, an offence referred to in section 14 of the Sexual Offences Act, 1957, and who has a previous conviction for a sexual offence against a person who is mentally disabled, including, as far as is possible, an offence referred to in section 15 of the Sexual Offences Act, 1957, and the Registrar must forthwith enter those particulars in the Register.

[Sub-s. (6) substituted by s. 37 of Act 66 of 2008 (wef 17 February 2009) and by s. 37 (b) of Act 8 of 2017 (wef 2 August 2017).]

(7) (a) The Director-General: Health must, in the prescribed manner and at least three months before the establishment of the Register referred to in section 42, forward to the Registrar the particulars referred to in section 49 of every person, who, at the commencement of this Chapter or in the period of five years preceding the commencement of this Chapter, is or was subject to a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled and the Registrar must forthwith enter those particulars in the Register.

[Para. (a) substituted by s. 37 (c) of Act 8 of 2017 (wef 2 August 2017).]

(b) The Director-General: Health must, in the prescribed manner and period, inform each person referred to in paragraph (a) whose particulars have been forwarded to the Registrar of the implications thereof.

[Sub-s. (7) substituted by s. 37 of Act 66 of 2008 (wef 17 February 2009).]

(8) (a) A person whose particulars have been submitted to the Registrar in terms of this section and whose name or names, sex, identity number, physical or postal address or other details as contemplated in section 49 have changed, must notify the Registrar of any such change within 14 days after such change.

(b) Any person referred to in paragraph (a) who intentionally fails to notify the Registrar of any change contemplated in that paragraph, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding seven years.

[Date of commencement of s. 50: 16 June 2008.]

## **51 Removal of particulars from Register**

(1) Subject to subsections (2), (2A) and (3), the particulars of a person-

(a) who-

- (i) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276 (1) (i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed after that person has been released from prison or the period of suspension has lapsed;
- (ii) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276 (1) (i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of seven years has lapsed after that person has been released from prison or the period of suspension has lapsed; or
- (iii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act 17 of 2002), from any restrictions imposed on him or her; or

(b) who has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to any other form of lesser punishment or court order may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed since the particulars of that person were included in the Register.

[Sub-s. (1) amended by s. 8 (a) of Act 5 of 2015 (wef 7 July 2015).]

(2) The particulars of a person who has-

- (a) been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276 (1) (i) of the Criminal Procedure Act, 1977, without the option of a fine for a period exceeding eighteen months, whether the sentence was suspended or not; or
- (b) two or more convictions of a sexual offence against a child or a person who is mentally disabled,

may not be removed from the Register.

(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.

[Sub-s. (2A) inserted by s. 8 (b) of Act 5 of 2015 (wef 7 July 2015).]

(3) (a) A person falling into the categories contemplated in subsection (1) may apply, in the prescribed manner, to the Registrar to have his or her particulars removed from the Register.

(b) The Registrar must, after considering the application, remove the particulars of the person contemplated in paragraph (a) from the Register, unless the person concerned has an investigation or a charge relating to a sexual offence against a child or a person who is mentally disabled pending against him or her and the relevant investigation or case has not yet been finalised, in which event the finalisation of the application must be postponed until the Registrar has, in the prescribed manner, received information on the outcome of the investigation or case.

(c) The Registrar may, at the request of a person whose particulars are included in the Register, remove those particulars from the Register if the Registrar is satisfied that the entry of those particulars in the Register was clearly in error.

[Date of commencement of s. 51: 16 June 2008.]

## **52 Confidentiality and disclosure of information**

(1) The Registrar and any other person who assists the Registrar in the exercise and performance of his or her powers, duties and functions may not disclose any information which he or she has acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him or her under this Chapter, except-

- (a) for the purpose of giving effect to the provisions of this Chapter; or
- (b) when required to do so by any competent court.

(2) Except in so far as it may be necessary for the purposes of this Chapter, the Registrar and any other person who assists the Registrar in the exercise and performance of his or her powers, duties and functions, who wilfully discloses any information to any other person, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.

(3) Any person who discloses any information which he or she has acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him or her under this Chapter, except-

- (a) for the purpose of giving effect to the provisions of this Chapter; or
- (b) when required to do so by any competent court,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.

(4) Except in so far as it may be necessary for the purposes of this Chapter, any person who wilfully discloses or publishes any information to any other person which he or she has acquired as a result of an application contemplated in section 44 or in any other manner, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.

[Date of commencement of s. 52: 16 June 2008.]

