

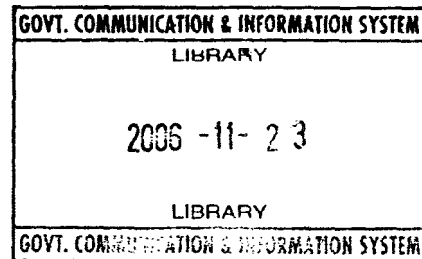
REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT BILL

*(As presented by the Portfolio Committee on Justice and Constitutional Development
(National Assembly), after consideration of Compulsory HIV Testing & Alleged Sexual
Offenders Bill [B10—2003] and Criminal Law (Sexual Offences) Amendment Bill
[B50—2003])*

(The English text is the official text of the Bill)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



[B 50B—2003]

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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 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 a sexual act with a corpse 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 and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years;
- 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;

- o 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;
- o establishing and regulating a National Register for Sex Offenders;
- o further regulating procedures, defences and other evidentiary matters in the prosecution and adjudication of sexual offences;
- o 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;
- o making interim provision relating to the trafficking in persons for sexual purposes; and
- o to provide for matters connected therewith.

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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DEFINITIONS AND OBJECTS

Definitions and interpretation of Act

1. (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; 20
- “**child**” means—
- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, 25
- and “**children**” has a corresponding meaning;
- “**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 No. 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; 30
- “**genital organs**” includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs; 35
- “**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 No. 32 of 1998); 40
- “**Minister**” means the cabinet member responsible for the administration of justice;
- “**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— 45
- (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 50
- (d) unable to communicate his or her unwillingness to participate in any such act;
- “**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 sections 55 and 71(1), (2) and (6) of this Act;

“**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) the 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; 5
 - (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 under the age of 12 years; or
 - (v) a person who is mentally disabled. 10

Objects

2. 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: 15

- (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; 20
- (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; 25
- (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; 30
 - (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; 35
 - (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 40
- (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. 45

CHAPTER 2

SEXUAL OFFENCES

Part 1: Rape and compelled rape

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Rape

3. 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.

Compelled rape

4. 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 5**Sexual assault**

5. (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. 10

Compelled sexual assault

6. 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. 15

Compelled self-sexual assault

7. A person (“A”) who unlawfully and intentionally compels a complainant (“B”), without the consent of B, to—
 (a) engage in—
 (i) masturbation; 20
 (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 25
 (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 30**Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation 35**

8. (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. 40

(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 45
 (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. 50

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

9. 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. 5

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

10. 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, as contemplated in paragraph (a), (b) or (c) of section 19, 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. 15

Engaging sexual services of persons 18 years or older

11. (1) 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”)— 20

- (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 engaging the sexual services of a person 18 years or older.

Part 4: Incest, bestiality and sexual acts with corpse 25

Incest

12. (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. 30

(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. 35
- (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. 40

(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. 45

Bestiality

13. 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 50

(b) of masturbation of an animal,
is guilty of the offence of bestiality.

Sexual act with corpse

14. 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. 5

CHAPTER 3

SEXUAL OFFENCES AGAINST CHILDREN

Part 1: Consensual sexual acts with certain children

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

15. (1) A person (“A”) who commits an act of sexual penetration with a child (“B”) 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. 10

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1). 15

(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.

Acts of consensual sexual violation with certain children (statutory sexual assault) 20

16. (1) A person (“A”) who commits an act of sexual violation with a child (“B”) 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.

(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 both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1). 25

(b) The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not. 30

Part 2: Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of pornography to children and using children for pornographic purposes or benefiting from child pornography

Sexual exploitation of children

17. (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”)— 35

(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, 40
is, in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a child.

(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”)— 45

(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; 50

(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— 5
- (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 No. 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, 10
- 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”) by a third person (“C”), is guilty of an offence of benefiting from the sexual exploitation of a child. 15
- (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”) by a third person (“C”), is guilty of an offence of living from the earnings of the sexual exploitation of a child. 20
- (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”), irrespective of whether that act is committed or not; or 25
- (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, 30
- is guilty of an offence of promoting child sex tours.

Sexual grooming of children

18. (1) A person (“A”) who—
- (a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article or a publication that promotes or is intended to be used in the commission of a sexual act with or by a child (“B”); 35
- (b) 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) pornography as contemplated in paragraph (a), (b) or (c) of section 19; or 40
- (iii) a publication, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or
- (c) 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, 45
- 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) pornography as contemplated in paragraph (a), (b) or (c) of section 19; or 50
- (iii) a publication, 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— 55
- (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; 60

- (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 pornography as contemplated in paragraph (a), (b) or (c) of section 19;
 - (v) be used for pornographic purposes as contemplated in section 20(1); or 5
 - (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; 10
 - (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 15
 - (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 20
 - (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence as contemplated in section 20(1) 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, 25
- is guilty of the offence of sexual grooming of a child.

Exposure or display of or causing exposure or display of pornography to children

- 19.** A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of— 30
- (a) any image, publication, depiction, description or sequence of child pornography as contemplated in section 20(1)(a) or (b);
 - (b) any publication or film classified in terms of Films and Publications Act, 1996 (Act No. 65 of 1996) as—
 - (i) a ‘*refused classification*’ on the grounds that it contains a visual presentation, description or representation of child pornography or child abuse; 35
 - (ii) ‘XX’ on the grounds that it contains a visual presentation, description or representation of an explicit sexual nature of a child; or
 - (iii) ‘X18’ on the grounds that it contains a visual presentation, description or representation of an explicit sexual nature of a child; 40
 - (c) 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, or in terms of any other legislation; or 45
 - (d) 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, 50
- 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 pornography to a child.

Using children for or benefiting from child pornography

- 20.** (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— 55

- (a) for the purpose of creating, making or producing or by creating, making or producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of—
- (i) B engaged in an act that constitutes a sexual offence; 5
 - (ii) B engaged in an act of sexual penetration;
 - (iii) B engaged in an act of sexual violation;
 - (iv) B engaged in an act of self-masturbation;
 - (v) the genital organs of B in a state of arousal or stimulation;
 - (vi) any form of stimulation of a sexual nature of the breasts of B; 10
 - (vii) B engaged in sexually suggestive or lewd acts;
 - (viii) B engaged in or as the subject of sadistic or masochistic acts of a sexual nature; or
 - (ix) the body, or parts of the body, of B in a manner or in circumstances which, within context, violate or offend the sexual integrity or dignity of B or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of B; or 15
- (b) for the purpose of creating, making or producing or by creating, making or producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of B— 20
- (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, 25
- any act contemplated in paragraph (a)(i) to (ix),
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. 30

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

Compelling or causing children to witness sexual offences, sexual acts or self-masturbation 35

21. (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. 40

(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 45

(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. 50

Exposure or display of or causing exposure or display of genital organs, anus or female breasts to children (“flashing”)

22. 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. 5

CHAPTER 4

SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED 10

Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of pornography or harmful material to persons who are mentally disabled and using persons who are mentally disabled for pornographic purposes or benefiting therefrom 15

Sexual exploitation of persons who are mentally disabled

23. (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 20

(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 sexual exploitation of a person who is mentally disabled.

(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”)— 25

(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; 30

(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, 35

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

(3) A person (“A”) who— 40

(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, 45

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. 50

(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. 55

- (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.

Sexual grooming of persons who are mentally disabled 10

24. (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) pornography as contemplated in paragraph (a), (b) or (c) of section 25; or
 - (iii) a publication, 15
 with the intention to encourage, enable, instruct or persuade C to perform a sexual act with 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, 20
- 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; 25
 - (ii) pornography as contemplated in paragraph (a), (b), or (c) of section 25; or
 - (iii) a publication, 30
 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”); 35
 - (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 pornography as contemplated in paragraph (a), (b) or (c) of section 25; 40
 - (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; 45
 - (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— 50
 - (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; 55
 - (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 as contemplated in section 26(1) of B himself or herself or any other person; or 60

- (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.

Exposure or display of or causing exposure or display of pornography or harmful material to persons who are mentally disabled 5

25. 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 as contemplated in section 26(1)(a) or (b); 10
- (b) any publication or film classified in terms of Films and Publications Act, 1996 (Act No. 65 of 1996) as—
- (i) a ‘*refused classification*’ on the grounds that it contains a visual presentation, description or representation of child pornography or child abuse; 15
- (ii) ‘XX’ on the grounds that it contains a visual presentation, description or representation of an explicit sexual nature of a child; or
- (iii) ‘X18’ on the grounds that it contains a visual presentation, description or representation of an explicit sexual nature of a child: 20
- (c) 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 a person who is mentally disabled; or
- (d) 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 a person who is mentally disabled, as contemplated in the Films and Publications Act, 1996, or in terms of any other law, 25
- to a complainant who is mentally disabled (“B”), is guilty of the offence of exposing or displaying or causing the exposure or display of pornography or harmful material to a person who is mentally disabled. 30

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

26. (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— 35

- (a) for the purpose of creating, making or producing or by creating, making or producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of—
- (i) B engaged in an act that constitutes a sexual offence; 40
- (ii) B engaged in an act of sexual penetration;
- (iii) B engaged in an act of sexual violation;
- (iv) B engaged in an act of self-masturbation;
- (v) the genital organs of B in a state of arousal or stimulation;
- (vi) any form of stimulation of a sexual nature of the breasts of B; 45
- (vii) B engaged in sexually suggestive or lewd acts;
- (viii) B engaged in or as the subject of sadistic or masochistic acts of a sexual nature; or
- (ix) the body, or parts of the body, of B in a manner or in circumstances which, within context, violate or offend the sexual integrity or dignity of B or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of B; 50
- (b) for the purpose of creating, making or producing or by creating, making or producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of B— 55
- (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 paragraph (a)(i) to (ix),
is guilty of the offence of using a person who is mentally disabled for pornographic purposes. 5
- (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. 10

CHAPTER 5

SERVICES FOR VICTIMS OF SEXUAL OFFENCES AND COMPULSORY HIV TESTING OF ALLEGED SEX OFFENDERS

Part 1: Definitions and services for victims of sexual offences

Definitions 15

27. 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; 20
- “**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; 25
- “**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; 30
- “**medical practitioner**” means a person registered as a medical practitioner in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), and who, for purposes of section 33, is authorised to take body specimens as contemplated in this Chapter; 35
- “**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; 40
- “**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. 45

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

28. (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— 50
- (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; 55

- (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 5
- (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 10
 - (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). 15
- (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— 20
 - (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 25
 - (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.

