

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT

ACT AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. of 2020) (The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B —2020]

GENERAL EXPLANATORY NOTE:

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

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

BILL

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

- * **further regulate the inclusion of particulars of persons in the National Register for Sex Offenders;**
 - * **extend the list of persons who are to be protected in terms of Chapter 6 of the Act; and**
 - * **further regulate the removal of particulars of persons from the National Register for Sex Offenders;**
- and to provide for matters connected therewith.**

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

Amendment of section 2 of Act 32 of 2007

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

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

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

2. Section 40 of the principal Act is hereby amended—

(a) by the substitution for the definition of “employer” of the following definition:

“**employer**” means—

(a) any—

- (i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,

which[—

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

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

- (b) any person, organisation, institution, club, sports club, association or body who or which, as the case may be—
- (i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or will gain access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** persons who are vulnerable are present or congregate; or
- (ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a **[child or a person who is mentally disabled]** person who is vulnerable or working with or who gains access to a **[child or a person who is mentally disabled]** person who is vulnerable or places where **[children or persons who are mentally disabled]** person who are vulnerable are present or congregate,

and ‘**employ**’, ‘**employing**’, ‘**employed**’ and ‘**employment relationship**’ have corresponding meanings;”;

- (b) by the insertion after the definition of “**licencing authority**” of the following definition:

“**person who is vulnerable**’ means—

- (a) a child;
- (b) a young person under the age of 25 receiving tuition at a higher education college, higher education institution or private higher education institution as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);
- (c) a person with a physical, intellectual or mental disability; or
- (d) an older person who is 60 years of age or older and who—
- (i) receives community-based care and support services;

- (ii) lives in a building, structure or facility used primarily as a residence for older persons;
 - (iii) is cared for in a facility providing 24-hour care to older persons; or
 - (iv) receives care or services from a caregiver, other than at a residence for older persons;”;
- (c) by the insertion after the definition of “relevant authority” of the following definition:
- “ **‘sexual offence’** means any –
- (a) sexual offence in terms of the law as it existed between 16 June 2003 and 15 December 2007;
 - (b) offence referred to in Chapters 2, 3 and 4 and sections 55 and 71 of this Act;
 - (c) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and
 - (d) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996);”; and
- (d) by the deletion of the definition of “sexual offence against a child”.

Substitution of section 41 of Act 32 of 2007

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

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

41. **[(1)]** A person who has been convicted of the commission of a sexual offence **[against a child]** or is alleged to have committed a sexual offence **[against a child]** and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the

commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Registers, may not—

- (a) be employed to work with a **[child] person who is vulnerable** in any circumstances;
- (b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a **[child] person who is vulnerable**, or which, in any other manner, places him or her in a position of authority, supervision or care of a **[child] person who is vulnerable** or where he or she gains access to a **[child] a person who is vulnerable** or places where **[children] persons who are vulnerable** are present or congregate;
- (c) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a **[child] person who is vulnerable** or where **[children] persons who are vulnerable** are present or congregate; or
- (d) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child or the curator of a person who is mentally disabled.

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

- (a) be employed to work with a person who is mentally disabled in any circumstances;**
- (b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in a position of authority, supervision or care of a person who is mentally disabled, or which, in any other manner, place him or her in a position of authority, supervision or care of a person who is mentally**

disabled or where he or she gains access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate;

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

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

4. Section 42 of the principal Act is hereby amended—

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

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

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

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

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

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

Amendment of section 43 of Act 32 of 2007

5. Section 43 of the principal Act is hereby amended by the substitution for subparagraphs (i) and (ii) of paragraph (a) of the following subparagraphs:

- “(i) have been convicted of a sexual offence **[against a child or a person who is mentally disabled]**, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic; or
- (ii) are alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** in respect of whom a court, whether before or after the commencement of this Chapter—“.

