

REPUBLIC OF SOUTH AFRICA

**CRIMINAL LAW (SEXUAL OFFENCES
AND RELATED MATTERS)
AMENDMENT ACT AMENDMENT
BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and
prior notice of its introduction published in Government Gazette No. 43595 of 7 August 2020)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 16—2020]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to—

- extend the ambit of the offence of incest;
- introduce a new offence of sexual intimidation;
- further regulate the inclusion of particulars of persons in the National Register for Sex Offenders;
- make provision for certain particulars of persons who have been convicted of sexual offences to be made publicly available;
- extend the list of persons who are to be protected in terms of Chapter 6 of the Act;
- further regulate the removal of particulars of persons from the National Register for Sex Offenders; and
- further regulate the reporting duty of persons who are aware that sexual offences have been committed against children, and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 2 of Act 32 of 2007

1. Section 2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (hereinafter referred to as the “principal Act”), is hereby amended by the substitution for paragraph (g) of the following paragraph: 5

“(g) establishing a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of any 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]** persons who are vulnerable.”. 10

Amendment of section 5 of Act 32 of 2007

2. Section 5 of the principal Act is hereby amended by the deletion of subsection (2). 15

Amendment of section 12 of Act 32 of 2007

3. Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(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— 5
 (a) sexual penetration with each other; or
 (b) sexual violation with each other where one of them is a child,
 are, despite their mutual consent to engage in such act, guilty of the offence of incest.”. 10

Insertion of new Part in Act 32 of 2007

4. The following Part is hereby inserted after Part 4 of Chapter 2 of the principal Act:

**“Part 5
 Sexual intimidation**

Sexual intimidation 15

14A. A person (“A”) who unlawfully and intentionally utters or conveys, whether directly or indirectly, a threat to a complainant (“B”) that inspires a reasonable belief of imminent harm in B that B, or a third party (“C”), shall be— 20
 (a) raped;
 (b) compelled to rape someone else;
 (c) sexually violated;
 (d) compelled to sexually violate someone else;
 (e) compelled to sexually violate himself or herself;
 (f) compelled to witness a sexual offence, sexual act or an act of self-masturbation; 25
 (g) exposed to the genital organs, anus or female breasts of another person; or
 (h) exposed to child pornography,
 as contemplated in section 3, 4, 5, 6, 7, 8, 9 or 10, respectively, is guilty of the offence of sexual intimidation.”. 30

Amendment of section 40 of Act 32 of 2007, as amended by section 36 of Act 8 of 2017

5. Section 40 of the principal Act is hereby amended—

(a) by the substitution for the definition of “employer” of the following definition: 35

“‘**employer**’ means—

- (a) any— 40
 (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 45 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] person who is vulnerable or in a position of authority, supervision or care of a [child] person who is vulnerable or will gain access to a [child] person who is vulnerable or places where [children] persons who are vulnerable are present or congregate; or 50

- [(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]** 5
- (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]** person who is vulnerable or working with or will gain access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate; or 10
- (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]** person who is vulnerable or working with or who gains access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate, 15
- and 'employ', 'employing', 'employed' and 'employment relationship' have corresponding meanings;"; 20
- (b) by the substitution for the definition of "licencing authority" of the following definition: 30
- "**'licencing 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]** person who is vulnerable;"; 35
- (c) by the insertion after the definition of "licencing authority" of the following definition:
- "**'person who is vulnerable'** means a— 40
- (a) child; 40
- (b) female under the age of 25 years; 40
- (c) person who is being cared for or sheltered in a facility that provides services to victims of crime; 40
- (d) person with a physical, intellectual or mental disability and who— 45
- (i) receives community-based care and support services, other than from a family member, for; 45
- (ii) lives in a building, structure or facility used primarily as a residence, for; or 45
- (iii) is cared for in a facility providing 24-hour care to, persons with physical, intellectual or mental disabilities; or 50
- (e) person who is 60 years of age or older and who— 50
- (i) receives community-based care and support services, other than from a family member, for; 50
- (ii) lives in a building, structure or facility used primarily as a residence, for; or 55
- (iii) is cared for in a facility providing 24-hour care to, such persons;"; 55
- (d) by the insertion after the definition of "relevant authority" of the following definition:
- "**'sexual offence'** means any— 60
- (a) sexual offence in terms of the law as it existed between 16 June 2003 and 15 December 2007; 60
- (b) offence referred to in Chapters 2, 3 and 4 and sections 55 and 71 of this Act; 60

- (c) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and
- (d) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996);; and
- (e) by the deletion of the definition of “sexual offence against a child”.