Designation of public health establishments for purposes of providing Post Exposure Prophylaxis and carrying out compulsory HIV testing 30

- 29.** (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, 35
- 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 40 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 Commissioner of Correctional Services and the Director-General of Health. 45
- (4)** The National Commissioner of the South African Police Service, 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.

Part 2: Application for compulsory HIV testing of alleged sex offender by victim 50

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

- 30.** (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. 5
- (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; 10
 - (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. 15
- (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); 20
 - (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 25
 - (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. 30
- (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. 35

Consideration of application by magistrate and issuing of order

- 31.** (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. 40
- (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. 45
- (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; 50
 - (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— 55
- (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 60
 - 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 5
- (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. 10
- (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 15
- (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.

Part 3: Application for compulsory HIV testing of alleged sex offender by police official 20

Application by police official for HIV testing of alleged sex offender

- 32.** (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— 25
- (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. 30
- (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 35
- (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— 40
- (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— 45
- (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). 50
- (4) An order contemplated in subsection (3) must be made in the prescribed manner and handed to the investigating officer. 55

(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.

Part 4: Execution of orders for compulsory HIV testing and results of HIV tests 5

Execution of order and issuing of warrant of arrest

33. (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; 10
- (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; 15
- (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; 20
 - (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 25
- (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 30
 - (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. 35 40

(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). 45

(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. 50

Use of results of H N tests

34. 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— 55
 - (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.

Part 5: Miscellaneous

5

Register of applications and orders

- 35.** (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.

10

Confidentiality of outcome of application

36. 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; 15
- (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 20
- (d) the persons who are required to execute the order as contemplated in section 33.

Confidentiality of HIV test results obtained

37. (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— 25

- (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 30
 - (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. 35

Offences and penalties

38. (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. 40

(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. 45

(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. 50

Regulations

- 39.** (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 5
 - (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
 - (6) 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. 10

CHAPTER 6**NATIONAL REGISTER FOR SEX OFFENDERS**

15

Definitions

- 40.** 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; 20
 - 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; 25
- “**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 30
 - (ii) any 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— 35
 - (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 40
 - (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 45
 - (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 50

- (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”, “employment relationship” have corresponding meanings; 5
- “licensing authority” means any authority which is responsible for granting licenses 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; 10
- “Register” means the National Register for Sex Offenders established under section 42(1); 15
- “Registrar” means the Registrar of the National Register for Sex Offenders contemplated in section 42(2); and
- “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 20
- (b) any 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. 25

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 (Act No. 51 of 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— 30
- (a) be employed to work with a child in any circumstances; 35
- (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; 40
- (c) be granted a license 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
- (d) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child. 45
- (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— 50
- (a) be employed to work with a person who is mentally disabled in any circumstances;
- (h) 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; 55 60

- (c) be granted a license 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
- (d) become the curator of a person who is mentally disabled.

Establishment of National Register for Sex Offenders and designation of Registrar of Register 5

42. (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, within six months after the commencement of this Chapter, and, in accordance with the provisions of this Chapter and the regulations made thereunder, be established and maintained by the Minister. 15

(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. 20

Objects of Register

43. 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 25
 - (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— 30
 - (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; 35
- (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 40
- (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. 45

Persons entitled to apply for certificate

44. 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— 50

- (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); 55

- (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 license or approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of children in respect of his or her own particulars; 5
- (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. 10

Obligations of employers in respect of employees

45. (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 15
 - (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. 20
- (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. 25
- (b) An employer who, during the course of an employment relationship, ascertains that the particulars of an employee contemplated in subsection (1)(a) have 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. 30
- (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 50(1). 35
- (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. 40
- (4) 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, 45

Obligations of employees

46. (1) An employee in the employ of an employer at the commencement of this Chapter, who is 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 during the course of his or her employment, must without delay disclose such conviction to his or her employer. 50 55

(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, disclose such conviction or finding when applying for employment. 5

(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.

Obligations in respect of license applications 10

47. (1) A licensing authority may not grant a license 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. 15

(2) A person who, after the commencement of this Chapter, applies for a license contemplated in subsection (1) to a licensing authority 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. 20

(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.

Obligations in respect of applications for fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship 25

48. (1) 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. 30

(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 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. 35

(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. 40

Contents of Register

49. 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 48:
 - (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; 45
 - (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 license number of the person, where applicable; 50
 - (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; 55
 - (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 5
- (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.

Persons whose names must be included in Register and related matters

- 50.** (1) The particulars of the following persons must be included in the Register: 10
- (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; 15
 - (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 20
 - (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: 25
 - (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. 30
- (2) (a) A court that has in terms of this Act or any other law— 35
- (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 make an order that the particulars of the person be included in the Register. 45
- (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.
- (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— 55
- (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. 60

(4) Where a court, for whatever reason, fails to make an order under subsection (2)(a) 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.

(5)(a) The Commissioner of Correctional Services must, in the prescribed manner and within three months after the commencement of this Chapter, 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 against a child 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 for a sexual offence against a person who is mentally disabled, including an offence contemplated in section 15 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), and the Registrar must forthwith enter those particulars in the Register.

(b) The 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.

(6) The National Commissioner of the South African Police Service must, in the prescribed manner and within three months after the commencement of this Chapter, 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 against a child, including, as far as is possible, a conviction for a sexual offence against a child, and who has a previous conviction for an offence against a person who is mentally disabled, including an offence contemplated in section 15 of the Sexual Offences Act, 1957, and the Registrar must forthwith enter those particulars in the Register.

(7)(a) The Director-General: Health must, in the prescribed manner and within three months after the commencement of this Chapter, forward to the Registrar the particulars referred to in section 49 of every person, who, at the commencement of this Chapter, is 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.

(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.

(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.

Removal of particulars from Register

51. (1) Subject to subsections (2) 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 5
- (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 No. 17 of 2002), from any restrictions imposed on him or her; 10
- (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. 15
- (2) The particulars of a person who has— 20
- (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 25
- (b) two or more convictions of a sexual offence against a child or a person who is mentally disabled, 30
- may not be removed from the Register.
- (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. 35
- (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. 40
- (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. 45

Confidentiality and disclosure of information

- 52.** (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— 50
- (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 purpose 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 willfully 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. 55
- 60.

(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. 5

(4) Except in so far as it may be necessary for the purposes of this Chapter, any person who willfully 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. 10

Regulations pertaining to Register

53. (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— 15

- (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); 20
- (c) the manner in which the 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 Commissioner of Correctional Services must inform each prisoner whose particulars have been forwarded to the Registrar as contemplated in section 50(5)(b); 25
- (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); 30
- (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); 35
- (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; 40
- (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; 45
- (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. 50

(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 paragraph (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. 55

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

CHAPTER 7

GENERAL PROVISIONS

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 5

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

54. (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. 10

(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. 15

(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. 20

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

55. Any person who—

(a) attempts; 25

(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,

Part 2: Defences, inability of children under 12 years and persons who are mentally disabled to consent to sexual acts, other evidentiary matters and extra-territorial jurisdiction 30

Defences

56. (1) Whenever an accused person is charged with an offence under section 3, 4, 5, 6 and 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. 35

(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; or 40

(b) section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence. 45

(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— 50

(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.

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

57. (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.

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Evidence of previous consistent statements

58. 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.

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Evidence of delay in reporting

59. 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.

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

60. 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.

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Extra-territorial jurisdiction

61. (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—

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- (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.

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(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—

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- (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.

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(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—

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- (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. 5

Part 3: National policy framework

National policy framework

62. (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— 10

- (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 15
- (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) within one year after the implementation of this Act, adopt and table the policy framework in Parliament; 20
- (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 25
- (d) amend the policy framework when required, in which case such amendments must be tabled in Parliament and published in the *Gazette*, as contemplated in paragraph (b).

Establishment of Inter-sectoral Committee

63. (1) There is hereby established a Committee to be known as the Inter-sectoral Committee for the Management of Sexual Offence Matters. 30

(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; 35
- (c) the 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. 40

(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. 45

Meetings of Committee

64. (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. 50

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

Responsibilities, functions and duties of Committee

- 65.** (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; 5
 - (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 10
 - (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. 15
- (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 20
 - (b) every year thereafter submit such reports to Parliament.

