



SEXUAL OFFENCES AND RELATED
MATTERS AMENDMENT ACT, 2007

Act 32 of 2007

AN OVERVIEW OF THE NEW
OFFENCES CREATED

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BACKGROUND

RAPE: COMMON LAW DEFINITION until 9 MAY 2007

- ◆ Intentional, unlawful sexual intercourse with a women without her consent (Burchell)
- ◆ A male having unlawful and intentional sexual intercourse with a female without her consent (Snyman)
- ◆ Sexual intercourse
 - Slightest penetration – vagina

RAPE: EXTENDED COMMON LAW DEFINITION:

10 MAY 2007 - 15 DECEMBER 2007

MASIYA v DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA AND ANOTHER (CENTRE FOR APPLIED LEGAL STUDIES AND ANOTHER, AMICI CURIAE) 2007 (2) SACR 435 (CC)

Rape - What constitutes - Common-law definition of - **Extended to include non-consensual anal penetration of woman** - Pending Sexual Offences Bill not thwarting broadening of definition since such extension clearly in public interest and delay causing injustice for survivors of non-consensual anal penetration.

Extension of common law definition of rape to include non-consensual intentional penetration of penis into female anus - Convicting accused of offence when conduct not constituting particular offence at time of commission unfair and violating s 35(3)(1) of Constitution - **Extended definition to apply only prospectively.**

INDECENT ASSAULT: COMMON LAW

- ◆ Unlawfully and intentionally assaulting, touching or handling another in circumstances in which either the act itself or the intention with which it is committed is indecent (Snyman)
- ◆ Consists in an assault that by its nature or design is of an indecent character (Burchell)
 - *F* 1982 (2) SA 580 (T)
 - *Kock* 2003 (2) SACR 5 (SCA) (following Abrahams 1918 CPD 590)

CONSENT

Snyman: *Criminal Law* (4th ed)

Just as Y's consent to the act may be signified either expressly or tacitly (by implication), her refusal to consent may likewise be signified either expressly or tacitly.

For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a woman who has the mental ability to understand what she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse. (447)

Burchell: *Principles of Criminal Law* (3rd ed)

South African practice ... widened the offence, the essence of which is now that intercourse should have occurred without consent, whether the lack of consent was due to force or fear or fraud or incapacity to consent.

On this approach the fact that the woman did not physically resist and passively submitted to intercourse is not directly relevant, the central question being whether it was in fact her present and freely made decision there and then to engage in sexual intercourse.

Consent deprives the penetration of a criminal character. To have this effect the consent must have been (a) real and (b) have been given before the penetration occurred. (708)

◆ **Factors affecting reality of consent:**

- ◆ **Mental defect**
- ◆ **Intoxication**
- ◆ **Age (under 12)**
- ◆ **Lack of opportunity (asleep, unconscious, hypnotized etc)**
- ◆ **Lack of physical capacity / fear (duress, threat, violence)**
- ◆ **Mistake**
- ◆ **Deceit (fraud)**

S v YORK 2002 (1) SACR 111 SCA

Consent – Court required to consider possibility of consent even where accused denies intercourse.

INTRODUCTION TO THE CRIMINAL LAW

(SEXUAL OFFENCES AND RELATED MATTERS)

AMENDMENT ACT, 2007 (Act 32 of 2007)

OBJECTIVES OF THE ACT

LONG TITLE

The purpose of the Bill is the comprehensive and extensive review and amendment of all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute. This will be done by:

- repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender;
- repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent;
- creating new statutory offences relating to certain compelled acts of penetration or violation;
- creating new statutory offences, for adults, by criminalising the compelling or causing the witnessing of certain sexual conduct and certain parts of the human anatomy, the exposure or display of child pornography and the engaging of sexual services of an adult;
- repealing the common law offences of incest, bestiality and a sexual act with a corpse, as far as such violation is of a sexual nature, and enacting corresponding new statutory offences;
- enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation;
- eliminating the differentiation drawn between the age of consent for different consensual sexual acts and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years;
- criminalising any attempt, conspiracy or incitement to commit a sexual offence;

- creating a duty to report sexual offences committed with or against children or persons who are mentally disabled;
- providing the South African Police Service with new investigative tools when investigating sexual offences or other offences involving the HIV status of the perpetrator;
- providing our courts with extra-territorial jurisdiction when hearing matters relating to sexual offences;
- providing certain services to certain victims of sexual offences, *inter alia*, to minimise or, as far as possible, eliminate secondary traumatisation, including affording a victim of certain sexual offences the right to require that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances;
- establishing and regulating a National Register for Sex Offenders;
- further regulating procedures, defences and other evidentiary matters in the prosecution and adjudication of sexual offences;
- making provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation, enforcement and administration of this Act in order to achieve the objects of the Act;
- making interim provision relating to the trafficking in persons for sexual purposes and to provide for matters connected therewith.

PREAMBLE

In the PREAMBLE the follow are noted as motivation for the legislation: THAT

- the commission of sexual offences in the Republic is of grave concern, as it has a particularly disadvantageous impact on vulnerable persons, the society as a whole and the economy;
- women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children;
- the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary;
- the South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences, and a uniform and co-ordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in Government; and thereby which, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatisation;
- several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children;
- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance.

OBJECTIVES OF THE ACT SECTION 2

Section 2:

The objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic by:

- (a) enacting all matters relating to sexual offences in a single statute;
- (b) criminalising all forms of sexual abuse or exploitation;
- (c) repealing certain common law sexual offences and replacing them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender;
- (d) protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;
- (e) promoting the spirit of *batho pele* (“the People First”) in respect of service delivery in the criminal justice system dealing with sexual offences by—
 - (i) ensuring more effective and efficient investigation and prosecution of perpetrators of sexual offences by clearly defining existing offences, and creating new offences;
 - (ii) giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution;
 - (iii) facilitating a uniform and co-ordinated approach by relevant Government departments in dealing with sexual offences;
 - (iv) entrenching accountability of government officials; and
 - (v) minimising disparities in the provision of services to victims of sexual offences;
- (f) providing certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances; and
- (g) establishing a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of sexual offences against children and persons who are mentally disabled so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of children or persons who are mentally disabled.

CONSTITUTIONAL RIGHTS: CONSTITUTION, 1996

S 9: Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

S 10: Human Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

S 12: Freedom and security of the person

- (1) Everyone has the right to freedom and security of the person, which includes the right –
 - (c) to be free from all forms of violence from either public or private sources
 - (d) not to be tortured in any way
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right –
 - (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body;

S 14: Privacy

Everyone has the right to privacy

S 28: Children

- (1) Every child has the right –
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

Promotion of Equality and Prevention of Unfair Discrimination Act

Act 4 of 2000

8 Prohibition of unfair discrimination on ground of gender

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including-

- (a) gender-based violence;
- (b) female genital mutilation;
- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- (f) discrimination on the ground of pregnancy;
- (g) limiting women's access to social services or benefits, such as health, education and social security;
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

CEDAW

The 1993 **Declaration on the Elimination of Violence against Women** (UN Doc A/48/49) defines in **Article 1** '*violence against women*' as meaning any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Article 2 states that violence against women will include for example, physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation. It further includes physical, sexual or psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution. It also refers to physical, sexual or psychological violence perpetrated or condoned by the state.

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

In **Article 1**, "*Violence against women*" is defined as meaning all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;

Article 4: The Rights to Life, Integrity and Security of the Person

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

2. States Parties shall take appropriate and effective measures to:

- a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
- b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
- c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
- d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
- e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
- f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
- g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
- h) prohibit all medical or scientific experiments on women without their informed consent;
- i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
- j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women.
- k) ensure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents;

SOUTH AFRICAN VICTIMS' CHARTER of RIGHTS

(Charter in terms of s 234 of Constitution, 1996)

YOUR RIGHTS AS A VICTIM OF CRIME.

In your contact with the criminal justice system the following rights will be upheld:

1. The right to be treated with fairness and with respect for your dignity and privacy.

- You have the right to be attended to promptly and courteously, treated with respect for your dignity and privacy by all members of any given service provider.
- The police, during the investigations; the prosecutors and court officials during preparation for and during the trial proceedings, as well as, all other service providers, must take measures to minimise any inconvenience to you as a victim by, amongst others, conducting interviews with you in your language and in private where necessary.
- These measures will prevent the victim from being subjected to secondary victimisation.

2. The right to offer information.

- You have the right to offer information during the criminal investigation and trial.
- The police, prosecutor and correctional service official will take measures to make sure that any contribution that you wish to make to the investigation, prosecution and parole hearing is heard and considered when deciding on whether to proceed with the investigation, or the prosecution or Parole Board hearing.
- This right means that you can participate (where necessary and where possible) in criminal justice proceedings, by attending the bail hearing, the trial, sentencing proceedings and/or parole board hearing.
- It means that you will have the opportunity to make a further statement to the police if you realise that your first statement is incomplete; you may also make a statement to the court to bring the impact of the crime to the courts attention.
- Furthermore you may make a written application to the Chairperson of the Parole Board to attend the parole hearing and submit written input.

3. The right to receive information.

- You have the right to receive information and to be informed of your rights and all relevant services available to you by service providers.
- You should be informed of your role in the case and of the approximate duration of the case. You can request information regarding court dates, witness fees and the witness protection programmes.
- You can also request to be informed of the status of the case, whether or not the offender has been arrested, charged, granted bail, indicted, convicted, and if applicable, sentenced.
- You have the right not only to be informed of your rights, but also on how to exercise them.
- You can also, as part of the right to receive information, ask for explanations of anything you do not understand in your own language.
- You may request reasons for a decision that has been taken about your case, to prosecute or not.
- You are also entitled to receive documents that the law entitles you to have access to.
- You can request to receive notification of proceedings you can attend. You can also request the prosecutor to notify your employer of any proceedings, which necessitates your absence from work.

4. The right to protection.

- You have the right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse.
- If you are a witness you must report such threats to the police or senior state prosecutor.
- The police will then, if you comply with certain requirements, apply that you be placed under witness protection.
- If such an application is successful you will be placed in a witness protection programme.
- Whilst there you will be protected, as far as possible, from all forms of undue influence, for example, you will be protected from harassment or intimidation.
- This will ensure your safety as a witness so as not to have your testimony influenced or to have you withdrawing from testifying as a result of any undue influence.
- This right means that in certain circumstances the court may prohibit the publication of any information (including your identity) or it may order that the trial be held behind close doors (in camera). You can request Correctional Services to inform you if the offender has escaped or has been transferred.

5. The right to assistance.

- You have the right to request assistance, and have access (when necessary/ and if applicable) to available social, health and counselling services as well as legal assistance responsive to your needs.
- The police will assist you by explaining police procedures; informing you of your rights and making the appropriate referral to other service providers.
- The office manager or head of office at the court will make provision for the services of an interpreter.
- The prosecutors will ensure that special measures are employed in relation to sexual offences, domestic violence and child support/maintenance and that cases are heard in specialized courts, where available.
- All service providers in relation to their respective functions have a duty to take all reasonable steps to accommodate victims with special needs and treat them in a sensitive manner.

6. The right to compensation

- You have the right to compensation for loss or damage to property suffered as a result of a crime being committed against you.
- You can on the date of sentencing of the accused request the prosecutor to apply to court for a compensation order in terms of Section 297 and 300 of the Criminal Procedure Act No. 51 of 1977. "Compensation" refers to an amount of money that a criminal court awards the victim who has suffered loss or damage to property, including money as a result of a criminal act or omission by the person convicted for committing the crime.
- The prosecutor will inform you of the compensation order but the clerk of the court will be responsible for its enforcement, and also that you can institute a civil action against the accused where the criminal court does not grant a compensation order as well as where the damages are not easily quantifiable in financial terms like in the case of psychological damages or pain and suffering.

7. The right to restitution.

- You have the right to restitution with respect to property that you have been unlawfully dispossessed of. "Restitution" refers to where the court, after a conviction, orders the offender to give back to you the goods that he/she is found guilty of having unlawfully taken from you in order to restore the you to the position that you were in prior to the offence.
- The prosecutor will inform the you what restitution involves and the clerk of the court will assist you in enforcing this right.

Cases

Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening) 2002 (1) SACR 79 (CC) para 45:

‘Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.’

OVERVIEW OF THE ACT

CHAPTER 1 DEFINITIONS AND OBJECTS

- S 1. Definitions and interpretation of Act
- S 2. Objects

CHAPTER 2 SEXUAL OFFENCES

Part 1: Rape and compelled rape

- S 3. Rape
- S 4. Compelled rape

Part 2: Sexual assault, compelled sexual assault and compelled self-sexual assault

- S 5. Sexual assault
- S 6. Compelled sexual assault
- S 7. Compelled self-sexual assault

Part 3: Persons 18 years older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing"), child pornography to persons 18 years or older or engaging sexual services of persons 18 years or older

- S 8. Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation
- S 9. Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ("flashing")
- S 10. Exposure or display of or causing exposure or display of child pornography to persons 18 years or older
- S 11. Engaging sexual services of persons 18 years or older

Part 4: Incest, bestiality and sexual acts with corpse

- S 12. Incest
- S 13. Bestiality
- S 14. Sexual act with corpse

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

Part 1: Consensual sexual acts with certain children

- S 15. Acts of consensual sexual penetration with certain children (statutory rape)
- S 16. Acts of consensual sexual violation with certain children (statutory sexual assault)

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

S 17. Sexual exploitation of children

S 18. Sexual grooming of children

S 19. Exposure or display of or causing exposure or display of pornography to children

S 20. Using children for or benefiting from child pornography

Part 3: Compelling or causing children to witness sexual offences, sexual acts or self-masturbation and exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing") to children

S 21. Compelling or causing children to witness sexual offences, sexual acts or self-masturbation

S 22. Exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children ("flashing")

CHAPTER 4

SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED

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

S 23. Sexual exploitation of persons who are mentally disabled

S 24. Sexual grooming of persons who are mentally disabled

S 25. Exposure or display of or causing exposure or display of pornography or harmful material to persons who are mentally disabled

S 26. Using persons who are mentally disabled for pornographic purposes or benefiting there from

CHAPTER 5

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

Part 1: Definitions and services for victims of sexual offences

S 27. Definitions

S 28. Services for victims relating to Post Exposure Prophylaxis and compulsory HIV testing of alleged sex offenders

S 29. Designation of public health establishments for purposes of providing Post Exposure Prophylaxis and carrying out compulsory HIV testing

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

S 30. Application by victim or interested person for HIV testing of alleged sex offender

S 31. Consideration of application by magistrate and issuing of order

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

S 32. Application by police official for HIV testing of alleged sex offender

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

S 33. Execution of order and issuing of warrant of arrest

S 34. Use of results of HIV tests

Part 5: Miscellaneous

S 35. Register of applications and orders

S 36. Confidentiality of outcome of application

S 37. Confidentiality of HIV test results obtained

S 38. Offences and penalties

S 39. Regulations

**CHAPTER 6
NATIONAL REGISTER FOR SEX OFFENDERS**

S 40. Definitions

S 41. Prohibition on certain types of employment by certain persons who have committed sexual offences against children and persons who are mentally disabled

S 42. Establishment of National Register for Sex Offenders and designation of Registrar of Register

S 43. Objects of Register

S 44. Persons entitled to apply for certificate

S 45. Obligations of employers in respect of employees

S 46. Obligations of employees

S 47. Obligations in respect of license applications

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

S 49. Contents of Register

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

- S 51. Removal of particulars from Register
- S 52. Confidentiality and disclosure of information
- S 53. Regulations pertaining to Register

CHAPTER 7 GENERAL PROVISIONS

Part 1: Miscellaneous offences: Obligation to report commission of sexual offences against children or persons who are mentally disabled and attempt, conspiracy, incitement or inducing another person to commit sexual offence

- S 54. Obligation to report commission of sexual offence against children or persons who are mentally disabled
- S 55. Attempt, conspiracy, incitement or inducing another person to commit sexual offence

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

- S 56. Defences
- S 57. Inability of children under 12 years and persons who are mentally disabled to consent to sexual acts
- S 58. Evidence of previous consistent statements
- S 59. Evidence of delay in reporting
- S 60. Court may not treat evidence of complainant with caution on account of nature of offence
- S 61. Extra-territorial jurisdiction

Part 3: National policy framework

- S 62. National policy framework
- S 63. Establishment of Inter-sectoral Committee
- S 64. Meetings of Committee
- S 65. Responsibilities, functions and duties of Committee

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

- S 66. National instructions and directives
- S 67. Regulations
- S 68. Repeal and amendment of laws

Part 5: Transitional provisions

S 69. Transitional provisions

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

S 70. Application and interpretation

S 71. Trafficking in persons for sexual purposes

S 72. Short title and commencement

Schedule

Laws amended or repealed by section 68

JURISDICTION

S 61: EXTRA-TERRITORIAL JURISDICTION

S 61(1): Even if the act alleged to constitute a sexual offence or other offence under this Act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place of its commission, has, subject to subsections (4) and (5), **jurisdiction** in respect of that offence **if the person to be charged—**

- (a) is a **citizen** of the Republic;
- (b) is ordinarily **resident** in the Republic;
- (c) was **arrested in the territory** of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;
- (d) is a **company, incorporated or registered** as such under any law, in the Republic; or
- (e) any **body of persons, corporate or unincorporated**, in the Republic.

S 61(2): Subject to subsections (4) and (5), **any act alleged** to constitute a sexual offence or other offence under this Act and **which is committed outside the Republic** by a person, other than a person contemplated in subsection (1), is, whether or not the act constitutes an offence at the place of its commission, **deemed to have been committed in the Republic** if that—

- (a) act was committed against a person referred to in paragraphs (a) or (b) of subsection (1);
- (b) person is found in the Republic; and
- (c) person is, for any reason, not extradited by the Republic or if there is no application to extradite that person.

S 61(3): Any **offence committed in a country outside the Republic** as contemplated in subsection (1) or (2), is, for purposes of determining the jurisdiction of a court to try the offence, **deemed to have been committed—**

- (a) at the **place** where the **complainant is ordinarily resident; or**
- (b) at the **accused person's principal place of business.**

S 61(4): No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Act in respect of which such person has already been convicted or acquitted by a court of another jurisdiction.

S 61(5): The **institution of a prosecution** in terms of this section **must be authorised in writing** by the National Director of Public Prosecutions.

DEFINITIONS S 1:

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

"Director of Public Prosecutions" means a Director of Public Prosecutions contemplated in section 179(1)(b) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 13 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), acting in accordance with any directives issued under this Act by the National Director of Public Prosecutions, where applicable, or in accordance with any other prosecution policy or policy directives contemplated in section 21 of the National Prosecuting Authority Act, 1998

JURISDICTION: GENERAL

AMENDMENT OF SECTION 89 OF THE MAGISTRATES' COURTS ACT 32 OF 1944:

Section 89(1): The court, other than the court of a regional division, shall have jurisdiction over all offences, except treason, murder, rape and compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively."

