**REPUBLIC OF SOUTH AFRICA**

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

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*WORKING DOCUMENT NO. 3 (March 2021)*

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**( …..…)**

**[B — 2020]**

**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

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**BILL**

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

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

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

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

**Amendment of section 2 of Act 32 of 2007**

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

"*(g)* establishing a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of any sexual offences **[against children and persons who are mentally disabled]** so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of **[children or persons who are mentally disabled]** persons who are vulnerable.".

**OPTION**

*Note: Comments received by the PC pointed out that the requirement of “access to” is very wide and should be reconsidered in view of the proposed definition of a “person who is vulnerable”.*

*(i) “Access to” or even “congregate” could be restricted to children and persons with disabilities.*

*(ii) “Access to” or even “congregate” could be omitted as requirement from the provisions concerned.*

"*(g)* establishing a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of any sexual offences **[against children and persons who are mentally disabled]** so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of **[children or persons who are mentally disabled]** persons who are vulnerable or have access to children or *certain persons who are mentally disabled*

*Note: The question is raised whether the Committee would want to refer to “vulnerable persons” in the “Objects clause”?*

**Amendment of section 5 of Act 32 of 2007**

*Note: Consequential amendment as a result of proposed new offence of sexual intimidation.*

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

**Amendment of section 12 of Act 32 of 2007**

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

**OPTION 1: *TO BE DELETED??***

*Note: This option was presented to PC at its previous meeting in an attempt to address the concern that was expressed by SAPS.*

"(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—

*(a)* sexual penetration with each other; or

*(b)* sexual violation with each other where one of them is a child and the act of sexual violation was committed in such a manner that it violates or offends the sexual integrity or dignity of that child,

are, despite their mutual consent to engage in such act, guilty of the offence of incest.".

**OPTION 2: *TO BE DELETED??***

*Note: This option aims to introduce a subjective test with reference to the child victim’s state of mind whether an act is unlawful or not.*

"(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—

*(a)* sexual penetration with each other; or

*(b)* sexual violation with each other where one of them is a child and the act of sexual violation was of such a nature that the child is, after the commission of the act, reluctant to participate in such an act again,

are, despite their mutual consent to engage in such act, guilty of the offence of incest.".

**OPTION 3: *PREFERRED OPTION??***

*Note: This option aims to introduce an objective test that focuses on the act itself and not the state of mind of the child and aims to require that the nature of the act should be objectively considered in order to determine unlawfulness.*

"(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—

*(a)* sexual penetration with each other; or

*(b)* sexual violation with each other where one of them is a child and the act of sexual violation was of such a nature that it was inappropriate or reprehensible for the adult person to have acted in that manner under the circumstances concerned,

are, despite their mutual consent to engage in such act, guilty of the offence of incest.".

**Insertion of new Part in Act 32 of 2007**

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

"***Part 5***

***Sexual intimidation***

**Sexual intimidation**

**OPTION 1: *TO BE DELETED??***

*Note: This option was presented to PC at its previous meeting in an attempt to address the concern that the word “indirect” is overbroad and the term “third party” is vague and too wide.*

**14A.** A person ("A") who unlawfully and intentionally utters or conveys, whether directly or indirectly, a threat to a complainant ("B") that inspires a reasonable belief of imminent harm in B that B, or a third party ("C") who is a member of the family or household of B or any other person in a close relationship with B, shall be—

*(a)* raped;

*(b)* compelled to rape someone else;

*(c)* sexually violated;

*(d)* compelled to sexually violate someone else;

*(e)* compelled to sexually violate himself or herself;

*(f)* compelled to witness a sexual offence, sexual act or an act of self-masturbation;

*(g)* exposed to the genital organs, anus or female breasts of another person; or

*(h)* exposed to child pornography,

as contemplated in section 3, 4, 5, 6, 7, 8, 9 or 10, respectively, is guilty of the offence of sexual intimidation.".

**OPTION 2: *PREFERRED OPTION??***

*Note: (i) The Department, after having reconsidered the proposed new offence, is of the view that the list of offences reflected in Option 1 should not be restricted to certain offences only, but should include all sexual offences as defined in section 1.*

*(ii) Regarding the question why “adult pornography” should not be included in paragraph (h). “Adult pornography” cannot be included in the list if “exposure to (adult) pornography” is not criminalised in the principal Act. This aspect was debated at length in the Portfolio Committee when the principal Act was promoted in Parliament.*

*(iii) The proposed wording “and may be liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable” which are similar to the wording reflected in section 55 of the principal Act have been found by the Constitutional Court in the Economic Freedom Fighters and Another v the Minister of Justice and Correctional Services and Another [2020] ZACC 25 case to be Constitutional. The offence referred to in section 55 of the principal Act is also in line with the Court’s judgment.*

*(iv) Reference to “sexual offences” includes reference to sections 13 (bestiality) and 14 (sexual violation of a corpse). The question is raised whether it is appropriate to include these offences in the proposed new offence.*

**14A.** A person ("A") who unlawfully and intentionally utters or conveys, whether directly or indirectly, a threat to a complainant ("B") that inspires a reasonable belief of imminent harm in B that a sexual offence will be committed against B, or a third party ("C") who is a member of the family of B or any other person in a close relationship with B, shall be—

*(a)* raped;

*(b)* compelled to rape someone else;

*(c)* sexually violated;

*(d)* compelled to sexually violate someone else;

*(e)* compelled to sexually violate himself or herself;

*(f)* compelled to witness a sexual offence, sexual act or an act of self-masturbation;

*(g)* exposed to the genital organs, anus or female breasts of another person; or

*(h)* exposed to child pornography,

as contemplated in section 3, 4, 5, 6, 7, 8, 9 or 10, respectively, is guilty of the offence of sexual intimidation and may be liable on conviction to the punishment to which a person convicted of actually committing a sexual offence would be liable.