Substitution of section 41 of Act 32 of 2007

6. The following section is hereby substituted for section 41 of the principal Act:

“Prohibition on certain types of employment by certain persons who have committed sexual offences [against children and persons who are mentally disabled]

41. [(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**] person who is vulnerable 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**] person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a [**child**] person who is vulnerable or where he or she gains access to a [**child**] person who is vulnerable or places where [**children**] persons who are vulnerable 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**] person who is vulnerable or where [**children**] persons who are vulnerable are present or congregate; or
- (d) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled.

[(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.]”.

Amendment of section 42 of Act 32 of 2007, as amended by section 36 of Act 66 of 2008

7. Section 42 of the principal Act is hereby amended—

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

“(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.”;

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

“(3) (a) 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.

(b) The Registrar may, subject to paragraph (c), delegate any power, duty or function to any other person, but the Registrar remains responsible and accountable for the exercise of the powers and the performance of the duties and functions so delegated.

(c) The Registrar may not delegate his or her function referred to in section 51 to any other person.”; and

(c) by the insertion after subsection (3) of the following subsection:

“(4) The Registrar must make the full names, surname, identity number and the sexual offence, of every person whose particulars have been included in the Register, available on the website of the Department of Justice and Constitutional Development.”.

Amendment of section 43 of Act 32 of 2007

8. Section 43 of the principal Act is hereby amended—

(a) by the substitution for the words preceding paragraph (a) of the following words:

“The objects of the Register are to protect [**children and persons who are mentally disabled**] persons who are vulnerable against sexual offenders by—”; and

(b) by the substitution for subparagraphs (i) and (ii) of paragraph (a) of the following subparagraphs:

“(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—”.

Amendment of section 44 of Act 32 of 2007

9. Section 44 of the principal Act is hereby amended by the substitution for paragraph (e) of the following paragraph:

“(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**] persons who are vulnerable in respect of his or her own particulars;”.

Amendment of section 45 of Act 32 of 2007

10. Section 45 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (c) and (d) of the following paragraphs, respectively:

“(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. 5

(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]** person who is vulnerable, 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]** person who is vulnerable, the employment relationship, the use of services or access, as the case may be, must be terminated immediately.”. 10 15

Amendment of section 46 of Act 32 of 2007, as amended by section 4 of Act 5 of 2015

11. Section 46 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively: 20

“(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. 25 30

(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.”. 35

Amendment of section 47 of Act 32 of 2007, as amended by section 5 of Act 5 of 2015

12. Section 47 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 40

“(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.”. 45

Amendment of section 48 of Act 32 of 2007, as amended by section 6 of Act 5 of 2015

13. Section 48 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 50

“(2) (a) 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 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** 55

disabled] and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.

(b) A person referred to in paragraph (a) who fails to comply with paragraph (a), 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.”.

5

Amendment of section 49 of Act 32 of 2007

14. Section 49 of the principal Act is hereby amended by the substitution for subparagraph (iv) of paragraph (b) of the following subparagraph:

“(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;”.