ASSESSORS: (s 93ter(2): NOT IN OPERATION YET)

"Schedule 2

Offences in respect of which judicial officers must be assisted by two assessors in terms of section 93ter (2): (NOTE: not in operation)

1. Murder.
2. Rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
3. Robbery, where serious bodily harm has been inflicted on the victim.
4. Assault, where serious bodily harm has been inflicted on the victim.

PRESCRIPTION

AMENDMENT TO CRIMINAL PROCEDURE ACT 51 OF 1977

The substitution for section 18 of the following section:

“Prescription of right to institute prosecution

18. The right to institute a prosecution for any offence, other than the offences of—

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing;
- (f) rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, or
- (h) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (i) Using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of **20 years** from the time when the offence was committed.”.

REPEAL AND AMENDMENT OF LAWS

S 68: REPEAL AND AMENDMENT OF LAWS

S 68(1): The common law relating to the—

- (a) irrefutable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
- (b) crimes of rape, indecent assault, incest, bestiality and violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse,

is hereby repealed.

NOTE: The repealed common law presumption in s 68(1)(a) is replaced with s 57:

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

57. (1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

(2) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

NOTE: The repealed common law crimes in s 68(1)(b) had been replaced with statutory crimes in the Act. s 3 (rape), s 5 (sexual assault), s 12 (incest), s 13 (bestiality), s 14 (sexual act with corpse).

S 68(2): The laws specified in the Schedule are repealed or amended to the extent indicated in the third column of that Schedule.

	Extent of repeal or amendment
<p>Act 23 of 1957 Sexual Offences Act</p>	<p>1. The amendment of section 1 by the insertion after the definition of “court” of the following definition: “female” means a female person 18 years or older;’.</p> <p>2. The substitution of subsection (1) of section 12A for the following subsection: “(1) Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person, who is 18 years or older, may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, who is 18 years or older, shall be guilty of an offence.”.</p> <p>3. The amendment of section 19 by the substitution for the following section: “19. (1) Any person who[— (a)] entices, solicits, or importunes in any public place for immoral purposes[; or (b)wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access], shall be guilty of an offence. (2) Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access, shall be guilty of an offence.”.</p> <p>4. The amendment of section 20 by the— (a) substitution for subsection (1) of the following subsection: “(1) Any person who— (a) knowingly lives wholly or in part on the earnings of prostitution; or [(aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or (b)in public commits any act of indecency with another person; or] (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence.”; and (b) insertion after subsection (1) of the following subsection: “(1A) Any person 18 years or older who— (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or (b) in public commits any act of indecency with another person, shall be guilty of an offence.”.</p> <p>5. The substitution for section 22 of the following section: “22. Penalties Any person who is convicted of an offence under the provisions of this Act for which no special penalty is prescribed, shall be liable— (a) in the case of an offence referred to in section 2 or 20(1)(a) or [(aA)] (1A)(a), to imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment; [(b)in the case of an offence referred to in section 9(1), to imprisonment for a period not exceeding five years, or, if the child concerned is a boy under the age of 14 years or a girl under the age of 12 years, for life;] (c) (d) in the case of an offence referred to in section [11,] 12A [or 18], with a fine, or imprisonment for a period not exceeding five years; (e) in the case of an offence referred to in section 10 or 12(1) [or 13(1)], to imprisonment for a period not exceeding seven years; (f) in the case of an offence referred to in section [14(1), 14(3), 15 or] 17, to imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment; (g) in the case of an offence referred to in section [18A, 19, 20(1)(b) or (c), or 20A(1),] 19 or 20(1)(c) or (1A)(b) to a fine not exceeding R4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”.</p> <p>7. The repeal of sections 9, 11, 12(2) 13, 14, 15, 18, 18A and 20A.</p>

TRANSITIONAL PROVISIONS

S 69: TRANSITIONAL PROVISIONS

S 69(1): All criminal proceedings relating to the common law crimes referred to in section 68(1)(b) which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.

S 69(2): An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68(1)(b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.

S 69(3): Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended.

NOTE:

See Constitution: s 35(3)(l)

35(3) (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

Burchell (3rd ed 105): There is a presumption against retrospectivity, which can only be rebutted by express wording or necessary intentment.

Snyman (4th ed 45): "The principle of legality entails that no-one can be found guilty of a crime unless *at the moment it took place*, his conduct was already recognised by law as a crime. It follows that the creation of a crime with retrospective effect (that is the *ex post facto* creation of crimes) is in conflict with the principle of legality. This application of the principle of legality is known as the *ius praeivium* rule.

The *ius praeivium* rule is incorporated in section 35(3)(l) of the Constitution, which provides that every accused has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. This means that any provisions by any legislative body which creates a crime with retrospective effect is null and void."

AMENDMENT TO SEXUAL OFFENCES ACT 23 OF 1957:

The repeal of sections 9, 11, 13, 14, 15, 18, 18A and 20A: sections however still applicable to offences committed until **15 December 2007**.

BAIL

Criminal Procedure Act 51 of 1977: Applicable amendments: Schedules 5, 6 & 1

Schedule 5 (Sections 58 and 60 (11) and (11A) and Schedule 6)

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.

Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively on a child under the age of 16 years.

An offence referred to in **Schedule 1**— (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

“Schedule 6 (Sections 50 (6), 58 and 60 (11) and (11A))

Murder, when-

(a) it was planned or premeditated;

(b) the victim was— (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:

(i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or

(ii) robbery with aggravating circumstances; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—

(a) when committed—

(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who is charged with having committed two or more offences of rape; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim—

(i) is a person under the age of 16 years;

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(c) involving the infliction of grievous bodily harm.

Trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Schedule 7 (Section 59A)

Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

OFFENCES CREATED IN THE ACT

CHAPTER 2: SEXUAL OFFENCES

PART 1: RAPE AND COMPELLED RAPE

S 3. RAPE

Any person (“A”) who **unlawfully** and **intentionally** commits an **act of sexual penetration** with a **complainant** (“B”), **without the consent** of B, is guilty of the offence of rape.

DEFINITIONS: S 1

“complainant” means the alleged victim of a sexual offence;

“genital organs” includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

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

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

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

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

‘sexual violation’ does not include an act of sexual penetration, and **“sexually violates”** has a corresponding meaning;

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “**consent**” means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) **does not voluntarily or without coercion agree to an act of sexual penetration**, as contemplated in sections 3, and 4, **or an act of sexual violation** as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of **force or intimidation** by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a **threat of harm** by A against B, C or D or **against the property** of B, C or D;
- (b) where there is an **abuse of power or authority** by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under **false pretences or by fraudulent means**, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a **different person**; or
 - (ii) such a sexual **act is something other** than that act; or
- (d) where B is **incapable in law of appreciating the nature of the sexual act**, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 56: DEFENCES

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Competent verdicts: Criminal Procedure Act 51 of 1977

S 261: Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

261(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

- (a) assault with intent to do grievous bodily harm;
- (b) common assault;
- (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.

SENTENCE:

Criminal Law Amendment Act, Act 105 of 1997:

Section 51

Schedule 2: Part 1 and 111

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)
- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

EXTRACTS: CRIMINAL LAW AMENDMENT ACT 105 OF 1997

[ASSENTED TO 27 NOVEMBER 1997]

[DATE OF COMMENCEMENT: 13 NOVEMBER 1998]

51 Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in **Part I of Schedule 2 to imprisonment for life**.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

- (a) Part II of Schedule 2, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) **Part III of Schedule 2**, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 10 years;

- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, in the case of-
- (i) a first offender, to imprisonment for a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that **substantial and compelling circumstances exist** which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to **Part 1 of Schedule 2**, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding **30 years**.

(aA) When imposing a sentence in respect of the **offence of rape** the following shall **not constitute substantial and compelling circumstances** justifying the imposition of a lesser sentence:

- (i) **The complainant's previous sexual history;**
- (ii) **an apparent lack of physical injury to the complainant;**
- (iii) **an accused person's cultural or religious beliefs about rape; or**
- (iv) **any relationship between the accused person and the complainant prior to the offence being committed.**

(4)

[Sub-s. (4) omitted by s. 1 of Act 38 of 2007.]

- (5) (a) Subject to paragraph (b), the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).
- (b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.

(6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).

(7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of that person beyond reasonable doubt.

EXTRACTS Schedule 2

(Section 51)

[Schedule 2 amended by s. 37 of Act 62 of 2000.]

PART I

[Part I amended by s. 27 (1) of Act 33 of 2004, substituted by s. 68 of Act 32 of 2007 and amended by s. 5 (a) of Act 38 of 2007.]

Murder, when-

- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
 - (i) **rape or compelled rape** as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or

Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

- (a) when committed-
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim-
 - (i) is a person under the age of 16 years;
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
 - (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (c) involving the infliction of grievous bodily harm.

Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

- (a) when committed-
 - (i) in circumstances where the victim was raped more than once by one or more than one person;
 - (ii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (iii) under circumstances where the accused knows that the person committing the rape has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim-
 - (i) is a person under the age of 16 years;
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

- (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (c) involving the infliction of grievous bodily harm.

PART III

[Part III substituted by s. 68 of Act 32 of 2007.]

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.

OFFENCES CREATED IN THE ACT

CHAPTER 2: SEXUAL OFFENCES

PART 1: RAPE AND COMPELLED RAPE

S 4. COMPELLED RAPE

Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of compelled rape.

DEFINITIONS: S 1

"**complainant**" means the alleged victim of a sexual offence;

"**genital organs**" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"**sexual act**" means an act of sexual penetration or an act of sexual violation;

"**sexual penetration**" includes any act which causes penetration to any extent whatsoever by—

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

and "**sexually penetrates**" has a corresponding meaning;

'**sexual violation**' does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning;

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “**consent**” means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 56: DEFENCES

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Competent verdicts: Criminal Procedure Act 51 of 1977

S 261: Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

261(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

- (a) assault with intent to do grievous bodily harm;
- (b) common assault;
- (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—

- (a) common assault or;
- (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.”.

SENTENCE:

Criminal Law Amendment Act, Act 105 of 1997:

Section 51

Schedule 2: Part 1 and 111

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)
- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

EXTRACTS: CRIMINAL LAW AMENDMENT ACT 105 OF 1997

[ASSENTED TO 27 NOVEMBER 1997]

[DATE OF COMMENCEMENT: 13 NOVEMBER 1998]

51 Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in **Part I of Schedule 2 to imprisonment for life**.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

- (a) Part II of Schedule 2, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) **Part III of Schedule 2**, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 10 years;

- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, in the case of-
- (i) a first offender, to imprisonment for a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that **substantial and compelling circumstances exist** which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to **Part 1 of Schedule 2**, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding **30 years**.

(aA) When imposing a sentence in respect of the **offence of rape** the following shall **not constitute substantial and compelling circumstances** justifying the imposition of a lesser sentence:

- (i) **The complainant's previous sexual history;**
- (ii) **an apparent lack of physical injury to the complainant;**
- (iii) **an accused person's cultural or religious beliefs about rape; or**
- (iv) **any relationship between the accused person and the complainant prior to the offence being committed.**

(4)

[Sub-s. (4) omitted by s. 1 of Act 38 of 2007.]

- (5) (a) Subject to paragraph (b), the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).
- (b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.

(6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).

(7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of that person beyond reasonable doubt.

EXTRACTS Schedule 2

(Section 51)

[Schedule 2 amended by s. 37 of Act 62 of 2000.]

PART I

[Part I amended by s. 27 (1) of Act 33 of 2004, substituted by s. 68 of Act 32 of 2007 and amended by s. 5 (a) of Act 38 of 2007.]

Murder, when-

- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
 - (i) **rape or compelled rape** as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or

Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

- (a) when committed-
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim-
 - (i) is a person under the age of 16 years;
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
 - (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (c) involving the infliction of grievous bodily harm.

Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

- (a) when committed-
 - (i) in circumstances where the victim was raped more than once by one or more than one person;
 - (ii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - (iii) under circumstances where the accused knows that the person committing the rape has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim-
 - (i) is a person under the age of 16 years;
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

- (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (c) involving the infliction of grievous bodily harm.

PART III

[Part III substituted by s. 68 of Act 32 of 2007.]

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.

OFFENCES CREATED IN THE ACT

PART 2: SEXUAL ASSAULT, COMPELLED SEXUAL ASSAULT AND COMPELLED SELF-SEXUAL ASSAULT

S 5. SEXUAL ASSAULT

S 5(1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.

S 5(2) A person (“A”) who unlawfully and intentionally inspires the belief in a complainant (“B”) that B will be sexually violated, is guilty of the offence of sexual assault.

DEFINITIONS: S 1

“**complainant**” means the alleged victim of a sexual offence;

“**sexual violation**” includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning

"**genital organs**" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

S 1(2): For the purposes of sections 3, 4, **5(1)**, 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, "**consent**" means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections **5(1)**, 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 56: Defences

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Competent verdicts: Criminal Procedure Act 51 of 1977

S 261: Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

261(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

- (a) assault with intent to do grievous bodily harm;
- (b) common assault;
- (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—

- (a) common assault or;
- (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.”.

S 266 Assault with the intent to do grievous bodily harm

If the evidence on a charge of assault with the intent to do grievous bodily harm does not prove the offence of assault with the intent to do grievous bodily harm but the offence of –

- (a) common assault
- (b) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
- (c) pointing of a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

S 267: Common assault

267. If the evidence on a charge of common assault proves the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, the accused may be found guilty of any such

offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.”.

S 268: Statutory unlawful carnal intercourse

268. If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—

- (a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (b) the offence of common assault; or
- (c) the statutory offence of—
 - (i) committing an immoral or indecent act with such other person;
 - (ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;
 - (iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
 - (iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.”

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

PART 2: SEXUAL ASSAULT, COMPELLED SEXUAL ASSAULT AND COMPELLED SELF-SEXUAL ASSAULT

S 6. COMPELLED SEXUAL ASSAULT

A person (“A”) who unlawfully and intentionally compels a third person (“C”), without the consent of C, to commit an act of sexual violation with a complainant (“B”), without the consent of B, is guilty of the offence of compelled sexual assault.

DEFINITIONS: S 1

“**complainant**” means the alleged victim of a sexual offence;

“**sexual violation**” includes any act which causes—

(a) direct or indirect contact between—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(dd) the mouth of another person;

(ee) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and “**sexually violates**” has a corresponding meaning

“**genital organs**” includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “**consent**” means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 56: DEFENCES

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Competent verdicts: Criminal Procedure Act 51 of 1977

S 261: Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

261(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

- (a) assault with intent to do grievous bodily harm;
- (b) common assault;
- (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—

- (a) common assault or;
- (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.”.

S 266 Assault with the intent to do grievous bodily harm

If the evidence on a charge of assault with the intent to do grievous bodily harm does not prove the offence of assault with the intent to do grievous bodily harm but the offence of –

- (a) common assault
- (b) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
- (c) pointing of a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

S 267: Common assault

267. If the evidence on a charge of common assault proves the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, the accused may be found guilty of any such

offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.”.

S 268: Statutory unlawful carnal intercourse

268. If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—

- (a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (b) the offence of common assault; or
- (c) the statutory offence of—
 - (i) committing an immoral or indecent act with such other person;
 - (ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;
 - (iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
 - (iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.”

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

PART 2: SEXUAL ASSAULT, COMPELLED SEXUAL ASSAULT AND COMPELLED SELF-SEXUAL ASSAULT

S 7. COMPELLED SELF-SEXUAL ASSAULT

A person (“A”) who unlawfully and intentionally compels a complainant (“B”), without the consent of B, to—

- (a) engage in—
 - (i) masturbation;
 - (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
 - (iii) sexually suggestive or lewd acts, with B himself or herself;
- (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or
- (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus.

is guilty of the offence of compelled self-sexual assault.

DEFINITIONS: S 1

“**complainant**” means the alleged victim of a sexual offence;

“**sexual violation**” includes any act which causes—

(a) direct or indirect contact between the—

- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
- ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (ff) the mouth of another person;
 - (gg) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning

"**genital organs**" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, "**consent**" means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 56: DEFENCES

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female **person under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Competent verdicts: Criminal Procedure Act 51 of 1977

S 261: Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

261(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

- (a) assault with intent to do grievous bodily harm;
- (b) common assault;
- (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of **sexual assault, compelled sexual assault or compelled self-sexual assault** as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—

- (a) common assault or;
- (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.”.

S 266 Assault with the intent to do grievous bodily harm

If the evidence on a charge of assault with the intent to do grievous bodily harm does not prove the offence of assault with the intent to do grievous bodily harm but the offence of –

- (a) common assault
- (b) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
- (c) pointing of a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

S 267: Common assault

267. If the evidence on a charge of common assault proves the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, the accused may be found guilty of any such

offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.”.

S 268: Statutory unlawful carnal intercourse

268. If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—

- (a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (b) the offence of common assault; or
- (c) the statutory offence of—
 - (i) committing an immoral or indecent act with such other person;
 - (ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;
 - (iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
 - (iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.”

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

PART 3: PERSONS 18 YEARS OLDER

S 8. COMPELLING OR CAUSING PERSONS 18 YEARS OR OLDER TO WITNESS SEXUAL OFFENCES, SEXUAL ACTS OR SELF-MASTURBATION

S 8(1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual offence.

S 8(2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch—

(a) A while he or she engages in a sexual act with C or another person (“D”); or

(b) C while he or she engages in a sexual act with D,

is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual act.

S8(3) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a person 18 years or older to witness self-masturbation.

DEFINITIONS S 1:

"complainant" means the alleged victim of a sexual offence;

"sexual act" means an act of sexual penetration or an act of sexual violation;

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

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

and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (hh) the mouth of another person;
 - (ii) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning; and

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, **8(1), 8(2), 8(3)**, 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “**consent**” means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections **8(1), 8(2), 8(3)**, 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;

- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or

- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

PART 3: PERSONS 18 YEARS OLDER

S 9. EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF GENITAL ORGANS, ANUS OR FEMALE BREASTS TO PERSONS 18 YEARS OR OLDER (“FLASHING”)

A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a complainant 18 years or older (“B”), without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a person 18 years or older.

DEFINITIONS S 1:

“**complainant**” means the alleged victim of a sexual offence;

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

“**genital organs**” includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), **9**, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “**consent**” means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), **9**, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is

inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
- (v) a person who is mentally disabled.

s 56: DEFENCES

s 56 (8) A person **may not be convicted** of an offence in terms of section 9 or 22 if that person commits such **act in compliance with and in the interest of a legitimate cultural practice**.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a **person who is mentally disabled is incapable of consenting** to a sexual act.

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence

OFFENCES CREATED IN THE ACT

PART 3: PERSONS 18 YEARS OLDER

S 10. EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF CHILD PORNOGRAPHY TO PERSONS 18 YEARS OR OLDER

A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, exposes or displays or causes the exposure or display of child pornography to a complainant 18 years or older ("B"), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography to a person 18 years or older.

DEFINITIONS S 1:

"**complainant**" means the alleged victim of a sexual offence;

"**child**" means—

- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and

"**children**" has a corresponding meaning

"**child pornography**" means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person's breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual

- nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
- (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or
(l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

"sexual act" means an act of sexual penetration or an act of sexual violation;

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

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

and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (jj) the mouth of another person;
 - (kk) any other part of the body of another person, other than the genital organs or anus of that person or, in the case

of a female, her breasts, which could—
(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning; and

S 1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, **10**, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, "**consent**" means **voluntary or uncoerced agreement**.