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

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

*(a)* by the substitution for the definition of "employer" of the following definition:

" **'employer'** means—

*(a)* any—

(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which**[—**

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

**[*(bb)* employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or]**

*(b)* any person, organisation, institution, club, sports club, association or body who or which, as the case may be—

(i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate; or

(ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate,

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

**OPTION 1**

Note: *Comments received by the PC pointed out that the requirement of “access to” is very wide and should be reconsidered in view of the proposed definition of a “person who is vulnerable” – Option 1.*

*(i) “Access to” or even “congregate” could be restricted to children and certain persons with disabilities.*

*(ii) “Access to” or even “congregate” could be omitted as requirement from the provisions concerned – Option 2.*

" **'employer'** means—

*(a)* any—

(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which**[—**

***(aa)*]** employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a **[child]** person who is vulnerable or in a position of authority, supervision or care of a **[child]** person who is vulnerable or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate; or

**[*(bb)* employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or]**

*(b)* any person, organisation, institution, club, sports club, association or body who or which, as the case may be—

(i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate; or

(ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate,

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

**OPTION 2**

" **'employer'** means—

*(a)* any—

(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which**[—**

***(aa)*]** employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a **[child]** person who is vulnerable or in a position of authority, supervision or care of a **[child]** person who is vulnerable or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate; or

**[*(bb)* employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or]**

*(b)* any person, organisation, institution, club, sports club, association or body who or which, as the case may be—

(i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate; or

(ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate,

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

*(b)* by the substitution for the definition of "licencing authority" of the following definition:

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

*(c)* by the insertion after the definition of "**licencing authority**" of the following definition:

**OPTON 1**

*Note: This option is the version of the provision in the introduced Bill reflecting the technical amendment.*

" **'person who is vulnerable'** means a—

*(a)* child or a person who is mentally disabled;

*(b)* female under the age of 25 years;

*(c)* person who is being cared for or sheltered in a facility that provides services to victims of crime;

*(d)* person with a physical, intellectual or mental sensory disability and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

persons with physical, intellectual or mental sensory disabilities; or

*(e)* person who is 60 years of age or older and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

such persons;";

**OPTION 2**

*Note: The extension of the ambit of the definition will have a direct effect on employers and potential employers to the possible detriment of persons who apply for employment or who, for example, want to become foster parents.*

" **'person who is vulnerable'** means a—

*(a)* child or a person who is mentally disabled;

*(b)* female under the age of 25 years;

*(c)* person who is being cared for or sheltered in a facility that provides services to victims of crime;

*(d)* person with a physical, intellectual or mental sensory disability and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

persons with physical, intellectual or mental sensory disabilities;

*(e)* person who is 60 years of age or older and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

such persons;

*(f)* person who is lesbian, gay, bi-sexual, transgender, intersexed, asexual or queer // Option 1: person with a characteristic that identifies that person as a member of a group that recognises itself as transgender, intersexed or according to its sexual orientation // Option 2: person who is transgender, intersexed or a person who as a result of his or her sexual orientation could be identified as a member of a group that is generally recognised as such;// Option 3: after consultation the following is recommended: person who is lesbian, gay, bisexual, transgender, intersex or queer: Option 4: person who is a member of a social group consisting of individuals who are transgender, intersex, or whose sexual orientation is gay, lesbian, bisexual or who falls under any other category that deems them a gender or sexual orientation minority.

*(g)* persons who are cared for or sheltered at designated areas, centres or places for the temporary reception and accommodation of asylum seekers or refugees as contemplated in section 35(2) of the Refugees Act, 1998 (Act No. 130 of 1998); or

*(h)* person who falls within a vulnerable group who are—

(i) part of a group that is either oppressed or more susceptible to harm, abuse or exploitation; and

(ii) in a particularly dangerous position and less capable of protecting themselves,

as prescribed by the Minister, subject to the approval of Parliament."

*Note: Paragraph (h) is proposed by Parliamentary Law Adviser. The Parliamentary Law Adviser also recommended that the “Regulations” section should also be amended accordingly. Insofar as the technical aspects of the formulation is concerned it should be noted that the Department would want to suggest alternative wording if the proposal is accepted.*:

**OPTION 3**

*Note: This option aims to restrict the definition to the most vulnerable of vulnerable persons. Insofar as females under 25 years are concerned consideration may also be given to extend paragraph (b) to include reference to, for example, hostels where students live.*

" **'person who is vulnerable'** means a—

*(a)* child or a person who is mentally disabled;

*(b)* female under the age of 25 years who—

(i) receiving receives tuition at a higher education college, higher education institution or university college as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);

(ii) receives vocational training at any training institute, other than the institutions referred to in subparagraph (i), or as part of their employment; or

(iii) lives in a building, structure or facility used primarily as a residence for any of the persons referred to in subparagraphs (i) and (ii);

*(c)* person who is being cared for or sheltered in a facility that provides services to victims of crime;

*(d)* person with a physical, intellectual or mental sensory disability and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

persons with physical, intellectual or mental sensory disabilities; or

*(e)* person who is 60 years of age or older and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

such persons;";

*(d)* by the insertion after the definition of "relevant authority" of the following definition:

 " **'sexual offence'** means any—

*(a)* sexual offence in terms of the law as it existed between 16 June 2003 and 15 December 2007;

*(b)* offence referred to in Chapters 2, 3 and 4 and sections 55 and 71 of this Act;

*(c)* offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and

*(d)* contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996);"; and

**Option**

*Note: The option aims to ensure that the extension to all sexual offences only applies prospectively i.e. only those convictions for offences that have been committed after the commencement of the Amendment Bill.*

"**'sexual offence'** means—

*(a)* any

(i) sexual offence in terms of the law as it existed between 16 June 2003 and 15 December 2007;

(ii) offence referred to in Chapters 2, 3 and 4 and sections 55 and 71 of this Act;

(iii) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and

(iv) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996);

that was committed against a child or a person who is mentally disabled between the period of 16 June 2003 and the date of; and

*(b)* any—

(i) offence in terms of Chapters 2, 3 and 4 and section 55 of this Act;

(ii) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and

(iii) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996);

that was committed after,

the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021.";

*(e)* by the deletion of the definition of "sexual offence against a child".

**Substitution of section 41 of Act 32 of 2007**

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

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

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

*(a)* be employed to work with a **[child]** person who is vulnerable in any circumstances;

*(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child]** person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child]** person who is vulnerable or where he or she gains access to a **[child]** person who is vulnerable or places where **[children]** persons who are vulnerable are present or congregate;

*(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child]** person who is vulnerable or where **[children]** persons who are vulnerable are present or congregate; or

*(d)* become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled.

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

***(a)* be employed to work with a person who is mentally disabled in any circumstances;**

***(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in a position of authority, supervision or care of a person who is mentally disabled, or which, in any other manner, places him or her in a position of authority, supervision or care of a person who is mentally disabled or where he or she gains access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate;**

***(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a person who is mentally disabled or where persons who are mentally disabled are present or congregate; or**

***(d)* become the curator of a person who is mentally disabled.]**".

**OPTION 1**

*Note: Option aims to address the concerns that were raised that the extension to include all sexual offences throws the net too wide.*

*(i) “Access to” or even “congregate” could be restricted to children and persons with disabilities. Option 1.*

*(ii) “Access to” or even “congregate” could be omitted as requirement from the provisions concerned. Option 2.*

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

*(a)* be employed to work with a **[child]** person who is vulnerable in any circumstances;

*(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child]** person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child]** person who is vulnerable or where he or she gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate;

*(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child]** person who is vulnerable or where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate; or

*(d)* become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable”.