10

Amendment of section 50 of Act 32 of 2007, as amended by section 37 of Act 66 of 2008, section 7 of Act 5 of 2015 and section 37 of Act 8 of 2017

15. Section 50 of the principal Act is hereby amended— 15

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

“(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— 20

(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; 25

(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**]; 35

(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 in paragraph (a)(ii), whether committed before or after the commencement of this Chapter.”; 40

(b) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 45

“(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 50

(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, 55

must, subject to paragraph (c), make an order that the particulars of the person be included in the Register.”;

- (c) by the substitution in subsection (2) for paragraph (c) of the following paragraph:

“(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 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.”;

- (d) by the substitution in subsection (5) for paragraph (a) of the following paragraph:

“(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 No. 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 Act, 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.”;

- (e) by the substitution for subsection (6) of the following subsection:

“(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.”; and

- (f) by the substitution in subsection (7) for paragraph (a) of the following paragraph:

“(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.” 5

Substitution of section 51 of Act 32 of 2007, as amended by section 8 of Act 5 of 2015

16. The following section is hereby substituted for section 51 of the principal Act:

“Removal of particulars from Register

51. (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]** 20 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]** 14 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]** 10 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 No. 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]** 10 years has lapsed since the particulars of that person were included in the Register.

(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, with or without the option of a fine for a period exceeding **[eighteen]** 18 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) or (2), 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.
- (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.
- (4) Any application that has been submitted to the Registrar in terms of subsection (3)(a) before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, must be considered and dealt with in all respects as if the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, had not commenced.”.

Amendment of section 53 of Act 32 of 2007

17. Section 53 of the principal Act is hereby amended by the substitution in subsection (1) for paragraphs (c), (e) and (f) of the following paragraphs, respectively:
- “(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);
- (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); and
- (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);”.

Substitution of section 54 of Act 32 of 2007

18. The following section is hereby substituted for section 54 of the principal Act:

“Obligation to report commission of sexual offences against children or persons who are mentally disabled 15

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

[(b)](2) (a) A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in [paragraph (a)] subsection (1), 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. 20

[(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. 25

(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.] 30

[(c)](b) 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.”. 35

Amendment of section 56 of Act 32 of 2007, as amended by section 4 of Act 6 of 2012 and section 9 of Act 5 of 2015

19. Section 56 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) A person (‘A’) may not be convicted of an offence in terms of section 12 if, at the time when the sexual act [of sexual penetration] was first committed— 40

(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.”.

Amendment of index of Act 32 of 2007, as amended by section 48 of Act 7 of 2013 and section 1 of Act 43 of 2013 45

20. The index of the principal Act is hereby amended by the insertion after item 14 of the following Part and item:

“Part 5
Sexual intimidation 50

14A. Sexual intimidation”.

Short title and commencement

21. This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT
ACT AMENDMENT BILL, 2020**

1. PURPOSE OF BILL

- 1.1 On 18 September 2019, the President expressed the country's commitment to address the scourge of gender-based violence and femicide that have reached endemic proportions in South Africa. The President also announced a 5-point emergency plan, which is to be implemented without delay, to tackle gender-based violence. One of the points is enhancing the legal and policy framework in order to strengthen the response of the State to this problem.
- 1.2 One of the measures identified is the tightening of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) ("the principal Act"), in particular the provisions regulating the National Register for Sex Offenders ("the NRSO").
- 1.3 Chapter 6 of the principal Act aims to regulate the management and administration of the NRSO. Chapter 6, in short, requires that the particulars of persons who have been convicted of sexual offences against children and persons who are mentally disabled must be recorded in the NRSO. Chapter 6 places a prohibition on the aforementioned persons to work with or to be placed in circumstances where they have access to children or persons who are mentally disabled. Relevant employers are required to vet existing employees and those who apply for work against the NRSO in order to determine whether they are suitable to work with children or persons who are mentally disabled or not.