Part 4: National instructions and directives, regulations and repeal and amendment of laws

National instructions and directives 25

- 66.** (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: 30
- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials; 35
 - (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; 40
 - (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; 45
 - (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. 50
- (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 55
 - (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; 5
- (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: 10 15

- (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; 20 25
- (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; 30
- (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; 35
- (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; 40
- (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; 45
- (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; and
- (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. 50

(b) The National Director of Public Prosecutions must develop training courses, which must— 55

- (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. 60

(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. 5

(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— 10 15

- (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; 20
- (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. 25

(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. 30

(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 35
- (ii) published in the *Gazette*.

(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. 40

(b) The cabinet members responsible for safety and security, the administration of justice and health must, within a year after the commencement of this Act and every 12 months thereafter, table a report in Parliament relating to the implementation of the training courses. 45

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

Regulations

67. The Minister, after consultation with the cabinet member responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, may make regulations regarding— 50

- (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. 55

Repeal and amendment of laws

68. (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. 5

(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 10

Transitional provisions

69. (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. 15

(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. 20

Part 6: Transitional provisions relating to trafficking in persons for sexual purposes 25

Application and interpretation

70. (1) Pending the adoption of legislation in compliance with the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Trans-National Organized Crime* (signed on 14 December 2000) and the repeal of this Part, the transitional provisions in this Part relating to the trafficking in persons for sexual purposes are provisionally provided for in partial compliance of our international obligations and to deal with this rapidly growing phenomena globally. 30

(2) For purposes of this Part—

- (a) **“commercial carrier”** includes a company, or the owner, operator or master of any means of transport, that engages in the transportation of goods or people for commercial gain; and 35
- (b) **“trafficking”** includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of— 40
 - (a) a threat of harm;
 - (b) the threat or use of force, intimidation or other forms of coercion;
 - (c) abduction;
 - (d) fraud;
 - (e) deception or false pretences; 45
 - (f) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
 - (g) the giving or receiving of payments or benefits, for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and **“trafficks”** and **“trafficked”** have a corresponding meaning. 50 55

Trafficking in persons for sexual purposes

71. (1) A person (“A”) who trafficks any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.

(2) A person who—

- (a) orders, commands, organises, supervises, controls or directs trafficking; 5
- (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or
- (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking. 10

is guilty of an offence of involvement in trafficking in persons for sexual purposes.

(3) For the purpose of subsection (1), “consent” means voluntary or uncoerced agreement.

(4) Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following—

- (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (a) to (g) of the definition of trafficking having been used or being present; or 20
- (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such 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; 25
 - (v) a child under the age of 12 years; or
 - (vi) a person who is mentally disabled.

(5) A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked. 30

(6) (a) A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic. 35

(b) A commercial carrier is not guilty of an offence under paragraph (a) if—

- (i) the carrier had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry into or departure from the Republic by that person; 40
- (ii) the person possessed the travel documents required for lawful entry into or departure from the Republic when that person boarded, or last boarded, the means of transport to travel to or from the Republic; or
- (iii) entry into the Republic occurred only because of illness of or injury to a child or adult on board, stress of weather or other circumstances beyond the control of the commercial carrier. 45

(c) A commercial carrier is, in addition to any offence under this section, liable to pay the costs of the trafficked person’s care and safekeeping and return from, the Republic.

(d) A court must, when convicting a commercial carrier of an offence under this section, in addition order the commercial carrier concerned to pay the costs contemplated in paragraph (c). 50

Short title and commencement

72. This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and takes effect on 21 March 2007 or an earlier date fixed by the President by proclamation in the *Gazette*. 55

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>1. The amendment of section 89 by the substitution for subsection (1) of the following subsection:</p> <p>“(1) The court, other than the court of a regional division, shall have jurisdiction over all offences, except treason, murder, [and] rape and compelled rape as contemplated in sections 3 and 4 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>, respectively.”.</p> <p>2. The substitution for Schedule 2 of the following Schedule:</p> <p style="text-align: center;">“Schedule 2</p> <p>Offences in respect of which judicial officers must be assisted by two assessors in terms of section 93ter (2):</p> <ol style="list-style-type: none"> 1. Murder. 2. Rape or compelled rape as contemplated in section 3 or 4 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>, respectively. 3. Robbery, where serious bodily harm has been inflicted on the victim. 4. Assault, where serious bodily harm has been inflicted on the victim. [5. Indecent assault.]”.
23 of 1957	Sexual Offences Act	<p>1. The amendment of section 1 by the insertion after the definition of “owner” of the following definition:</p> <ul style="list-style-type: none"> • “person” means a person of 18 years and older;”. <p>2. The substitution for section 22 of the following section:</p> <p>“Penalties</p> <p>22. Any person who is convicted of an offence under the provisions of this Act for which no special penalty is prescribed, shall be liable—</p> <p>(a) in the case of an offence referred to in section 2 or 20(1)(a) or (aA), to imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment;</p> <p>[(b) in the case of an offence referred to in section 9(1), to imprisonment for a period not exceeding five Years, or, if the child concerned is a boy under the age of 14 years or a girl under the age of 12 years, for life;]</p> <p>(c) ...</p>

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		<p>(d) in the case of an offence referred to in section [11,] 12A [or 18], with a fine, or imprisonment for a period not exceeding five years;</p> <p>(e) in the case of an offence referred to in section 10 or 12(1) [or 13(1)], to imprisonment for a period not exceeding seven years;</p> <p>(f) in the case of an offence referred to in section [14(1), 14(3), 15 or] 17, to imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment;</p> <p>(g) in the case of an offence referred to in section [18A,] 19 or 20(1)(b) or (c), [or 20A (1),] to a fine not exceeding R4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”.</p> <p>3. The repeal of sections 9, 11, 13, 14, 15, 18A and 20A.</p>
t 8 of 1959	Correctional Services Act	<p>1. The substitution for Schedule 2 of the following Schedule:</p> <p style="text-align: center;">“Schedule 2 (Section 29 (5))</p> <p>Murder Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively Robbery where the wielding of a firearm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is in- involved Assault with intent to commit grievous bodily harm, or when a dangerous wound is inflicted [Assault of a sexual nature] Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively Kidnapping Any offence under any law relating to the illicit conveyance or supply of dependence producing drugs Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.”.</p>

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Act 68 of 1969	Prescription Act	<p>1. The amendment of section 12—</p> <p>(a) by the substitution for subsection (1) of the following subsection: “(1) Subject to the provisions of subsections (2), [and] (3), <u>and (4)</u>, prescription shall commence to run as soon as the debt is due.”; and</p> <p>(b) by the addition after subsection (3) of the following subsection: “(4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18(2), 20(1), 23, 24(2), 26(1) and 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.”.</p>
Act 51 of 1977	Criminal Procedure Act	<p>1. The substitution for section 18 of the following section: “Prescription of right to institute prosecution 18. The right to institute a prosecution for any offence, other than the offences of—</p> <p>(a) murder;</p> <p>(b) treason committed when the Republic is in a state of war;</p> <p>(c) robbery, if aggravating circumstances were present;</p> <p>(d) kidnapping;</p> <p>(e) child-stealing; [or]</p> <p>(f) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</p> <p>(g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002,</p> <p>(h) <u>trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</u></p>

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		<p>(i) <u>using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,</u> shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.”</p> <p>2. The amendment of section 77 by the substitution for subsection (6) of the following subsection:</p> <p>“(6)(a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused’s incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused —</p> <p>(i) in the case of a charge of murder or culpable homicide or rape <u>or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively,</u> or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; or</p> <p>(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence —</p> <p>(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,</p>

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		<p>and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.</p> <p>(b) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he has pleaded not guilty.”</p> <p>3. The amendment of section 78 by the substitution for subsection (6) of the following subsection:</p> <p>“(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—</p> <p>(a) the court shall find the accused not guilty; or</p> <p>(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or intellectual disability, as the case may be, and direct—</p> <p>(i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—</p> <p>(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;</p> <p>(bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health user contemplated in section 37 of the Mental Health Care Act, 2002;</p> <p>(cc) . . .</p> <p>(dd) released subject to such conditions as the court considers appropriate; or</p> <p>(ee) released unconditionally;</p>

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		<p>(ii) in any other case than a case contemplated in subparagraph (i), that the accused—</p> <p>(aa) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 2002;</p> <p>(bb) . . .</p> <p>(cc) be released subject to such conditions as the court considers appropriate; or</p> <p>(dd) be released unconditionally.”</p> <p>4. The amendment of section 79 by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on—</p> <p>(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court: or</p> <p>(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively</u>, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—</p> <p>(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;</p> <p>(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State;</p> <p>(iii) by a psychiatrist appointed for the accused by the court; and (iv) by a clinical psychologist where the court so directs.”</p>

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		<p>5. The amendment of section 153 by the substitution for subsection (3) of the following Subsection:</p> <p>“(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit—</p> <p>(a) any [indecent act] sexual offence as contemplated in section 1 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>, towards or in connection with any other person;</p> <p>(b) any act for the purpose of [procuring or] furthering the commission of [an indecent act] a sexual offence as contemplated in section 1 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>, towards or in connection with any other person; or</p> <p>(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.”.</p> <p>6. The amendment of section 154—</p> <p>‘a) by the substitution for subsection (5) of the following subsection:</p> <p>“(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding [one year] <u>three years</u> or to both such fine and such imprisonment if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.”; and</p>

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		<p>b) by the addition of the following subsection: <u>“(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if—</u> <u>(a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any sexual act as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of a sexual act, as contemplated in that Act, towards or in connection with any other person; and</u> <u>(b) the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support.”</u></p> <p>7. The amendment of section 158 by the addition after subsection (4) of the following subsection: <u>“(5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant under the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.”</u></p> <p>8. The amendment of section 164 by the substitution for subsection (1) of the following subsection: <u>“(1) Any person, who [from ignorance arising from youth, defective education or other cause,] is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth[, the whole truth and nothing but the truth].”</u></p>

