

EXTRACT: CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS)
AMENDMENT ACT, 2007 (ACT 32 OF 2007):
PROVISIONS OF ACT RELEVANT TO BRIEFING

Definitions and interpretation of Act

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

“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,

and **“children”** has a corresponding meaning;

“sexual act” means an act of sexual penetration or an act of sexual violation;

“sexual penetration” includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person,

and **“sexually penetrates”** has a corresponding meaning;

“sexual violation” includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (bb) the mouth of another person;
 - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or

- (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) mouth of the complainant and the genital organs or anus of an animal;
 - (b) the masturbation of one person by another person; or
 - (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,
- but does not include an act of sexual penetration, and “**sexually violates**” has a corresponding meaning; and

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.

(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).

(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)

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).

(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.

Obligations of employees

46. (1) An employee in the employ of an employer at the commencement of this Chapter, who is or was convicted of a sexual offence against a child or a person who is mentally disabled, or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, irrespective of whether or not such offence was committed or allegedly committed during the course of his or her employment, must without delay disclose such conviction or finding to his or her employer.

(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.

(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 licence applications

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

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

(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

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.

(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.

(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.

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:

- (a) A person who in terms of this Act or any other law—
 - (i) has been convicted of a sexual offence against a child or a person who is mentally disabled;
 - (ii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977;
 - (iii) is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled; or
 - (iv) has a previous conviction for a sexual offence against a child or a person who is mentally disabled or who has not served a sentence of imprisonment for such offence; and
- (b) any person—
 - (i) who, in any foreign jurisdiction, has been convicted of any offence equivalent to the commission of a sexual offence against a child or a person who is mentally disabled;

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

whether committed before or after the commencement of this Chapter.

(2) (a) A court that has in terms of this Act or any other law—

- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or
- (ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,

must make an order that the particulars of the person be included in the Register.

(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—

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

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

(4) Where a court, for whatever reason, fails to make an order under subsection (2)(a) 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 National Commissioner of Correctional Services must, in the prescribed manner and at least three months before the establishment of the Register referred to in section 42, forward to the Registrar the particulars referred to in section 49 of every prisoner or former prisoner which he or she has on record, who, at the commencement of this Chapter, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child, including an offence referred to in section 14 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), and must, where possible, forward the available particulars of every prisoner or former prisoner which he or she has on record, who at the commencement of this Chapter, is serving a sentence of imprisonment or has served a sentence of imprisonment as a result of a conviction for a sexual offence against a person who is mentally disabled, including an offence referred to in section 15 of the Sexual Offences Act, 1957, and the Registrar must forthwith enter those particulars in the Register.

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

[Sub-s. (5) substituted by s. 37 of Act No. 66 of 2008.]

Wording of Sections

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

[Sub-s. (6) substituted by s. 37 of Act No. 66 of 2008.]

Wording of Sections

(7) (a) The Director-General: Health must, in the prescribed manner and at least three months before the establishment of the Register referred to in section 42, forward to the Registrar the particulars referred to in section 49 of every person, who, at the commencement of this Chapter, 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.

[Sub-s. (7) substituted by s. 37 of Act No. 66 of 2008.]

Wording of Sections

(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
 - (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; or

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

(2) The particulars of a person who has—

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

may not be removed from the Register.

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

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

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

Defences and sentencing

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

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

- (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or
- (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.

(3) The provisions of subsection (2)(a) do not apply if the accused person is related to the child within the prohibited incest degrees of blood, affinity or an adoptive relationship.

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

- (a) A was below the age of 18 years; and
- (b) the other person ("B") exercised power or authority over A or a relationship of trust existed between A and B.

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

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

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

- (a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and
- (b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.

(7)

[Sub-s. (7) deleted by s. 4 (b) of Act No. 6 of 2012.]

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

[S. 56 amended by s. 4 (a) of Act No. 6 of 2012.]

Regulations

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

- (a) any matter which is required or permitted by this Act to be prescribed by regulation;
 - (b) the inter-sectoral implementation of this Act; and
 - (c) any other matter which is necessary or expedient to be prescribed in order to achieve or promote the objects of this Act.
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