S 1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, **10**, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C or D;

(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—

(i) B is committing such a sexual act with a particular person who is in fact a different person; or

(ii) such a sexual act is something other than that act; or

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—

- (i) asleep;
- (ii) unconscious;
- (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
- (iv) a child below the age of 12 years; or
- (v) a person who is mentally disabled.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is **mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

OFFENCES CREATED IN THE ACT

PART 3: PERSONS 18 YEARS OLDER

S 11. ENGAGING SEXUAL SERVICES OF PERSONS 18 YEARS OR OLDER

S 11(1): A person ("A") who unlawfully and intentionally engages the services of a person 18 years or older ("B"), for financial or other reward, favour or compensation to B or to a third person ("C")—

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B,
is guilty of engaging the sexual services of a person 18 years or older.

DEFINITIONS S 1:

"**complainant**" means the alleged victim of a sexual offence;

"**sexual act**" means an act of sexual penetration or an act of sexual violation;

"**sexual penetration**" includes any act which causes penetration to any extent whatsoever by—

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

and "**sexually penetrates**" has a corresponding meaning;

"**sexual violation**" includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

- (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (ll) the mouth of another person;
 - (mm) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning; and

SENTENCE:
In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

OFFENCES CREATED IN THE ACT

PART 4: INCEST, BESTIALITY AND SEXUAL ACTS WITH CORPSE

S 12. INCEST

S 12(1): Persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other, are, despite their mutual consent to engage in such act, guilty of the offence of incest.

S 12(2): For the purposes of subsection (1)—

- (a) the prohibited degrees of consanguinity (blood relationship) are the following:
 - (i) ascendants and descendants in the direct line; or
 - (ii) collaterals, if either of them is related to their common ancestor in the first degree of descent;
- (b) the prohibited degrees of affinity are relations by marriage in the ascending and descending line; and
- (c) an adoptive relationship is the relationship of adoption as provided for in any other law.

S 12(3)(a): The institution of a **prosecution** of a person who is a **child at the time of the alleged commission of the offence** referred to in subsection (1) must be **authorised in writing by the National Director of Public Prosecutions**.

S 12(3)(b): The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

DEFINITIONS S 1:

"complainant" means the alleged victim of a sexual offence;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"National Director of Public Prosecutions" means the person contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

"sexual act" means an act of sexual penetration or an act of sexual violation;

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

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

and **"sexually penetrates"** has a corresponding meaning;

'sexual violation' does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning;

S1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, **12**, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, **"consent"** means **voluntary or uncoerced agreement**.

S1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, **12**, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;

- (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
- (iv) a child below the age of 12 years; or
- (v) a person who is mentally disabled.

S 56: DEFENCES

S 56(4): A person ("A") **may not be convicted of an offence** in terms of section 12 if, at the **time** when the act of sexual penetration was **first committed**—

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is **mentally disabled is incapable of consenting** to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Competent verdicts

Section 238 Criminal Procedure Act, Act 51 of 1977

S 238 (1) At criminal proceedings at which an accused is charged with incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—

(a) it shall be sufficient to prove that the person against whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, brother, stepmother, stepfather, stepdaughter or stepson of the other party to the incest;

(b) the accused shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest” ; and

(2) Whenever the fact that any lawful and binding marriage was contracted is relevant to the issue at criminal proceedings at which an accused is charged with incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, such fact may be proved *prima facie* in the manner provided in section 237 for the proof of the existence of a lawful and binding marriage of a person charged with bigamy.”.

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

PART 4: INCEST, BESTIALITY AND SEXUAL ACTS WITH CORPSE

S 13. BESTIALITY

A person ("A") who unlawfully and intentionally commits an act—

(a) which causes penetration to any extent whatsoever by the genital organs of—

(i) A into or beyond the mouth, genital organs or anus of an animal; or

(ii) an animal into or beyond the mouth, genital organs or anus of A; or

(b) of masturbation of an animal, unless such act is committed for scientific reasons or breeding purposes, or of masturbation with an animal

is guilty of the offence of bestiality.

DEFINITIONS S 1:

"complainant" means the alleged victim of a sexual offence;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

SENTENCE:

In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

OFFENCES CREATED IN THE ACT

PART 4: INCEST, BESTIALITY AND SEXUAL ACTS WITH CORPSE

S 14. SEXUAL ACT WITH CORPSE

A person who unlawfully and intentionally commits a sexual act with a human corpse, is guilty of the offence of committing a sexual act with a corpse.

DEFINITIONS S 1:

"**genital organs**" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"**sexual act**" means an act of sexual penetration or an act of sexual violation;

"**sexual penetration**" includes any act which causes penetration to any extent whatsoever by—

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

and "**sexually penetrates**" has a corresponding meaning;

"**sexual violation**" includes any act which causes—

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

- (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning;

SENTENCE:

In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 1: CONSENSUAL SEXUAL ACTS WITH CERTAIN CHILDREN

S 15. ACTS OF CONSENSUAL SEXUAL PENETRATION WITH CERTAIN CHILDREN (STATUTORY RAPE)

S 15(1): A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.

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

S 15(2)(b): The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

DEFINITIONS: S 1

"child" means—

- (a) a person under the age of 18 years; or
- (b) with reference to **sections 15 and 16**, a person 12 years or older but under the age of 16 years,

and "children" has a corresponding meaning;

"**National Director of Public Prosecutions**" means the person contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

"**genital organs**" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"**sexual act**" means an act of sexual penetration or an act of sexual violation;

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

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

and **"sexually penetrates"** has a corresponding meaning;

'sexual violation' does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning;

S 56: DEFENCES

S 56(2): Whenever an accused person is charged with an offence under—

- (a) **section 15** or 16, it is, subject to subsection (3), a **valid defence** to such a charge to contend that the **child deceived** the accused person **into believing that he or she was 16 years or older** at the time of the alleged commission of the offence **and** the accused person **reasonably believed that the child was 16 years or older**; or
- (b) **section 16**, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.

S 56(3): The provisions of subsection **(2)(a)** do **not** apply if the accused person is **related to the child** within the prohibited incest degrees of blood, affinity or an adoptive relationship.

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 1: CONSENSUAL SEXUAL ACTS WITH CERTAIN CHILDREN

S 16. ACTS OF CONSENSUAL SEXUAL VIOLATION WITH CERTAIN CHILDREN (STATUTORY SEXUAL ASSAULT)

S 16(1): A person ("A") who commits an act of sexual violation with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.

S16(2)(a): The institution of a **prosecution** for an offence referred to in subsection (1) must be **authorised** in writing by the relevant **Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence**: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, **both A and B must be charged** with contravening subsection (1).

S 16(2)(b): The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

DEFINITIONS: S 1

"child" means—

- (a) a person under the age of 18 years; or
- (b) with reference to **sections 15 and 16**, a person **12 years or older but under the age of 16 years**,

and "**children**" has a corresponding meaning;

"**Director of Public Prosecutions**" means a Director of Public Prosecutions contemplated in section 179(1)(b) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 13 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), acting in accordance with any directives issued under this Act by the National Director of Public Prosecutions, where applicable, or in accordance with any other prosecution policy or policy directives contemplated in section 21 of the National Prosecuting Authority Act, 1998;

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(pp) the mouth of another person;

(qq) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(vi) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

S 56: DEFENCES

S 56(2): Whenever an accused person is charged with an offence under—

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

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

S 56(3): The provisions of subsection **(2)(a)** do not apply if the accused person is **related to the child** within the prohibited incest degrees of blood, affinity or an adoptive relationship.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 2: SEXUAL EXPLOITATION AND SEXUAL GROOMING OF CHILDREN, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY TO CHILDREN AND USING CHILDREN FOR PORNOGRAPHIC PURPOSES OR BENEFITING FROM CHILD PORNOGRAPHY

S 17. SEXUAL EXPLOITATION OF CHILDREN

S 17(1): A person ("A") who unlawfully and intentionally engages the services of a child complainant ("B"), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ("C")—

(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 sexual exploitation of a child.

S 17(2): A person ("A") who unlawfully and intentionally offers the services of a child complainant ("B") to a third person ("C"), with or without the consent of B, for financial or other reward, favour or compensation to A, B or to another person ("D")—

(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 child.

S 17(3): A person ("A") who—

- (a) intentionally allows or knowingly permits the commission of a sexual act by a third person ("C") with a child complainant ("B"), with or without the consent of B, while being a primary care-giver defined in section 1 of the Social Assistance Act, 2004 (Act No. 13 of 2004), parent or guardian of B; or**

[Social Assistance Act 13 of 2004: s 1: 'primary care giver' means a person older than 16 years, whether or not related to a child, who takes primary responsibility for meeting the daily care needs of that child;]

- (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 child.

S 17(4): A person ("A") who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a child complainant ("B") by a third person ("C"), is guilty of an offence of benefiting from the sexual exploitation of a child.

S 17(5): A person ("A") who intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a child complainant ("B") by a third person ("C"), is guilty of an offence of living from the earnings of the sexual exploitation of a child.

S 17(6): A person ("A"), including a juristic person, who—

- (a) makes or organises any travel arrangements for or on behalf of a third person ("C"), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a child complainant ("B"), irrespective of whether that act is committed or not; or**
- (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 child sex tours.

DEFINITIONS S 1:

"child" means—

- (a)** a person **under the age of 18 years**; or
- (b)** with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,

and **"children"** has a corresponding meaning;

"complainant" means the alleged victim of a sexual offence;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

- (a)** the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b)** any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c)** the genital organs of an animal, into or beyond the mouth of another person, and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(rr) the mouth of another person;

(ss) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;
(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning; and

S1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, **17(1), 17(2), 17(3)(a)**, 19, 20(1), 21(1), 21(2), 21(3) and 22, **"consent"** means **voluntary or uncoerced agreement**.

S1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, **17(1), 17(2), 17(3)(a)**, 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C or D;

- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 56: DEFENCES

S 56(5): A person **may not be convicted** of an offence in terms of section 17(4) or (5) or section 23(4) or (5) or section 54, **if that person is—**

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

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

<p>SENTENCE: Criminal Law Amendment Act Act 105 of 1997</p>	<p style="text-align: center;"><u>Schedule 2:</u> PART III</p> <p>Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.</p>
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Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 2: SEXUAL EXPLOITATION AND SEXUAL GROOMING OF CHILDREN, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY TO CHILDREN AND USING CHILDREN FOR PORNOGRAPHIC PURPOSES OR BENEFITING FROM CHILD PORNOGRAPHY

S 18. SEXUAL GROOMING OF CHILDREN

S 18(1) A person (“A”) who—

- (a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child (“B”);**
- (b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by “B”;**
- (c) 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 B; or**
- (d) 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 child.

S 18(2) A person (“A”) who—

- (a) supplies, exposes or displays to a child complainant (“B”)—**

 - (i) an article which is intended to be used in the performance of a sexual act;**
 - (ii) child pornography or pornography; or**
 - (iii) a publication or film, with the intention to encourage, enable, instruct or persuade B to perform a sexual act;**

- (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to—**

 - (i) perform a sexual act with A or a third person (“C”);**
 - (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;**
 - (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;**
 - (iv) be exposed to child pornography or pornography;**
 - (v) be used for pornographic purposes as contemplated in section 20(1); or**
 - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;**

- (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;**

- (d) **having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B—**
- (i) **to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or**
 - (ii) **during such meeting or communication or any subsequent meeting or communication to—**
 - (aa) **commit a sexual act with A;**
 - (bb) **discuss, explain or describe the commission of a sexual act; or**
 - (cc) **provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person; or**
- (e) **having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B,**

is guilty of the offence of sexual grooming of a child.

DEFINITIONS S 1:

"complainant" means the alleged victim of a sexual offence;

"child" means—

- (a) a person **under the age of 18 years**; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and

"children" has a corresponding meaning

“child pornography” means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
- (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

“pornography” means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

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

"sexually penetrates" has a corresponding meaning;

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(tt) the mouth of another person;

(uu) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include

an act of sexual penetration, and

"sexually violates" has a corresponding meaning; and

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 2: SEXUAL EXPLOITATION AND SEXUAL GROOMING OF CHILDREN, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY TO CHILDREN AND USING CHILDREN FOR PORNOGRAPHIC PURPOSES OR BENEFITING FROM CHILD PORNOGRAPHY

S 19: EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF CHILD PORNOGRAPHY OR PORNOGRAPHY TO CHILDREN

19. A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of—

- (a) any image, publication, depiction, description or sequence of child pornography or pornography;**

- (b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or**

- (c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law,**

to a child (“B”), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

DEFINITIONS S 1:

"child" means—

- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,

and **"children"** has a corresponding meaning;

"complainant" means the alleged victim of a sexual offence;

"child pornography" means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person's breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
 - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or
 - (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

“pornography” means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;

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

“sexual offence” means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

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

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

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(vv) the mouth of another person;

(ww) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and

"sexually violates" has a corresponding meaning; and

S1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, "**consent**" means **voluntary or uncoerced agreement**.

S1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C

or D;

- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 2: SEXUAL EXPLOITATION AND SEXUAL GROOMING OF CHILDREN, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY TO CHILDREN AND USING CHILDREN FOR PORNOGRAPHIC PURPOSES OR BENEFITING FROM CHILD PORNOGRAPHY

S 20. USING CHILDREN FOR OR BENEFITING FROM CHILD PORNOGRAPHY

S 20(1) A person (“A”) who unlawfully and intentionally uses a child complainant (“B”), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person (“C”) or not—

- (a) for purposes 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 child pornography,**

is guilty of the offence of using a child for child pornography.

S 20(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child pornography.

DEFINITIONS S 1:

"complainant" means the alleged victim of a sexual offence;

"child" means—

- (a) a person under the age of 18 years; or**
- (b) with reference to sections 15 and 16, a person 12 years or older but under the**

age of 16 years, and “**children**” has a corresponding meaning

“**child pornography**” means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
- (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

“**genital organs**” includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

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

“**sexual offence**” means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and “**sexually penetrates**” has a corresponding meaning;

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(xx) the mouth of another person;

(yy) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning; and

S1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, **20(1)**, 21(1), 21(2), 21(3) and 22, **"consent"** means **voluntary or uncoerced agreement**.

S1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, **20(1)**, 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C or D;

(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual

act, or unwillingness to participate in such a sexual act;

- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (vii) a child below the age of 12 years; or
 - (viii) a person who is mentally disabled.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

S 20(1): Schedule 2: Part 111 Act 105 of 1997

S 20(2): In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

SENTENCE:

**Criminal Law
Amendment Act
Act 105 of 1997**

**Schedule 2:
PART III**

Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or **using a child for child pornography** or using a person who is mentally disabled for pornographic purposes, as contemplated in **section 20(1)** or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)
- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 3: COMPELLING OR CAUSING CHILDREN TO WITNESS SEXUAL OFFENCES, SEXUAL ACTS OR SELF-MASTURBATION AND EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF GENITAL ORGANS, ANUS OR FEMALE BREASTS ("FLASHING") TO CHILDREN

S 21. COMPELLING OR CAUSING CHILDREN TO WITNESS SEXUAL OFFENCES, SEXUAL ACTS OR SELF-MASTURBATION

S 21(1): A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a child complainant ("B"), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence.

S21(2): A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a child complainant ("B"), without the consent of B, to be in the presence of or watch—

(a) A while he or she engages in a sexual act with C or another person ("D"); or

(b) C while he or she engages in a sexual act with D, is guilty of the offence of compelling or causing a child to witness a sexual act.

S 21(3): A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a child complainant ("B"), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation is guilty of the offence of compelling or causing a child to witness self-masturbation.

DEFINITIONS S 1:

"child" means—

- (a) a person **under the age of 18 years**; or
 - (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,
- and **"children"** has a corresponding meaning;

"complainant" means the alleged victim of a sexual offence;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

- (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
- (zz) the mouth of another person;

- (aaa) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning; and

S1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), **21(1), 21(2), 21(3)** and 22, "**consent**" means **voluntary or uncoerced agreement**.

S1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), **21(1), 21(2), 21(3)** and 22 include, but are not limited to, the following:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;

- (ii) unconscious;
- (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
- (iv) a child below the age of 12 years; or
- (v) a person who is mentally disabled.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person **under the age of 12 years is incapable of consenting** to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

PART 3: COMPELLING OR CAUSING CHILDREN TO WITNESS SEXUAL OFFENCES, SEXUAL ACTS OR SELF-MASTURBATION AND EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF GENITAL ORGANS, ANUS OR FEMALE BREASTS ("FLASHING") TO CHILDREN

S 22. EXPOSURE OR DISPLAY OF OR CAUSING OF EXPOSURE OR DISPLAY OF GENITAL ORGANS, ANUS OR FEMALE BREASTS TO CHILDREN ("FLASHING")

A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a child complainant ("B"), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a child.

DEFINITIONS S 1:

"child" means—

- (a) a person **under the age of 18 years**; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,

and "**children**" has a corresponding meaning;

"**complainant**" means the alleged victim of a sexual offence;

"**genital organs**" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"**sexual act**" means an act of sexual penetration or an act of sexual violation;

"**sexual offence**" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

"**sexual penetration**" includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and "**sexually penetrates**" has a corresponding meaning;

"**sexual violation**" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bbb) the mouth of another person;

(ccc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning; and

S1(2): For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and **22**, "**consent**" means **voluntary or uncoerced agreement**.

S1(3): Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does **not voluntarily or without coercion agree** to an act of sexual penetration, as contemplated in sections 3, and 4, or an act of sexual violation as contemplated in sections 5(1), 6, and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and **22** include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—

(i) the use of force or intimidation by A (the accused person) against B, C

(a third person) or D (another person) or against the property of B, C or D; or

- (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (ix) a person who is mentally disabled.

S 56: DEFENCES

S 56(8): A person may not be convicted of an offence in terms of section 9 or 22 if that person commits such act in compliance with and in the interest of a legitimate cultural practice.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;

- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)
- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 4 SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED

SEXUAL EXPLOITATION AND SEXUAL GROOMING OF, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY OR HARMFUL MATERIAL TO PERSONS WHO ARE MENTALLY DISABLED AND USING PERSONS WHO ARE MENTALLY DISABLED FOR PORNOGRAPHIC PURPOSES OR BENEFITING THEREFROM

S 23. SEXUAL EXPLOITATION OF PERSONS WHO ARE MENTALLY DISABLED

S 23(1): A person (“A”) who unlawfully and intentionally engages the services of a complainant who is mentally disabled (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”)—

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

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

S 23(2): A person ("A") who unlawfully and intentionally offers the services of a person who is mentally disabled ("B") to a third person ("C"), for financial or other reward, favour or compensation to A, B or to another person ("D")—

- (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.

S 23(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 ("B") while being a care-giver, parent or 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.

S 23(4): A person ("A") who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a person who is mentally disabled ("B") by a third person ("C"), is guilty of an offence of benefiting from the sexual exploitation of a person who is mentally disabled.

