

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS SECOND AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 36945 of 18 October 2013)
(The English text is the official text of the Bill)*

(PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 51—2013]

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GENERAL EXPLANATORY NOTE:

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

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



BILL

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to enable the Minister of Justice and Constitutional Development to designate certain courts for purposes of dealing with sexual offences; and to provide for matters connected therewith.

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

Insertion of Part 1A in Chapter 7 of Index to Act 32 of 2007

1. The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the insertion after Part 1 of Chapter 7 of the following heading: 5

“PART 1

SEXUAL OFFENCES COURTS

Designation of sexual offences courts

55A. Designation of sexual offences courts”. 10

Insertion of Part 1A in Chapter 7 of Act 32 of 2007

2. The following section is hereby inserted in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, after section 55:

“Part 1A:

Sexual offences courts

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Designation of sexual offences courts

55A. (1) Subject to subsection (2), the Minister may by notice in the *Gazette* designate any Division of the High Court or the main seat or any local seat of a Division or Magistrate’s Court, as defined in section 1 of the

Superior Courts Act, 2013 (Act No. 10 of 2013), as a sexual offences court exclusively for the purposes of the trial of any person or other proceedings arising out of—

- (a) an alleged commission of a sexual offence in terms of the common law, any offence in terms of the Sexual Offences Act, 1957 (Act No. 23 of 1957), or any offence in terms of this Act; or
- (b) any act or omission which constitutes an offence in terms of any other law which has a bearing on sexual offences, as the Director of Public Prosecutions having jurisdiction, may, in writing, authorise.

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

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

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

(4) The Minister may—

- (a) in consultation with the persons referred to in subsection (2)(a); and
 - (b) after consultation with the National Director of Public Prosecutions as contemplated in subsection (2)(b),
- by notice in the *Gazette*, increase or decrease the area of jurisdiction of any Magistrate's Court designated in terms of subsection (1).

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

Amendment of section 66 of Act 32 of 2007

3. Section 66 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended—

- (a) the substitution in subsection (1) for paragraph (a) of the following paragraph:

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

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;
- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;
- (iii) the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;

- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality; **[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; and 5
 - (vii) the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).” 10
- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
- “(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: 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; 25
 - (ii) the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made; 30
 - (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; 35
 - (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; 40
 - (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, 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; 45
 - (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; 50
 - (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; 55
 - (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]** 60

- (ix) the manner in which prosecutors must ensure that an order contemplated in section 50(2)(a) (dealing with an order of a court to include the accused's name in the Register) is forwarded to and received by the Registrar of the National Register for Sex Offenders; and 5
- (x) the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)."; 5
- (c) by the substitution in subsection (3) for paragraph (a) of the following paragraph: 10
- “(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— 15
- (i) the administering of Post Exposure Prophylaxis; 20
- (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; 25
- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality; 30
- (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]** 30
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided; and 35
- (vi) the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)."; 35
- (d) by the insertion after subsection (3) of the following subsection: 40
- “(3A) The Director-General: Social Development must, in consultation with the Minister of Social Development, and after consultation with the Directors-General: Justice and Constitutional Development and Health, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference to the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)."; and 45
- (e) by the substitution in subsection (4) for paragraph (a) of the following paragraph: 55
- “(a) The national instructions and directives by each Department or institution, contemplated in this section must be— 60
- (i) submitted to Parliament within six months after the commencement of this section, before publication in the *Gazette*: Provided that the first national instructions or directives giving effect to section 3 of the Judicial Matters Second Amendment Act, 2013, 60

- must be submitted to Parliament within six months after any regulations have been made in terms of section 67(b); and
(ii) published in the *Gazette*.”.

