REPUBLIC OF SOUTH AFRICA

**SELECT COMMITTEE AMENDMENTS TO**

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

**[B 16B—2020]**

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*As agrxxx to by the Select Committee on Security and Justice (National Council of Provinces)*

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**[B 16C—2020]**

**AMENDMENTS AGRXXX TO**

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

[B 16B—2020]

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NEW CLAUSE

1. That the following be a new clause:

“**Amendment of section 1 of Act 32 of 2007, as amended by section 48 of Act 7 of 2013, section 1 of Act 5 of 2015 and section 35 of Act 8 of 2017**

**1.** Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (hereafter referred to as the “principal Act”), is hereby amended—

*(a)* by the substitution of the definition of “care giver” of the following definition:

“**’care giver’** means any person who, in relation to a person **[who is mentally disabled]** with a mental disability, takes responsibility for meeting the daily needs of or is in substantial contact with such person;”;

*(b)* by the substitution for the words preceding paragraph *(a)* of the definition of “person with a mental disability” of the following words:

“**'person [who is mentally disabled] with a mental disability'** means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—“; and

*(c)* by the substitution for subparagraph (v) of subsection (3)*(d)* of the following subparagraph:

“(v) a person **[who is mentally disabled]** with a mental disability.”.

**CLAUSE 1**

1. On page 2, in line 4, to delete “**1.**” and to replace with “**2.**”.

2. On page 2, in lines 4 and 5, to delete “Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (hereafter referred to as the “principal Act”),” and to replace with “principal Act”.

**CLAUSE 2**

1. On page 2, in line 15, to delete “**2.**” and to replace with “**3.**”.

**CLAUSE 3**

1. On page 3, in line 2, to delete “**3.**” and to replace with “**4.**”.

**CLAUSE 4**

1. On page 3, in line 14, to delete “**4.**” and to replace with “**5.**”.

**NEW CLAUSES**

1. That the following be new clauses:

“**Substitution of heading to Act 32 of 2007**

**6.** The heading for Chapter 4 of the principal Act is hereby substituted of the following heading:

“**SEXUAL OFFENCES AGAINST PERSONS [WHO ARE MENTALLY DISABLED] WITH MENTAL DISABILITIES**

**Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of child pornography or pornography to persons [who are mentally disabled] with mental disabilities and using persons [who are mentally disabled] with mental disabilities for pornographic purposes or benefiting therefrom**”.

**Substitution of section 23 of Act 32 of 2007, as substituted by section 3 of Act 6 of 2012, as substituted by section 3 of Act 6 of 2012**

**7.** Section 23 of the principal Act is hereby substituted of the following section:

“**Sexual exploitation of persons [who are mentally disabled] with mental disabilities**

**23.** (1) A person ('A') who unlawfully and intentionally engages the services of a complainant **[who is mentally disabled]** with a mental disability ('B'), for financial or other reward, favour or compensation to B or to a third person ('C')—

*(a)* for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

*(b)* by committing a sexual act with B,

is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a person **[who is mentally disabled]** with a mental disability.

(2) A person ('A') who unlawfully and intentionally offers the services of a person **[who is mentally disabled]** with a mental disability ('B') to a third person ('C'), for financial or other reward, favour or compensation to A, B or to another person ('D')—

*(a)* for purposes of the commission of a sexual act with B by C;

*(b)* by inviting, persuading or inducing B to allow C to commit a sexual act with B;

*(c)* by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with B by C;

*(d)* by making available, offering or engaging B for purposes of the commission of a sexual act with B by C; or

*(e)* by detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with B by C,

is guilty of an offence of being involved in the sexual exploitation of a person **[who is mentally disabled]** with a mental disability.

(3) A person ('A') who—

*(a)* intentionally allows or knowingly permits the commission of a sexual act by a third person ('C') with a person **[who is mentally disabled]** with a mental disability ('B') while being a care-giver, parent, guardian, curator or teacher of B; or

*(b)* owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with B by C,

is guilty of the offence of furthering the sexual exploitation of a person **[who is mentally disabled]** with a mental disability.

(4) A person ('A') who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a person **[who is mentally disabled]** with a mental disability ('B') by a third person ('C'), is guilty of an offence of benefiting from the sexual exploitation of a person **[who is mentally disabled]** with a mental disability.

(5) A person ('A') who intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a person **[who is mentally disabled]** with a mental disability ('B') by a third person ('C'), is guilty of an offence of living from the earnings of the sexual exploitation of a person who is mentally disabled.

(6) A person ('A'), including a juristic person, who—

*(a)* makes or organises any travel arrangements for or on behalf of a third person ('C'), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a person **[who is mentally disabled]** with a mental disability ('B'), irrespective of whether that act is committed or not; or

*(b)* prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B,

is guilty of an offence of promoting sex tours with persons **[who are mentally disabled]** with mental disabilities.”.