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		<p>9. The amendment of section 170A by—</p> <p>(a) the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 2em;">“(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the <u>biological or mental</u> age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.”;</p> <p>(b) the addition after subsection (6) of the following subsection:</p> <p style="padding-left: 2em;">“(7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants under the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.”;</p> <p>(c) the addition after subsection (7) of the following subsections:</p> <p style="padding-left: 2em;">“(8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.</p> <p style="padding-left: 2em;">(9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court—</p> <p style="padding-left: 4em;">(a) is for any reason absent;</p> <p style="padding-left: 4em;">(b) becomes unable to act as an intermediary in the opinion of the court;</p> <p style="padding-left: 4em;">or</p> <p style="padding-left: 4em;">(c) dies,</p> <p style="padding-left: 2em;">the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor—</p> <p style="padding-left: 4em;">(i) postpone the proceedings in order to obtain the intermediary’s presence;</p> <p style="padding-left: 4em;">(ii) summons the intermediary to appear before the court to advance reasons for being absent;</p> <p style="padding-left: 4em;">(iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or</p> <p style="padding-left: 4em;">(iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.</p> <p style="padding-left: 2em;">(10) The court shall immediately give reasons for any direction referred to in subsection (9)(iv), which reasons shall be entered into the record of the proceedings.”.</p>

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		<p>10. The amendment of section 195 by the substitution for subsection (1) of the following subsection:</p> <p>"(1)The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with—</p> <p>(a) any offence committed against the person of either of them or of a child of either of them or of a child that is in the care of either of them;</p> <p>(b) any offence under Chapter 8 of the Child Care Act, 1983 (Act No. 74 of 1983), committed in respect of any child of either of them;</p> <p>(c) any contravention of any provision of section 31(1) of the Maintenance Act, 1998, or of such provision as applied by any other law;</p> <p>(d) bigamy;</p> <p>(e) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</p> <p>(f) abduction;</p> <p>(g) any contravention of any provision of section 2, 8, [9,] 10, [11,] 12, 12A, [13,] 17 or 20 of the Sexual Offences Act, 1957 (Act No. 23 of 1957);</p> <p>(gA) <u>any contravention of any provision of section 17 or 23 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</u></p> <p>(h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;</p> <p>(i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h).</p>

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		<p>11. The substitution for section 227 of the Following section:</p> <p>“Evidence of character and previous sexual experience</p> <p>227. (1) Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.</p> <p>(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless—</p> <p>(a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question, or</p> <p>(b) such evidence has been introduced by the prosecution.</p> <p>(3) Before an application for leave contemplated in subsection (2)(a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.</p> <p>(4) The court shall, subject to subsection (6), grant the application referred to in subsection (2)(a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.</p> <p>(5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning—</p> <p>(a) is in the interests of justice, with due regard to the accused’s right to a fair trial;</p> <p>(b) is in the interests of society in encouraging the reporting of sexual offences;</p>

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	<p>(c) relates to a specific instance of sexual activity relevant to a fact in issue;</p> <p>(d) is likely to rebut evidence previously adduced by the prosecution;</p> <p>(e) is fundamental to the accused's defence;</p> <p>(f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or</p> <p>(g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;</p> <p>(6) The court shall not grant an application referred to in subsection (2)(a) if, in its opinion, such evidence or question- ing is sought to be adduced to support an inference that by reason of the nature of the complainant's experience or conduct, the complainant—</p> <p>(a) is more likely to have consented to the offence being tried; or</p> <p>(b) is less worthy of belief.</p> <p>(7) The court shall provide reasons for granting or refusing an application in terms of subsection (2)(a), which reasons shall be entered in the record of the proceedings.”</p> <p>2. The amendment of section 238 by—</p> <p>a) the substitution for subsection (1) of the following subsection:</p> <p>“(1) At criminal proceedings at which an accused is charged with incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—</p> <p>(a) it shall be sufficient to prove that the [woman or girl on] person against whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, brother, stepmother, stepfather, [or] stepdaughter or stepson of the other party to the incest;</p> <p>(b) the accused shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him and the other party to the incest” ;</p> <p>and</p> <p>b) the substitution for subsection (2) of the following subsection:</p>

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		<p>“(2) Whenever the fact that any lawful and binding marriage was contracted is relevant to the issue at criminal proceedings at which an accused is charged with incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, such fact may be proved <i>prima facie</i> in the manner provided in section 237 for the proof of the existence of a lawful and binding marriage of a person charged with bigamy.”.</p> <p>.3. The substitution for section 261 of the following section:</p> <p>“Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault</p> <p>261. (1) If the evidence on a charge of rape or compelled rape, as Contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—</p> <p>(a) assault with intent to do grievous bodily harm;</p> <p>(b) common assault;</p> <p>(c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</p> <p>(d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</p> <p>(e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</p> <p>(f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</p> <p>(g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</p> <p>(h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,</p> <p>the accused may be found guilty of the offence so proved.</p>

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		<p>(2) If the evidence on a charge of <u>sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,</u> respectively, does not prove any such offence but the offence of—</p> <p>(a) common assault; or</p> <p>(b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,</u></p> <p>the accused may be found guilty of the offence so proved.”.</p> <p>14. The amendment of section 266 by the substitution for paragraph (b) of the following paragraph:</p> <p>“(b) [indecent assault] <u>sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or</u>”.</p> <p>15. The amendment of section 267 by the substitution for that section of the following section:</p> <p>“Common assault</p> <p>267. If the evidence on a charge of common assault proves the offence of [indecent assault] <u>sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,</u> respectively, the accused may be found guilty of [indecent assault] <u>any such offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.</u>”.</p> <p>6. The amendment of section 268 by the substitution for that section of the following section:</p> <p>“Statutory unlawful carnal intercourse</p> <p>268. If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—</p> <p>(a) the offence of [indecent assault] <u>sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</u></p> <p>(b) the offence of common assault; or</p> <p>(c) the statutory offence of—</p>

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		<p>(i) committing an immoral or indecent act with such other person;</p> <p>(ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;</p> <p>(iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or</p> <p>(iv) conspiring with such other person to have unlawful carnal intercourse,</p> <p>the accused may be found guilty of the offence so proved.”</p> <p>17. The repeal of section 269.</p> <p>18. The amendment of section 276A—</p> <p>(a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:</p> <p>“(b) for a fixed period not exceeding three years, or in the case of a conviction for any offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, for a fixed period not exceeding five years.”;</p> <p>and</p> <p>(b) by the insertion after subsection (2) of the following subsection:</p> <p>“(2A) Punishment imposed under paragraph (h) or (i) of section 276(1) on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific treatment programme as prescribed in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the cost of which shall be borne by the convicted person himself or herself.”</p> <p>19. The amendment of section 299A by the substitution for subsection (1) of the following subsection:</p> <p>“(1) When a court sentences a person to imprisonment for—</p> <p>(a) murder or any other offence which involves the intentional killing of a person;</p> <p>(b) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</p> <p>(c) robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;</p>