**OPTION 2**

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

*(a)* be employed to work with a **[child]** person who is vulnerable in any circumstances;

*(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child]** person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child]** person who is vulnerable or where he or she gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate;

*(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child]** person who is vulnerable or where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate; or

*(d)* become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable”.

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

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

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

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

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

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

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

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

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

"(4)[[1]](#footnote-1) The Registrar must make the full names, surname, identity number and the sexual offence, of every person—

*(a)* whose particulars have been included in the Register; and

*(b)* who was not a child at the time of the commission of the offence, available on the website of the Department of Justice and Constitutional Development.”.

**OPTION 1**

*Note: This option aims to ensure that child victims (and persons who are mentally disabled) cannot be identified through the disclosure of information to the public*.

"(4) The Registrar must make the full names, surname, the first 8 digits of the identity number and the sexual offence, of every person—

*(a)* whose particulars have been included in the Register;

*(b)* who was not a child at the time of the commission of the offence; and

*(c)* who was not convicted of having committed a sexual offence against a child or a person who is mentally disabled,

available on the website of the Department of Justice and Constitutional Development.”

**OPTION 2**

*Note: This option aims to ensure that members of the public may access the Registrar by applying to the Registrar for information to be made available to them.*

*It should be kept in mind that the purpose of the NRSO is to protect children and persons who are mentally disabled. Providing any member of the public access to the Register raises the question what the purpose thereof is?*

"(4) *(a)* Any person may apply, in prescribed form, to the Registrar to determine whether the particulars of any other person have been included in the Register or not.

*(b)* The Registrar may—

(i) grant the request by indicating, in the prescribed manner, whether the particulars of the person concerned have been included in the Register or not;

(ii) refuse the request, if the confirmation that the particulars of an individual appear on the Register may identify a person who was a child complainant or a person who is mentally disabled against whom the offence was committed.

 (5) Except in so far as it may be necessary for the purposes of this Chapter, any person who wilfully discloses or publishes any information to any other person which he or she has acquired as a result of an application contemplated in subsection (4) 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.

**Amendment of section 43 of Act 32 of 2007**

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

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

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

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

"(i) have been convicted of a sexual offence **[against a child or a person who is mentally disabled]**, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic; or

(ii) are alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** in respect of whom a court, whether before or after the commencement of this Chapter—".

**Amendment of section 44 of Act 32 of 2007**

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

"*(e)* a person contemplated in section 47(2) applying for a licence or approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of **[children or persons who are mentally disabled]** persons who are vulnerable in respect of his or her own particulars;".

**Insertion of sections 44B and 44C in Act 32 of 2007[[2]](#footnote-2)**

 **9A.** The following sections are hereby inserted after section 44A of the principal Act:

“**Access to Register by National Commissioner of South African Police Service**

 **44B.** For the purposes of section 36D(2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and section 15A(2) of the South African Police Service Act, 1995 (Act No. 65 of 1995), the National Commissioner of the South African Police Service may be granted access to the data base of the Register by the Registrar.

 **Obligations of Director-General: Home Affairs and Registrar**

 **44C.** (1) The Director-General: Home Affairs must inform the Registrar in writing whenever a person’s change in identity has been formally approved and recognised by the Department of Home Affairs by providing the Registrar with that person’s old and new identity details.

(2) The Registrar must endorse the Register accordingly, where necessary.”.

**Amendment of section 45 of Act 32 of 2007**

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

"*(c)* Notwithstanding paragraph *(d)* an employer must immediately terminate the employment of an employee who fails to disclose a conviction of a sexual offence **[against a child or a person who is mentally disabled]** or that he or she is alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as contemplated in section 41.

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

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

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

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

(2) An employee who, after the commencement of this Chapter, applies for employment, must, if he or she has been convicted of a sexual offence **[against a child or a person who is mentally disabled]** or is alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, and whose particulars are included or are to be included in the Register, disclose such conviction or finding when applying for employment.".

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

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

"(2) A person who, after the commencement of this Chapter, applies for a licence contemplated in subsection (1) to a licensing authority, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence **[against a child or a person who is mentally disabled]** or that he or she is alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.".

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

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

"(2) *(a)* A person who, after the commencement of this Chapter, applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or curator, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence **[against a child or a person who is mentally disabled]** or that he or she is alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.

 *(b)* A person referred to in paragraph *(a)* who fails to comply with paragraph *(a)*, is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding seven years or to both a fine and such imprisonment.

 *(c)* A child who is in the custody and care of a person contemplated in paragraph *(a)* must, as soon as reasonably possible, be removed from the care of such person in accordance with section 152 Chapter 9 of the Children’s Act, 2005 (Act No. 38 of 2005).".

**Amendment of section 49 of Act 32 of 2007**

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

"(iv) the sexual offence **[against a child or a person who is mentally disabled]** in respect of which the person has been convicted, the sentence imposed, the date and place of conviction and sentence, as well as the relevant prisoner identification number, where applicable;".

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

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

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

"(1) The particulars of the following persons must be included in the Register:

*(a)* A person who in terms of this Act or any other law—

(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 in paragraph *(a)*(ii),

whether committed before or after the commencement of this Chapter.".

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

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

1. 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
2. made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence **[against a child or a person who is mentally disabled]**, in the presence of that person,

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

*(c)* by the substitution insubsection (2) for paragraph *(c)* for the following paragraph:

"*(c)* If a court has, in terms of this Act or any other law, convicted a person ("A") of a sexual offence **[referred to in paragraph *(a)*(i)]** and A was a child at the time of the commission of such offence, or if a court has made a finding and given a direction referred to in paragraph *(a)*(ii) in respect of A who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in paragraph *(a)* unless—

1. the prosecutor has made an application to the court for such order;
2. the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of A committing another sexual offence **[against a child or a person who is mentally disabled, as the case may be,]** in future;
3. A has been given the opportunity to address the court as to why his or her particulars should not be included in the Register; and
4. the court is satisfied that substantial and compelling circumstances exist based upon such report and any other evidence, which justify the making of such an order.";