### **53 Regulations pertaining to Register**

(1) The Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health, if applicable, make regulations relating to-

- (a) the manner and format in which the Register is to be established and maintained as contemplated in section 42 (1);
- (b) any particulars to be included in the Register, in addition to those mentioned in section 49 (b) (i) to (vi);
- (c) the manner in which the National Commissioner of Correctional Services must forward particulars of prisoners who are serving a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled to the Registrar as contemplated in section 50 (5) (a);
- (d) the manner and period within which the National Commissioner of Correctional Services must inform each prisoner whose particulars have been forwarded to the Registrar as contemplated in section 50 (5) (b);
- (e) the manner in which the National Commissioner of the South African Police Service must forward particulars of persons with a previous conviction for a sexual offence against a child or a person who is mentally disabled to the Registrar as contemplated in section 50 (6);
- (f) the manner in which the Director-General: Health must forward particulars of persons who are subject to a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled to the Registrar as contemplated in section 50 (7) (a);
- (g) the manner and period within which the Director-General: Health must inform each person whose particulars have been forwarded to the Registrar as contemplated in section 50 (7) (b);
- (h) the manner in which persons mentioned in section 44 must apply to the Registrar for a certificate;
- (i) the format and content of the certificate contemplated in section 44;
- (j) persons who may apply for a certificate in terms of section 44;
- (k) any further category of employers to whom this Chapter shall apply;
- (l) the period within which a certificate contemplated in section 44 must be provided to any person by the Registrar;
- (m) access to the Register;
- (n) the safe-keeping and disposal of records; and
- (o) any aspect in this Chapter in respect of which regulations may be required or are necessary.

(2) The provisions of this Chapter shall apply with the necessary changes to the category of employers and employees in their employment from the date of publication of the regulations contemplated in subsection (1) (k).

(3) Regulations made in terms of subsection (1) may, in respect of any contravention thereof or failure to comply therewith, prescribe as a penalty a fine or imprisonment for a period not exceeding 12 months.

(4) Any regulation made in terms of this section must be submitted to Parliament at least 30 days before publication thereof in the *Gazette*.

[Date of commencement of s. 53: 16 June 2008.]

## **CHAPTER 7 GENERAL PROVISIONS (ss 54-72)**

### **Part 1**

#### ***Miscellaneous offences: Obligation to report commission of sexual offences against children or persons who are mentally disabled and attempt, conspiracy, incitement or inducing another person to commit sexual offence (ss 54-55)***

#### **54 Obligation to report commission of sexual offences against children or persons who are mentally disabled**

(1) (a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.

(b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(2) (a) A person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled must report such knowledge, reasonable belief or suspicion immediately to a police official.

(b) A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(c) A person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal proceedings by reason of making such report.

#### **55 Attempt, conspiracy, incitement or inducing another person to commit sexual offence**

Any person who-

- (a) attempts;
- (b) conspires with any other person; or
- (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

**[NB:** A Part 1A (s. 55A) has been inserted by s. 2 of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX. S. 55A has subsequently been amended by s. 38 of the Judicial Matters Amendment Act 8 of 2017, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

### **Part 2**

#### ***Defences and sentencing, inability of children under 12 years and persons who are mentally disabled to consent to sexual acts, other evidentiary matters and extra-territorial jurisdiction (ss 56-61)***

**56 Defences**

[Heading substituted by s. 4 (a) of Act 6 of 2012 (wef 26 June 2012).]

(1) Whenever an accused person is charged with an offence under section 3, 4, 5, 6 or 7 it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant.

(2) Whenever an accused person is charged with an offence under-

(a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child 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.

(b) .....

[Para. (b) deleted by s. 9 of Act 5 of 2015 (wef 7 July 2015).]

(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.

(4) A person ('A') may not be convicted of an offence in terms of section 12 if, at the time when the act of sexual penetration was first committed-

(a) A was below the age of 18 years; and

(b) the other person ('B') exercised power or authority over A or a relationship of trust existed between A and B.

(5) A person may not be convicted of an offence in terms of section 17 (4) or (5) or section 23 (4) or (5) or section 54, if that person is-

(a) a child; and

(b) not a person contemplated in section 17 (1) and (2) or 23 (1) and (2), as the case may be.

(6) It is not a valid defence to a charge under section 20 (1), in respect of a visual representation that-

(a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and

(b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.

(7) .....

[Sub-s. (7) deleted by s. 4 (b) of Act 6 of 2012 (wef 26 June 2012).]

(8) A person may not be convicted of an offence in terms of section 9 or 22 if that person commits such act in compliance with and in the interest of a legitimate cultural practice.