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		<p>(d) <u>[assault of a sexual nature] sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</u></p> <p>(e) kidnapping; or</p> <p>(f) any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs (a) to (e), it shall inform—</p> <p>(i) the complainant; or</p> <p>(ii) in the case of murder or any other offence contemplated in paragraph (a), any immediate relative of the deceased,</p> <p>if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.”</p> <p>20. The amendment of section 335A—</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding [one year] three years or to both such fine and such imprisonment <u>if the person whose identity has been revealed is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.</u>”; and</p> <p>(b) by the addition after subsection (2) of the following subsection:</p> <p>“(3) <u>The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (2) and if the person whose identity has been revealed suffered any physical, psychological or other injury or loss of income or support.</u>”.</p> <p>21. The amendment of section 335B by the substitution for subsection (1) of the following subsection:</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(i) If a police official charged with the investigation of a case is of the opinion that it is necessary that a minor or a person who is mentally disabled in respect of whom it is alleged that [an offence of an indecent or violent nature] a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or an offence of a violent nature has been committed be examined by a district surgeon or, if he is not available, by a registered medical practitioner, but that the parent or guardian or curator or custodian of such minor or mentally disabled person—</p> <p>(a) cannot be traced within a reasonable time;</p> <p>(b) cannot grant consent in time;</p> <p>(c) is a suspect in respect of the offence in consequence of which the examination must be conducted;</p> <p>(d) unreasonably refuses to consent that the examination be conducted;</p> <p>(e) is incompetent on account of mental disorder to consent that the examination be conducted; or</p> <p>(f) is deceased,</p> <p>a magistrate may, on the written application of that police official and if he is satisfied that the medical examination is necessary, grant the necessary consent that such examination be conducted.”.</p> <p>2. The substitution for Schedule 1 of the following Schedule:</p> <p style="text-align: center;">“Schedule 1 (Sections 40 and 42)</p> <p>Treason. Sedition. Public violence. Murder. Culpable homicide. Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. [Indecent assault] Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. [Sodomy.] Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>Bestiality as contemplated in section 13 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>.</p> <p>Robbery.</p> <p>Kidnapping.</p> <p>Childstealing.</p> <p>Assault, when a dangerous wound is inflicted.</p> <p>Arson.</p> <p>Malicious injury to property.</p> <p>Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.</p> <p>Theft, whether under the common law or a statutory provision.</p> <p>Receiving stolen property knowing it to have been stolen.</p> <p>Fraud.</p> <p>Forgery or uttering a forged document knowing it to have been forged.</p> <p>Offences relating to the coinage.</p> <p>Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.</p> <p>Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.</p> <p>Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.”.</p> <p>13. The substitution for Part II of Schedule 2 of the following Part:</p> <p style="text-align: center;">“PART II (Sections 59, 72)</p> <p>Treason.</p> <p>Sedition.</p> <p>Murder.</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>, respectively.</p> <p>Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>, respectively.</p> <p>Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007</u>.</p> <p>Robbery.</p> <p>Assault, when a dangerous wound is inflicted.</p> <p>Arson.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.</p> <p>Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500.</p> <p>Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones.</p> <p>Any offence under any law relating to the illicit-</p> <p>(a) possession of—</p> <p>(i) dagga exceeding 115 grams; or</p> <p>(ii) any other dependence-producing drugs; or</p> <p>(b) conveyance or supply of dependence-producing drugs.</p> <p>Any offence relating to the coinage.</p> <p>Any conspiracy, incitement or attempt to commit any offence referred to in this Part.</p> <p>14. The substitution for Schedule 5 of the following Schedule:</p> <p style="text-align: center;">“Schedule 5 (Sections 58 and 60 (11) and (11A) and Schedule 6)</p> <p>Treason.</p> <p>Murder.</p> <p>Attempted murder involving the infliction of grievous bodily harm.</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.</p> <p><u>Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</u></p> <p>Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that—</p> <p>(a) the value of the dependence-producing substance in question is more than R50 000,00; or</p> <p>(b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or</p> <p>(c) the offence was committed by any law enforcement officer.</p> <p>Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act.</p> <p>Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—</p> <p>(a) involving amounts of more than R500 000,00; or</p> <p>(b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or</p> <p>(c) if it is alleged that the offence was committed by any law enforcement officer—</p> <p>(i) involving amounts of more than R10 000,00; or</p> <p>(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.</p> <p>[Indecent assault] <u>Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively on a child under the age of 16 years.</u></p> <p>An offence referred to in Schedule 1—</p> <p>(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or</p> <p>(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.</p> <p>The offences referred to in section 4 (2) or (3), 13 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.”</p> <p>15 The substitution for Schedule 6 of the following Schedule:</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p style="text-align: center;">“Schedule 6 (Sections 50 (6), 58 and 60 (11) and (11A))</p> <p>Murder, when—</p> <p>(a) it was planned or premeditated;</p> <p>(b) the victim was—</p> <p style="padding-left: 20px;">(i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or</p> <p style="padding-left: 20px;">(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;</p> <p>(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:</p> <p style="padding-left: 20px;">(i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or</p> <p style="padding-left: 20px;">(ii) robbery with aggravating circumstances; or</p> <p>(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.</p> <p><u>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—</u></p> <p>(a) when committed—</p> <p style="padding-left: 20px;">(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;</p> <p style="padding-left: 20px;">(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;</p> <p style="padding-left: 20px;">(iii) by a person who is charged with having committed two or more offences of rape; or</p> <p style="padding-left: 20px;">(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;</p> <p>(b) where the victim—</p> <p style="padding-left: 20px;">(i) is a [girl] person under the age of 16 years;</p> <p style="padding-left: 20px;">(ii) is a physically disabled [woman] person who, due to his or her physical disability, is rendered particularly vulnerable; or</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(iii) is a [mentally ill woman] person who is mentally disabled as contemplated in section 1 of the [Mental Health Act, 1973 (Act 18 of 1973)] <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</u></p> <p>(c) involving the infliction of grievous bodily harm.</p> <p><u>Trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</u></p> <p>Robbery, involving—</p> <p>(a) the use by the accused or any co-perpetrators or participants of a firearm;</p> <p>(b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or</p> <p>(c) the taking of a motor vehicle.</p> <p>[Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.]</p> <p>An offence referred to in Schedule 5—</p> <p>(a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or</p> <p>(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.</p> <p>The offences referred to in section 2, 3(2)(a), 4 (1), 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, section 2 (1) and (2) of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972), section 26(1)(j) of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993) and section 56(1)(h) of the Nuclear Energy Act, 1999 (Act No. 46 of 1999).”.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>16. The substitution for Schedule 7 of the following Schedule:</p> <p style="text-align: center;">“Schedule 7 (Section 59A)</p> <p>Public violence. Culpable homicide. Bestiality <u>as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</u> Assault, involving the infliction of grievous bodily harm. Arson. Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence. Malicious injury to property. Robbery, other than a robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000,00. Theft and any offence referred to in section 264(1)(a), (b) and (c), if the amount involved in the offence does not exceed R20 000,00. Any offence in terms of any law relating to the illicit possession of dependence-producing drugs. Any offence relating to extortion, fraud, forgery or uttering if the amount of value involved in the offence does not exceed R20 000,00. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.”.</p>
Act 74 of 1983	Child Care Act	<p>1. The amendment of section 1 by the substitution for the definition of “commercial sexual exploitation” of the following definition:</p> <p>“ ‘commercial sexual exploitation’ means [the procurement of a child] <u>engaging the services of a child to perform a sexual act or to produce child pornography as contemplated in section 17 or 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively,</u> for a financial or other reward payable to the child, the parents or guardian of the child[, the procurer] or any other person;”.</p>
Act 133 of 1993	Prevention of Family Violence Act	1. The repeal of section 5.

No. and year of law	short title	Extent of repeal or amendment
Act 92 of 1996	Choice on Termination of Pregnancy Act	<p>l. The amendment of section 1 by the substitution for the definitions of “incest” and “rape” of the following definitions:</p> <p>-- ‘incest’ means sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them <u>as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</u></p> <p>‘rape’ [also includes statutory rape as referred to in sections 14 and 15 of the Sexual Offences Act, 1957 (Act 23 of 1957)] refers to the offences contemplated in sections 3, 4 and 15 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;</u>”.</p>
Act 105 of 1997	Criminal Law Amendment Act	<p>l. The amendment of Schedule 2 by—</p> <p>‘a) the substitution for Part I of the following part:</p> <p style="text-align: center;">‘PART I</p> <p>Murder, when—</p> <p>(a) it was planned or premeditated;</p> <p>(b) the victim was—</p> <p>(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or</p> <p>(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), at criminal proceedings in any court;</p> <p>(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:</p> <p>(i) <u>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</u> or</p> <p>(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): or</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—</p> <p>(a) when committed—</p> <ul style="list-style-type: none"> (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; <p>(b) where the victim—</p> <ul style="list-style-type: none"> (i) is a [girl] person under the age of 16 years; (ii) is a physically disabled [woman] person who, due to his or her physical disability, is rendered particularly vulnerable; or (iii) is a [mentally ill woman] person who is mentally disabled as contemplated in section 1 of the [Mental Health Act, 1973 (Act 18 of 1973)] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or <p>(c) involving the infliction of grievous bodily harm.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>Any offence referred to in section 2, 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, when it is proved that the offence has—</p> <p>(a) endangered the life or caused serious bodily injury to or the death of, any person, or any number or group of persons;</p> <p>(b) caused serious risk to the health or safety of the public or any segment of the public; or</p> <p>(c) created a serious public emergency situation or a general insurrection.</p> <p><u>Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</u>”; and</p> <p><i>b)</i> the substitution for Part III of the following Part:</p> <p style="text-align: center;">“PART III</p> <p>Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.</p> <p>[Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm.]</p> <p><u>Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</u></p> <p>Assault with intent to do grievous bodily harm on a child under the age of 16 years.</p> <p>Any offence in contravention of section 36 of the Arms and Ammunitions Act, 1969 (Act No. 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act.</p> <p><u>Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007”.</u></p>

No. and year of law	Short title	Extent of repeal or amendment
Act 112 of 1998	Witness Protection Act	<p>The substitution for the Schedule of the following Schedule:</p> <p style="text-align: center;">“Schedule OFFENCES IN RESPECT OF WHICH A WITNESS OR RELATED PERSON MAY BE PLACED UNDER PROTECTION</p> <ol style="list-style-type: none"> 1. Treason. 2. Sedition. 3. Murder. 4. Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. 5. Public violence. 6. Robbery— <ol style="list-style-type: none"> (a) when there are aggravating circumstances; or (b) involving the taking of a motor vehicle. 7. Kidnapping. 8. Defeating the ends of justice. 9. Perjury. [10. Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.] <u>10. Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</u> <u>10A. Trafficking in persons for sexual purposes by a person or commercial carrier as contemplated in section 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</u> 11. Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that— <ol style="list-style-type: none"> (a) the value of the dependence-producing substance in question is more than R10 000,00; or (b) the value of the dependence-producing substance in question is more than R5 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) the offence was committed by any law enforcement officer. 12. Any offence referred to in section 1 or 1A of the Intimidation Act, 1982 (Act No. 72 of 1982). 13. Any offence relating to— <ol style="list-style-type: none"> (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or (b) the possession of an automatic or semi-automatic firearm, explosives or armament.