2. OBJECTS OF BILL

- 2.1 The Bill aims to—
 - (a) extend the ambit of the offence of incest;
 - (b) introduce a new offence of sexual intimidation;
 - (c) amend Chapter 6 of the principal Act so as to—
 - (i) expand the scope of the NRSO to include the particulars of all sex offenders and not only offenders against children and persons who are mentally disabled;
 - (ii) expand the list of persons who are to be protected to include other vulnerable persons, namely young women, persons with physical, mental or intellectual disabilities and persons over 60 years of age who, for example, receive community-based care and support services;
 - (iii) increase the periods for which sex offenders' particulars must remain on the NRSO before they can be removed from the Register; and
 - (iv) make provision for certain particulars of persons who have been convicted of sexual offences to be made publicly available; and
 - (d) further regulate the reporting duty of persons who are aware that sexual offences have been committed against children.
- 2.2 Section 2 of the principal Act deals with the objects of the Act. The amendments that are reflected in clause 1 of the Bill are of a consequential nature in order to align the objects section of the principal Act with the proposed extension of the ambit of Chapter 6 of the principal Act (see paragraph 2.1(c)(i) and (ii) above).
- 2.3 The common law principle that a threat to harm another, which constitutes assault, was confirmed in section 5(2) of the principal Act, which provides that a person who inspires the belief in another person that he or she will be sexually violated, is guilty of the offence of sexual violation. The question was raised why the principle could not be extended to include other sexual offences. Clause 2 of the Bill, to be read with clause 4, therefore aims to delete

section 5(2) of the principal Act and to replace it with a new offence with a wider ambit.

- 2.4 Section 12 of the principal Act criminalises incest, namely acts of consensual **sexual penetration** between persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship. The proposed amendment that is reflected in clause 3 of the Bill aims to extend the ambit of section 12 to include acts of **sexual violation** where children are involved.
- 2.5 Clause 4 of the Bill aims to introduce a new section 14A in the principal Act in order to extend the protection currently afforded to persons contemplated in section 5(2) of the principal Act (see paragraph 2.3 above). Clause 4 aims to introduce a new offence of sexual intimidation in order to prohibit persons from intimidating others into believing that they will be subjected to, or forced to commit, certain sexual offences.
- 2.6 Section 40 of the principal Act defines certain terms for purposes of Chapter 6 and clause 5 reflects proposed consequential amendments to the definitions of “employer” and “licencing authority” and the insertion of two new definitions, namely that of “person who is vulnerable” and of “sexual offence”. The inclusion of the aforementioned definitions is aimed at extending the ambit of Chapter 6 beyond the current protection afforded to children and persons who are mentally disabled to also include other persons who are vulnerable (see paragraph 2.1(c)(ii) above).
- 2.7 Clauses 6 to 12, 14, 15 and 17 aim to effect consequential amendments and a few technical amendments to the following sections of the principal Act:
- (a) Section 41, the prohibition on certain types of employment by certain persons who have committed sexual offences;
 - (b) section 42, the establishment of the NRSO and the designation of a Registrar for the NRSO, with the exception that certain particulars of affected persons will be made publicly available;
 - (c) section 43, the objects of the NRSO;
 - (d) section 44, persons entitled to apply for a certificate from the Registrar;
 - (e) section 45, obligations of employers in respect of employees;
 - (f) section 46, obligations of employees;
 - (g) section 47, obligations in respect of licence applications;
 - (h) section 48, obligations in respect of applications for fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship;
 - (i) section 49, contents of the NRSO;
 - (j) section 50, persons whose names must be included in the NRSO and related matters; and
 - (k) section 53, regulations pertaining to the NRSO, respectively, by replacing the phrase “child or person who is mentally disabled” wherever it appears with the term “person who is vulnerable” in order to ensure that the sections are aligned to the proposed extension of the ambit of Chapter 6 of the principal Act.
- 2.8 Section 48 of the principal Act, similar to other provisions of the Chapter, places an obligation on persons who submit applications for fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship to disclose that they have been convicted of sexual offences. However, section 48, in contrast to other sections of the Chapter, does not criminalise the non-disclosure of convictions of sexual offences where applications, for example to become foster parents, are submitted. Clause 13 therefore aims to amend section 48 of the principal Act by introducing an offence in respect of the non-disclosure of previous convictions for sexual offences.
- 2.9 Section 51 of the principal Act deals with the removal of a person’s particulars from the NRSO. Clause 16 of the Bill aims to double those periods in respect of which a person’s particulars must remain on the Register except for a

person who has been convicted of two or more sexual offences (such a person's particulars may never be removed from the Register). The proposed amendment is aimed at enhancing the protection afforded by the NRSO by ensuring that the particulars of persons remain for a longer period on the Register, namely, from five to 10 and from 10 to 20 years, respectively, in the case of first offenders. The particulars of persons who have been convicted of more than one sexual offence may not be removed from the NRSO.