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

"*(a)* The National Commissioner of Correctional Services must, in the prescribed manner,**[and at least three months before the establishment of the Register referred to in section 42,]** forward to the Registrar the particulars referred to in section 49 of every prisoner or former prisoner which he or she has on record, who, at the commencement of this Chapter, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence, five years preceding the commencement of this Chapter, **[against a child, including an offence referred to in section 14 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), and must, where possible, forward the available particulars of every prisoner or former prisoner which he or she has on record, who at the commencement of this Chapter, is serving a sentence of imprisonment or has served a sentence of imprisonment as a result of a conviction, five years preceding the commencement of this Act, for a sexual offence against a person who is mentally disabled, including an offence referred to in section 15 of the Sexual Offences Act, 1957,]** and the Registrar must forthwith enter those particulars in the Register.";

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

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

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

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

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

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

"**Removal of particulars from Register**

 **51.** (1) Subject to subsections (2), (2A), and (3), the particulars of a person—

*(a)* who—

(i) has been sentenced for a conviction of a sexual offence **[against a child or a person who is mentally disabled]** to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)*(i)* of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of **[ten]** 20 years has lapsed after that person has been released from prison or the period of suspension has lapsed;

(ii) has been sentenced for a conviction of a sexual offence **[against a child or a person who is mentally disabled]** to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)*(i)* of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of **[seven]** 14 years has lapsed after that person has been released from prison or the period of suspension has lapsed; or

(iii) is alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of **[five]** ten 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]** ten years has lapsed since the particulars of that person were included in the Register.

(2) The particulars of a person who has—

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

*(b)* two or more convictions of a sexual offence **[against a child or a person who is mentally disabled]**,

may not be removed from the Register.

(2A) A person falling into the categories contemplated in subsection (1) or (2), who was a child at the time of the commission of the offence concerned and who was convicted of such offence or a person who was a child at the time of the alleged commission of the offence and in respect of whom a court has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977—

*(a)* before the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to a court for an order that his or her particulars must be removed from the Register by—

(i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence **[against a child or a person who is mentally disabled, as the case may be]**; and

(ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence **[against a child or a person who is mentally disabled, as the case may be,]** is pending against him or her; or

*(b)* after the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)*(c)* for an order that his or her particulars must be removed from the Register by—

(i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence **[against a child or a person who is mentally disabled, as the case may be]**; and

(ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence **[against a child or a person who is mentally disabled, as the case may be,]** is pending against him or her.

 (2B) The periods applicable in subsection (1) should be reduced by half if the person was a child at the time of the commission of the offence.

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

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

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

(4) Any application that has been submitted to the Registrar in terms of subsection (3)*(a)* before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, must be considered and dealt with in all respects as if the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, had not commenced.

**OPTION**

*Note: The option was presented to the PC at its previous meeting. The option aims to ensure that all persons who have qualified (but have not necessarily applied yet) for removal of their particulars before commencement of the amendments should be able to apply for removal.*

(4) Any person who has qualified for the removal of his or her particulars from the Register before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 20202021, may submit an application to the Registrar in terms of subsection (3)*(a)* and the Registrar must consider the application as if the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, had not commenced.".

**Amendment of section 53 of Act 32 of 2007**

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

"*(c)* the manner in which the National Commissioner of Correctional Services must forward particulars of prisoners who are serving a sentence of imprisonment as the result of a conviction for a sexual offence **[against a child or a person who is mentally disabled]** to the Registrar as contemplated in section 50(5)*(a)*;

*(e)* the manner in which the National Commissioner of the South African Police Service must forward particulars of persons with a previous conviction for a sexual offence **[against a child or a person who is mentally disabled]** to the Registrar as contemplated in section 50(6);

*(f)* the manner in which the Director-General: Health must forward particulars of persons who are subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence **[against a child or a person who is mentally disabled]** to the Registrar as contemplated in section 50(7)*(a)*;".

**Substitution of section 54 of Act 32 of 2007**

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

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

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

 **[*(b)*]**(2) *(a)* A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in **[paragraph *(a)*]** subsection (1), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

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

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

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

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

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

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

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

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

**Amendment of long title of Act 32 of 2007, as amended by section 48 of Act 7 of 2013, section 5 of Act 43 of 2013 and section 12 of Act 5 of 2015**

 **XX.** The long title of the principal Act is hereby amended by the substitution for the fourth bullet thereof of the following bullet:

“\* 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 and sexual intimidation;”.

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

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

"***Part 5***

***Sexual intimidation***

**14A.** Sexual intimidation".

**Short title and commencement**

 **21.** This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 20202021, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**OPTION: TRANSFER OF FUNCTIONS TO SOUTH AFRICAN POLICE SERVICE CRIMINAL RECORD CENTRE**

*Note: Long title of the Amendment Bill will have to be deleted and replaced with the long title hereunder if duties are transferred to SAPS CRC.*

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

* **extend the ambit of the offence of incest;**
* **introduce a new offence of sexual intimidation;**
* **further regulate the inclusion of particulars of persons in the National Register for Sex Offenders;**
* **make provision for certain particulars of persons who have been convicted of sexual offences publicly available;**
* **extend the list of persons who are to be protected in terms of Chapter 6 of the Act;**
* **transfer the functions of the National Register for Sex Offenders to the Criminal Record Centre of the South African Police Service;**
* **further regulate the removal of particulars of persons from the National Register for Sex Offenders; and**
* **further regulate the reporting duty of persons who are aware that sexual offences have been committed against children,**

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

*Note: The fourth and thirteenth bullets of the long title of the principal Act will also have to be amended*

* 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 and sexual intimidation;
* **[establishing and]** regulating **[a National Register for Sex Offenders]** access to a person’s criminal record by certain persons;

*Note: The index to the principle Act will also have to be amended.*

**[NATIONAL REGISTER FOR SEX OFFENDERS]** **PROHIBITION IN RESPECT OF PERSONS WITH PREVIOUS CONVICTIONS FOR SEXUAL OFFENCES**

40. Definitions

41. Prohibition on certain types of employment by certain persons who have **previous convictions for sexual offences //Option: previous convictions [committed sexual offences against children and persons who are mentally disabled**

42. **[Establishment of National Register for Sex Offenders and designation of Registrar of Register]**

43. Objects of **[Register]** Chapter

44. Persons entitled to apply for certificate

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

45. Obligations of employers in respect of employees

46. Obligations of employees

47. Obligations in respect of licence applications

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

49. **[Contents of Register**

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

51. **Removal of particulars from Register]**

52. Confidentiality and disclosure of information

52A. Transitional provision

53. **[Regulations pertaining to Register]**

**Amendment of section 2 of Act 32 of 2007**

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

"*(g)* **[establishing a National Register for Sex Offenders in order to establish a record of]** prohibiting persons who are or have been convicted of any sexual offences //Option: any sexual offence **[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]** certain persons who are vulnerable.".