S 23(5): A person ("A") who intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a person who is mentally disabled ("B") by a third person ("C"), is guilty of an offence of living from the earnings of the sexual exploitation of a person who is mentally disabled.

S 23(6): A person ("A"), including a juristic person, who—

- (a) makes or organises any travel arrangements for or on behalf of a third person ("C"), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a person who is mentally disabled ("B"), irrespective of whether that act is committed or not; or**
- (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B,**

is guilty of an offence of promoting sex tours with persons who are mentally disabled.

DEFINITIONS S 1:

"care giver" means any person who, in relation to a person who is mentally disabled, takes responsibility for meeting the daily needs of or is in substantial contact with such person;

"child" means—

- (a) a person under the age of 18 years; or**
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,**

and **"children"** has a corresponding meaning;

"complainant" means the alleged victim of a sexual offence;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

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

and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

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

- (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is **mentally disabled is incapable of consenting** to a sexual act.

SENTENCE:

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

SENTENCE:

**Criminal Law
Amendment Act
Act 105 of 1997**

**Schedule 2:
PART III**

Sexual exploitation of a child or **sexual exploitation of a person who is mentally disabled** as contemplated in **section 17 or 23** or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)
- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 4 SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED

SEXUAL EXPLOITATION AND SEXUAL GROOMING OF, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY OR HARMFUL MATERIAL TO PERSONS WHO ARE MENTALLY DISABLED AND USING PERSONS WHO ARE MENTALLY DISABLED FOR PORNOGRAPHIC PURPOSES OR BENEFITING THEREFROM

S 24. SEXUAL GROOMING OF PERSONS WHO ARE MENTALLY DISABLED

S 24(1): A person (“A”) who—

- (a) supplies, exposes or displays to a third person (“C”)—
- (i) an article which is intended to be used in the performance of a sexual act;
 - (ii) pornography as contemplated in paragraph (a), (b) or (c) of section 25; or
 - (iii) a publication,
- with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or
- (b) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B,

is guilty of the offence of promoting the sexual grooming of a person who is mentally disabled.

S 24(2): A person (“A”) who—

(a) supplies, exposes or displays to a person who is mentally disabled (“B”)—

- (i) an article which is intended to be used in the performance of a sexual act;**
- (ii) pornography as contemplated in paragraph (a), (b), or (c) of section 25; or**
- (iii) a publication,**

with the intention to encourage, enable, instruct or persuade B to perform such sexual act;

(b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to reduce or diminish any resistance or unwillingness on the part of B to—

- (i) perform a sexual act with A or a third person (“C”);**
- (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;**
- (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;**
- (iv) be exposed to pornography as contemplated in paragraph (a), (b) or (c) of section 25;**
- (v) be used for pornographic purposes as contemplated in section 26 (1); or**
- (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;**

(c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;

- (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B—
- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
 - (ii) during such meeting or communication or any subsequent meeting or communication to—
 - (aa) commit a sexual act with A;
 - (bb) discuss, explain or describe the commission of a sexual act; or
 - (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence as contemplated in section 26(1) of B himself or herself or any other person; or
- (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B;

is guilty of the offence of sexual grooming of a person who is mentally disabled.

DEFINITIONS S 1:

"**care giver**" means any person who, in relation to a person who is mentally disabled, takes responsibility for meeting the daily needs of or is in substantial contact with such person;

"**complainant**" means the alleged victim of a sexual offence;

"**child**" means—

- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and "**children**" has a corresponding meaning

“child pornography” means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
- (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

“genital organs” includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

“pornography” means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person

or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;

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

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

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

and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (fff) the mouth of another person;
 - (ggg) any other part of the body of another person, other than

the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is **mentally disabled is incapable of consenting** to a sexual act.

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 4 SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED

SEXUAL EXPLOITATION AND SEXUAL GROOMING OF, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY OR HARMFUL MATERIAL TO PERSONS WHO ARE MENTALLY DISABLED AND USING PERSONS WHO ARE MENTALLY DISABLED FOR PORNOGRAPHIC PURPOSES OR BENEFITING THEREFROM

S 25. EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY OR HARMFUL MATERIAL TO PERSONS WHO ARE MENTALLY DISABLED

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 (“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.

DEFINITIONS S 1:

"care giver" means any person who, in relation to a person who is mentally disabled, takes responsibility for meeting the daily needs of or is in substantial contact with such person;

"complainant" means the alleged victim of a sexual offence;

"child" means—

- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and **"children"** has a corresponding meaning

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

“child pornography” means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
- (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

“pornography” means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

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

and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

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

SENTENCE:

In terms of **ORDINARY** penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

OFFENCES CREATED IN THE ACT

CHAPTER 4 SEXUAL OFFENCES AGAINST PERSONS WHO ARE MENTALLY DISABLED

SEXUAL EXPLOITATION AND SEXUAL GROOMING OF, EXPOSURE OR DISPLAY OF OR CAUSING EXPOSURE OR DISPLAY OF PORNOGRAPHY OR HARMFUL MATERIAL TO PERSONS WHO ARE MENTALLY DISABLED AND USING PERSONS WHO ARE MENTALLY DISABLED FOR PORNOGRAPHIC PURPOSES OR BENEFITING THEREFROM

S 26. USING PERSONS WHO ARE MENTALLY DISABLED FOR PORNOGRAPHIC PURPOSES OR BENEFITING THEREFROM

S 26(1) A person (“A”) who unlawfully and intentionally uses a complainant who is mentally disabled (“B”), whether for financial or other reward, favour or compensation to B or to a third person (“C”) or not—

- (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 for pornographic purposes.

S 26(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from using a person who is mentally disabled for pornographic purposes.

DEFINITIONS S 1:

"care giver" means any person who, in relation to a person who is mentally disabled, takes responsibility for meeting the daily needs of or is in substantial contact with such person;

"complainant" means the alleged victim of a sexual offence;

"child" means—

- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and **"children"** has a corresponding meaning

"child pornography" means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of such person's breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
 - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

"pornography" means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;

- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;

"genital organs" includes the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs;

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

"sexual act" means an act of sexual penetration or an act of sexual violation;

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

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

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

and **"sexually penetrates"** has a corresponding meaning;

"sexual violation" includes any act which causes—

- (a) direct or indirect contact between the—

- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (jjj) the mouth of another person;
 - (kkk) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
 - (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration, and "**sexually violates**" has a corresponding meaning

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is **mentally disabled is incapable of consenting** to a sexual act.

SENTENCE:

S 26(1): Schedule 2 Part 111: Act 105 of 1997

S 26(2): In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

SENTENCE:

**Criminal Law
Amendment Act
Act 105 of 1997**

**Schedule 2:
PART III**

Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or **using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.**

Other Orders:

- 1) **S 103 Fire Arms Control Act, Act 60 of 2000** (unfit to possess a fire arm)

- 2) **S 50(2)(a) Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**
 - order that the particulars of the person be included in the National Register:
 - Form 5 to be completed by court (Form 6 by Clerk of Court)
 - Explain provisions of Act regarding Register, in particular section 45
 - applicable when offence was committed against a **child** (under 18) or a person who is **mentally disabled** (as defined in s 1 of Act)

**OFFENCES CREATED IN THE ACT
CHAPTER 7
GENERAL PROVISIONS**

PART 1: MISCELLANEOUS OFFENCES: OBLIGATION TO REPORT COMMISSION OF SEXUAL OFFENCES AGAINST CHILDREN OR PERSONS WHO ARE MENTALLY DISABLED AND ATTEMPT, CONSPIRACY, INCITEMENT OR INDUCING ANOTHER PERSON TO COMMIT SEXUAL OFFENCE

S 54. OBLIGATION TO REPORT COMMISSION OF SEXUAL OFFENCE AGAINST CHILDREN OR PERSONS WHO ARE MENTALLY DISABLED

S 54(1):

- (a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.**
- (b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.**

S 54(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.**

S 54(2)(c): A person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal proceedings by reason of making such report.

DEFINITIONS S 1:

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

SENTENCE:

In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

OFFENCES CREATED IN THE ACT

CHAPTER 7 GENERAL PROVISIONS

PART 1: MISCELLANEOUS OFFENCES: OBLIGATION TO REPORT COMMISSION OF SEXUAL OFFENCES AGAINST CHILDREN OR PERSONS WHO ARE MENTALLY DISABLED AND ATTEMPT, CONSPIRACY, INCITEMENT OR INDUCING ANOTHER PERSON TO COMMIT SEXUAL OFFENCE

S 55. ATTEMPT, CONSPIRACY, INCITEMENT OR INDUCING ANOTHER PERSON TO COMMIT SEXUAL OFFENCE

Any person who—

- (a) attempts;
- (b) conspires with any other person; or
- (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit a sexual offence in terms of this Act, is guilty of an offence.

DEFINITIONS S 1:

"sexual offence" means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

SENTENCE:

In terms of ORDINARY penal jurisdiction

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

OFFENCES CREATED IN THE ACT

CHAPTER 7 GENERAL PROVISIONS

PART 6: TRANSITIONAL PROVISIONS RELATING TO TRAFFICKING IN PERSONS FOR SEXUAL PURPOSES

S 71. TRAFFICKING IN PERSONS FOR SEXUAL PURPOSES

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

S 71(2): A person who—

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

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

S 71(3): For the purpose of subsection (1), "**consent**" means **voluntary or uncoerced agreement**.

S 71(4): Circumstances in which B does **not voluntarily or without coercion agree** to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following—

- (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (a) to (g) of the definition of trafficking having been used or being present; or
- (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (v) a child below the age of 12 years; or
 - (vi) a person who is mentally disabled.

S 71(5): A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.

S 71(6)(a): A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic.

S 71(6)(b): A commercial carrier is **not guilty of an offence** under paragraph (a) if—

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

S 71(6)(c): A commercial carrier is, *in addition to any offence* under this section, **liable to pay the costs** of the trafficked person's **care and safekeeping and return** from, the Republic.

S 71(6)(d): A **court must**, when convicting a commercial carrier of an offence under this section, in addition **order the commercial carrier concerned to pay the costs contemplated in paragraph (c).**

S 70: APPLICATION AND INTERPRETATION

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

S 70(2): For purposes of this Part—

- (a) **"commercial carrier"** includes a company, or the owner, operator or master of any means of transport, that engages in the transportation of goods or people for commercial gain; and
- (b) **"trafficking"** includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of—
- (i) a threat of harm;
 - (ii) the threat or use of force, intimidation or other forms of coercion;
 - (iii) abduction;
 - (iv) fraud;
 - (v) deception or false pretences;
 - (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
 - (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage, for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic,

and **"trafficks"** and **"trafficked"** have a corresponding meaning.

S 57: INABILITY OF CHILDREN UNDER 12 YEARS AND PERSONS WHO ARE MENTALLY DISABLED TO CONSENT TO SEXUAL ACTS

S 57(a) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

S 57(b) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

DEFINITION S 1:

"person who is mentally disabled" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

SENTENCE:

S 56: DEFENCES

S 56 (7): If a person is **convicted of any offence** under this Act, the court that imposes the sentence **shall consider** as an **aggravating factor** the fact that the person—

- (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
- (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

SENTENCE:

**Criminal Law
Amendment Act
Act 105 of 1997**

Schedule 2: PART I

Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

PART III

Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.”.

OFFENCES CREATED IN THE ACT

CHAPTER 5

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

PART 5: MISCELLANEOUS

S 38: OFFENCES AND PENALTIES

S 38(1)(a): Any person who, with malicious intent lays a charge with the South African Police Service in respect of an alleged sexual offence and makes an application in terms of section 30(1), with the intention of ascertaining the HIV status of any person, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years.

S 38(1)(b): Any person who with malicious intent or who in a grossly negligent manner discloses the results of any HIV tests in contravention of section 37, is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding three years.

S 38(1)(c): The institution of a prosecution for an offence referred to in paragraph (a) or (b) must be authorised in writing by the relevant Director of Public Prosecutions.

S 38(2): An alleged offender who, in any manner whatsoever, fails or refuses to comply with or avoids compliance with, or deliberately frustrates any attempt to serve on himself or herself, an order of court that he or she be tested for HIV, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years.

OFFENCES CREATED IN THE BILL

CHAPTER 6 NATIONAL REGISTER FOR SEX OFFENDERS

S 41: Prohibition on certain types of employment by certain persons who have committed sexual offences against children and persons who are mentally disabled

S 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 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, or which, in any other manner, places him or her in a position of authority, supervision or care of a child or where he or she gains access to a child or places where children are present or congregate;
- (c) be granted a license or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child; or
- (d) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child.

S 41(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 license or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a

person who is mentally disabled; or

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

S 45: Obligations of employers in respect of employees

S 45(1): Any employer who—

- (a) at the date of commencement of this Chapter, has in his or her employment any employee, may from the date of establishment of the Register, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the employee are recorded in the Register; or
- (b) from the date of establishment of the Register, intends employing an employee, must, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the potential employee are recorded in the Register.

S 45(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.
- (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, 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 against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as contemplated in section 50(1).
 - (d) An employer must take reasonable steps to prevent an employee whose particulars are recorded in the Register from continuing to gain access to a child or a person who is mentally disabled, in the course of his or her employment, including, if reasonably possible or practicable to transfer such person from the post or position occupied by him or her to another post or position: Provided that if any such steps to be taken will not ensure the safety of a child or a person who is mentally disabled, the employment relationship, the use of services or access, as the case may be, must be terminated immediately.

S 45(4): An employer who fails to comply with any provision of this section is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding seven years or to both a fine and such imprisonment.

S 46: Obligations of employees

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

S 46(2): An **employee** who, after the commencement of this Chapter, **applies for employment, must, if he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, disclose such conviction or finding when applying for employment.**

S 46(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.

S 47: Obligations in respect of license applications

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

S 47(2): A **person** who, after the commencement of this Chapter, applies for a license contemplated in subsection (1) to a licensing authority **must disclose** that he or she has been **convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.**

S 47(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.

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

S 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.

S 48(2): A **person** who, after the commencement of this Chapter, applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or a curator **must disclose** that he or she has been **convicted of a sexual offence against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.**

S 48(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.

S 50: Persons whose names must be included in Register and related matters

S 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 **servng 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.

S 50(2)(a) A court that has in terms of this Act or any other law—

(i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or

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

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.

S 50(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.

S 50(4) Where a court, for whatever reason, fails to make an order under subsection (2)(a) the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court and the court must make such order.

S 50(5)(a) The Commissioner of Correctional Services must, in the prescribed manner and within three months after the commencement of this Chapter, forward to the Registrar the particulars referred to in section 49 of every prisoner or former prisoner which he or she has on record, who, at the commencement of this Chapter, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child and must, where possible, forward the available particulars of every prisoner or former prisoner which he or she has on record, who at the commencement of this Chapter, is serving a sentence of imprisonment or has served a sentence of imprisonment as a result of a conviction for a sexual offence against a person who is mentally disabled, including an offence contemplated in section 15 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), and the Registrar must forthwith enter those particulars in the Register.

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

S 50(6) The National Commissioner of the South African Police Service must, in the prescribed manner and within three months after the commencement of this Chapter, forward to the Registrar all the available particulars in his or her possession referred to in section 49 of every person, who, at the commencement of this Chapter, has a previous conviction for a sexual offence against a child, including, as far as is possible, a conviction for a sexual offence against a child, and who has a previous conviction for an offence against a person who is mentally disabled, including an offence contemplated in section 15 of the Sexual Offences Act, 1957, and the Registrar must forthwith enter those particulars in the Register.

S 50(7)(a) The Director-General: Health must, in the prescribed manner and within three months after the commencement of this Chapter, forward to the Registrar the particulars referred to in section 49 of every person, who, at the commencement of this Chapter, is subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled and the Registrar must forthwith enter those particulars in the Register.

(b) The Director-General: Health must, in the prescribed manner and period, inform each person referred to in paragraph (a) whose particulars have been forwarded to the Registrar of the implications thereof.

S 50(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.

S 52: Confidentiality and disclosure of information

S 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—

- (i) for the purpose of giving effect to the provisions of this Chapter; or
- (ii) when required to do so by any competent court.

S 50(2) Except in so far as it may be necessary for the purpose of this Chapter, the Registrar and any other person who assists the Registrar in the exercise and performance of his or her powers, duties and functions, who 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.

S 50(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.

S 50(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.

S 40: DEFINITIONS

For purposes of this Chapter, and unless the context indicates otherwise—
"certificate" means a certificate contemplated in section 44;

"employee" means—

- (a) any person who applies to work for or works for an employer, and who receives, or is entitled to receive, any remuneration, reward, favour or benefit; 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) any other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation, which—
 - (aa) employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a child or in a position of authority, supervision or care of a child or will gain access to a child or places where children are present or congregate; or
 - (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 or working with or will gain access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate; or
 - (ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the

management or operation of any entity or business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled or working with or who gains access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate,

and “employ”, “employing”, “employed”, “employment relationship” have corresponding meanings;

“licensing authority” means any authority which is responsible for granting licenses or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled;

“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); and

“relevant authority” means any—

- (a) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

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

IMPACT OF THE ACT ON PROCEDURAL ASPECTS

Amendments to Criminal Procedure Act 51 of 1977

153 Circumstances in which criminal proceedings shall not take place in open court

- (1) If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.
- (2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct-
 - (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;
 - (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.
- (3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-
 - (a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;
 - (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or
 - (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

[Sub-s. (3) substituted by s. 68 of Act 32 of 2007.]

- (3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person in loco parentis, requests otherwise. [Sub-s. (3A) inserted by s. 2 of Act 103 of 1987.]
- (4) Where an accused at criminal proceedings before any court is under the age of eighteen years, no person, other than such accused, his legal representative and parent or guardian or a person in loco parentis, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.
- (5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person in loco parentis, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.
- (6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorized by the court.

154 Prohibition of publication of certain information relating to criminal proceedings

- (1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153 (1), in which event the court may direct that such part shall not be published.
- (2) (a) Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding

judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable.

[Para. (a) substituted by s. 3 of Act 103 of 1987.]

(b) No person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153 (3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question.

(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.

(4) No prohibition or direction under this section shall apply with reference to the publication in the form of a bona fide law report of-

(a) information for the purpose of reporting any question of law relating to the proceedings in question; or

(b) any decision or ruling given by any court on such question,

if such report does not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and does not mention the place where the offence in question was alleged to have been committed.

(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153 (2), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

[Sub-s. (5) substituted by s. 12 of Act 33 of 1986 and by s. 68 of Act 32 of 2007.]

(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if-

- (a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any sexual act as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of a sexual act, as contemplated in that Act, towards or in connection with any other person; and
 - (b) the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support.
- [Sub-s. (6) added by s. 68 of Act 32 of 2007.]

158 Criminal proceedings to take place in presence of accused

- (1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
- (2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
(b) A court may make a similar order on the application of an accused or a witness.
- (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-
 - (a) prevent unreasonable delay;
 - (b) save costs;
 - (c) be convenient;
 - (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
 - (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
- (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.
- (5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed

circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

[Sub-s. (5) added by s. 68 of Act 32 of 2007.]