Yo and year of law	Short title	Extent of repeal or amendment
		<p>14. Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004.</p> <p>(a) involving amounts of more than R50 000,00; or</p> <p>(b) involving amounts of more than R10 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or</p> <p>(c) if it is alleged that the offence was committed by any law enforcement officer—</p> <p>(i) involving amounts of more than R10 000,00; or</p> <p>(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.</p> <p>15. Any offence referred to in the Prevention of Organised Crime Act, 1998.</p> <p>16. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.</p> <p>17. Any other offence which the Minister has determined by regulation.</p> <p>18. Any other offence in respect of which it is alleged that the offence was committed by—</p> <p>(a) a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or</p> <p>(b) a law enforcement officer, and in respect of which the Director is of the opinion that the safety of a witness who is or may be required to give evidence, or who has given evidence in respect of such an offence in any proceedings or any related person, warrants protection.</p> <p>19. Any other offence in respect of which the Director, after having considered the factors mentioned in section 10(1) and any information gained in terms of section 10(2), is of the opinion that the safety of a witness who is or may be required to give evidence, or who has given evidence in respect of such an offence in any proceedings or any related person, warrants protection.”.</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 121 of 1998	Prevention of Organised Crime Act	<p>1. The substitution for Schedule 1 of the following Schedule —</p> <p style="text-align: center;">“Schedule 1</p> <p>(Sections 1, 38, 50, 51, 52, 54, 58 and 73)</p> <ol style="list-style-type: none"> 1. murder; 2. rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; 3. kidnapping; 4. arson; 5. public violence; 6. robbery; 7. assault with intent to do grievous bodily harm; 8. [indecent assault] sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; 9. [the statutory offence of— <ol style="list-style-type: none"> (a) unlawful carnal intercourse with a girl under a specified age; (b) committing an immoral or indecent act with a girl or a boy under a specified age; (c) soliciting or enticing such girl or boy to the commission of an immoral or indecent act] any offence contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; 10. any offence under any legislation dealing with gambling, gaming or lotteries; 11. contravention of section 20 (1) of the Sexual Offences Act, 1957 (Act No. 23 of 1957); 12. any offence contemplated in Part 1 to 4, or section 17, 18, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; 13. extortion; 14. childstealing; 15. breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence; 16. malicious injury to property; 17. theft, whether under the common law or a statutory provision; 18. any offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act No. 62 of 1955); 19. fraud; 20. forgery or uttering a forged document knowing it to have been forged;

No. and year of law	Short title	Extent of repeal or amendment
		<p>21. offences relating to the coinage;</p> <p>22. any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);</p> <p>23. any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament;</p> <p>24. any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969);</p> <p>25. dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance;</p> <p>26. any offence relating to exchange control;</p> <p>27. any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones;</p> <p>28. any offence contemplated in sections 1 (1) and 1A (1) of the Intimidation Act, 1982 (Act No. 72 of 1982);</p> <p>29. defeating or obstructing the course of justice;</p> <p>30. perjury;</p> <p>31. subornation of perjury;</p> <p>32. any offence referred to in Chapter 3 or 4 of this Act;</p> <p>32A. any specified offence as defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004;</p> <p>33. any offence the punishment whereof may be a period of imprisonment exceeding one year without the option of a fine;</p> <p>34. any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.”.</p>
Act 16 of 1999	Military Discipline Supplementary Measures Act	<p>1. The amendment of section 3 by the substitution for subsection (3) of the following subsection:</p> <p>“(3) When a person who is subject to the Code is suspected of having committed murder, treason, rape or compelled rape as contemplated in section 3 or 4 of the <u>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively</u>, or culpable homicide in the Republic, the matter will be dealt with in accordance with section 27 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and any ensuing trial shall take place in a civilian court.”.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>2. The amendment of section 7 by the substitution for paragraph (a) of subsection (1) of the following paragraph:</p> <p>“(a) in matters where treason, murder, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or culpable homicide committed outside the Republic, or where contraventions of section 4 or 5 of the Code are involved, composed of five members, being-”.</p> <p>3. The amendment of section 9 by the substitution for subsections (2) and (3) of the following subsections:</p> <p>“(2) A Court of a Senior Military Judge may, subject to subsection (3), try any person subject to the Code for any offence, other than murder, treason, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or culpable homicide committed within the Republic, and may on conviction sentence the offender to any punishment referred to in section 12.</p> <p>(3) In any case where the charge or one of the charges brought or to be brought against an accused is murder, treason, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or culpable homicide committed beyond the borders of the Republic, or is a contravention of section 4 or 5 of the Code, the powers conferred by this section shall be exercised by three senior military judges sitting together under the presidency of the senior of those judges.”.</p> <p>4. The amendment of section 30 by the substitution for subsection (8) of the following subsection:</p> <p>“(8) When a preliminary investigation is held in respect of treason, murder, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or culpable homicide, committed outside the Republic, or a contravention of section 4 or 5 of the Code or any offence punishable by imprisonment exceeding a period of 10 years, the prosecution counsel shall, subject to subsection (10), lead the evidence of every witness called by him or her and any witness may thereafter be re-examined by the prosecution counsel in relation to any evidence given by that witness under cross-examination and may at any stage of the proceedings be recalled by the presiding judge, commanding officer or recording officer for the purpose of being further examined or cross-examined, as the case may be.”.</p>

No. and year of law	short title	Extent of repeal or amendment
Act 56 of 2001	Private Security Industry Regulation Act	<p>1. The substitution for the Schedule of the following Schedule:</p> <p style="text-align: center;">“Schedule TABLE OF OFFENCES</p> <p>High treason. Sedition. Sabotage. Terrorism. Public violence. Arson. Malicious damage to property. Intimidation. Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. Murder. Robbery. Culpable homicide involving the use of a firearm or any form of intentional violence. Kidnapping. Assault with the intention to cause serious bodily harm. [Indecent assault] Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. Child stealing. Fraud. Forgery or uttering of a forged document knowing it to have been forged. Breaking or entering any premises, whether in terms of common or statutory law, with the intention to commit an offence. Theft, whether in terms of common law or statutory law. Receiving stolen property knowing it to have been stolen. Extortion. Defeating the ends of justice. Perjury, whether in terms of common law or statutory law. An offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004. An offence involving the illicit dealing in dependence-producing substances. Any offence in terms of statutory law involving an element of dishonesty. Any offence in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998). Any offence in terms of the Explosives Act 1956 (Act No. 26 of 1956).</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>Any offence in terms of the Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998).</p> <p>Any offence in terms of legislation pertaining to the control over the possession and use of firearms and ammunition.</p> <p>Any offence in terms of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992).</p> <p>Any offence in terms of the Intelligence Services Act, 1994 (Act No. 38 of 1994).</p> <p>Any offence in terms of the Protection of Information Act, 1982 (Act No. 84 of 1982).</p> <p>Crimen injuria.</p> <p>Any offence in terms of statutory law involving cruelty to an animal.</p> <p>Any offence in terms of any law relating to illicit dealing in or possession of precious medals or precious stones.</p> <p>Any offence in terms of statutory law punishable by a period of imprisonment exceeding two years without the option of a fine.</p> <p>Any conspiracy, incitement or attempt to commit any of the above offences.”.</p>
Act 13 of 2002	Immigration Act	<p>1. The substitution for Schedule 1 of the following Schedule:</p> <p style="text-align: center;">“Schedule 1 OFFENCES REFERRED TO IN SECTION 28(a) AND (b) OF THIS ACT</p> <p>Treason against the Republic Murder Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively [other than statutory rape] [Indecent assault] Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively Trafficking in persons for sexual purposes by a person as contemplated in section 71(1), (2) or (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 Robbery Kidnapping Assault when a dangerous wound is inflicted Arson Any conspiracy, incitement or attempt to commit an offence referred to in this Schedule”.</p>

No. and year of law	Short title	Extent of repeal or amendment
4ct 15 of 2003	Explosives Act	<p>1. The amendment of section 30 by the substitution for paragraph <i>(n)</i> of subsection (1) of the following paragraph:</p> <p>“<i>(n)</i> any offence involving sabotage, terrorism, public violence, arson, intimidation, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, kidnapping or child stealing; or”.</p>

**MEMORANDUM ON THE
OBJECTS OF THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS)
AMENDMENT BILL, 2003**

1. PURPOSE OF BILL

The Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2003 (the Bill), emanating from the South African Law Reform Commission's report on sexual offences and introduced into Parliament as the Criminal Law (Sexual Offences) Amendment Bill [B50 of 2003], aims to review and amend all aspects of the law relating to sexual offences, and to deal with all legal aspects of or relating to, sexual offences in a single statute.

2. OBJECTS OF BILL

2. The Bill is divided into seven Chapters and each chapter is further subdivided into Parts.

2.1 Chapter 1 contains definitions and sets out the objects of the proposed legislation (Clauses 1 and 2).

2.1.1 Clause 1(2) and (3), forming part of the definition provisions, states what "consent", an element in many of the offences created in the Bill, means and the circumstances in which "consent" is lacking.

2.1.2 Clause 2 sets out the objects of the Bill, which, in broad terms, can be summarised as follows:

- (i) To afford complainants of sexual offences the maximum and least traumatising protection the law can provide;
- (ii) to introduce measures which seek to enable the relevant organs of state to give full effect to the Bill; and
- (iii) to create offences which are intended to address the relatively high incidence of sexual offences committed in the Republic.

2.2 Chapter 2 deals with sexual offences generally and consists of four Parts.

2.2.1 Clauses 3 and 4, in Part 1, aim to codify those offences that are characterised by acts of sexual penetration. Two distinct statutory offences are created, namely, rape (clause 3) and compelled rape (clause 4). A person is guilty of rape in terms of clause 3 if he or she unlawfully and intentionally commits an act of "sexual penetration" with a "complainant" (as defined) without his or her consent. (See the definition of "sexual penetration" which, besides vaginal penetration, also includes oral or anal penetration in certain circumstances.) This new crime replaces the common law crime of rape and addresses the gender specific nature of common law rape. Clause 4 criminalises those actions where a perpetrator compels a third person to rape another person, which is to be known as "compelled rape". A person who compels another to rape a third person will consequently be liable to be convicted as a perpetrator and not as an accomplice to rape, as is currently the approach being followed in some cases.