**Amendment of section 24 of Act 32 of 2007**

**8.** Section 24 of the principal Act is hereby amended—

*(a)* by the substitution for the heading of the following heading:

“**Sexual grooming of persons [who are mentally disabled**] **with mental disabilities**”;

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

“(1) A person ('A') who—

*(a)* supplies, exposes or displays to a third person ('C')—

(i) an article which is intended to be used in the performance of a sexual act;

(ii) child pornography or pornography; or

(iii) a publication or film,

with the intention to encourage, enable, instruct or persuade C to perform a sexual act with a person **[who is mentally disabled]** with a mental disability ('B'); or

*(b)* arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B,

is guilty of the offence of promoting the sexual grooming of a person **[who is mentally disabled]** with a mental disability.”;

*(c)* by the substitution for the words preceding subparagraph (i) of subsection (2)*(a)* of the following words:

“*(a)* supplies, exposes or displays to a person **[who is mentally disabled]** with a mental disability ('B')—“; and

*(d)* by the substitution for the words following subsection (2)*(e)* of the following words:

“is guilty of the offence of sexual grooming of a person **[who is mentally disabled]** with a mental disability.”.

**Substitution of section 25 of Act 32 of 2007**

**9.** Section 25 for the principal Act is hereby substituted of the following section:

“**Exposure or display of or causing exposure or display of child pornography or pornography to persons [who are mentally disabled] with mental disabilities**

**25.** A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of any image, publication, depiction, description or sequence of child pornography or pornography to a complainant **[who is mentally disabled]** with a mental disability ('B'), is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a person **[who is mentally disabled]** with a mental disability.”.

**Substitution of section 26 of Act 32 of 2007**

**10.** Section 26 for the principal Act is hereby substituted of the following section:

“**Using persons [who are mentally disabled] with mental disabilities for pornographic purposes or benefiting therefrom**

**26.** (1) A person ('A') who unlawfully and intentionally uses a complainant **[who is mentally disabled]** with a mental disability ('B'), whether for financial or other reward, favour or compensation to B or to a third person ('C') or not—

*(a)* for the purpose of creating, making or producing;

*(b)* by creating, making or producing; or

*(c)* in any manner assisting to create, make or produce,

any image, publication, depiction, description or sequence in any manner whatsoever, of pornography or child pornography, is guilty of the offence of using a person **[who is mentally disabled]** with a mental disability for pornographic purposes.

(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from using a person **[who is mentally disabled]** with a mental disability for pornographic purposes.”.

**Substitution of section 30 of Act 32 of 2007**

**11.** Section 30 for the principal Act is hereby amended by the substitution for subparagraph (ii) of subsection (1)*(b)* of the following subparagraph:

“(ii) a person **[who is mentally disabled]** with a mental disability;”.

**CLAUSE 5**

1. On page 3, in line 28, to delete “**5.**” and to replace with “**12.**”.

2. On page 4, in line 29, to delete “who is mentally disabled” and to replace with “with a mental disability”.

3. On page 5, in line 9, to delete “in terms of Chapters 2, 3 and 4 and section” and to replace with “referred to in sections 3 to 10, 12 to 26 and”.

**CLAUSE 6**

1. On page 5, in line 21, to delete “**6.**” And to replace with “**13.**”.

2. On page 5, in lines 39 to 41, to delete “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” and to replace with the following:

“**[child or where he or she gains access to a child or places where children are present or congregate]** person who is vulnerable;”.

3. On page 5, in lines 44 and 45, to delete “or where **[children]** persons who are vulnerable are present or congregate” and to replace with the following:

“**[or where children are present or congregate]**”.

4. On page 5, in line 49, to delete “who is mentally disabled” and to replace with “with a mental disability”.

**CLAUSE 7**

1. On page 6, in line 17, to delete “**7.**” and to replace with “**14.**”.

**CLAUSE 8**

1. On page 6, in line 57, to delete “**8.**” and to replace with “**15.**”.

**CLAUSE 9**

1. On page 7, in line 15, to delete “**9.**” and to replace with “**16.**”.

**CLAUSE 10**

1. On page 7, in line 22, to delete “**10.**” and to replace with “**17.**”.

**CLAUSE 11**

1. On page 7, in line 38, to delete “**11.**” and to replace with “**18.**”.

**CLAUSE 12**

1. On page 8, in line 4, to delete “**12.**” and to replace with “**19.**”.

**CLAUSE 13**

1. Clause rejected and replaced with the following clause:

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

**20.** Section 47 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

"(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.

(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.".