[S. 158 substituted by s. 7 of Act 86 of 1996.]

161 Witness to testify viva voce

- (1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence viva voce.
- (2) In this section the expression 'viva voce' shall, in the case of a deaf and dumb witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

[Sub-s. (2) substituted by s. 1 of Act 135 of 1991.]

162 Witness to be examined under oath

- (1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:
'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'
- (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

163 Affirmation in lieu of oath

- (1) Any person who is or may be required to take the oath and-
 - (a) who objects to taking the oath;
 - (b) who objects to taking the oath in the prescribed form;
 - (c) who does not consider the oath in the prescribed form to be binding on his conscience; or
 - (d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:
'I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth'.
- (2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.

- (3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

164 When unsworn or unaffirmed evidence admissible

- (1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.
[Sub-s. (1) substituted by s. 68 of Act 32 of 2007.]
- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

165 Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.
[S. 165 substituted by s. 2 of Act 135 of 1991.]

167 Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

186 Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

170A Evidence through intermediaries

(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

[Sub-s. (1) substituted by s. 68 of Act 32 of 2007.]

- (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
- (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
- (3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place-
- (a) which is informally arranged to set that witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.
- (4) (a) The Minister may by notice in the Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
- (b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.
- (5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.
- (b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has

been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to-

- (i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
 - (ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
 - (iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.
- (6) (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.
- (b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection-
- (i) the trial court; or
 - (ii) the court considering an appeal or review, has not delivered judgment.
- (7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.
[Sub-s. (7) added by s. 68 of Act 32 of 2007.]
- (8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.
[Sub-s. (8) added by s. 68 of Act 32 of 2007.]
- (9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court-
- (a) is for any reason absent;
 - (b) becomes unable to act as an intermediary in the opinion of the court; or
 - (c) dies,
- the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor-

- (i) postpone the proceedings in order to obtain the intermediary's presence;
- (ii) summons the intermediary to appear before the court to advance reasons for being absent;
- (iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or
- (iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.

[Sub-s. (9) added by s. 68 of Act 32 of 2007.]

- (10) The court shall immediately give reasons for any direction or order referred to in subsection (9) (iv), which reasons shall be entered into the record of the proceedings.

[Sub-s. (10) added by s. 68 of Act 32 of 2007.]

[S. 170A inserted by s. 3 of Act 135 of 1991 and substituted by s. 1 of Act 17 of 2001.]

**PERSONS OR CATEGORIES OR CLASSES OF PERSONS
WHO ARE COMPETENT TO BE APPOINTED AS
INTERMEDIARIES**

**GN R1374 GG 15024 of 30 July 1993 as amended by
GN R360 GG 22435 of 28 February 1997
GN R597 GG 22435 of 2 July 2001**

- (a) **Medical practitioners: registered** as such under Medical, Dental & Supplementary Health Services Professions Act 56 of 1974 **AND registered: specialty pediatrics**
- (b) **Medical practitioners: registered** as such under Medical, Dental & Supplementary Health Services Professions Act 56 of 1974 **AND registered: specialty psychiatry**
- (c) **Family Councillors appointed under s 3** of the Mediation in Certain Divorce Matters Act 24 of 1987 **AND** who are or were **registered as social workers** under s 17 of the Social Service Professions Act 110 of 1978 OR who are or were **educators** as contemplated in (f), OR who are or were **registered as clinical, educational or counseling psychologists** under the Medical, Dental & Supplementary Health Services Professions Act 56 of 1974
- (d) **Child care workers** who have successfully completed a **2year course** in child & youth care approved by the National Association of Child Care Workers **AND** who have **2 years' experience** in child care
- (e)
 - (i) **Social Workers** who are **registered** under s 17 of the Social Service Professions Act 110 of 1978 **AND** who have **2 years' experience** in social work and
 - (ii) persons who obtained a **masters degree in social work AND** who have **2 years' experience** in social work
- (f)
 - (i) Persons who have **4 years' experience** as **educators** who have **NOT** at any stage, as a result of misconduct, been **dismissed** from service as educators;
 - (ii) '**educators**' means persons **who teach, educate or train other persons**, or who provide **professional education services**, incl. professional therapy & educational psychological services at a public, independent or private school as contemplated in the SA Schools Act 84 of 1996, **incl. former & retired educators**
- (g) **Psychologists** who are **registered as clinical, educational or counseling psychologists** under the Medical, Dental & Supplementary Health Services Professions Act 56 of 1974

IMPACT OF THE ACT ON EVIDENTIARY ASPECTS

S 58: EVIDENCE OF PREVIOUS CONSISTENT STATEMENTS

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.

S 59: EVIDENCE OF DELAY IN REPORTING

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

S 60: COURT MAY NOT TREAT EVIDENCE OF COMPLAINANT WITH CAUTION ON ACCOUNT OF NATURE OF OFFENCE

Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.

Criminal Procedure Act 51 of 1977

S 192: Every witness competent and compellable unless expressly excluded

Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

S 193: Court to decide upon competency of witness

The court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence.

S 194: Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

S 195: Evidence for prosecution by husband or wife of accused

S 195(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with-

- (a) any offence committed against the person of either of them or of a child of either of them or of a child that is in the care of either of them;

- (b) any offence under Chapter 8 of the Child Care Act, 1983 (Act 74 of 1983), committed in respect of any child of either of them;
- (c) any contravention of any provision of section 31 (1) of the Maintenance Act, 1998, or of such provision as applied by any other law;
- (d) bigamy;
- (e) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) abduction;
- (g) any contravention of any provision of section 2, 8, 10, 12, 12A, 17 or 20 of the Sexual Offences Act, 1957 (Act 23 of 1957);
- (gA) any contravention of any provision of section 17 or 23 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;
- (i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h).
[Sub-s. (1) amended by s. 5 of Act 72 of 1985 and by s. 7 of Act 26 of 1987, substituted by s. 6 of Act 45 of 1988, amended by s. 4 of Act 18 of 1996, by s. 1 of Act 49 of 1996 and by s. 45 (1) of Act 99 of 1998 and substituted by s. 68 of Act 32 of 2007.]

- (2) For the purposes of the law of evidence in criminal proceedings 'marriage' shall include a customary marriage or customary union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa or any marriage concluded under any system of religious law.

227 Evidence of character and previous sexual experience

- (1) Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.
- (2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual

experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-

- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or
 - (b) such evidence has been introduced by the prosecution.
- (3) Before an application for leave contemplated in subsection (2) (a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.
- (4) The court shall, subject to subsection (6), grant the application referred to in subsection (2) (a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.
- (5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning-
- (a) is in the interests of justice, with due regard to the accused's right to a fair trial;
 - (b) is in the interests of society in encouraging the reporting of sexual offences;
 - (c) relates to a specific instance of sexual activity relevant to a fact in issue
- ;
- (d) is likely to rebut evidence previously adduced by the prosecution;
 - (e) is fundamental to the accused's defence;
 - (f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
 - (g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;
- (6) The court shall not grant an application referred to in subsection (2) (a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant-
- (a) is more likely to have consented to the offence being tried; or
 - (b) is less worthy of belief.
- (7) The court shall provide reasons for granting or refusing an application in terms of subsection (2) (a), which reasons shall be entered in the record of the proceedings.

[S. 227 substituted by s. 2 of Act 39 of 1989 and by s. 68 of Act 32 of 2007.]

HIV STATUS

S 34: Use of results of HIV tests

The results of an HIV test, performed in terms of an order contemplated in sections 31(3) and 32(3), may only be used in the following circumstances:

- (a) to inform a victim or an interested person whether or not the alleged offender in the case in question is infected with HIV with the view to—
 - (i) reducing secondary trauma and empowering the victim to make informed medical, lifestyle and other personal decisions; or
 - (ii) using the test results as evidence in any ensuing civil proceedings as a result of the sexual offence in question; or
- (b) **to enable an investigating officer to gather information with the view to using it as evidence in criminal proceedings.**

S 36: Confidentiality of outcome of application

The fact that an order for HIV testing of an alleged offender has been granted as contemplated in section 31 or section 32 may not be communicated to any person other than—

- (a) the victim or an interested person referred to in section 30;
- (b) the alleged offender;
- (c) the investigating officer and, where applicable, to—
 - (i) a prosecutor; or
 - (ii) subject to section 35(2), any other person who needs to know the test results for purposes of any criminal investigations or proceedings or any civil proceedings; and
- (d) the persons who are required to execute the order as contemplated in section 33.

S 37: Confidentiality of HIV test results obtained

37(1): The results of the HIV tests performed on an alleged offender in terms of this Chapter may, subject to subsection (2), be communicated only to—

- (a) the victim or the interested person referred to in section 30;
- (b) the alleged offender; and
- (c) the investigating officer and, where applicable, to—

- (i) a prosecutor if the alleged offender is tested as contemplated in section 32; or
- (ii) any other person who needs to know the test results for purposes of any civil proceedings or an order of a court.

37(2): A presiding officer, in any proceedings contemplated in this Chapter or in any ensuing criminal or civil proceedings, may make any order he or she deems appropriate in order to give effect to this section, including the manner in which such results are to be kept confidential and the manner in which the court record in question is to be dealt with.

COMPETENT VERDICTS

Criminal Procedure Act 51 of 1977

Competent verdicts: Criminal Procedure Act 51 of 1977

S 261: Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

261 (1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

- (a) assault with intent to do grievous bodily harm;
- (b) common assault;
- (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—

- (a) common assault or;
- (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

the accused may be found guilty of the offence so proved.”.

S 266 Assault with the intent to do grievous bodily harm

If the evidence on a charge of assault with the intent to do grievous bodily harm does not prove the offence of assault with the intent to do grievous bodily harm but the offence of –

- (a) common assault
- (b) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
- (c) pointing of a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

S 267: Common assault

267. If the evidence on a charge of common assault proves the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, the accused may be found guilty of any such offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.”.

S 268: Statutory unlawful carnal intercourse

268. If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—

- (a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (b) the offence of common assault; or
- (c) the statutory offence of—
 - (i) committing an immoral or indecent act with such other person;
 - (ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;
 - (iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
 - (iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.”

NOTE: Section 269 – sodomy: repealed

SENTENCING

Principle of legality:

Nullem crimen sine lege

Statute should make it clear that crime is created, not merely a prohibition: must explicitly state 'shall be an offence' or 'shall be guilty of an offence'.

Nullem crimen sine poena

Burchell (3rd ed 99): .. the fact that the Legislature does not specify what the punishment is for the offence is not regarded as a serious flaw in the legislation. In such a case, it is presumed that the determination of the appropriate punishment has been left to the courts.

Snyman (4th ed 44): If a statutory provision creates a criminal norm only, but remains silent on the criminal sanction, ... the punishment is simply at the court's discretion, that is, the court itself can decide what punishment to impose.

R v Forlee 1917 TPD 52

'where the act is definitely prohibited in a manner which renders it clear that the Legislature was not exhorting or advising, then it is punishable at the discretion of the Judge where the law has not itself attached any "penalty"'

Nulla poena sine lege (punishment for offences must be prescribed by the law)

Snyman (4th ed: 49 - 50): The application of the *ius acceptum* principle to punishment is as follows: in the same way as a court cannot find anyone guilty of a crime unless his conduct is recognised by statutory or common law as a crime, it cannot impose a punishment unless the punishment, in respect of both its nature and extent, is recognised or prescribed by statutory or common law. In the case of statutory crimes, the maximum penalty which can be imposed for each crime is usually specifically set out. If the legislature creates a crime, it should, in order to best comply with the principle of legality, set out the punishment for the crime. This limits the possibility of an unusual, cruel or arbitrary punishment being imposed. If the legislature creates an offence but omits to specify the punishment, then the punishment is in the discretion of the court.

Constitution: s 35(3)

Amendments to Criminal Procedure Act 51 of 1977

The amendment of **section 276A**—

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

“(b) for a fixed period not exceeding three years, or in the case of a conviction for any offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, for a fixed period not exceeding five years.”; and

(b) by the insertion after subsection (2) of the following subsection:

“(2A) Punishment imposed under paragraph (h) or (i) of section 276(1) on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific treatment programme as prescribed in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the cost of which shall be borne by the convicted person himself or herself.”.

Section 299A amended by the substitution for subsection (1) of the following subsection:

“(1) When a court sentences a person to imprisonment for—

- (a) murder or any other offence which involves the intentional killing of a person;
- (b) rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (c) robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;
- (d) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (e) kidnapping; or
- (f) any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs (a) to (e),

it shall inform—

- (i) the complainant; or
- (ii) in the case of murder or any other offence contemplated in paragraph (a), any immediate relative of the deceased,

if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.”.

The amendment of **section 335A**—

(a) by the substitution for subsection (2) of the following subsection:

“(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment if the person whose identity has been revealed is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.”; and

(b) by the addition after subsection (2) of the following subsection:

“(3) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (2) and if the person whose identity has been revealed suffered any physical, psychological or other injury or loss of income or support.”.

Criminal Law Amendment Act 105 of 1997

- 51 Discretionary minimum sentences for certain serious offences**
- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
- (a) Part II of Schedule 2, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
 - (b) Part III of Schedule 2, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 10 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (c) Part IV of Schedule 2, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:
- Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.
- (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.
- (aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.

(4)

[Sub-s. (4) omitted by s. 1 of Act 38 of 2007.]

- (5) (a) Subject to paragraph (b), the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).
- (b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.
- (6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).
- (7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of that person beyond reasonable doubt.
- (8) For the purposes of this section and Schedule 2, 'law enforcement officer' includes-
 - (a) a member of the National Intelligence Agency or the South African Secret Service referred to in section 3 of the Intelligence Services Act, 2002 (Act 65 of 2002); and
 - (b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act 111 of 1998).
- (9) The amounts mentioned in respect of the offences referred to in Part II of Schedule 2 to the Act, may be adjusted by the Minister from time to time by notice in the Gazette.
[S. 51 amended by s. 33 of Act 62 of 2000 and by s. 36 (1) of Act 12 of 2004 and substituted by s. 1 of Act 38 of 2007.]
[Date of commencement of s. 51: 1 May 1998.]

52

[S. 52 amended by s. 34 (a), (b), (c), (d), (e) and (f) of Act 62 of 2000 and repealed by s. 2 of Act 38 of 2007.]

[Date of commencement of s. 52: 1 May 1998.]

52A and 52B.....

[Ss. 52A and 52B inserted by s. 35 of Act 62 of 2000 and repealed by s. 2 of Act 38 of 2007.]

53 Saving

(1)

[Sub-s. (1) substituted by s. 16 (a) of Act 42 of 2001 and deleted by s. 3 (a) of Act 38 of 2007.]

(2)

[Sub-s. (2) deleted by s. 3 (a) of Act 38 of 2007.]

(2A)

[Sub-s. (2A) inserted by s. 16 (b) of Act 42 of 2001 and deleted by s. 3 (b) of Act 38 of 2007.]

- (3) Any appeal against-
- (a) a conviction of an offence-
 - (i) referred to in Schedule 2 of this Act and a resultant sentence imposed in terms of section 51; or
 - (ii) not referred to in the said Schedule 2 and a resultant sentence imposed in terms of section 52A; or
 - (b) a sentence imposed in terms of section 51 or 52A, as the case may be, shall be continued and concluded as if sections 51 and 52A had at all relevant times been in operation.
- (4) Sections 51 and 52 shall not derogate from the provisions of section 89 (2) of the Magistrates' Courts Act, 1944 (Act 32 of 1944).
- (5) If a regional court has convicted an accused of an offence referred to in Schedule 2 as well as an offence not referred to in that Schedule, and the court has, prior to the commencement of the Judicial Matters Amendment Act, 2000, committed the accused under section 52 (1) for sentence by a High Court in respect of the offence referred to in the said Schedule 2, but has not committed the accused for sentence by the High Court in question in respect of the offence not referred to in that Schedule, the regional court must sentence the accused in respect of the last-mentioned offence as if the Judicial Matters Amendment Act, 2000, had not been passed.
- [S. 53 substituted by s. 36 of Act 62 of 2000.]
[Date of commencement of s. 53: 1 May 1998.]

53A Transitional provision

If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007-

- (a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or
- (b) not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007.

[S. 53A inserted by s. 4 of Act 38 of 2007.]

The amendment of Schedule 2 by—

- (a) the substitution for Part I of the following part:

“PART I

Murder, when—

- (a) it was planned or premeditated;
- (b) the victim was-
- (i) a law enforcement officer performing his or her functions as such, whether on duty or not; or
 - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), at criminal proceedings in any court;
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
- (i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
 - (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or
- (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—

- (a) when committed—
- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim—
- (i) is a person under the age of 16 years;

- (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
 - (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- or

(c) involving the infliction of grievous bodily harm.

Any offence referred to in section 2, 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, when it is proved that the offence has—

- (a) endangered the life or caused serious bodily injury to or the death of, any person, or any number or group of persons;
- (b) caused serious risk to the health or safety of the public or any segment of the public; or
- (c) created a serious public emergency situation or a general insurrection.

Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.; and

(b) the substitution for Part III of the following Part:

“PART III

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.

Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

Any offence in contravention of section 36 of the Arms and Ammunitions Act, 1969 (Act No. 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act.

Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.”.

SENTENCING: OTHER ORDERS

CHAPTER 6 NATIONAL REGISTER FOR SEX OFFENDERS

S 50: Persons whose names must be included in Register and related matters

S 50(1) The particulars of the following persons must be included in the Register:

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

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

whether committed before or after the commencement of this Chapter.

- (2) (a) **A court that has in terms of this Act or any other law—**
 - (i) **convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or**
 - (ii) **made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure**

Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,

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

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.

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

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

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

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

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

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

- (b) The Commissioner of Correctional Services must, in the prescribed manner and period, inform each serving prisoner whose particulars have been forwarded to the Registrar of the implications thereof.
- (6) The National Commissioner of the South African Police Service must, in the prescribed manner and within three months after the commencement of this Chapter, forward to the Registrar all the available particulars in his or her possession referred to in section 49 of every person, who, at the commencement of this Chapter, has a previous conviction for a sexual offence against a child, including, as far as is possible, a conviction for a sexual offence against a child, and who has a previous conviction for an offence against a person who is mentally disabled, including an offence contemplated in section 15 of the Sexual Offences Act, 1957, and the Registrar must forthwith enter those particulars in the Register.
- (7) (a) The Director-General: Health must, in the prescribed manner and within three months after the commencement of this Chapter, forward to the Registrar the particulars referred to in section 49 of every person, who, at the commencement of this Chapter, is subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled and the Registrar must forthwith enter those particulars in the Register.
- (b) The Director-General: Health must, in the prescribed manner and period, inform each person referred to in paragraph (a) whose particulars have been forwarded to the Registrar of the implications thereof.
- (8) (a) ***A person whose particulars have been submitted to the Registrar in terms of this section and whose name or names, sex, identity number, physical or postal address or other details as contemplated in section 49 have changed, must notify the Registrar of any such change within 14 days after such change.***
- (b) ***Any person referred to in paragraph (a) who intentionally fails to notify the Registrar of any change contemplated in that paragraph, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding seven years.***

S 51: Removal of particulars from Register

51. (1) Subject to subsections (2) and (3), the particulars of a person—
- (a) who—
 - (i) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence

was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed after that person has been released from prison or the period of suspension has lapsed;

- (ii) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of seven years has lapsed after that person has been released from prison or the period of suspension has lapsed; or
- (iii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002), from any restrictions imposed on him or her;

- (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.