**CHAPTER 6**

**[NATIONAL REGISTER FOR SEX OFFENDERS] PROHIBITION IN RESPECT OF PERSONS WITH PREVIOUS CONVICTIONS FOR SEXUAL OFFENCES (ss 40-53)**

**Definitions**

**40.** For purposes of this Chapter, and unless the context indicates otherwise—

**“certificate”** means a **[certificate contemplated in section 44]** Clearance Certificate issued by the Criminal Record Centre of the South African Police Service indicating whether a person has been convicted of a sexual offence or not;[[3]](#footnote-3)//Option: has been convicted of any offence;

 **“employee”** means—

*(a)* any person who applies to work for or works for an employer, and who receives, or is entitled to receive, any remuneration, reward, favour or benefit; or

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

**“employer”** means—

*(a)* any—

(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

Which**[—**

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

*(bb)* employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or

*(b)* any person, organisation, institution, club, sports club, association or body who or which, as the case may be—

(i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate; or

(ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate,

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

**OPTION 1**

Note: *Comments received by the PC pointed out that the requirement of “access to” is very wide and should be reconsidered in view of the proposed definition of a “person who is vulnerable” Option 1.*

*(i) “Access to” or even “congregate” could be restricted to children and persons with disabilities.*

*(ii) “Access to” or even “congregate” could be omitted as requirement from the provisions concerned Option 2.*

" **'employer'** means—

*(a)* any—

(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which**[—**

***(aa)*]** employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a **[child]** person who is vulnerable or in a position of authority, supervision or care of a **[child]** person who is vulnerable or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate; or

**[*(bb)* employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or]**

*(b)* any person, organisation, institution, club, sports club, association or body who or which, as the case may be—

(i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate; or

(ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate,

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

**OPTION 2**

" **'employer'** means—

*(a)* any—

(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which**[—**

***(aa)*]** employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a **[child]** person who is vulnerable or in a position of authority, supervision or care of a **[child]** person who is vulnerable or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate; or

**[*(bb)* employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or]**

*(b)* any person, organisation, institution, club, sports club, association or body who or which, as the case may be—

(i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate; or

(ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of “person who is vulnerable” are present or congregate,

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

" **'person who is vulnerable'** means a—

*(a)* child or a person who is mentally disabled;

*(b)* female under the age of 25 years;

*(c)* person who is being cared for or sheltered in a facility that provides services to victims of crime;

*(d)* person with a physical, intellectual or mental sensory disability and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

persons with physical, intellectual or mental sensory disabilities; or

*(e)* person who is 60 years of age or older and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

such persons;";

**OPTION 2**

*Note: The extension of the ambit of the definition will have a direct effect on employers and potential employers to the possible detriment of persons who apply for employment.*

" **'person who is vulnerable'** means a—

*(a)* child or a person who is mentally disabled;

*(b)* female under the age of 25 years;

*(c)* person who is being cared for or sheltered in a facility that provides services to victims of crime;

*(d)* person with a physical, intellectual or mental sensory disability and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

persons with physical, intellectual or mental sensory disabilities;

*(e)* person who is 60 years of age or older and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

such persons;

*(f)* person who is lesbian, gay, bi-sexual, transgender, intersexed, asexual or queer // Option 1: person with a characteristic that identifies that person as a member of a group that recognises itself as transgender, intersexed or according to its sexual orientation // Option 2: person who is transgender, intersexed or a person who as a result of his or her sexual orientation could be identified as a member of a group that is generally recognised as such; // Option 3: after consultation the following is recommended: person who is lesbian, gay, bisexual, transgender, intersex or queer: Option 4: person who is a member of a social group consisting of individuals who are transgender, intersex, or whose sexual orientation is gay, lesbian, bisexual or who falls under any other category that deems them a gender or sexual orientation minority.

*(g)* persons who are cared for or sheltered at designated areas, centres or places for the temporary reception and accommodation of asylum seekers or refugees as contemplated in section 35(2) of the Refugees Act, 1998 (Act No. 130 of 1998); or

*(h)* person who falls within a vulnerable group who are—

(i) part of a group that is either oppressed or more susceptible to harm, abuse or exploitation; and

(ii) in a particularly dangerous position and less capable of protecting themselves,

as prescribed by the Minister, subject to the approval of Parliament."

*Note: Paragraph (h) is proposed by Parliamentary Law Adviser. The Parliamentary Law Adviser also recommended that the “Regulations” section should also be amended accordingly. Insofar as the technical aspects of the formulation is concerned it should be noted that the Department would want to suggest alternative wording if the proposal is accepted.*:

**OPTION 3**

*Note: This option aims to restrict the definition to the most vulnerable of vulnerable persons. Insofar as females under 25 years are concerned consideration may also be given to extend paragraph (b) to include reference to, for example, hostels where students live.*

" **'person who is vulnerable'** means a—

*(a)* child or a person who is mentally disabled;

*(b)* female under the age of 25 years who—

(i) receiving receives tuition at a higher education college, higher education institution or university college as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);

(ii) receives vocational training at any training institute, other than the institutions referred to in subparagraph (i), or as part of their employment; or

(iii) lives in a building, structure or facility used primarily as a residence for any of the persons referred to in subparagraphs (i) and (ii);

*(c)* person who is being cared for or sheltered in a facility that provides services to victims of crime;

*(d)* person with a physical, intellectual or mental sensory disability and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

persons with physical, intellectual or mental sensory disabilities; or

*(e)* person who is 60 years of age or older and who—

(i) receives community-based care and support services, other than from a family member for;

(ii) lives in a building, structure or facility used primarily as a residence for; or

(iii) is cared for in a facility providing 24-hour care to,

such persons;";

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

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

**'relevant authority'** means any—

(a) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

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

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

**Prohibition on certain types of employment by certain persons who have previous convictions for sexual offences //Option: previous convictions for offences [committed sexual offences against children and persons who are mentally disabled]**

**41.** **[(1)]** A person who has a previous conviction for a sexual offence //Option: a previous conviction **[been convicted of the commission of a sexual offence against a child or is alleged to have committed a sexual offence against a child and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register]**, may not—

*(a)* be employed to work with a **[child in any circumstances]** person who is vulnerable;

*(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child]** person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child]** person who is vulnerable or where he or she gains access to a **[child]** person who is vulnerable or places where **[children]** persons who are vulnerable are present or congregate;

*(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child]** person who is vulnerable or where **[children]** persons who are vulnerable are present or congregate; or

*(d)* become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled.