**CLAUSE 14**

1. On page 8, in line 33, to delete “**14.**” and to replace with “**21.**”.

**CLAUSE 15**

1. On page 8, in line 50, to delete “**15.**” and to replace with “**22.**”.

**CLAUSE 16**

1. On page 9, in line 3, to delete “**16.**” and to replace with “**23.**”.

2. On page 9, in line 7, to delete “in terms of this Act or any other law” and to replace with “**[in terms of this Act or any other law]**”.

**CLAUSE 17**

1. On page 10, in line 58, to delete “**17.**” and to replace with “**24.**”.

**CLAUSE 18**

1. On page 12, in line 51, to delete “**18.**” and to replace with “**25.**”.

**CLAUSE 19**

1. On page 13, in line 7, to delete “**19.**” and to replace with “**26.**”.

**NEW CLAUSE**

1. That the following be a new clause:

**Amendment of section 57 of Act 32 of 2007**

**27**. Section 57 of the principal Act is hereby amended—

*(a)* by the substitution for the heading for section 57 of the following heading:

“**Inability of children under 12 years and persons [who are mentally disabled] with mental disabilities to consent to sexual acts**”; and

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

“(2) Notwithstanding anything to the contrary in any law contained, a person **[who is mentally disabled]** with a mental disability is incapable of consenting to a sexual act.”.

**CLAUSE 20**

1. On page 13, in line 33, to delete “**20.**” and to replace with “**28.**”.

**CLAUSE 21**

1. Clause rejected and that the following be a new clause:

“**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**

**29.** The long title of the principal Act is hereby amended—

*(a)*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;”;

*(b)* by the substitution for the sixth bullet thereof of the following bullet:

“enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons **[who are mentally disabled]** with mental disabilities, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons **[who are mentally disabled]** with mental disabilities in respect of sexual abuse or exploitation;”; and

*(c)* by the substitution for the ninth bullet of the following bullet:

“creating a duty to report sexual offences committed with or against **[children or persons who are mentally disabled]** persons who are vulnerable;”.

**CLAUSE 22**

1. Clause rejected and that the following be a new clause:

**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**

**30.** The index of the principal Act is hereby amended—

*(a)* by the insertion after item 14 of the following Part and item:

"**Part 5**

**Sexual intimidation**

14A. Sexual intimidation";

*(b)* by the substitution for Chapter 4 of the following Chapter:

“**CHAPTER 4**

**SEXUAL OFFENCES AGAINST PERSONS [WHO ARE MENTALLY DISABLED] WITH MENTAL DISABILITIES**

**Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of child pornography or pornography to persons [who are mentally disabled] with mental disabilities and using persons [who are mentally disabled] with mental disabilities for pornographic purposes or benefiting therefrom**

23. Sexual exploitation of persons **[who are mentally disabled]** with mental disabilities

24. Sexual grooming of persons **[who are mentally disabled]** with mental disabilities

25. Exposure or display of or causing exposure or display of child pornography or pornography to persons **[who are mentally disabled]** with mental disabilities

26. Using persons **[who are mentally disabled]** with mental disabilities for pornographic purposes or benefiting therefrom”;

*(c)* by the substitution for item 41 of the following item:

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

*(d)* by the insertion after item 44A of the following items:

“44B. Access to Register by National Commissioner of South African Police Service

44C. Obligations of Director-General: Home Affairs and Registrar.”;

*(e)* by the substitution for the heading to Part 1 of Chapter 7 of the following heading:

“*Miscellaneous offences: Obligation to report commission of sexual offences against* ***[children or persons who are mentally disabled]*** *vulnerable persons and attempt, conspiracy, incitement or inducing another person to commit sexual offence*”;

*(f)* by the substitution for item 54 of the following item:

“54. Obligation to report commission of sexual offences against **[children or persons who are mentally disabled]** persons who are vulnerable”;

*(g)* by the substitution for the heading to Part 2 of Chapter 7 of the following heading:

“*Defences and sentencing, inability of children under 12 years and persons* ***[who are mentally disabled]*** *with mental disabilities to consent to sexual acts, other evidentiary matters and extra-territorial jurisdiction*”; and

*(h)* by the substitution for item 57 of the following item:

“57. Inability of children under 12 years and persons **[who are mentally disabled]** with mental disabilities to consent to sexual acts”.

**CLAUSE 23**

1. On page 14, in line 9, to delete “**23.**” and to replace with “**31.**”.

**LONG TITLE**

1. On page 2, after the second bullet of the long title, to insert the following bullet:

* substitute the phrase “a person with a mental disability” or “persons who are mentally disabled” wherever the phrase appears with the phrase “a person with a mental disability” or “persons with mental disabilities”;