- (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.

S 43: Objects of Register

43. The objects of the Register are to protect children and persons who are mentally disabled against sexual offenders by—

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

S 44: Persons entitled to apply for certificate

44. An application for a prescribed certificate, stating whether or not the particulars of a person mentioned in the application are recorded in the Register may, solely for the purpose of complying with any obligation under this Chapter, be made

in the prescribed manner by—

- (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 license or approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of children in respect of his or her own particulars;
- (f) a person contemplated in section 48(2) applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent in respect of his or her own particulars; or
- (g) any person whose particulars appear on the Register in respect of his or her own particulars.

S 45: Obligations of employers in respect of employees

45. (1) Any employer who—

- (a) at the date of commencement of this Chapter, has in his or her employment any employee, may from the date of establishment of the Register, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the employee are recorded in the Register; or
- (b) from the date of establishment of the Register, intends employing an employee, must, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the potential employee are recorded in the Register.

(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.

(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, 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 against a child or a person who is mentally disabled or that he or she is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as contemplated in section 50(1).

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

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

S 46: Obligations of employees

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

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

(3) An employee who fails to comply with subsection (1) or (2) is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding seven years or to both a fine and such imprisonment.

S 49: Contents of Register

49. The Register must—

(a) be established and maintained in the prescribed manner and format;

(b) contain the following particulars of persons referred to in section 48:

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

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

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

(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.

FORM 6 NOTE:

- 1 National Register for Sex Offenders:
The Minister for Justice and Constitutional Development has established 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.
- 2 Implication of inclusion of particulars in Register:
 - 2.1 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 who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may not-
 - (i) be employed to work with a child in any circumstances;
 - (ii) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child, or which, in any other manner, places him or her in a position of authority, supervision or care of a child or where he or she gains access to a child or places where children are present or congregate;
 - (iii) 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; or
 - (iv) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child.
 - 2.2 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 who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may not-
 - (i) be employed to work with a person who is mentally disabled in any circumstances;
 - (ii) 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 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;
 - (iii) 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
 - (iv) become a curator of a person who is mentally disabled.
 - 2.3 (i) An employee in the employ of an employer must without delay disclose a conviction or finding referred to in 2.1 or 2.2 above, to his or her employer.

(ii) An employee who applies for employment, must, if he or she has been convicted of an offence referred to in 2.1 or 2.2 above, or is alleged to have committed such offence and who has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, disclose such conviction or finding when applying for employment.

(iii) An employee who fails to comply with this obligation 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.

2.4 (i) A person who applies for approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or a person who is mentally disabled must disclose that 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 such offence and was dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.

(ii) A person who contravenes the above obligation 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.

.....
SIGNATURE OF *CLERK OF THE COURT/REGISTRAR OF THE HIGH COURT

APPLICATION FOR HIV TESTING

CHAPTER 5 SERVICES FOR VICTIMS OF SEXUAL OFFENCES AND COMPULSORY HIV TESTING OF ALLEGED SEX OFFENDERS

NOTE: APPLICATIONS FOR HIV TESTING DONE BY MAGISTRATE NOT REGIONAL MAGISTRATE

Part 1: Definitions and services for victims of sexual offences

S 27: Definitions

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

"application" means an application in terms of section 30 or 32;

"body fluid" means any body substance which may contain HIV or any other sexually transmissible infection, but does not include saliva, tears or perspiration;

"body specimen" means any body sample which can be tested to determine the presence or absence of HIV infection;

"HIV" means the Human Immuno-deficiency Virus;

"HIV test" means any validated and medically recognised test for determining the presence or absence of HIV infection in a person;

"interested person" means any person who has a material interest in the well-being of a victim, including a spouse, same sex or heterosexual permanent life partner, parent, guardian, family member, care giver, curator, counsellor, medical practitioner, health service provider, social worker or teacher of such victim;

"investigating officer" means a member of the South African Police Service responsible for the investigation of an alleged sexual offence or any other offence or any member acting under his or her command;

"medical practitioner" means a person registered as a medical practitioner in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), and who, for purposes of section 33, is authorised to take body specimens as contemplated in this Chapter;

"nurse" means a person registered as such in terms of any relevant legislation and who, for purposes of section 33, is authorised to take body specimens as contemplated in this Chapter;

"offence" means any offence, other than a sexual offence, in which the HIV status of the alleged offender may be relevant for purposes of investigation or prosecution;

"PEP" means Post Exposure Prophylaxis;

"sexual offence" means a sexual offence in terms of this Act in which the victim may have been exposed to body fluids of the alleged offender; and

"victim" means any person alleging that a sexual offence has been perpetrated against him or her.

S 28: Services for victims relating to Post Exposure Prophylaxis and compulsory HIV testing of alleged sex offenders

28(1) If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may—

- (a) subject to subsection (2)—
 - (i) receive PEP for HIV infection, at a public health establishment designated from time to time by the cabinet member responsible for health by notice in the *Gazette* for that purpose under section 29, at State expense and in accordance with the State's prevailing treatment norms and protocols;
 - (ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and
 - (iii) be supplied with a prescribed list, containing the names, addresses and contact particulars of accessible public health establishments contemplated in section 29(1)(a); and
- (b) **subject to section 30, apply to a magistrate for an order that the alleged offender be tested for HIV, at State expense.**

(2) Only a victim who—

- (a) lays a charge with the South African Police Service in respect of an alleged sexual offence; or
- (b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in subsection (1)(a)(i),

within 72 hours after the alleged sexual offence took place, may receive the services contemplated in subsection (1)(a).

- (3) A victim contemplated in subsection (1) or an interested person must—
- (a) when or immediately after laying a charge with the South African Police Service or making a report in respect of the alleged sexual offence, in the prescribed manner, be informed by the police official to whom the charge is made or by a medical practitioner or a nurse to whom the incident is reported, as the case may be, of the—
 - (i) importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence took place;
 - (ii) need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections; and
 - (iii) services referred to in subsection (1); and
 - (b) in the case of an application contemplated in section 30, be handed a notice containing the prescribed information regarding the compulsory HIV testing of the alleged offender and have the contents thereof explained to him or her.

S 29: Designation of public health establishments for purposes of providing Post Exposure Prophylaxis and carrying out compulsory HIV testing

29(1) The cabinet member responsible for health must, by notice in the *Gazette*, designate any public health establishment for the purposes of—

- (a) providing PEP to victims; and
- (b) carrying out compulsory HIV testing,

and may, by notice in the *Gazette*, withdraw any designation under this section, after giving 14 days' prior notice of such withdrawal in the *Gazette*.

(2) The first notice in terms of subsection (1) must be published within two months of the implementation of this section, and at least at intervals of six months thereafter.

(3) The Director-General: Justice and Constitutional Development must, within 14 days of publication of each designation or withdrawal thereof contemplated in subsection (1), provide a copy of the notice to—

- (a) the relevant role-players falling under his or her jurisdiction; and
- (b) the National Commissioner of the South African Police Service, the Commissioner of Correctional Services and the Director-General of Health.

(4) The National Commissioner of the South African Police Service, Commissioner of Correctional Services and Director-General of Health must distribute the notice referred to in subsection (1) to all relevant role-players falling under his or her jurisdiction.

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

S 30: Application by victim or interested person for HIV testing of alleged sex offender

30(1)(a) Within 90 days after the alleged commission of a sexual offence any victim or any interested person on behalf of a victim, may apply to a magistrate, in the prescribed form, for an order that—

- (i) the alleged offender be tested for HIV and that the results thereof be disclosed to the victim or interested person, as the case may be, and to the alleged offender; or
- (ii) the HIV test results in respect of the alleged offender, obtained on application by a police official as contemplated in section 32, be disclosed to the victim or interested person, as the case may be.

- (b) If the application is brought by an interested person, such application must be brought with the written consent of the victim, unless the victim is—

- (i) under the age of 14 years;
- (ii) a person who is mentally disabled;
- (iii) unconscious;
- (iv) a person in respect of whom a curator has been appointed in terms of an order of court; or
- (v) a person whom the magistrate is satisfied is unable to provide the required consent.

(2)(a) Every application must—

- (i) state that a sexual offence was committed against the victim by the alleged offender;
 - (ii) confirm that the alleged offence has been reported as contemplated in section 28(2);
 - (iii) state that the victim may have been exposed to the risk of being infected with HIV as a result of the alleged sexual offence;
 - (iv) if it is brought by an interested person, state the nature of the relationship between the interested person and the victim, and if the interested person is not the spouse, same sex or heterosexual permanent life partner or a parent of the victim, the reason why the application is being made by such interested person; and
 - (v) state that less than 90 days have elapsed from the date on which it is alleged that the offence in question took place.
- (b) The matters referred to in paragraph (a) must be verified by the victim or the interested person, as the case may be, by affidavit or solemn declaration.
- (3) The application must be made as soon as possible after a charge has been laid, and may be made before or after an arrest has been effected.
- (4) **The application must be handed to the investigating officer, who must, as soon as is reasonably practicable, submit the application to a magistrate of the magisterial district in which the sexual offence is alleged to have occurred.**

S 31: Consideration of application by magistrate and issuing of order

31(1) The magistrate must, as soon as is reasonably practicable, consider the application contemplated in section 30, in chambers and may call for such additional evidence as he or she deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings.

(2)(a) For the purpose of the proceedings contemplated in subsection (1), the magistrate may consider evidence by or on behalf of the alleged offender if, to do so, will not give rise to any substantial delay.

(b) Evidence contemplated in paragraph (a) may be adduced in the absence of the victim, if the magistrate is of the opinion that it is in the best interests of the victim to do so.

(3) If the magistrate is satisfied that there is *prima facie* evidence that—

(a) a sexual offence has been committed against the victim by the alleged offender;

(b) the victim may have been exposed to the body fluids of the alleged offender; and

(c) no more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place,

the magistrate must—

(i) in the case where the alleged offender has not been tested for HIV on application by a police official as contemplated in section 32, order that the alleged offender be tested for HIV in accordance with the State's prevailing norms and protocols, including where necessary—

(aa) the collection from the alleged offender of two prescribed body specimens; and

(bb) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender, and that the HIV test results be disclosed in the prescribed manner to the victim or interested person, as the case may be, and to the alleged offender; or

(ii) in the case where the alleged offender has already been tested for HIV on application by a police official as contemplated in section 32, order that the HIV test results be disclosed in the prescribed manner to the victim or interested person, as the case may be.

(4) An order referred to in subsection (3) must be made in the prescribed manner and handed to the investigating officer.

(5) The investigating officer must, as soon as is reasonably practicable, after an application has been considered—

(a) inform the victim or interested person, as the case may be, of the outcome of the application; and

(b) if an order has been granted in terms of subsection (3), inform the alleged offender thereof by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.

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

S 32: Application by police official for HIV testing of alleged sex offender

32(1) An investigating officer may, subject to subsection (2), for purposes of investigating a sexual offence or offence apply in the prescribed form to a magistrate of the magisterial district in which the sexual offence or offence is alleged to have occurred, in chambers, for an order that—

- (a) the alleged offender be tested for HIV; or
 - (b) the HIV test results in respect of the alleged offender, already obtained on application by a victim or any interested person on behalf of a victim as contemplated in section 30(1)(a)(i), be made available to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.
- (2) An application contemplated in subsection (1) must—
- (a) set out the grounds, on the strength of information taken on oath or by way of solemn declaration, in which it is alleged that a sexual offence or offence was committed by the alleged offender; and
 - (b) be made after a charge has been laid, and may be made before or after an arrest has been effected, or after conviction.
- (3) If the magistrate is satisfied that there is *prima facie* evidence that—
- (a) a sexual offence or offence has been committed by the offender; and
 - (b) HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence,

the magistrate must, in the case of an application contemplated in subsection (1)(a), order that the alleged offender be tested for HIV in accordance with the State's prevailing norms and protocols, including, where necessary—

- (i) the collection from the alleged offender of two prescribed body specimens; and
 - (ii) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender, and that the HIV test results be disclosed in the prescribed manner to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings and to the alleged offender, if the results have not already been made available to such offender as contemplated in section 30(1)(a)(i).
- (4) An order contemplated in subsection (3) must be made in the prescribed manner and handed to the investigating officer.
- (5) The investigating officer must, as soon as is reasonably practicable, after an application has been granted in terms of subsection (3), inform the alleged

offender by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.

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

S 33: Execution of order and issuing of warrant of arrest

33(1) As soon as an order referred to in section 31(3) or section 32(3) has been handed to an investigating officer—

(a) the investigating officer must request any medical practitioner or nurse to take two prescribed body specimens from the alleged offender, and the investigating officer must make the alleged offender available or cause such person to be made available for that purpose;

(b) the medical practitioner or nurse concerned must take two prescribed body specimens from the alleged offender;

(c) the investigating officer must deliver the body specimens to the head of a public health establishment designated in terms of section 29 or to a person designated in writing by the head of such establishment;

(d) the head of the establishment or the person referred to in paragraph

(c) must—

(i) perform one or more HIV tests on the body specimens of the alleged offender as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender;

(ii) record the results of the HIV test in the prescribed manner;

(iii) provide the investigating officer with duplicate sealed records of the test results; and

(iv) retain one sealed record of the test results in the prescribed manner and place; and

(e) the investigating officer must—

(i) in the case of an order contemplated in section 31(3), hand over to the victim or to the interested person, as the case may be, and to the alleged offender the sealed record of the test results and a notice containing prescribed information on the confidentiality of and how to deal with the HIV test results, and if necessary explain the contents of the notice; or

(ii) in the case of an order contemplated in section 32(3), hand over to the alleged offender a sealed record of the test results and a notice containing prescribed information on how to deal with the test results, and if necessary explain the contents of the notice, and retain the other record of the test results as prescribed or, where applicable, make the record of the test results available to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.

(2)(a) An order made in terms of section 31(3) lapses if the charge is withdrawn by the prosecution at the request of the victim.

(b) Any specimens taken or results obtained prior to the lapsing of the order, if any, as contemplated in paragraph (a), must be destroyed in accordance with the Department of Health's prevailing norms and protocols or where relevant, in accordance with any national instructions issued by the National Commissioner of the South African Police Service in terms of section 66(1)(c).

(3) The magistrate may, when or after issuing an order contemplated in section 31(3) or 32(3), issue a warrant for the arrest of the alleged offender if there is reason to believe that such offender may avoid compliance with such order or such offender has avoided compliance with such order.

S 34: Use of results of HIV tests

The results of an HIV test, performed in terms of an order contemplated in sections 31(3) and 32(3), may only be used in the following circumstances:

(a) to inform a victim or an interested person whether or not the alleged offender in the case in question is infected with HIV with the view to—

(i) reducing secondary trauma and empowering the victim to make informed medical, lifestyle and other personal decisions; or

(ii) using the test results as evidence in any ensuing civil proceedings as a result of the sexual offence in question; or

(b) to enable an investigating officer to gather information with the view to using it as evidence in criminal proceedings.

Part 5: Miscellaneous

S 35: Register of applications and orders

35(1) The National Commissioner of the South African Police Service must cause all applications made, and all orders granted, in terms of this Chapter, to be recorded in a register and kept in the manner determined by the National Commissioner as prescribed.

(2) Access to the register must be limited as prescribed.

S 36: Confidentiality of outcome of application

The fact that an order for HIV testing of an alleged offender has been granted as contemplated in section 31 or section 32 may not be communicated to any person other than—

(a) the victim or an interested person referred to in section 30;

(b) the alleged offender;

(c) the investigating officer and, where applicable, to—

(i) a prosecutor; or

(ii) subject to section 35(2), any other person who needs to know the test results for purposes of any criminal investigations or proceedings or any civil proceedings; and

(d) the persons who are required to execute the order as contemplated in section 33.

S 37: Confidentiality of HIV test results obtained

37(1) The results of the HIV tests performed on an alleged offender in terms of this Chapter may, subject to subsection (2), be communicated only to—

- (a) the victim or the interested person referred to in section 30;
 - (b) the alleged offender; and
 - (c) the investigating officer and, where applicable, to—
 - (i) a prosecutor if the alleged offender is tested as contemplated in section 32; or
 - (ii) any other person who needs to know the test results for purposes of any civil proceedings or an order of a court.
- (2) A presiding officer, in any proceedings contemplated in this Chapter or in any ensuing criminal or civil proceedings, may make any order he or she deems appropriate in order to give effect to this section, including the manner in which such results are to be kept confidential and the manner in which the court record in question is to be dealt with.

FILMS AND PUBLICATIONS ACT 65 OF 1996: *EXTRACTS*

[ASSENTED TO 30 OCTOBER 1996] [DATE OF COMMENCEMENT: 1 JUNE 1998]

(Unless otherwise indicated)

DEFINITIONS (s 1)

(NB: This is a selection from the definitions)

In this Act, unless the context otherwise indicates-

'child pornography' includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years-

- (i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in, sexual conduct; or
- (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation;

[Definition of 'child pornography' inserted by s. 1 (a) of Act 34 of 1999 and substituted by s. 1 (a) of Act 18 of 2004.]

'distribute', in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections 25 (a), (b) and (c), 26 (1) (a) and (b) and 28 (1) and (2), includes to hand or exhibit a film or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;

[Definition of 'distribute' substituted by s. 1 (c) of Act 18 of 2004.]

'distributor', in relation to a film, means a person who conducts business in the selling, hiring out or exhibition of films;

'film' means-

- (a) any sequence of visual images recorded on any substance, whether a film, magnetic tape, disc or any other material, in such manner that by using such substance such images will be capable of being seen as a moving picture;
- (b) the soundtrack associated with and any exhibited illustration relating to a film as defined in paragraph (a);
- (c) any picture intended for exhibition through the medium of any mechanical, electronic or other device;

'in public', without derogating from the ordinary meaning of that word, includes any place to which admission is obtained for any consideration, direct or indirect, or by virtue of membership of any association of persons or contribution towards any fund;

'possession', in relation to a film or publication, without derogating from its ordinary meaning, includes keeping or storing in or on a computer or computer system or computer data storage medium and also having custody, control or supervision on behalf of another person;

[Definition of 'possession' inserted by s. 1 (e) of Act 18 of 2004.]

'publication' means-

- (a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript which has in any manner been duplicated;
- (c) any drawing, picture, illustration or painting;
- (d) any print, photograph, engraving or lithograph;
- (e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
- (f) computer software which is not a film;
- (g) the cover or packaging of a film;
- (h) any figure, carving, statue or model; and
- (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet;

[Para. (i) added by s. 1 (b) of Act 34 of 1999.]