**56A Sentencing**

(1) A court shall, if-

(a) that or another court has convicted a person of an offence in terms of this Act; and

(b) a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act,

impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction.

(2) If a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person-

- (a) committed the offence with the intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage,

from the commission of such offence.

[S. 56A inserted by s. 5 of Act 6 of 2012 (wef 26 June 2012).]

### **57 Inability of children under 12 years and persons who are mentally disabled to consent to sexual acts**

(1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

(2) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

### **58 Evidence of previous consistent statements**

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.

### **59 Evidence of delay in reporting**

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

### **60 Court may not treat evidence of complainant with caution on account of nature of offence**

Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.

### **61 Extra-territorial jurisdiction**

(1) Even if the act alleged to constitute a sexual offence or other offence under this Act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place of its commission, has, subject to subsections (4) and (5), jurisdiction in respect of that offence if the person to be charged-

- (a) is a citizen of the Republic;
- (b) is ordinarily resident in the Republic;
- (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;
- (d) is a company, incorporated or registered as such under any law, in the Republic; or
- (e) any body of persons, corporate or unincorporated, in the Republic.

(2) Subject to subsections (4) and (5), any act alleged to constitute a sexual offence or other offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), is, whether or not the act constitutes an offence at the place of its commission, deemed to have been committed in the Republic if that-

- (a) act was committed against a person referred to in paragraphs (a) or (b) of subsection (1);
- (b) person is found in the Republic; and
- (c) person is, for any reason, not extradited by the Republic or if there is no application to extradite that person.

(3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for purposes of determining the jurisdiction of a court to try the offence, deemed to have been committed-

- (a) at the place where the complainant is ordinarily resident; or
- (b) at the accused person's principal place of business.

(4) No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Act in respect of which such person has already been convicted or acquitted by a court of another jurisdiction.

(5) The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions.

### **Part 3** **National policy framework (ss 62-65)**

#### **62 National policy framework**

(1) The Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, adopt a national policy framework, relating to all matters dealt with in this Act, to-

- (a) ensure a uniform and co-ordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences;
- (b) guide the implementation, enforcement and administration of this Act; and
- (c) enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources.

(2) The Minister must-

- (a) before 31 March 2009, adopt and table the policy framework in Parliament;
- (b) publish the policy framework in the *Gazette* within one month after it has been tabled in Parliament;
- (c) review the policy framework within five years after its publication in the *Gazette* and at least once every five years thereafter; and
- (d) amend the policy framework when required, in which case the amendments must be tabled in Parliament and published in the *Gazette*, as provided for in paragraph (b).

[Sub-s. (2) substituted by s. 38 of Act 66 of 2008 (wef 17 February 2009).]

#### **63 Establishment of Inter-sectoral Committee**

(1) There is hereby established a Committee to be known as the Inter-sectoral Committee for the Management of Sexual Offence Matters.

(2) The Committee shall consist of-

- (a) the Director-General: Justice and Constitutional Development, who shall be the chairperson of the Committee;
- (b) the National Commissioner of the South African Police Service;
- (c) the National Commissioner of Correctional Services;
- (d) the Director-General: Social Development;
- (e) the Director-General: Health; and
- (f) the National Director of Public Prosecutions.

(3) The members of the Committee may designate an alternate to attend a meeting of the Committee in their place.

(4) (a) The members of the Committee shall designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy

chairperson shall act as chairperson.

(b) If neither the chairperson nor deputy chairperson is available, the members present at a meeting shall elect a person from their own ranks to preside at that meeting.

#### **64 Meetings of Committee**

(1) The Committee shall meet at least twice every year and meetings shall be held at a time and place determined by the chairperson.

(2) The procedure, including the manner in which decisions shall be taken, to be followed at meetings of the Committee and the manner in which the Committee shall conduct its affairs shall be determined by the Committee.

(3) The Committee shall report in writing on every meeting to the Minister within one month of such meeting.

#### **65 Responsibilities, functions and duties of Committee**

(1) The Committee shall be responsible for developing and compiling a draft national policy framework, as contemplated in section 62 (1), which must include guidelines for-

- (a) the implementation of the priorities and strategies contained in the national policy framework;
- (b) measuring progress on the achievement of the national policy framework objectives;
- (c) ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the national policy framework and this Act; and
- (d) monitoring the implementation of the national policy framework and of this Act.

(2) The Committee may make recommendations to the Minister with regard to the amendment of the national policy framework.

(3) The Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions-

- (a) within one year after the implementation of this Act, submit reports to Parliament, by each Department or institution contemplated in section 63 (2), on the implementation of this Act; and
- (b) every year thereafter submit such reports to Parliament.