2.10.1 Section 54 of the principal Act deals with the obligation to report the commission of a sexual offence against a child or a person who is mentally disabled. The section draws a distinction between the reporting requirement in respect of a child and a person who is mentally disabled. A person who has "knowledge" that a sexual offence was committed against a child must report such knowledge immediately to the police. A person who, on the other hand, has "*knowledge, reasonable belief or suspicion*" that a sexual offence was committed against a person who is mentally disabled must report it immediately to the police.

2.10.2 It was proposed that the provision should be aligned so that the reporting duty in the case of reasonable belief or suspicion should apply to both persons with disabilities and children. Clause 18 therefore aims to amend section 54 of the principal Act accordingly.

2.11 Section 56(4) of the principal Act, among others, provides that a person may not be convicted of an offence in terms of section 12 (incest) if, at the time when the act of "**sexual penetration**" was first committed, he or she was below the age of 18 years and the other person exercised power or authority over him or her or a relationship of trust existed between the two parties. Since the ambit of section 12 is to be extended to offer greater protection to children where acts of **sexual violation** are committed with them, clause 19 aims to amend section 56(4) by replacing the reference to "sexual penetration" with "sexual act", which encompasses both sexual penetration and sexual violation.

2.12 Clause 20 aims to amend the index to the principal Act so as to ensure that the index includes reference to the new provision dealing with sexual intimidation to be inserted in the principal Act.

2.13 Clause 21, the short title and commencement clause, is self-explanatory.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department received inputs from the Registrar of the NRSO, PACSEN (a Lobby Group for children with special educational needs), the Commission for Gender Equality, the MEC for Social Development of the Western Cape, the Centre for Child Law, Professor Ann Skelton, Dr Joan van Niekerk, the United Nations Office for Drugs and Crime, ASIJKI, the Centre for Applied Legal Studies and a combined input from the three organisations Rape Crisis (Cape Town), Lawyers for Human Rights and Judges Matter.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

The extension of the ambit of Chapter 6 of the principal Act will lead to an increase in the number of particulars of persons to be included in the NRSO and therefore will give rise to an increase in the workload of the National Commissioner of the South African Police Service, the Director-General of Health, the National Commissioner of Correctional Services and the Registrar of the NRSO. The number of applications for certificates to be processed by the Registrar of the NRSO will also increase. The

aforementioned increase in the workload of the functionaries concerned is not quantifiable at this stage and therefore also not the concomitant financial impact of such an increase.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the classification of Bills. Therefore, a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] ZACC10*, confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*. The test entails that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 6.4 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The issue to be determined is whether the proposed amendments as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.6 The Bill aims to—
 - (a) extend the ambit of the offence of incest;
 - (b) introduce a new offence of sexual intimidation;
 - (c) amend Chapter 6 of the principal Act so as to—
 - (i) expand the scope of the NRSO to include the particulars of all sex offenders and not only offenders against children and persons who are mentally disabled;
 - (ii) expand the list of persons who are to be protected to include other vulnerable persons, namely, young women, persons with physical, mental or intellectual disabilities and persons over 60 years of age who, for example, receive community based care and support services;
 - (iii) increase the periods for which a sex offenders’ particulars must remain on the NRSO before they can be removed from the NRSO; and
 - (iv) make provision for certain particulars of persons who have been convicted of sexual offences to be made publicly available; and
 - (d) further regulate the reporting duty of persons who are aware that sexual offences have been committed against children.
- 6.7 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.8 The Department of Justice and Constitutional Development and the State Law Advisers are of the view that the provisions of the Bill do not, in substantial measure, fall within the functional areas listed in Schedule 4. The Department and the State Law Advisers are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

- 6.9 The Department and the State Law Advisers are further of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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