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

***(a)* be employed to work with a person who is mentally disabled in any circumstances;**

***(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in a position of authority, supervision or care of a person who is mentally disabled, or which, in any other manner, places him or her in a position of authority, supervision or care of a person who is mentally disabled or where he or she gains access to a person who is mentally disabled or places where persons who are mentally disabled *are present or congregate;***

***(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a person who is mentally disabled or where persons who are mentally disabled are present or congregate; or**

 ***(d)* become the curator of a person who is mentally disabled.]**

**OPTION 1**

*Note: Option aims to address the concerns that were raised that the extension to include all sexual offences draws the net too wide.*

*(i) “Access to” could be restricted to children and persons with disabilities Option 1.*

*(ii) “Access to” could be omitted as requirement from the provisions concerned Option 2.*

**41.** **[(1)]** A person who has a previous conviction for a sexual offence //Option: a previous conviction **[been convicted of the commission of a sexual offence against a child or is alleged to have committed a sexual offence against a child and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register,]** may not—

*(a)* be employed to work with a **[child]** person who is vulnerable in any circumstances;

*(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child]** person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child]** person who is vulnerable or where he or she gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate;

*(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child]** person who is vulnerable or where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate; or

*(d)* become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable”.

**OPTION 2**

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

*(a)* be employed to work with a **[child]** person who is vulnerable in any circumstances;

*(b)* hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child]** person who is vulnerable, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child]** person who is vulnerable or where he or she gains access to a **[child]** person who is vulnerable child or a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of “person who is vulnerable” or places where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate;

*(c)* be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child]** person who is vulnerable or where **[children]** persons who are vulnerable children or persons who are mentally disabled or those persons referred to in paragraph *(d)* of the definition of a “person who is vulnerable” are present or congregate; or

*(d)* become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled or a person referred to in paragraph *(d)* of the definition of a “person who is vulnerable”.

**[Establishment of National Register for Sex Offenders and designation of Registrar of Register**

**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, before 30 June 2009, and, in accordance with the provisions of this Chapter and the regulations made thereunder, be established and maintained by the Minister.**

**(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.]**

**Objects of [Register] Chapter**

**43.** The objects of **[the Register]** this Chapter are to protect **[children and persons who are mentally disabled]** certain vulnerable persons against sexual offenders //Option: offenders by—

*(a)* **[establishing and maintaining a record of persons who—**

**(i) have been convicted of a sexual offence against a child or a person who is mentally disabled, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic; or**

**(ii) are alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter—**

***(aa)* in the Republic has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977; or**

***(bb)* outside the Republic has made a finding and given a direction contemplated in subparagraph *(aa)* in terms of the law of the country in question;]**

*(b)* informing an employer **[applying for a certificate as contemplated in this Chapter]** whether or not **[the particulars of]** an employee **[contemplated in section 45(1)*(a)* or *(b)* are contained in the Register]**;

*(c)* informing a licensing authority **[applying for a certificate as contemplated in this Chapter]** whether or not **[the particulars of]** an applicant contemplated in section 47 **[are contained in the Register]**; and

*(d)* informing the relevant authorities dealing with fostering, kinship care-giving, temporary safe care-giving, adoption or curatorship **[applying for a certificate as contemplated in this Chapter]** whether or not **[the particulars of]** an applicant, as contemplated in section 48, **[have been included in the Register]**

has a previous conviction for a sexual offence //Option: has a previous conviction.

**Persons entitled to apply for certificate**

*Note: Strictly speaking it is not necessary to restrict any person from applying to the SAPS CRC for a clearance certificate in respect of another person*

**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,]** has a previous conviction for a sexual offence may // Option: has a previous conviction may be made **[in the prescribed manner]** by—

*(a)* an employer in respect of an employee as contemplated in section 45(1);

*(b)* a licensing authority in respect of an applicant as contemplated in section 47(1);

*(c)* a relevant authority in respect of an applicant as contemplated in section 48(1);

*(d)* an employee contemplated in section 46(1) and (2) in respect of his or her own particulars;

*(e)* a person contemplated in section 47(2) applying for a licence or approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of persons who are vulnerable **[children or persons who are mentally disabled]** in respect of his or her own particulars]; or

*(f)* a person contemplated in section 48(2) applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent or curator 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]**.

**[Enquiries for purposes of expungement applications in terms of Criminal Procedure Act, 1977**

**44A. (1) For the purposes of section 271B of the Criminal Procedure Act, 1977 (Act 51 of 1977), the Director-General: Justice and Constitutional Development may enquire from the Registrar whether or not the particulars of a person are contained in the Register and whether or not that person's particulars have been removed from the Register in terms of section 51(1) or (3)*(c)*, as the case may be.**

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

**Obligations of employers in respect of employees**

**45.** (1) Any employer who—

*(a)* at the date of commencement **[of this Chapter]** of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, ~~2020~~ 2021, has in his or her employment any employee, may from the date of **[establishment of the Register, in the prescribed manner,]** the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021, apply **[to the Registrar]** for a **[prescribed]** certificate, stating whether or not **[the particulars of]** the employee **[are recorded in the Register]** has been convicted of a sexual offence //Option: has been convicted of an offence; or

*(b)* from the date of **[establishment of the Register,]** commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021, 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]** has a previous conviction for a sexual offence //Option: has any previous conviction.

(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]** who has a previous conviction for a sexual offence //Option: has any previous conviction.

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

*(c)* Notwithstanding paragraph *(d)* an employer must immediately terminate the employment of an employee who fails to disclose a conviction of a sexual offence //Option: any offence **[against a child or a person who is mentally disabled]** or that he or she is alleged to have committed a sexual offence //Option: any offence **[against a child or a person who is mentally disabled]** and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as contemplated in section 41.

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

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

**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 //Option: any offence **[against a child or a person who is mentally disabled, or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977,]** irrespective of whether or not such offence was **[committed or allegedly]** committed during the course of his or her employment**[, and whose particulars are included or are to be included in the Register,]** must without delay disclose such conviction or finding to his or her employer.

(2) An employee who, after the commencement of **[this Chapter]** the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 2020, applies for employment, must, if he or she has been convicted of a sexual offence //Option: any previous conviction **[against a child or a person who is mentally disabled or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, and whose particulars are included or are to be included in the Register,]** disclose such conviction **[or finding]** when applying for employment.

(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]** person who is vulnerable 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]** has a previous conviction for a sexual offence //Option: has any previous conviction.