**[NB:** Sub-s. (3) has been substituted and a sub-s. (4) has been added by s. 14 (a) and (b) respectively of the Judicial Matters Amendment Act 24 of 2015, provisions which will be put into operation by proclamation. See PENDLEX.]

### **Part 4**

#### ***National instructions and directives, regulations and repeal and amendment of laws (ss 66-68)***

#### **66 National instructions and directives**

(1) (a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Safety and Security and after consultation with the Minister, the National Director or Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health and Social Development, issue and publish in the *Gazette* national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt

with by police officials;

- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;
- (iii) the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality; and
- (vi) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results.

**[NB:** Para. (a) has been substituted by s. 3 (a) of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(b) The National Commissioner of the South African Police Service must develop training courses, which must-

- (i) include training on the national instructions referred to in paragraph (a);
- (ii) include social context training in respect of sexual offences; and
- (iii) provide for and promote the use of uniform norms, standards and procedures,

with a view to ensuring that as many police officials as possible are able to deal with sexual offence cases in an appropriate, efficient and sensitive manner.

(c) The National Commissioner of the South African Police Service must, in consultation with the National Director of Public Prosecutions, issue and publish in the *Gazette* national instructions regarding the manner in which police officials must-

- (i) retain test results obtained;
- (ii) make the record of the test results available to a prosecutor; and
- (iii) destroy the test results as contemplated in section 33 (2) (b),

as contemplated in section 33 (1) (e), in order to ensure the confidentiality of such test results.

(2) (a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health and Social Development, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
- (ii) the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms subsection (2) (a) of that section or an application in terms of subsection (2) (b) of that section is not made;
- (iii) the criteria to be used and circumstances in which the prosecution must

request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;

- (iv) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
- (v) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family;
- (vi) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16 (2), dealing with consensual sexual violation with a child with the view to ensuring uniformity;
- (vii) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 38 (1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity; and
- (viii) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant.
- (ix) .....

[Sub-para. (ix) deleted by s. 33 of Act 42 of 2013 (wef 22 January 2014).]

**[NB:** Para. (a) has been substituted by s. 3 (b) of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(b) The National Director of Public Prosecutions must develop training courses, which must-

- (i) include training on the directives referred to in paragraph (a);
- (ii) include social context training in respect of sexual offences; and
- (iii) provide for and promote the use of uniform norms, standards and procedures,

with a view to ensuring that as many prosecutors as possible are able to deal with sexual offence cases in an appropriate, efficient and sensitive manner.

(c) The National Director of Public Prosecutions must, in consultation with the National Commissioner of the South African Police Service, issue and publish in the *Gazette* directives regarding the manner in which prosecutors and other officials in the national prosecuting authority must deal with the HIV test results that were disclosed by police officials, as contemplated in section 33 (1) (e) (ii), in order to ensure the confidentiality of such test results.

(3) (a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with the Directors-General: Justice and Constitutional Development and Social Development and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all medical practitioners and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others, to-

- (i) the administering of Post Exposure Prophylaxis;
- (ii) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;

- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality;
- (iv) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment; and
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided.

**[NB:** Para. (a) has been substituted by s. 3 (c) of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(b) The Director-General: Health must develop training courses, which must-

- (i) include training on the directives referred to in paragraph (a);
- (ii) include social context training in respect of sexual offences; and
- (iii) provide for and promote the use of uniform norms, standards and procedures,

with a view to ensuring that as many medical practitioners and any other relevant persons as possible are able to deal with sexual offence cases in an appropriate, efficient and sensitive manner.

**[NB:** A sub-s. (3A) has been inserted by s. 3 (d) of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(4) (a) The national instructions and directives by each Department or institution, contemplated in this section, must be:

- (i) Submitted to Parliament within six months after the commencement of this section, before publication in the *Gazette*; and
- (ii) published in the *Gazette*.

**[NB:** Para. (a) has been substituted by s. 3 (e) of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(b) Paragraph (a) applies to any new or amended national instructions or directives issued under this section with the changes required by the context.

(5) (a) The training courses contemplated in this section must be tabled in Parliament within six months after the commencement of this Act.

(b) .....

[Para. (b) deleted by s. 15 of Act 24 of 2015 (wef 8 January 2016).]

(c) Any new or amended training courses developed under this section must be tabled in Parliament within 14 days of the finalisation thereof.

## 67 Regulations

(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.

[S. 67 substituted by s. 10 of Act 5 of 2015 (wef 7 July 2015).]