'sexual conduct' includes-

- (i) male genitals in a state of arousal or stimulation;
- (ii) the undue display of genitals or of the anal region;
- (iii) masturbation;
- (iv) bestiality;
- (v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
- (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
- (vii) the penetration of a vagina or anus with any object;
- (viii) oral genital contact; or
- (ix) oral anal contact;

[Definition of 'sexual conduct' inserted by s. 1 (f) of Act 18 of 2004.]

'visual presentation' means-

- (a) a drawing, picture, illustration, painting, photograph or image;
or
- (b) a drawing, picture, illustration, painting, photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout.

[Definition of 'visual presentation' substituted by s. 1 (c) of Act 34 of 1999.]

[Date of commencement of s. 1: 16 January 1998.]

CHAPTER 2

2 Objects of Act

The objects of this Act shall be to-

- (a) regulate the creation, production, possession and distribution of certain publications and certain films by means of classification, the imposition of age restrictions and the giving of consumer advice, due regard being had in particular to the protection of children against sexual exploitation or degradation in publications, films and on the Internet; and
- (b) make the exploitative use of children in pornographic publications, films or on the Internet, punishable.

[S. 2 substituted by s. 2 of Act 34 of 1999.] [Date of commencement of s. 2: 16 January 1998.]

CHAPTER 6

EXEMPTIONS: PUBLICATIONS AND FILMS (ss 22-24)

22 Exemption of persons from certain sections, and exclusions from application of this Act

(1) The executive committee may on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from sections 25, 27 and 28 if it has good reason to believe that bona fide purposes will be served by such an exemption.

(2) Where the executive committee after due inquiry has good reason to believe that the conditions of an exemption are not complied with or that the bona fide purposes are no longer present, it may withdraw the exemption.

(3) A newspaper published, and a poster of a newspaper issued as an advertisement of any newspaper, by a publisher who is a member of the Newspaper Press Union of South Africa, shall not be subject to the provisions of this Act.

CHAPTER 7: PROHIBITION OF CONDUCT CONTRARY TO CLASSIFICATIONS (ss 25-30)

25 Prohibition of distribution of publications contrary to classifications

Any person who knowingly-

- (a) distributes or advertises for distribution a publication classified as XX in terms of a decision of the Board which has been published in the Gazette;
- (b) distributes a publication classified as X18 in terms of such a decision so published;
- (c) distributes any publication in conflict with any condition imposed on such a publication in terms of section 17;
[Para. (c) substituted by s. 9 of Act 18 of 2004.]
- (d) publishes any publication without having printed in such publication his or her name and the prescribed particulars of his or her business address,

shall be guilty of an offence.

26 Prohibition relating to exhibition, distribution or advertisement of films

(1) Any person who knowingly-

- (a) exhibits in public or distributes any film which has not been classified by the Board;
[Para. (a) substituted by s. 10 (a) of Act 18 of 2004.]
- (aA) exhibits in public or distributes or broadcasts any film which has been classified as XX in accordance with Schedule 6 or 10;
[Para. (aA) inserted by s. 10 (b) of Act 18 of 2004.]
- (b) exhibits in public or distributes or broadcasts any film which has been classified as X18 contrary to the provisions of section 24;
[Para. (b) substituted by s. 10 (c) of Act 18 of 2004.]
- (c) does not in an advertisement of a film contained in a publication, including a newspaper or advertisement referred to in section 22 (3) or (4), or on the cover and packaging of a film indicate the classification, age restriction and consumer advice which in terms of a decision of the Board applies in respect of that film;
- (d) exhibits in public or distributes any film without having been registered with the Board as an exhibitor or distributor of films;

- (e) without the approval of the chief executive officer, exhibits in public during the same screening session, or distributes on the same film, an advertisement or a trailer of a film with a more restrictive classification than the featured film;
[Para. (e) substituted by s. 10 (d) of Act 18 of 2004.]
- (f) exhibits in public or distributes any film in conflict with any condition imposed by the Board in terms of section 18 (4) (b),

shall be guilty of an offence.

(2) Any person who publishes a film, or a copy of a film, which has been classified by the Board, or which has been approved in terms of the Publications Act, 1974 (Act 42 of 1974), at any time after the commencement of the Publications Amendment Act, 1992, to any other person, including a distributor of films, shall when he or she delivers the film or the copy to such other person, furnish that person with a certificate in the prescribed form, stating-

- (a) that the film has been so classified or so approved;
- (b) if the particular classification was made subject to a condition that a specified portion or portions were to be excised from the film, that the portion or portions concerned have been excised;
- (c) that the film has been classified in terms of a decision of the Board as X18 or R18, if that is the case;
- (d) the age restriction, if any, imposed in terms of such a decision, in respect of the exhibition of the film;
- (e) particulars of the consumer advice, if any, which in terms of such a decision, applies to the film.

(3) Any person who-

- (a) knowingly publishes a film to any other person without furnishing him or her with the certificate as required by subsection (2);
- (b) knowingly furnishes a certificate which does not contain all the particulars required in terms of subsection (2); or
- (c) furnishes a certificate containing incorrect particulars knowing that the particulars contained in that certificate are incorrect,

shall be guilty of an offence.

- (4) (a) Any person who knowingly broadcasts a film which has been classified as XX in terms of a decision of the Board which has been published in the Gazette or who knowingly broadcasts a film which has not been classified but which falls within Schedule 6 read with Schedule 9, or Schedule 10, shall be guilty of an offence.
- (b) A person shall not be convicted of a contravention of paragraph (a), unless the State either proves the classification concerned or proves that the Board has not given a decision which is to the effect that the film referred to in that paragraph does not fall within Schedule 6 read with Schedule 9, or Schedule 10.
- (c) No prosecution shall be instituted in terms of this section without the written authority of the Attorney-General concerned.

27 Possession of certain publications and films prohibited

- (1) (a) Any person shall be guilty of an offence if he or she-
- (i) is in possession of;
 - (ii) creates or produces or in any way contributes to, or assists in, the creation or production of;
 - (iii) imports or in any way takes steps to procure, obtain or access; or
 - (iv) knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed,
- a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.

(b) Paragraph (a) does not apply to a person who is in possession of a film or publication containing child pornography if such possession is necessary for the performance of any function in terms of this Act.

[Sub-s. (1) substituted by s. 8 of Act 34 of 1999 and by s. 11 (a) of Act 18 of 2004.]

- (2) (a) A person shall be guilty of an offence if he or she, having knowledge of the commission of an offence under subsection (1) or having reason to suspect that such an offence has been or is being committed-
- (i) fails to report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; or
 - (ii) fails to furnish, at the request of an official of the South African Police Service, all particulars of such knowledge or suspicion.

(b) No prosecution under this subsection shall be instituted without the written authority of the National Director of Public Prosecutions.

[Sub-s. (2) substituted by s. 11 (b) of Act 18 of 2004.]

- (3) Any person who has under her or his control any material referred to in Schedule 1, 2, 6 or 7 and who fails to take all reasonable steps to prevent access to such materials by a person under the age of 18 years shall be guilty of an offence.

[Sub-s. (3) substituted by s. 11 (c) of Act 18 of 2004.]

- (4) Subject to Schedule 5 or 9, as the case may be, the Board shall refer to the South African Police Service for prosecution any film or publication submitted to it in terms of this Act if it contains child pornography.

[Sub-s. (4) added by s. 11 (d) of Act 18 of 2004.]

27A Registration and other obligations of Internet service providers

- (1) Every Internet service provider shall-
- (a) register with the Board in the manner prescribed by regulations made under this Act; and
 - (b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.
- (2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall-
- (a) take all reasonable steps to prevent access to the child pornography by any person;
 - (b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and
 - (c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.
- (3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.
- (4) Any person who fails to comply with the provisions of this section shall be guilty of an offence.

[S. 27A inserted by s. 12 of Act 18 of 2004.]

28 Distribution of certain publications prohibited

- (1) Any person who knowingly distributes a publication which contains a visual presentation or a description referred to in Schedule 1, read with Schedule 5, shall be guilty of an offence.
- (2) Any person who knowingly distributes a publication which contains a visual presentation or a description referred to in Schedule 2, read with Schedule 5, or which contains the descriptions referred to in clause (2) of Schedule 2, read with Schedule 5, shall be guilty of an offence.

30 Punishment

- (1) Any person found guilty of a contravention of section 25 (a), (b) or (c), 26 (1) (a), (aA), (b) or (f), 26 (4), 27 (2) or (3), 27A, 28 (1) or (2) or 29 may be sentenced to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

[Sub-s. (1) substituted by s. 15 (a) of Act 18 of 2004.]

- (1A) Any person found guilty of a contravention of section 27 (1) may be sentenced to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

[Sub-s. (1A) inserted by s. 15 (b) of Act 18 of 2004.]

- (2) If a court convicting a person of a contravention referred to in subsection (1), finds that aggravating circumstances are predominant, the court may, if the person so convicted is the holder of a licence to conduct an adult premises referred to in section 24, withdraw such licence and declare that such person shall be disqualified from obtaining another such licence for a period not exceeding 12 months.

(3) Any person found guilty of a contravention of any other section of this Act may be sentenced to a fine or to imprisonment for a period not exceeding six months.

[Sub-s. (3) substituted by s. 15 (c) of Act 18 of 2004.]

(4) (a) If any person who has contravened or failed to comply with section 26 (1) (a), (aA), (b), (c), (d), (2) or (3) or 27A (1) agrees to abide by a decision of the executive committee of the Board and deposits with the Board such sum as the executive committee of the Board may determine but not exceeding the greater of two thousand rand or twice the prescribed classification costs on each such contravention or failure to comply, the executive committee of the Board may, after conducting an enquiry, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited.

(b) There shall be a right of appeal to the Minister from any determination or order of the executive committee of the Board under paragraph (a), as long as that right is exercised within a period of three months from the date of such determination or order.

(c) The imposition of a penalty under paragraph (a) shall not be regarded as a conviction in respect of a criminal offence but no prosecution for that offence shall thereafter be competent.

[Sub-s. (4) added by s. 15 (d) of Act 18 of 2004.]

30A Extra-territorial jurisdiction

(a) Any citizen or permanent resident of the Republic who commits any act outside the Republic which would have constituted an offence under this Act had it been committed within the Republic, shall be guilty of the offence which would have been so constituted and liable to the penalty prescribed for such offence in this Act.

(b) No prosecution under this section shall be instituted without the written consent of a Director of Public Prosecutions.

(c) For the purpose of this section, any court in the Republic and any Director of Public Prosecutions shall have jurisdiction.

[S. 30A inserted by s. 16 of Act 18 of 2004.]

30B Presumptions and proof

(1) If in any prosecution in terms of this Act it is proved that-

(a) any message or communication, including a visual presentation, was placed on any distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that it was so placed by the registered subscriber or user;

(b) access was gained or attempted to be gained to child pornography on a distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that such access was gained or attempted to be gained by the registered subscriber or user.

(2) If in any prosecution it is necessary to prove that-

- (a) any application for registration or classification in terms of this Act has or has not been made to the Board; or
- (b) any publication or film has or has not been submitted to the Board in terms of this Act; or
- (c) any decision or classification has or has not been made or that any restriction or condition has or has not been imposed by the Board in terms of this Act; or
- (d) a certificate of exemption has or has not been issued, granted, withdrawn, cancelled or suspended by the Board; or
- (e) a decision or classification of the Board has or has not been suspended by the Review Board,

a certificate, issued under the authority of the executive committee of the Board, shall, upon its mere production, be prima facie proof of such fact.

[S. 30B inserted by s. 16 of Act 18 of 2004.]

SEXUAL OFFENCES ACT 23 OF 1957

(Previous short title, 'Immorality Act', substituted by s. 10 of Act 2 of 1988)

[ASSENTED TO 3 APRIL 1957] [DATE OF COMMENCEMENT: 12 APRIL 1957]

(English text signed by the Governor-General)

as amended by

Immorality Amendment Act 68 of 1967

Immorality Amendment Act 57 of 1969

Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985

Immorality Amendment Act 2 of 1988

Criminal Law Amendment Act 4 of 1992

General Law Amendment Act 139 of 1992

General Law Fourth Amendment Act 132 of 1993

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

ACT

To consolidate and amend the laws relating to brothels and unlawful carnal intercourse and other acts in relation thereto.

1 Definitions

In this Act, unless the context otherwise indicates-

'brothel' includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose;

'coloured person'

[Definition of 'coloured person' deleted by s. 1 (a) of Act 72 of 1985.]

'court' means the court before which the charge is brought;

[Definition of 'court' substituted by s. 1 of Act 2 of 1988.]

'female' means a female person 18 years or older;

[Definition of 'female' inserted by s. 68 of Act 32 of 2007.]

'house' includes a dwelling-house, building, room, out-house, shed or tent or any part thereof;

'owner' includes any person who lets or sub-lets or permits the occupation of any house or place whether in his own right or that of another;

'place' includes any field, enclosure, space, vehicle, or boat or any part thereof;

'police officer' means any member of any police force established under the authority of any law;

'unlawful carnal intercourse' means carnal intercourse otherwise than between husband and wife;

'white person'

[Definition of 'white person' deleted by s. 1 (b) of Act 72 of 1985.]

2 Keeping a brothel

Any person who keeps a brothel shall be guilty of an offence.

3 Certain persons deemed to keep a brothel

The following persons shall for the purposes of section two be deemed to keep a brothel:

- (a) any person who resides in a brothel unless he or she proves that he or she was ignorant of the character of the house or place;
- (b) any person who manages or assists in the management of any brothel;

- (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel;
- (d) any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;
- (f) any person found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;
[Para. (f) amended by s. 5 of Act 139 of 1992.]
- (g) any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein.
[Para. (g) substituted by s. 11 of Act 132 of 1993.]

4 Onus of proof

In prosecutions under this Act the onus of proving that a house or place is to be kept or used or is being kept or used as a brothel to the knowledge of the owner shall be on the prosecution: Provided that-

- (a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent to be paid or paid for the house or place is exorbitant, the onus shall be on the accused to prove that he was ignorant that such house or place is to be kept or used or was kept or used as a brothel;
- (b) proof of written notice having been given to the owner by a police officer not below the rank of sergeant or by two householders living in the vicinity of the house or place that any house or place is being kept or used as a brothel, shall be conclusive proof of knowledge on his part.

5 Contract to let house or place for a brothel void

Any contract to let any house or place to be kept or used as a brothel shall be null and void.

6 Use of house or place as a brothel voids contract of letting

Any contract of letting and hiring of any house or place which subsequently to the making of such contract becomes a brothel shall as from the date of such event be determined and become null and void: Provided that upon proof by the owner of his ignorance that the house or place was so kept or used he shall be entitled to recover the rent up to the date upon which he became aware that the house or place was being kept or used as a brothel.

7 Summary ejectment when a house or place is used as a brothel

The owner of any house or place kept or used as a brothel shall be entitled to apply to the magistrate of the district in which such house or place is situated for the summary ejectment of any person who may be keeping or using such

house or place as a brothel and such magistrate shall be entitled after enquiry to order the summary ejection of such person.

8 Proceedings upon complaint by householders or police that a house or place is used as a brothel

- (1) If it appears to any magistrate on sworn information laid before him by not less than two householders of good repute that any house or place in the vicinity of the dwellings of such householders is being kept or used as a brothel or on similar information upon oath laid before him by any police officer not below the rank of sergeant, or by a welfare officer employed by a department of State responsible for Health and Welfare, a local authority or a welfare organization registered under the National Welfare Act, 1978 (Act 100 of 1978), the magistrate may-
- (a) issue a warrant for the arrest of the person alleged to be the keeper of such brothel; or
 - (b) issue a warrant authorizing any police officer not below the rank of sergeant-
 - (i) to enter at any time and within such period as shall be stated in such warrant, such house or place for the purpose of ascertaining the name and identity of the keeper of such house or place;
 - (ii) to interrogate, and to demand the name and address of any person found in or upon such house or place; and
 - (iii) to demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.

[Sub-s. (1) amended by s. 2 (a) of Act 2 of 1988.]

- (2) Any person found in or upon such house or place who, when called upon to do so by the police officer conducting the search, refuses to furnish his name and address or furnishes a name or address which is false in any material particular or refuses to disclose the name or identity of the keeper of such house or place or to produce any book, receipt, paper, document or thing which he has in his possession or custody or under his control, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding R1 000 and in default of payment to imprisonment for a period not exceeding six months.

[Sub-s. (2) substituted by s. 1 of Act 68 of 1967 and by s. 2 (b) of Act 2 of 1988.]

- (3) The issue of a warrant under paragraph (b) of subsection (1) shall not in any way affect the power of the magistrate to issue at any time a warrant under paragraph (a) of subsection (1) or under any other law.

9

[S. 9 amended by s. 3 of Act 2 of 1988 and repealed by s. 68 of Act 32 of 2007.]

10 Procuration

Any person who-

- (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
- (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
- (c) procures or attempts to procure any female to become a common prostitute; or
- (d) procures or attempts to procure any female to become an inmate of a brothel; or
- (e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,

shall be guilty of an offence.

11

[S. 11 repealed by s. 68 of Act 32 of 2007.]

12 Detention for purposes of unlawful carnal intercourse

- (1) Any person who takes or detains any female against her will-
 - (a) to or in or upon any house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not; or
 - (b) to or in a brothel,

shall be guilty of an offence.

(2)

[Sub-s. (2) repealed by s. 68 of Act 32 of 2007.]

- (3) Any person shall be deemed to detain a female in or upon any house or place or in a brothel if, with intent to compel or induce her to remain in or upon such house or place or in such brothel, such person withholds from her any wearing apparel or other property to the possession of which she is entitled or which has been lent or supplied to her by such person or for the purposes of prostitution; and any such female shall be justified in taking away such wearing apparel as is necessary to enable her to leave such house or place or brothel.

12A Assistance for purposes of unlawful carnal intercourse

- (1) Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person, who is 18 years or older, may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, who is 18 years or older, shall be guilty of an offence.

[Sub-s. (1) substituted by s. 4 (a) of Act 2 of 1988 and by s. 68 of Act 32 of 2007.]

(2)

[Sub-s. (2) deleted by s. 4 (b) of Act 2 of 1988.]

[S. 12A inserted by s. 2 of Act 68 of 1967.]

13

[S. 13 repealed by s. 68 of Act 32 of 2007.]

14

[S. 14 substituted by s. 1 of Act 57 of 1969 and by s. 5 of Act 2 of 1988 and repealed by s. 68 of Act 32 of 2007.]

15

[S. 15 substituted by s. 6 of Act 2 of 1988 and repealed by s. 68 of Act 32 of 2007.]

16

[S. 16 repealed by s. 2 of Act 72 of 1985.]

17 Owner or occupier permitting on his premises the defilement of a female or any offence against this Act

Any person who being the owner or occupier of any house or place or having or acting or assisting in the management or control thereof knowingly permits the use of such house or place for the purpose of any offence against any provision of this Act, shall be guilty of an offence.

18

[S. 18 repealed by s. 68 of Act 32 of 2007.]

18A

[S. 18A inserted by s. 2 of Act 57 of 1969 and repealed by s. 68 of Act 32 of 2007.]