(2) A person who, after the commencement of **[this Chapter]** the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021, applies for a licence contemplated in subsection (1) to a licensing authority**[, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977]** must submit a certificate to the licencing authority upon submitting such application.

(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]** received a certificate from the applicant concerned.

(2) A person who, after the commencement of **[this Chapter]** the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021, applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or a curator**[, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977]** must submit a certificate to the licencing authority upon submitting such application.

(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.

**[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 50:**

**(i) The title, full names and surname of the person, including any known alias or nickname and, where applicable, the profession or trade of the person;**

**(ii) the last known physical address of the person, and any other contact details, including a postal address, where applicable;**

**(iii) the identity number, passport number and driver's licence number of the person, where applicable;**

**(iv) the sexual offence against a child or a person who is mentally disabled in respect of which the person has been convicted, the sentence imposed, the date and place of conviction and sentence, as well as the relevant prisoner identification number, where applicable;**

**(v) the court in which the trial took place and the case number;**

**(vi) the name of the medical institution or medical practitioner of a person and details of the sexual offence allegedly committed by a person who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977; and**

**(vii) any other particulars as may be prescribed by regulation; and**

***(c)* if the conviction and sentence took place in a foreign jurisdiction, contain as far as possible the equivalent information as is contemplated in paragraph *(b)*, as obtained from the relevant country or any other legal source.]**

**[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, subject to paragraph *(c)*, 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.**

***(c)* If a court has, in terms of this Act or any other law, convicted a person ('A') of a sexual offence referred to in paragraph *(a)*(i) and A was a child at the time of the commission of such offence, or if a court has made a finding and given a direction referred to in paragraph *(a)*(ii) in respect of A who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in paragraph *(a)* unless—**

**(i) the prosecutor has made an application to the court for such an order;**

**(ii) the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of A committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future;**

**(iii) A has been given the opportunity to address the court as to why his or her particulars should not be included in the Register; and**

**(iv) the court is satisfied that substantial and compelling circumstances exist based upon such report and any other evidence, which justify the making of such an order.**

***(d)* In the event that a court finds that substantial and compelling circumstances exist which justify the making of an order as contemplated in paragraph *(a)*, the court must enter such circumstances on the record of the proceedings.**

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

***(a)* the period for noting an appeal or taking the matter on review has expired; or**

***(b)* the appeal or review proceedings have been concluded in the case of an appeal or review,**

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

**(4) Where a court, for whatever reason, fails to make an order under subsection (2)*(a)*, in respect of any person other than a person referred to in subsection (2)*(c)*, the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court and the court must make such order.**

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

***(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.**

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

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

***(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), (2A) and (3), the particulars of a person—**

***(a)* who—**

**(i) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed after that person has been released from prison or the period of suspension has lapsed;**

**(ii) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of seven years has lapsed after that person has been released from prison or the period of suspension has lapsed; or**

**(iii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act 17 of 2002), from any restrictions imposed on him or her; or**

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

**(2) The particulars of a person who has—**

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

***(b)* two or more convictions of a sexual offence against a child or a person who is mentally disabled,**

**may not be removed from the Register.**

**(2A) A person falling into the categories contemplated in subsection (1), who was a child at the time of the commission of the offence concerned and who was convicted of such offence or a person who was a child at the time of the alleged commission of the offence and in respect of whom a court has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977—**

***(a)* before the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to a court for an order that his or her particulars must be removed from the Register by—**

**(i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and**

**(ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her; or**

***(b)* after the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)*(c)* for an order that his or her particulars must be removed from the Register by—**

**(i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and**

**(ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her.**

**(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.]**

**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—**

***(a)* for the purpose of giving effect to the provisions of this Chapter; or**

***(b)* when required to do so by any competent court.**

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

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

*(a)* for the purpose of giving effect to the provisions of this Chapter; or

*(b)* when required to do so by any competent court,

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

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

**Transitional provision**

 **52A.** The Registrar//Minister must, before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021, transfer the data base in his or her//the Registrar’s custody to the National Commissioner of the South African Police Service and all the particulars that he or she receives from the clerks of the courts and the Registrars of the High Courts after such transfer, but before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021.

**[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—

*(a)* the manner and format in which the Register is to be established and maintained as contemplated in section 42(1);

*(b)* any particulars to be included in the Register, in addition to those mentioned in section 49*(b)* (i) to (vi);

*(c)* the manner in which the National Commissioner of Correctional Services must forward particulars of prisoners who are serving a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled to the Registrar as contemplated in section 50(5)*(a)*;

*(d)* the manner and period within which the National Commissioner of Correctional Services must inform each prisoner whose particulars have been forwarded to the Registrar as contemplated in section 50(5)*(b)*;

*(e)* the manner in which the National Commissioner of the South African Police Service must forward particulars of persons with a previous conviction for a sexual offence against a child or a person who is mentally disabled to the Registrar as contemplated in section 50(6);

*(f)* the manner in which the Director-General: Health must forward particulars of persons who are subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled to the Registrar as contemplated in section 50(7)*(a)*;

*(g)* the manner and period within which the Director-General: Health must inform each person whose particulars have been forwarded to the Registrar as contemplated in section 50(7)*(b)*;

*(h)* the manner in which persons mentioned in section 44 must apply to the Registrar for a certificate;

*(i)* the format and content of the certificate contemplated in section 44;

*(j)* persons who may apply for a certificate in terms of section 44;

*(k)* any further category of employers to whom this Chapter shall apply;

*(l)* the period within which a certificate contemplated in section 44 must be provided to any person by the Registrar;

*(m)* access to the Register;

*(n)* the safe-keeping and disposal of records; and

*(o)* any aspect in this Chapter in respect of which regulations may be required or are necessary.

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

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

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

**SECTIONS 36D AND 271B OF CRIMINAL PROCEDURE ACT, 1977**

**Powers in respect of buccal samples, bodily samples and crime scene samples**

 **36D**. (1) Subject to section 36A(5), an authorised person must—

*(a)* take a buccal sample; or

*(b)* cause the taking of any other bodily sample by a registered medical practitioner or registered nurse defined in the National Health Act,

of any person—

(i) after arrest but before appearance in court to be formally charged for any offence referred to in Schedule 8;

(ii) released on bail in respect of any offence referred to in Schedule 8, if a buccal sample or a bodily sample of that person was not taken upon his or her arrest;

(iii) upon whom a summons has been served in respect of any offence referred to in Schedule 8;

(iv) **[whose name appears on the National Register for Sex Offenders; or]** who has a previous conviction for a sexual offence as defined in section 40 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or

(v) charged or convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection.