**[NB:** S. 67 has been substituted by s. 4 of the Judicial Matters Second Amendment Act 43 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

## 68 Repeal and amendment of laws

(1) The common law relating to the-

- (a) irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
- (b) crimes of rape, indecent assault, incest, bestiality and violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse,

is hereby repealed.

(2) The laws specified in the Schedule are repealed or amended to the extent indicated in the third column of that Schedule.

**Part 5**  
**Transitional provisions (ss 69-69A)**

**69 Transitional provisions**

(1) All criminal proceedings relating to the common law crimes referred to in section 68 (1) (b) which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.

(2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68 (1) (b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.

(3) Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended.

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

(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
- (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).

(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 23 of 1957), if the convicted person was 16 years or younger at the time of the commission of the offence;
- (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
- (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.

(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,

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).

(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
- (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.

[S. 69A added by s. 11 of Act 5 of 2015 (wef 7 July 2015).]

**Part 6**

.....

[Heading deleted by s. 48 of Act 7 of 2013 (wef 9 August 2015).]

**70 and 71 .....**

[Ss. 70 and 71 repealed by s. 48 of Act 7 of 2013 (wef 9 August 2015).]

**72 Short title and commencement**

(1) This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and, subject to subsection (2), takes effect on 16 December 2007, or an earlier date fixed by the President by proclamation in the *Gazette*.

(2) (a) Chapter 5 of the Act takes effect on 21 March 2008, or an earlier date fixed by the President by proclamation in the *Gazette*.

(b) Chapter 6 of the Act takes effect on 16 June 2008, or an earlier date fixed by the President by proclamation in the *Gazette*.

**Schedule  
LAWS AMENDED OR REPEALED BY SECTION 68**

No. and year of law	Short title	Extent of repeal or amendment
Act 32 of 1944	Magistrates' Courts Act	<p><b>1</b> Amends section 89 by substituting subsection (1).</p> <p><b>2</b> Substitutes Schedule 2.</p>
Act 23 of 1957	Sexual Offences Act	<p><b>1</b> Amends section 1 by inserting the definition of 'female'.</p> <p><b>2</b> Amends section 12A by substituting subsection (1).</p> <p><b>3</b> Substitutes section 19.</p> <p><b>4</b> Amends section 20, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) inserts subsection (1A).</p> <p><b>5</b> Substitutes section 22.</p> <p><b>6</b> .....</p> <p>[Para. 6 omitted by Act 32 of 2007.]</p> <p><b>7</b> Repeals sections 9, 11, 12 (2) 13, 14, 15, 18, 18A and 20A.</p>
Act 8 of 1959	Correctional Services Act	<p><b>1</b> Substitutes Schedule 2.</p>

Act 68 of 1969	Prescription Act	<p><b>1</b> Amends section 12; as follows: paragraph (a) substitutes subsection (1); and paragraph (b) adds subsection (4).</p>
Act 51 of 1977	Criminal Procedure Act	<p><b>1</b> Substitutes section 18.</p> <p><b>2</b> Amends section 77 by substituting subsection (6).</p> <p><b>3</b> Amends section 78 by substituting subsection (6).</p> <p><b>4</b> Amends section 79 by substituting subsection (1).</p> <p><b>5</b> Amends section 153 by substituting subsection (3).</p> <p><b>6</b> Amends section 154, as follows: paragraph (a) substitutes subsection (5); and paragraph (b) adds subsection (6).</p> <p><b>7</b> Amends section 158 by adding subsection (5).</p> <p><b>8</b> Amends section 164 by substituting subsection (1).</p> <p><b>9</b> Amends section 170A, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) adds subsections (7) to (10) inclusive.</p> <p><b>10</b> Amends section 195 by substituting subsection (1).</p> <p><b>11</b> Substitutes section 227.</p> <p><b>12</b> Amends section 238, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) substitutes subsection (2).</p> <p><b>13</b> Substitutes section 261.</p> <p><b>14</b> Amends section 266 by substituting paragraph (b).</p> <p><b>15 and 16</b> Substitute respectively sections 267 and 268.</p> <p><b>17</b> Repeals section 269.</p> <p><b>18</b> Amends section 276A, as follows: paragraph (a) substitutes subsection (1) (b); and paragraph (b) inserts subsection (2A).</p> <p><b>19</b> Amends section 299A by substituting subsection (1).</p> <p><b>20</b> Amends section 335A, as follows: paragraph (a) substitutes subsection (2); and paragraph (b) adds subsection (3).</p> <p><b>21</b> Amends section 335B by substituting subsection (1).</p> <p><b>22</b> Substitutes Schedule 1.</p>