19 Enticing to commission of immoral acts

(1) Any person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence.

(2) Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access, shall be guilty of an offence.

[S. 19 substituted by s. 68 of Act 32 of 2007.]

20 Persons living on earnings of prostitution or committing or assisting in commission of indecent acts

(1) Any person who-

(a) knowingly lives wholly or in part on the earnings of prostitution;
or

(b)

(c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person,

shall be guilty of an offence.

[Sub-s. (1) amended by s. 7 (a) of Act 2 of 1988 and substituted by s. 68 of Act 32 of 2007.]

- (1A) Any person 18 years or older who-
- (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or
 - (b) in public commits any act of indecency with another person,
- shall be guilty of an offence.

[Sub-s. (1A) inserted by s. 68 of Act 32 of 2007.]

- (2) If it is made to appear to a magistrate by information on oath that there is reason to suspect that any house is used for purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of prostitution, the magistrate may issue a warrant authorizing any police officer not below the rank of sergeant to enter and search the house and to arrest that person.

[Sub-s. (2) substituted by s. 7 (b) of Act 2 of 1988.]

20A

[S. 20A inserted by s. 3 of Act 57 of 1969 and repealed by s. 68 of Act 32 of 2007.]

21 Presumptions

- (1) Whenever in any prosecution under this Act the question is in issue whether any carnal intercourse between a male and a female was unlawful, such male and female shall be deemed to have been unmarried at the time of such intercourse unless the accused proves the contrary.

(2)

[Sub-s. (2) deleted by s. 3 of Act 72 of 1985.]

- (3) Whenever in any prosecution under this Act a person is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless he or she satisfies the court to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

- (4) Whenever in any prosecution for an offence under section 12A it is proved-

(a) that the accused has performed any act for reward which was calculated to enable any person to communicate with any other person who is a prostitute; or

(b) that the other person with whom communication was made as a result of such act has had unlawful carnal intercourse, or has committed an act of indecency, with such person for reward, the accused shall be presumed to have performed such act with intent or while he reasonably ought to have foreseen the possibility that such other person may have unlawful carnal intercourse, or commit an act of indecency, with such person for reward unless the contrary is proved beyond reasonable doubt.

[Sub-s. (4) added by s. 3 of Act 68 of 1967 and substituted by s. 8 of Act 2 of 1988.]

22 Penalties

Any person who is convicted of an offence under the provisions of this Act for which no special penalty is prescribed, shall be liable-

- (a) in the case of an offence referred to in section 2 or 20 (1) (a) or (1A) (a), to imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment;
- (b) and (c)
- (d) in the case of an offence referred to in section 12A, with a fine, or imprisonment for a period not exceeding five years;
- (e) in the case of an offence referred to in section 10 or 12 (1), to imprisonment for a period not exceeding seven years;
- (f) in the case of an offence referred to in section 17, to imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment;
- (g) in the case of an offence referred to in section 19 or 20 (1) (c) or (1A) (b) to a fine not exceeding R4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[S. 22 substituted by s. 4 of Act 68 of 1967, amended by s. 4 of Act 57 of 1969, by s. 4 of Act 72 of 1985, by s. 9 of Act 2 of 1988 and by s. 2 of Act 4 of 1992 and substituted by s. 68 of Act 32 of 2007.]

23 Repeal of laws

The laws specified in the Schedule are hereby repealed to the extent set out in the fourth column of that Schedule.

24

[S. 24 repealed by s. 6 of Act 139 of 1992.]

25 Short title

This Act shall be called the Sexual Offences Act, 1957.

[S. 25 substituted by s. 10 of Act 2 of 1988.]

**PROVISIONS REPEALED by Act 32 of 2007
(Offences until 15 December 2007)**

13 Abduction

- (1) Any person who takes or detains or causes to be taken or detained any unmarried male or female under the age of twenty-one years out of the custody and against the will of his or her father or mother or guardian, with intent that such person or any other person, whether a particular person or not, may have unlawful carnal intercourse with such unmarried male or female, shall be guilty of an offence.
- (2) The term 'guardian' in this section includes any person who has in law or in fact the custody or control of the unmarried male or female.

14 Sexual offences with youths

- (1) Any male person who-
 - (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
 - (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or
 - (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,shall be guilty of an offence.
- (2) It shall be a sufficient defence to any charge under subsection (1) if it shall be made to appear to the court-
 - (a) that the girl at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which he is so charged; or
 - (b) and (bA)

[Paras. (b) and (bA) deleted when s. 14 substituted by s. 5 of Act 2 of 1988.]

 - (c) that the girl or person in whose charge she was, deceived the person so charged into believing that she was over the age of 16 years at the said time.
- (3) Any female who-
 - (a) has or attempts to have unlawful carnal intercourse with a boy under the age of sixteen years; or
 - (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or
 - (c) solicits or entices such a boy or girl to the commission of an immoral or indecent act,shall be guilty of an offence.
- (4) It shall be a sufficient defence to any charge under subsection (3) if it shall be made to appear to the court-
 - (a) that the boy at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which she is so charged; or
 - (b) that the boy or person in whose charge he was, deceived the person so charged into believing that he was over the age of 16 years at the said time.

[S. 14 substituted by s. 1 of Act 57 of 1969 and by s. 5 of Act 2 of 1988.]

15 Sexual offences with idiots or imbeciles

Any person who-

- (a) has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or
- (b) commits or attempts to commit with such a male or female any immoral or indecent act; or
- (c) solicits or entices such a male or female to the commission of any immoral or indecent act,

shall, if it be proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence.

[S. 15 substituted by s. 6 of Act 2 of 1988.]

18 Use of drugs, etc, for purposes of defilement of females

Any person who applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable him to have unlawful carnal intercourse with her, shall be guilty of an offence.

18A Manufacture, sale or supply of article which is intended to be used to perform an unnatural sexual act

- (1) Any person who manufactures, sells or supplies any article which is intended to be used to perform an unnatural sexual act, shall be guilty of an offence.
- (2) For the purposes of subsection (1), 'sell' includes to offer for sale, to keep for sale or to keep in a place where goods are sold, offered or kept for sale.

[S. 18A inserted by s. 2 of Act 57 of 1969.]

22 Penalties

Any person who is convicted of an offence under the provisions of this Act for which no special penalty is prescribed, shall be liable-

- (d) in the case of an offence referred to in section 11, 12A or **18**, with a fine, or imprisonment for a period not exceeding five years;
[Para. (d) substituted by s. 2 (b) of Act 4 of 1992.]
- (e) in the case of an offence referred to in section 10, 12 (1) or **13 (1)**, to imprisonment for a period not exceeding seven years;
[Para. (e) substituted by s. 4 (c) of Act 72 of 1985 and by s. 2 (b) of Act 4 of 1992.]
- (f) in the case of an offence referred to in section **14(1), 14(3), 15** or 17, to imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment;
[Para.(f) substituted by s. 9 (d) of Act 2 of 1988.]
- (g) in the case of an offence referred to in section **18A**, 19, 20 (1) (b) or (c), or 20A (1), to a fine not exceeding R4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[Para. (g) substituted by s. 4 of Act 57 of 1969 and by s. 9 (e) of Act 2 of 1988.]
[S. 22 substituted by s. 4 of Act 68 of 1967.]

CHILD CARE ACT 74 OF 1983: *EXTRACTS*

[ASSENTED TO 15 JUNE 1983] [DATE OF COMMENCEMENT: 1 FEBRUARY 1987]

'child' means any person under the age of 18 years;

'child in need of care' means a child referred to in section 14 (4);

[Definition of 'child in need of care' inserted by s. 1 (c) of Act 96 of 1996.]

'children in especially difficult circumstances' means children in circumstances which deny them their basic human needs, such as children living on the streets and children exposed to armed conflict or violence;

[Definition of 'children in especially difficult circumstances' inserted by s. 1 (c) of Act 96 of 1996.]

'children's home' means any residence or home maintained for the reception, protection, care and bringing-up of more than six children apart from their parents, but does not include any school of industries or reform school;

'commercial sexual exploitation' means the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person;

[Definition of 'commercial sexual exploitation' inserted by s. 1 (a) of Act 13 of 1999.]

'institution' means a reform school, school of industries or a children's home established under section 29 or a children's home registered under section 30;

'parent' includes, except in Chapter 4, an adoptive parent;

'place of care' means any building or premises maintained or used, whether for profit or otherwise, for the reception, protection and temporary or partial care of more than six children apart from their parents, but does not include any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or which has been registered or approved by the State, including a provincial administration;

'place of safety' means any place established under section 28 and includes any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child;

'pupil' means any child who has been sent to or transferred to an institution in terms of Chapter 3 or 6 of this Act or section 290 of the Criminal Procedure Act, 1977 (Act 51 of 1977), and includes a pupil referred to in section 16(3);

'reform school' means a school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or transferred thereto under this Act;

'school of industries' means a school maintained for the reception, care, education and training of children sent or transferred thereto under this Act;

'secure care' means the physical, behavioural and emotional containment of children offering an environment and programme conducive to their care, safety and healthy development;

[Definition of 'secure care' inserted by s. 1 (b) of Act 13 of 1999.]

'secure care facility' means a facility established under section 28A;

[Definition of 'secure care facility' inserted by s. 1 (b) of Act 13 of 1999.]

'shelter' means any building or premises maintained or used for the reception, protection and temporary care of more than six children in especially difficult circumstances;

[Definition of 'shelter' inserted by s. 1 (f) of Act 96 of 1996.]

50 Ill-treatment or abandonment of children

(1) Any parent or guardian of a child or any person having the custody of a child who-

- (a) ill-treats that child or allows it to be ill-treated; or
- (b) abandons that child,

or any other person who ill-treats a child, shall be guilty of an offence.

[Sub-s. (1) amended by s. 18 (a) of Act 86 of 1991.]

- (2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.
- (3) Any person convicted of any offence under this section shall be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.
[Sub-s. (3) substituted by s. 18 (b) of Act 86 of 1991.]

50A Commercial sexual exploitation of children

- (1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.
- (2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence, fails to report such occurrence at a police station, shall be guilty of an offence.
- (3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.
[S. 50A inserted by s. 5 of Act 13 of 1999.]

51 Unlawful removal of children

Any person who abducts or removes any child or pupil, or directly or indirectly counsels, induces or aids any child or pupil to abscond from any institution, place of safety or custody in which the child or pupil was lawfully placed, or knowingly harbours or conceals a child or pupil who has been so abducted or removed or has so absconded, or prevents him from returning to the institution, place of safety or custody from which he was abducted or removed or has absconded, shall be guilty of an offence.

52 Unlawful removal of foster child or pupil from Republic

Any person who without the approval of the Minister removes a foster child or pupil from the Republic shall be guilty of an offence.

58 Penalties

Any person who is convicted of an offence under any provision of this Act for which no punishment is specially provided shall be liable to a fine not exceeding R4000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Children's Act 38 of 2005

S 305

S 305 (1)

Offences

A person is guilty of an offence if that person-

- (a) commits an act in contravention of the prohibition set out in section 12 (2), (3), (4), (6), (7), or (8);
- (b) **contravenes a provision of section 32 (4), 74, 116 (1), 123 (1), (2) or (3), 127, 133 (1), 249, 250 (1), 252, 273, 301, 302 or 303;**
[Date of commencement of para. (b): 1 July 2007.]
- (c) **fails to comply with section 12 (5), 12 (9), 57 (2), 124, 126 (1), 134 (1) or 232 (6);**
[Date of commencement of para. (c): 1 July 2007.]
[NB: Para (c) has been substituted by s. 13 (a) of the Children's Amendment Act 41 of 2007, a provision which will be put into operation by proclamation. See PENDLEX.]
- (d) fails to comply with a request in terms of section 57 (1);
[NB: Paras (e) to (j) inclusive have been inserted by s. 13 (b) of the Children's Amendment Act 41 of 2007, a provision which will be put into operation by proclamation. See PENDLEX.]
- (k) knowing that a child in alternative care has absconded from or failed to return to that care, directly or indirectly counsels, induces or aids that child not to return to such care, or harbours or prevents the child from returning to that care;
- (l) hinders or obstructs-
 - (i) a police official or designated social worker in the execution of a warrant issued in terms of section 151 (2);
 - (ii) a police official, social worker or authorised officer when removing a child to temporary safe care in terms of section 152 (1);
- (m) hinders or interferes with a person in the execution of official duties in terms of section 304;
- (n) fails to comply with a request of a person in the execution of his or her official duties in terms of section 50 (4) or section 304 or furnishes false or misleading information to such a person when complying with such a request;
- (o) falsely professes to be a person authorised in terms of section 50 (4) or 304 or an assistant of such a person;
- (p) has been issued with a written notice as contemplated in section 153 (1) and-
 - (i) refuses to leave the home or the place where the child resides; or
 - (ii) has contact with the child in contravention of the written notice;
- (q) contravenes or fails to comply with an order of a High Court, Divorce Court in a divorce case and children's court issued in terms of this Act, including section 153 (6), or contravenes or fails to comply with any condition contained in such order;

- (r) commits an act in contravention of the prohibition set out in section 285 (1); or
- (s) commits an act in contravention of the prohibition set out in section 284 (1).

- (2) A person unfit to work with children is guilty of an offence if that person-
- (a) operates or assists in any way in operating a partial care facility, child and youth care centre, shelter or drop-in centre;
 - (b) assumes the foster care or temporary safe care of a child; or
 - (c) applies for the foster care, temporary safe care or adoption of a child.

- (3) **A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person-**
- (a) abuses or deliberately neglects the child; or**
 - (b) abandons the child.**
- [Date of commencement of sub-s. (3): 1 July 2007.]

- (4) **A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.**
- [Date of commencement of sub-s. (4): 1 July 2007.]

- (5) **A person who is the owner, lessor, manager, tenant or occupier of any premises on which the commercial sexual exploitation of a child has occurred is guilty of an offence if that person, on gaining information of that occurrence, fails to promptly take reasonable steps to report the occurrence to the South African Police Service.**
- [Date of commencement of sub-s. (5): 1 July 2007.]

- (6) **Subject to subsection (8), a person convicted of an offence in terms of subsection (1), (2), (3), (4) or (5) is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.**
- [Date of commencement of sub-s. (6): 1 July 2007.]

- (7) **A person convicted of an offence in terms of subsection (1), (2), (3), (4) or (5) more than once is liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.**
- [Date of commencement of sub-s. (7): 1 July 2007.]

- (8) A person convicted of an offence in terms of subsection (1)(s) is, in addition to a sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

EXTRACTS from other provisions:

S 1: Definitions

(1) In this Act, unless the context indicates otherwise-
'abandoned', in relation to a child, means a child who-

- (a) has obviously been deserted by the parent, guardian or care-giver; or
- (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months;

'abuse', in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;

'care', in relation to a child, includes, where appropriate-

- (a) within available means, providing the child with-
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and

- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

'care-giver' means any person other than a parent or guardian, who factually cares for a child and includes-

- (a) a foster parent;
- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care centre where a child has been placed;
- (e) the person at the head of a shelter;
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (g) the child at the head of a child-headed household;

'child' means a person under the age of 18 years;

'child labour' means work by a child which-

- (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and
- (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development;

'commercial sexual exploitation', in relation to a child, means-

- (a) the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person; or
- (b) trafficking in a child for use in sexual activities, including prostitution or pornography;

'contact', in relation to a child, means-

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else-
 - (i) communication on a regular basis with the child in person, including-
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communication on a regular basis with the child in any other manner, including-
 - (aa) through the post; or
 - (bb) by telephone or any other form of electronic communication;

'delegation', in relation to a duty, includes an instruction to perform the duty;

'Department' means the national department responsible for the provision of social development services;

'designated social worker' means a social worker in the service of-

- (a) the Department or a provincial department of social development;
- (b) a designated child protection organisation; or
- (c) a municipality;

'exploitation', in relation to a child, includes-

- (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
- (b) sexual exploitation;
- (c) servitude;
- (d) forced labour or services;
- (e) child labour prohibited in terms of section 141; and
- (f) the removal of body parts;

'family advocate' means a family advocate appointed in terms of the Mediation in Certain Divorce Matters Act;

'family member', in relation to a child, means-

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

'guardian' means a parent or other person who has guardianship of a child;

'guardianship', in relation to a child, means guardianship as contemplated in section 18;

'in need of care and protection', in relation to a child, means a child who is in a situation contemplated in section 150 (1);

'marriage' means a marriage-

- (a) recognised in terms of South African law or customary law; or
- (b) concluded in accordance with a system of religious law subject to specified procedures,

and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly;

'medical practitioner' means a person registered or deemed to be registered as a medical practitioner under the Health Professions Act, 1974 (Act 56 of 1974) and includes a dentist so registered or deemed to be registered;

'mental illness' means mental illness as defined in the Mental Health Care Act, 2002 (Act 17 of 2002);

'neglect', in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs;

'orphan' means a child who has no surviving parent caring for him or her;

'parent', in relation to a child, includes the adoptive parent of a child, but excludes-

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated;

'parental responsibilities and rights', in relation to a child, means the responsibilities and the rights referred to in section 18;

'sexual abuse', in relation to a child, means-

- (a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
- (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
- (c) using a child in or deliberately exposing a child to sexual activities or pornography; or
- (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child;

'social service professional' includes a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security worker who are registered as such in terms of the Social Service Professions Act, 1978 (Act 110 of 1978);

'social worker' means a person who is registered or deemed to be registered as a social worker in terms of the Social Service Professions Act, 1978 (Act 110 of 1978);

'street child' means a child who-

- (a) because of abuse, neglect, poverty, community upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets; or
- (b) because of inadequate care, begs or works on the streets but returns home at night;

'temporary safe care', in relation to a child, means care of a child in an approved child and youth care centre, shelter or private home or any other place, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell;

- (2) In addition to the meaning assigned to the terms 'custody' and 'access' in any law, and the common law, the terms 'custody' and 'access' in any law must be construed to also mean 'care' and 'contact' as defined in this Act.

[Date of commencement of s. 1: 1 July 2007.]

2 Objects of Act

The objects of this Act are-

- (a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely-
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;

- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities may have; and
- (i) generally, to promote the protection, development and well-being of children.

[Date of commencement of s. 2: 1 July 2007.]

GENERAL PRINCIPLES (ss 6-17)

6 General principles

- (1) The general principles set out in this section guide-
 - (a) the implementation of all legislation applicable to children, including this Act; and
 - (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.
- (2) All proceedings, actions or decisions in a matter concerning a child must-
 - (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child's inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
 - (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
 - (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.
- (3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.
- (4) In any matter concerning a child-
 - (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
 - (b) a delay in any action or decision to be taken must be avoided as far as possible.
- (5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

[Date of commencement of s. 6: 1 July 2007.]

7 Best interests of child standard

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

- (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
 - (i) any disability that a child may have;
 - (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.

[Date of commencement of s. 7: 1 July 2007.]

8 Application

(1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.

(2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.

(3) A provision of this Act binds both natural or juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[Date of commencement of s. 8: 1 July 2007.]

9 Best interests of child paramount

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

[Date of commencement of s. 9: 1 July 2007.]