Substitution of section 67 of Act 32 of 2007

4. The following section is hereby substituted for section 67 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007: 5

“Regulations

67. The Minister[,] may—
- (a) after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, [may] make regulations regarding— 10
- [(a)](i) any matter which is required or permitted by this Act to be prescribed by regulation;
- [(b)](ii) the intersectoral implementation of this Act; and 15
- [(c)](iii) any other matter which is necessary or expedient to be prescribed in order to achieve or promote the objects of this Act; and
- (b) in consultation with the Chief Justice make regulations necessary to give effect to the designation of the courts referred to in section 55A(1), including the requirements for the efficient and effective functioning thereof.”. 20

Amendment of long title of Act 32 of 2007

5. The long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the insertion of the following bullet after the thirteenth bullet in the long title: 25

- “* designating certain courts, where necessary, to deal with matters relating to sexual offences;”.

Short title and commencement

6. This Act is called the Judicial Matters Second Amendment Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 30

**MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS
SECOND AMENDMENT BILL, 2013**

1. BACKGROUND

- 1.1 In 1993 the first Sexual Offences Court was introduced in South Africa as a pilot project at Wynberg as an innovative measure to improve the prosecution and adjudication of sexual offences. The pilot project proved to be a huge success resulting in the rolling out of further Sexual Offences Courts around the country. Due to a number of reasons the Sexual Offences Courts which were established have since become dedicated Sexual Offences Courts with mixed court rolls that give priority to sexual offences cases.
- 1.2 The demise of the Sexual Offences Courts was criticised from different corners in view of, amongst others, the high rate of sexual violence perpetrated. The amendments proposed deal with the re-introduction of Sexual Offences Courts as announced in the media by the Minister of Justice and Constitutional Development. There is a need to provide for a legislative framework that expressly authorises the establishment of these courts.

2. OBJECTS OF BILL

2.1 Clause 1

Clause 1 contains a consequential amendment to the Index of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (hereafter referred to as the Sexual Offences Act) due to the insertion by clause 2 of section 55A.

2.2 Clause 2

- 2.2.1 Clause 2 of the Bill inserts a new section 55A in the Sexual Offences Act, after section 55. The proposed new section confers upon the Minister the power to designate any court as a sexual offences court exclusively for the purposes of the trial of any person or other proceedings arising out of the alleged commission of sexual offences which he or she may only exercise after consultation with the prosecution and in consultation with the judiciary.
- 2.2.2 The clause regulates the area of jurisdiction of a court designated and the power is given to the Minister to increase or decrease the area of jurisdiction of a Magistrate's Court so designated.
- 2.2.3 It also provides that this provision may not be interpreted as precluding any court referred to in this provision from dealing with matters referred to in the provision if it has not been so designated. This is inserted to make it clear that all courts can continue to deal with these matters in the normal course if there is no need for a designated court.

2.3 Clause 3

Clause 3 amends section 66 of the 2007 Sexual Offences Act by—

- (a) amending section 66(1)(a), requiring the National Commissioner of the South African Police Service to publish national instructions on “the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).”;
- (b) amending section 66(2)(a), requiring the National Director of Public Prosecutions to publish directives on “the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).”;

- (c) amending section 66(3)(a), requiring the Director-General: Health to publish directives on “the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).”;
- (d) inserting a new section 66(3A), requiring the Director-General: Social Development to publish directives “regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference to the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).”; and
- (e) amending section 66(4)(a), requiring the first national instructions or directives giving effect to clause 3 of the Bill to be submitted to Parliament within six months after any regulations have been made in terms of section 67(b).

2.4 Clause 4

Clause 4 substitutes section 67 of the Sexual Offences Act to provide that the Minister may, in consultation with the Chief Justice, make regulations necessary to give effect to the designation of the courts referred to in section 55A(1), including the requirements for the efficient and effective functioning thereof.

3. FINANCIAL IMPLICATIONS

The Bill will have substantial financial implications for the Departments involved in the criminal justice system. However, the Sexual Offences Courts will only be designated once the necessary funding has been acquired to put in place the specified infrastructure, sufficient court personnel has been appointed and trained and professional multi-disciplinary services for victims are available. Some of the courts which were previously established as Sexual Offences Courts have some infrastructure in place and basic capacity to deal with sexual offences.

4. PARLIAMENTARY PROCEDURE

- 4.1 The Portfolio Committee on Justice and Constitutional Development (the Portfolio Committee) is 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.
- 4.2 The Portfolio Committee is of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.