		<b>23</b> Amends Schedule 2 by substituting Part II.
		<b>24 to 26 inclusive</b> Substitute respectively Schedules 5, 6 and 7.
Act 74 of 1983	Child Care Act	<b>1</b> Amends section 1 by substituting the definition of 'commercial sexual exploitation'.
Act 133 of 1993	Prevention of Family Violence Act	<b>1</b> Repeals section 5.
Act 92 of 1996	Choice on Termination of Pregnancy Act	<b>1</b> Amends section 1 by substituting the definitions of 'incest' and 'rape'.
Act 105 of 1997	Criminal Law Amendment Act	<b>1</b> Amends Schedule 2, as follows: paragraph (a) substitutes Part I; and paragraph (b) substitutes Part III.
Act 112 of 1998	Witness Protection Act	<b>1</b> Substitutes the Schedule.
Act 121 of 1998	Prevention of Organised Crime Act	<b>1</b> Substitutes Schedule 1.
Act 16 of 1999	Military Discipline Supplementary Measures Act	<b>1</b> Amends section 3 by substituting subsection (3).  <b>2</b> Amends section 7 (1) by substituting paragraph (a).  <b>3</b> Amends section 9 by substituting subsections (2) and (3).  <b>4</b> Amends section 30 by substituting subsection (8).
Act 56 of 2001	Private Security Industry Regulation Act	<b>1</b> Substitutes the Schedule.
Act 13 of 2002	Immigration Act	<b>1</b> Substitutes Schedule 1.
Act 15 of 2003	Explosives Act	<b>1</b> Amends section 30 (1) by substituting paragraph (n).

*PENDLEX: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* **after amendment by the Judicial Matters Second Amendment Act 43 of 2013**

**Long title - fourteenth bullet point**

\* designating certain courts, where necessary, to deal with matters relating to sexual offences;

**Index, Chapter 7, Part 1A - Sexual offences courts**

*Part 1A  
Sexual offences courts*

55A Designation of sexual offences courts

**Chapter 7, Part 1A - Sexual offences courts**

*Part 1A*  
*Sexual offences courts (s 55A)*

**55A Designation of sexual offences courts**

(1) Subject to subsection (2), the Minister may by notice in the *Gazette* designate any Division of the High Court or the main seat or any local seat of a Division or Magistrate's Court, as defined in section 1 of the Superior Courts Act, 2013 (Act 10 of 2013), as a sexual offences court exclusively for the purposes of the trial of any person or other proceedings arising out of-

- (a) an alleged commission of a sexual offence in terms of the common law, any offence in terms of the Sexual Offences Act, 1957 (Act 23 of 1957), or any offence in terms of this Act; or
- (b) any act or omission which constitutes an offence in terms of any other law which has a bearing on sexual offences, as the Director of Public Prosecutions having jurisdiction, may, in writing, authorise.

**[NB:** Sub-s. (1) has been substituted by s. 38 (a) of the Judicial Matters Amendment Act 8 of 2017, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(2) The Minister must exercise the power provided for in subsection (1)-

- (a) in consultation with the Chief Justice, the head of the court in question as defined in section 1 of the Superior Courts Act, 2013, and, in the case of a Magistrate's Court, the Judge President who, in terms of section 8 (4) (c) of the Superior Courts Act, 2013, is responsible for the coordination of judicial functions of the Magistrate's Courts falling within his or her area of jurisdiction; and
- (b) after consultation with the National Director of Public Prosecutions.

**[NB:** Sub-s. (2) has been substituted by s. 38 (a) of the Judicial Matters Amendment Act 8 of 2017, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]

(3) Subject to subsection (4) or any other law regulating the jurisdiction of a court, the area of jurisdiction of a court designated in terms of subsection (1), is the area of jurisdiction determined in terms of section 2 of the Magistrate's Courts Act, 1944, in respect of a Magistrate's Court or in terms of section 6 (3) of the Superior Courts Act, 2013, in respect of a Division of the High Court or a seat thereof.

(4) The Minister may-

- (a) in consultation with the persons referred to in subsection (2) (a); and
- (b) after consultation with the National Director of Public Prosecutions as contemplated in subsection (2) (b),

by notice in the *Gazette*, increase or decrease the area of jurisdiction of any Magistrate's Court designated in terms of subsection (1).

(5) This section does not preclude any court referred to in subsection (1) from dealing with the matters referred to in that subsection if it has not been designated as a sexual offences court.