2.2.2 Clauses 5 to 7 in Part 2 of Chapter 2, criminalise those acts of a sexual nature that are non-penetrative. Clause 5, creates the crime of sexual assault and replaces the common law crime of indecent assault. A person is guilty of sexual assault if he or she unlawfully and intentionally sexually violates a complainant without his or her consent. (See also the definition of "sexual violation"). Clause 5(2) deals with the situation where a person unlawfully and intentionally inspires the belief in another person that he or she will be sexually violated, similar to the current position in our common law in respect of assault common (sexual assault is a form of assault and all principles applicable to assault common are also applicable to the specific forms of assault, in this case sexual assault). The principles relating to compelled rape are also applicable to clause 6 of the Bill, dealing with compelled sexual assault (acts of a non-penetrative nature). Since the definition of "sexual violation" implies the involvement of two parties, clause 7, creating the offence of compelled self-sexual assault, extends the above

principle to situations where a person is compelled by someone else to sexually violate his or her own body.

2.2.3 Clauses 8 to 11 in Part 3 of Chapter 2 aim to criminalise a variety of unlawful sexual activities which involve complainants who are 18 years and older. In terms of clause 8, a person who unlawfully and intentionally compels or causes a complainant 18 years or older, without the consent of the complainant, to be in the presence of or watch the commission of a “sexual offence” (as defined), a “sexual act” (as defined) or an act of self masturbation, is guilty of compelling or causing a person 18 years or older to witness such an act. This clause, among others, aims to criminalise those instances where a person is, for example, forced to witness a family member being raped. Clause 9 provides that a person who unlawfully and intentionally exposes or displays his or her genital organs, anus or female breasts, or the genital organs, anus or female breasts of a third person to a complainant 18 years or older, without the consent of the latter, is guilty of an offence, commonly referred to as “flashing”. Clause 10 prohibits any person from displaying or exposing a complainant 18 years or older, with or without the complainant’s consent, to child pornography. Clause 11 provides that a person who unlawfully and intentionally and for reward, engages the services of a person older than 18 years for sexual purposes, is guilty of the offence of engaging the sexual services of a person 18 years or older. This clause targets the client of an adult prostitute. In the case of *S v Jordan and Others*, the Constitutional Court held that the law already criminalises a client if he or she engages the services of a prostitute. This clause therefore, not only confirms the existing law, but also addresses the unacceptable consequences of the selective application of the law, as pointed out by the Constitutional Court, whereby the clients are not arrested, charged and prosecuted for contraventions of this nature.

2.2.4 Clauses 12 to 14 in Part 4 of Chapter 2 replace the common law crimes of incest, bestiality and violation of a corpse, as far as such violation is of a sexual nature, with similar statutory crimes. Clause 12, incest, further aims to address the concern that children, who are caught up in circumstances beyond their control, are not labelled as criminals as a result of being prosecuted for committing incest. Subclause (3) therefore proposes that the institution of a prosecution against a child should only be authorised by the National Director of Public Prosecutions.

2.3 Chapters 3 and 4 are intended to address the particular vulnerability of “children” (as defined) and “persons who are mentally disabled” (as defined) and create offences where persons commit sexual offences against these categories of vulnerable persons.

2.3.1 Chapter 3 is divided into three Parts. Part 1 deals with consensual sexual acts with children under 16 years, Part 2 aims to address the commission of exploitative sexual acts involving children, namely sexual exploitation, sexual grooming and offences relating to child pornography, while Part 3 creates sexual offences similar to some of those found in Chapter 2, but in respect of children.

2.3.2 Clauses 15 and 16 in ~~Part~~ 1 of Chapter 3 replace section 14 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), which contains a number of inconsistencies, for instance the age of consent for homosexual acts is 19 years, as opposed to 16 years for heterosexual acts, while the age of consent for heterosexual “intercourse” is 16 years, but the age of consent to commit an “immoral or indecent act” (whether homosexual or heterosexual) is 19 years. Clause 15 (read with the definition of “child” in clause 1) criminalises acts of sexual penetration with children under 16 years, but older than 12 years, despite their consent and clause 16, criminalises acts of sexual violation perpetrated against children, in the same age group, despite their consent.

2.3.3 Clauses 17, 18, 19 and 20 in Part 2 of Chapter 3 create crimes to address activities which are characterised by an exploitative sexual nature.

2.3.3.1 Clause 17, dealing with sexual exploitation of children, is similar to clause 11, and provides that a person (either a client or a “pimp”) who unlawfully and intentionally engages the services of a child for sexual favours, for any type of reward, irrespective of whether the sexual act is committed or not, is guilty of the sexual exploitation of a child. This clause also highlights the possibility of the client being liable to be convicted of a second but separate offence if the sexual act is in fact committed, for example, for statutory rape. Subclauses (2) to (6) ensure that all other role players, such as pimps and those who benefit from the sexual exploitation of a child

in any manner whatsoever, are liable to be convicted on the basis of their involvement in the sexual exploitation of children.

2.3.3.2 Clause 18, dealing with sexual grooming of children, aims to draw a distinction between persons who promote or facilitate the grooming of a child (subclause (1)) and those who actively groom children (subclause (2)). It further aims to address the grooming of a child over the Internet, for example, by placing greater emphasis on the process of inviting, persuading or enticing a child to respond to certain sexual overtures. This clause is specifically aimed at providing additional protection to children against an ever-increasing threat.

2.3.3.3 Clause 19 creates the crime of exposure or display of or causing exposure or display of pornography to a child. It prohibits any person from exposing or displaying child pornography to persons younger than 18 years. It also criminalises the exposure of films or publications to children that, in terms of the Films and Publications Act, 1996, have been afforded certain specific classifications as a result of the explicit sexual nature thereof. The provision finally also prevents persons from exposing children to publications that are not suitable in respect of the sexual content thereof for the specific age group they are in. (What constitutes child pornography is to be found in clause 20(1)(a) and (b)).

2.3.3.4 Clause 20, creating the crime of using a child for or benefiting from child pornography, targets different role-players that are actively involved in engaging or using children for pornographic purposes. Subclause (1) provides for different scenarios, for instance, it prohibits a person from engaging a child, whether for financial or other reward or not, for purposes of making child pornography and it also criminalises the actual making of child pornography. Subclause (2) is aimed at punishing all role-players who benefit in any manner from their involvement in child pornography.

2.3.4 Clauses 21 and 22 in Part 3 of Chapter 3 create crimes similar to those in clauses 8 and 9 but in respect of children.

2.3.5 Clauses 23, 24, 25 and 26 in Chapter 4, dealing with the sexual exploitation and sexual grooming of persons who are mentally disabled and offences relating to pornography involving persons with mental disabilities, to a large extent, mirror their counterparts in clauses 17, 18, 19, and 20 in Chapter 3.

2.4 Chapter 5, which is divided into five parts, aims to regulate the provision of certain services to victims of sexual offences and the compulsory HIV testing of sex offenders.

2.4.1 Clauses 27, 28 and 29 in Part 1 of Chapter 5 deal with definitions applicable to this Chapter and provide that victims of sexual offences are entitled to—

- (i) be provided with PEP at State expense at public health establishments designated by the Minister of Health on condition that they report the offence within 72 hours of its commission; and
- (ii) apply to court for an order directing that the alleged sex offender be tested for HIV, with the view to having the test results made available to him or her for purposes of making personal lifestyle decisions.

2.4.2 Clauses 30 and 31 in Part 2 of Chapter 5 regulate how a victim applies to court for an order for HIV testing and how the court considers such an application. Of importance in this regard is the provision that such an application must be made by the victim or an “interested person” (as defined) on behalf of such victim within 90 days (the so-called “window period”) of the commission of the alleged sexual offence. The magistrate hearing the application does so in chambers and may do so in the absence of the victim and the alleged offender, unless he or she decides to call for either oral or written additional evidence, including evidence by or on behalf of the alleged sexual offender, if to do so will not give rise to any substantial delay. If the magistrate is satisfied that there is *prima facie* evidence that a sexual offence was committed by the alleged offender against the victim, that the victim may have been exposed to the body fluids of the alleged offender and that no more than 90 days have lapsed since the commission of the offence, he or she must order that the alleged offender be tested for HIV and that the test results be made available to the victim.

2.4.3 Clauses 32, constituting Part 3 of Chapter 5, provides an investigative tool for the police, allowing a police official to apply to court for an order directing that an alleged

offender be tested for HIV. The ambit of this Part is not limited to the investigation of sexual offences and may also be applied by the police where the HIV status of the offender may be relevant for the investigation or prosecution of any other offence. This clause envisages a similar application procedure to that in clause 30, by a police official. If the magistrate hearing the application is satisfied that there is *prima facie* evidence that a sexual offence or any other offence was committed by the alleged offender and that HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence, the magistrate must order that the alleged offender be tested for HIV and that the test results be made available to the relevant police official (investigating officer).