(2) Subject to section 36A(5), an authorised person may—

(a) take a buccal sample; or

(b) cause the taking of any other bodily sample by a registered medical practitioner or registered nurse,

of any person—

(i) after arrest but before appearance in court to be formally charged in respect of any offence;

(ii) released on bail in respect of any offence, if a buccal sample or bodily sample was not taken upon his or her arrest;

(iii) upon whom a summons has been served in respect of any offence;

(iv) **[whose name appears on the National Register for Sex Offenders]** who has a previous conviction for a sexual offence as defined in section 40 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or

(v) charged or convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection.

 (3) The authorised person must supervise the taking of a buccal sample from a person referred to in subsection (1) or (2) who is required to submit such sample and who requests to take it himself or herself.

 (4) The Station Commander or other relevant commander must within 30 days furnish every bodily sample taken under subsection (1) or (2) to the authorised officer, who must carry out a forensic DNA analysis on every such sample in terms of Chapter 5B of the South African Police Service Act.

 (5) Subject to section 36A(5), nothing in this Chapter prohibits—

(a) an authorised person from re-taking or supervising the re-taking of a buccal sample from any person referred to in subsection (1), (2) or (3), if the buccal sample taken from him or her was either not suitable or insufficient for forensic DNA analysis; or

(b) a registered medical practitioner or registered nurse from re-taking a bodily sample taken from any person referred to in subsection (1) or (2), if the bodily sample taken from him or her was either not suitable or insufficient for forensic DNA analysis.

 (6) The forensic DNA profile derived from bodily samples, taken under any power conferred by this section, may be used to conduct a comparative search.

 (7) *(a)* Any forensic DNA profile derived from such sample, taken under any power conferred by this section must only be used for the purposes referred to in section 15F of the South African Police Service Act.

 *(b)* The forensic DNA profile derived from bodily samples, taken under any power conferred by this section must be retained on, or removed from, the NFDD in accordance with the provisions of Chapter 5B of the South African Police Service Act.

 *(c)* Any person who uses or allows the use of a bodily sample, crime scene sample or any forensic DNA profile derived from such sample for any purpose other than as contemplated in paragraph *(a)*, is guilty of an offence and liable in the case of a natural person, to imprisonment for a period not exceeding 15 years, and in the case of a juristic person, to a fine.

 *(d)* Intimate samples may only be taken—

(i) by a registered medical practitioner or registered nurse; and

(ii) in accordance with strict regard to decency and order.

**Expungement of certain criminal records**

**271B.** (1) *(a)* Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of, a person convicted of an offence, the criminal record of that person, containing the conviction and sentence or order in question, must, subject to paragraph *(b)* and subsection (2) and section 271D, on the person's written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:

(i) A sentence postponing the passing of sentence in terms of section 297(1)*(a)* where that person was discharged in terms of section 297(2), without the passing of sentence, or where that person was not called upon to appear before the court in terms of section 297(3);

(ii) a sentence discharging that person with a caution or reprimand in terms of section 297(1)*(c)*;

(iii) a sentence in the form of a fine only, not exceeding R20 000;

(iv) a sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;

(v) any sentence of imprisonment with the option of a fine, not exceeding R20 000;

(vi) any sentence of imprisonment which was suspended wholly;

(viA) an order in terms of section 290 (1)*(a)* or *(b)* as that section was before it was repealed by section 99 of the Child Justice Act, 2008 (Act 75 of 2008);

(vii) a sentence of correctional supervision, referred to in section 276(1)*(h)* or a sentence referred to in section 276(1)*(i)*; or

(viii) a sentence of periodical imprisonment, referred to in section 276(1)*(c)*.

 *(b)* A person**[—**

**(i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007); or**

**(ii)]** whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120(1)*(b)* of the Children's Act, 2005 (Act 38 of 2005),

does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed **[from the National Register of Sex Offenders, as provided for in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or]** as provided for in section 128 of the Children's Act, 2005**[, as the case may be]**.

 (2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1).

 (3) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (2) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.

**SECTION 15A OF SOUTH AFRICAN POLICE SERVICE ACT, 1995**

**Storage and use of fingerprints, body-prints and photographic images**

**15A.** (1) The National Commissioner must ensure that fingerprints, body-prints or photographic images taken under—

*(a)* section 36B(1), section 36C(1) or section 37 of the Criminal Procedure Act, 1977 (Act 51 of 1977);

*(b)* section 113 of the Firearms Control Act, 2000 (Act 60 of 2000);

*(c)* section 9 of the Explosives Act, 2003 (Act 15 of 2003); or

*(d)* any Order of the Department of Correctional Services,

are stored, maintained, administered, and readily available, whether in computerised or other form, and shall be located within the Division of the Service responsible for criminal records.

 (2) The National Commissioner must ensure that the fingerprints and photographic images of persons **[whose names must be included in the National Register for Sex Offenders, as determined under section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007),]** who have been convicted of sexual offences after the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020 2021, are taken and dealt with in accordance with subsection (1).

 (3) The provisions of this Chapter apply mutatis mutandis to the fingerprints, body-prints or photographic images stored, maintained and administered by the Division of the Service responsible for criminal records prior to the coming into operation of this Act and nothing in this Chapter shall affect the use of such prints and photographic images for the purposes set out in subsections (4) and (5).

 (4) Subject to subsection (5), the fingerprints, body-prints or photographic images referred to in subsections (1), (2) and (3) shall only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.

 (5) Subsection (4) does not prohibit the use by the police officer commanding the Division of the Service responsible for criminal records or his or her delegate, of any fingerprints stored in terms of this section, for the purpose of establishing if a person has been convicted of an offence.

 (6) Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter—

(a) uses or who allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or

(b) tampers with or manipulates the process or the fingerprints, bodyprints or images in question; or

(c) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,

is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

1. The concern has been expressed that the particulars of persons who were children at the time of the commission of the sexual offence should not appear on the Register in line with the findings of the Constitutional Court in the *Centre for Child Law v Media 24* case. [↑](#footnote-ref-1)
2. SAPS indicated that they would require access to the Register in order to be able to comply with section 15A(2) of the SAPS Act. [↑](#footnote-ref-2)
3. The requirement that the clearance certificate should only reflect previous convictions for sexual offences will require additional resources to be allocated to SAPS in order for them to create a filter mechanism to separate sexual offences from any other offences. It has been suggested by some interested parties that the complete criminal record of a person should be reflected in the required clearance certificate. [↑](#footnote-ref-3)