**[NB:** Sub-s. (5) has been substituted and sub-ss. (6) to (9) inclusive have been added by s. 38 (b) and (c) respectively of the Judicial Matters Amendment Act 8 of 2017, provisions which will be put into operation on a date to be proclaimed. See PENDLEX.]

**Section 66 (1) (a)**

The National Commissioner of the South African Police Service must, in consultation with the Minister of Police and after consultation with the Minister, the National Director of Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health and Social Development, issue and publish in the *Gazette* national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;

- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;
- (iii) the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality;
- (vi) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results; and
- (vii) the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67 (b).

### **Section 66 (2) (a)**

The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health and Social Development, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
- (ii) the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2) (a) of that section or an application in terms of subsection (2) (b) of that section is not made;
- (iii) the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;
- (iv) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
- (v) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family;
- (vi) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16 (2), dealing with consensual sexual violation with a child with the view to ensuring uniformity;
- (vii) the criteria to be used, circumstances and manner in which Directors of

Public Prosecutions should authorise and institute a prosecution contemplated in section 38 (1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity;

- (viii) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant;
- (ix) the manner in which prosecutors must ensure that an order contemplated in section 50 (2) (a) (dealing with an order of a court to include the accused's name in the Register) is forwarded to and received by the Registrar of the National Register for Sex Offenders; and
- (x) the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67 (b).

### **Section 66 (3) (a)**

The Director-General: Health must, in consultation with the Minister of Health and after consultation with the Directors-General: Justice and Constitutional Development and Social Development and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all medical practitioners and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others, to-

- (i) the administering of Post Exposure Prophylaxis;
- (ii) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;
- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality;
- (iv) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment;
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided; and
- (vi) the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67 (b).

### **Section 66 (3A)**

The Director-General: Social Development must, in consultation with the Minister of Social Development, and after consultation with the Directors-General: Justice and Constitutional Development and Health, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference to the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67 (b).

### **Section 66 (4) (a)**

The national instructions and directives by each Department or institution, contemplated in this section must be-

- (i) submitted to Parliament within six months after the commencement of this section, before publication in the *Gazette*: Provided that the first national instructions or directives giving effect to section 3 of the Judicial Matters Second Amendment Act, 2013, must be submitted to Parliament within six months after any regulations have been made in terms of section 67 (b); and
- (ii) published in the *Gazette*.

### **Section 67 - Regulations**

The Minister may-

- (a) after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, make regulations regarding-
  - (i) any matter which is required or permitted by this Act to be prescribed by regulation;
  - (ii) the intersectoral implementation of this Act; and
  - (iii) any other matter which is necessary or expedient to be prescribed in order to achieve or promote the objects of this Act; and
- (b) in consultation with the Chief Justice make regulations necessary to give effect to the designation of the courts referred to in section 55A (1), including the requirements for the efficient and effective functioning thereof.

*PENDLEX: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 after amendment by the Judicial Matters Amendment Act 24 of 2015*

### **Section 65 (3)**

The Minister and the Cabinet members responsible for safety and security, correctional services, social development and health must, not later than 30 September of every year-

- (a) after the commencement of section 14 of the Judicial Matters Amendment Act, 2015, each submit reports, as prescribed, to Parliament by each Department or institution contemplated in section 63 (2) on the implementation of this Act; and
- (b) report thereon to a committee or committees of Parliament sitting jointly or separately as determined by Parliament.

### **Section 65 (4)**

The Cabinet members referred to in subsection (3) must, in their individual reports, that are referred to in subsection (3), report on the implementation of the training courses contemplated in section 66.

*PENDLEX: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 after amendment by the Judicial Matters Amendment Act 8 of 2017*

### **Section 1 - definition**

'**sexual offences court**' means a court that has a court roll that deals exclusively with the bail application, plea proceedings, trial or sentencing of a person in criminal proceedings arising out of-

- (a) an alleged commission of a sexual offence in terms of the common law, any offence in terms of the Sexual Offences Act, 1957 (Act 23 of 1957), or any offence in terms of this Act;
- (b) any offence in terms of any other law which has a bearing on sexual offences contemplated in paragraph (a), or which involves the complainant against whom a sexual offence contemplated in paragraph (a) is alleged to have been committed; or
- (c) any offence in terms of any other law which the Director of Public

Prosecutions having jurisdiction, or a prosecutor authorised thereto in writing by him or her, deems expedient or necessary for the administration of justice in a particular case, to be disposed of together with an offence contemplated in paragraph (a),

and which has facilities, measures, services and requirements as prescribed by the Minister by regulation in terms of section 55A (6) of the Act;

### **Section 55A (1)**

Subject to subsection (2), the Minister may by notice in the *Gazette* designate any-

- (a) Division of the High Court of South Africa or the main seat or any local seat of a Division referred to in section 6 of the Superior Courts Act, 2013 (Act 10 of 2013); or
- (b) Magistrate's Court, as defined in section 1 of the Superior Courts Act, 2013,

at which a sexual offences court must be established.