2.4.4 Clauses 33 and 34 in Part 4 of Chapter 5 regulate how the court order must be executed and the circumstances in which the results of the HIV tests may be used. Of importance in this regard is the following:

- (i) A court order directing that an alleged offender be tested for HIV lapses if the criminal charge is withdrawn by the prosecution at the request of the victim and any test results already obtained must be destroyed.
- (ii) The HIV test results obtained as the result of a court order can only be used in the following circumstances:
 - * To inform a victim of a sexual offence whether or not the alleged offender is infected with HIV with the view to reducing secondary trauma and empowering the victim to make certain informed personal decisions or using them in any ensuing civil proceedings.
 - * To enable an investigating officer to gather information for purposes of criminal proceedings.

It needs to be stressed that this Chapter, in general, and these provisions, in particular, should not be interpreted as detracting from the importance of a victim determining his or her HIV status, notwithstanding the outcome of the HIV testing, and receiving the necessary medical advice and treatment, after the commission of a sexual offence against him or her. This is borne out by numerous provisions in this Chapter which require that victims be provided with information prescribed by regulation on what services are available to them and how they should go about accessing them with due regard to the implications thereof.

2.4.5 Clauses 35 to 39 in Part 5 of Chapter 5 place great emphasis on confidentiality in this very new and sensitive area of the law. For instance, the fact that the court grants an application for HIV testing may only be communicated to the victim or an “interested person”, the alleged sex offender, an investigating officer, any other person who needs to know the test results for purposes of any criminal investigations or proceedings and civil proceedings and the persons who are required to execute the order. (clause 36). The HIV test results may only be communicated to the persons contemplated in clause 36 as well as to a prosecutor dealing with any criminal proceedings arising from the sexual offence in question. A court may, in any criminal or civil proceedings, furthermore make any order it deems appropriate relating to the manner in which the test results are to be kept confidential and the manner in which the court record is to be dealt with. (clause 37). Clause 38 deals with offences and penalties, making it an offence for a person who, with malicious intent, lays a charge with the South African Police Service in respect of an alleged sexual offence with the intention of ascertaining the HIV status of any person. A person who, with malicious intent or in a grossly negligent manner, discloses the test results in contravention of clause 37 is guilty of an offence. Clause 38(1)(c) aims to address the concern that a provision of this nature could be manipulated by accused persons, who have not been successfully prosecuted, to further victimise complainants by using the clause to lay charges against such complainants. This paragraph therefore provides that the institution of a prosecution for such an offence must be authorised in writing by the relevant Director of Public Prosecutions.

2.5 Chapter 6 creates a National Register for Sex Offenders.

2.5.1 Clause 43 sets out the objects of the Register, namely, to protect children and persons who are mentally disabled against certain sex offenders, by establishing and maintaining a record of persons who have been convicted of sexual offences against children or persons who are mentally disabled, whether such offences were committed before or after the commencement of this Chapter and whether they were committed in or outside the Republic. Clause 40 contains definitions applicable to this Chapter, for

instance definitions of “employer”, “employee”, “licensing authority” and “relevant authority”, generic terms which indicate the categories of persons or organisations that have child-related responsibilities and who have obligations in terms of this Chapter. Clause 41 prohibits persons who have been convicted of sexual offences against children or persons who are mentally disabled from working with or, in any manner, having access to children or persons with mental disabilities, either as an employer, an employee, a self-employed person, a foster parent, a kinship care-giver, a temporary safe care-giver, an adoptive parent or a curator of a person who is mentally disabled. Clause 42 places an obligation on the Minister for Justice and Constitutional Development to establish and maintain the Register. Clause 44 sets out who may apply for a prescribed certificate from the Registrar in order to ascertain whether the particulars of a specific person are recorded in the Register or not. Clause 45 prohibits an employer from employing a person whose particulars have been included in the Register or, in certain circumstances, from continuing to employ a person whose particulars have been recorded in the Register. If such a person can be re-deployed in the work environment to a position where he or she will not come into contact with children, the employer is encouraged to do so, failing which the employment relationship must be terminated immediately. Similar obligations are, in terms of clauses 47 and 48, placed on certain authorities that are responsible for approving licences for the operation of certain businesses or that are responsible for considering applications by persons who wish to become foster parents, adoptive parents, kinship care-givers and temporary safe care givers. Clause 49 sets out the type of information that must be included in the Register in order to facilitate the correct and effective identification of persons whose names have been included in the Register. Clause 50 sets out the categories of persons whose particulars must be recorded in the Register and clause 51 regulates the removal of a person’s particulars from the Register. The period after which a person’s particulars may be removed from the Register is coupled to the severity of the sentence that was imposed in respect of that person for a conviction of having committed a sexual offence against a child or a person who is mentally disabled. Clause 52 deals with issues of confidentiality and clause 53 empowers the Minister for Justice and Constitutional Development to make regulations for purposes of this Chapter.

2.6 Chapter 7 contains general provisions and is divided into 6 Parts.

2.6.1 Clauses 54 and 55 in Part 1 of Chapter 7 contain miscellaneous offences. Clause 54(1) places an obligation on any person to report knowledge that a sexual offence has been committed against a child to a police official and clause 54(2) places a similar obligation on any person to report knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled. Failure to comply with these obligations is criminalised. Clause 55 provides that any person who is involved in the commission of a sexual offence by way of attempt, conspiracy, aiding or abetting, inducement, incitement, instigation, instruction, commanding, counselling or procurement, is also guilty of an offence.

2.6.2 Clauses 56, 57, 58, 59, 60 and 61 in Part 2 of Chapter 7 deal with evidentiary matters.

2.6.3 Clause 56 creates certain defences, for instance it is not a valid defence for an accused person to contend that a marital or similar relationship exists or existed between him or her and the complainant in a sexual offence prosecution. (clause 56(1). Clause 56(2) provides that whenever a person is charged with an offence under section 15 or 16, it is a valid defence to contend that the child deceived the accused person into believing that he or she was 16 years or older and the accused person reasonably so believed. Clause 56(4) provides that, in the case of incest, a person may not be convicted of incest if, at the time the offence was first committed, the person was under 18 years and the other party to the offence exercised power or authority over the child or there was a relationship of trust between them. Clause 56(5) provides that a child may not be convicted of benefiting from or living off the earnings of the sexual exploitation of a child. Clause 57 creates a legal rule that a person under the age of 12 years or a person who is mentally disabled (as defined in clause 1) cannot consent to a sexual act. Clauses 58 and 59 provide that a negative inference may not be drawn only from the absence of a previous consistent statement relating to the offence, or from a delay in reporting the alleged offence, respectively. Clause 60 repeals the cautionary rule in sexual offences cases and provides that the evidence of a complainant in sexual offence cases may not be treated with caution on account of the nature of the offence. Clause 61 deals with

extra-territorial jurisdiction and establishes jurisdiction for South African courts to try persons who have committed sexual offences outside South Africa in certain circumstances.

2.6.4 Clauses 62 to 65 in Part 3 of Chapter 7 envisage—

- (i) the adoption of a national policy framework to ensure a uniform and co-ordinated approach by all Government departments in dealing with sexual offences matters and to guide the implementation, enforcement and administration of the Act; and
- (ii) the establishment of an Intersectoral Committee that will be responsible for developing and compiling a national policy framework that will, among others, facilitate the implementation of the Act and the monitoring of the implementation thereof.

2.6.5 Clauses 66 to 68 in Part 4 of Chapter 7 deal with national prescripts, regulations and the repeal and amendment of laws. Clause 66 requires the National Commissioner of the South African Police Service, the National Director of Public Prosecutions and the Director-General: Health to issue national prescripts which are to be followed by functionaries falling under their jurisdiction when dealing with sexual offences cases. Clauses 67 and 68 deal with regulations and the repeal and amendment of laws, respectively, including the repeal of all common law sexual offences and the irrebuttable common law presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse.

2.6.6 Clause 69 constitutes Part 5 of Chapter 7 and regulates the manner in which investigations and criminal proceedings relating to sexual offences which are instituted prior to the commencement of the Bill and which are not concluded before the commencement of the Bill, are to be dealt with.

2.6.7 Clauses 70 and 71 constitute Part 6 of Chapter 7 and are intended to be of a temporary nature, pending the enactment of comprehensive legislation arising from the investigation by the South African Law Reform Commission relating to the trafficking of persons. The aim of these clauses is to elevate “Trafficking” to a substantive offence, providing, among others, that a person who “trafficks” (as defined) any person, without that person’s consent, is guilty of the offence of trafficking in persons for sexual offences. These clauses give effect to South Africa’s international obligations as a party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The South African Law Reform Commission consulted widely during the course of its investigation and solicited comments from a variety of interested parties in the public and private sectors. The Portfolio Committee on Justice and Constitutional Development also invited comments from interested parties when the Bill was first introduced into Parliament and again after the Bill was revived by a resolution of the National Assembly after the 2004 elections. Oral and written submissions made pursuant to these invitations were considered formally and debated extensively.

4. IMPLICATIONS FOR PROVINCES

The provincial health departments will be required to provide PEP to victims of sexual offences as contemplated in Chapter 5 of the Bill.

5. FINANCIAL IMPLICATIONS FOR STATE

In 2003 when the Department approached Cabinet for approval to introduce the Criminal Law (Sexual Offences) Amendment Bill into Parliament, Cabinet was informed that the South African Law Reform Commission had not costed its legislative proposals relating to sexual offences and that this would be done in tandem with the Parliamentary process, allowing the costing process to take cognisance of developments in respect of the Bill in Parliament. An interdepartmental committee, with the Department of Justice and Constitutional Development as the lead Department, namely

the Operational Committee of the National Project Oversight Committee, has been tasked with the costing of the Bill. This aspect is receiving this Committee's attention.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.