### **Section 55A (2)**

The Minister must exercise the power provided for in subsection (1)-

- (a) in consultation with the Chief Justice, who must consult-
  - (i) if a Division of the High Court of South Africa or the main seat or any local seat thereof, is to be designated, the Judge President of the Division; or
  - (ii) if a court for a regional division, referred to in section 2 (g) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), is to be designated, the Judge President and the magistrate at the head of a regional division; or
  - (iii) if a court for a district, referred to in section 2 (f) of the Magistrates' Courts Act, 1944, is to be designated, the Judge President and the head of the administrative region contemplated in the Magistrates' Courts Act, 1944; and

- (b) after consultation with the National Director of Public Prosecutions.

### **Section 55A (5)**

This section does not preclude any court referred to in subsection (1) (a) or (b) from dealing with the matters referred to in that subsection if it has not been established as a sexual offences court.

### **Section 55A (6)**

The facilities, measures, services and requirements as prescribed by the Minister by regulation made in terms of section 67 in respect of sexual offences cases and the courts established as sexual offences courts in terms of subsection (1), must be in place and complied with, within the periods as may be prescribed by the Minister.

### **Section 55A (7)**

Upon establishing a court as a sexual offences court in terms of subsection (1), the following persons must ensure that sexual offences cases in that court receive priority and must, for this purpose, issue directives to the judicial officers of that court:

- (a) In the case of a Division of the High Court of South Africa or the main seat or any local seat thereof, the Judge President of the Division;
- (b) in the case of a court for a regional division, the magistrate at the head of a regional division referred to in subsection (2) (a) (ii); or
- (c) in the case of a court for a district, the head of the administrative region referred to in subsection (2) (a) (iii).

### **Section 55A (8)**

The directives referred to in subsection (7) may only be issued-

- (a) after consultation with the National Director of Public Prosecutions; and

(b) with the approval of the Chief Justice.

**Section 55A (9)**

The Chief Justice must monitor the application of the directives issued in terms of subsection (8).

**CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS)  
AMENDMENT ACT AMENDMENT ACT 6 OF 2012<sup>1</sup>**

[ASSENTED TO 23 JUNE 2012]

[DATE OF COMMENCEMENT: 26 JUNE 2012]

(see s. 6 of this Act)

*(English text signed by the President)*

**published in**

GG 35473 of 26 June 2012

**ACT**

**To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to expressly provide that the imposition of penalties in respect of certain offences contained in the Act is left to the discretion of the courts; and to provide for matters connected therewith.**

Parliament of the Republic of South Africa enacts, as follows:-

<sup>1</sup> This Act has been updated to include all available historical commencement details

**1**

Substitutes section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

**2**

Amends section 17 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by substituting subsection (1).

**3**

Amends section 23 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by substituting subsection (1).

**4**

Amends section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as follows: paragraph (a) substitutes the heading; and paragraph (b) deletes subsection (7).

**5**

Inserts section 56A in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

**6 Short title**

This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2012.

## **CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT ACT 5 OF 2015<sup>1</sup>**

[ASSENTED TO 3 JULY 2015]

[DATE OF COMMENCEMENT: 7 JULY 2015]

(see s. 14 of this Act)

*(English text signed by the President)*

**published in**

GG 38977 of 7 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 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:-

1 This Act has been updated to include all available historical commencement details

**1**

Amends section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by substituting the definition of 'child'.

**2 and 3**

Substitute respectively sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

**4**

Amends section 46 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) substitutes subsection (2).

**5**

Amends section 47 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by substituting subsection (2).

**6**

Amends section 48 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by substituting subsection (2).

**7**

Amends section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as follows: paragraph (a) substitutes subsection (2) (a); paragraph (b) inserts subsection (2) (c) and (d); and paragraph (c) substitutes subsection (4).

**8**

Amends section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as follows: paragraph (a) substitutes in subsection (1) the words preceding paragraph (a); and paragraph (b) inserts subsection (2A).

**9**

Amends section 56 (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by deleting paragraph (b).

**10**

Substitutes section 67 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

**11**

Inserts section 69A in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

**12**

Amends the long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by substituting the seventh bullet.

**13**

Amends the index of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by inserting item 69A.

**14 Short title**

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

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