Amendment of section 44 of Act 32 of 2007

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

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

Amendment of section 45 of Act 32 of 2007

7. Section 45 of the principal Act is hereby amended by the substitution for paragraph (c) of subsection (2) of the following paragraph:

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

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

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

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

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

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

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

“(2) A person who, after the commencement of this Chapter, applies for a licence contemplated in subsection (1) to a licensing authority, and whose particulars are included or are to be included in the Register, must disclose that he or she has been convicted of a sexual offence **[against a child or a person who is mentally disabled]** or that he or she is alleged to have committed a sexual

offence **[against a child or a person who is mentally disabled]** and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.”.

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

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

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

Amendment of section 49 of Act 32 of 2007

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

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

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

12. Section 50 of the principal Act is hereby amended –
(a) by the substitution for subsection (1) of the following subsection:

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

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

(b) any person—

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

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

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

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

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

mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence **[against a child or a person who is mentally disabled]**, in the presence of that person,

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

(c) by the substitution for paragraph (c) of subsection (2) for the following paragraph:

“(c) If a court has, in terms of this Act or any other law, convicted a person (“A”) of a sexual offence referred³ to in paragraph (a)(i) and A was a child at the time of the commission of such offence, or if a court has made a finding and given a direction referred to in paragraph (a)(ii) in respect of A who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in paragraph (a) unless—

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

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

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

every prisoner or former prisoner which he or she has on record, who at the commencement of this Chapter, is serving a sentence of imprisonment or has served a sentence of imprisonment as a result of a conviction, five years preceding the commencement of this Act, for a sexual offence against a person who is mentally disabled, including an offence referred to in section 15 of the Sexual Offences Act, 1957,] and the Registrar must forthwith enter those particulars in the Register.”;

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

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

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

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

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

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

“Removal of particulars from Register

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

(a) who—

- (i) has been sentenced for a conviction of a sexual offence **[against a child or a person who is mentally disabled]** to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of **[ten] 20** years has lapsed after that person has been released from prison or the period of suspension has lapsed;
- (ii) has been sentenced for a conviction of a sexual offence **[against a child or a person who is mentally disabled]** to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of **[seven] 14** years has lapsed after that person has been released from prison or the period of suspension has lapsed;
or
- (iii) is alleged to have committed a sexual offence **[against a child or a person who is mentally disabled]** in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in

subsection 93), be removed from the Register after a period of **[five] ten** years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002), from any restrictions imposed on him or her; or

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

(2) The particulars of a person who has—

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

may not be removed from the Register.

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

- (a) before the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to a court for an order that his or her particulars must be removed from the Register by—
- (i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence **[against a child or a person who is mentally disabled, as the case may be]**; and

- (ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence **[against a child or a person who is mentally disabled, as the case may be,]** is pending against him or her; or
- (b) after the implementation of this Chapter, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)(c) for an order that his or her particulars must be removed from the Register by—
- (i) addressing the court on the reasons for such application and showing good cause why it is unlikely that he or she will commit another sexual offence **[against a child or a person who is mentally disabled, as the case may be];** and
 - (ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence **[against a child or a person who is mentally disabled, as the case may be,]** is pending against him or her.
- (3) (a) A person falling into the categories contemplated in subsection (1) may apply, in the prescribed manner, to the Registrar to have his or her particulars removed from the Register.
- (b) The Registrar must, after considering the application, remove the particulars of the person contemplated in paragraph (a) from the Register, unless the person concerned has **[an investigation or]**¹ 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

¹ The proposed amendment is necessitated by administrative and technical procedures within the SAPS environment that make it impossible for SAPS to indicate with absolute certainty whether an investigation is pending against a person or not. This places an inordinate delay in processing of applications by the Registrar. However, the requirement of establishing whether a criminal case is pending against a person or not, will not be affected by the proposed amendment.

Register, if the Registrar is satisfied that the entry of those particulars in the Register was clearly in error.

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

Amendment of section 53 of Act 32 of 2007

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

- “(c) the manner in which the National Commissioner of Correctional Services must forward particulars of prisoners who are serving a sentence of imprisonment as the result of a conviction for a sexual offence **[against a child or a person who is mentally disabled]** to the Registrar as contemplated in section 50(5)(a);
- (e) the manner in which the National Commissioner of the South African Police Service must forward particulars of persons with a previous conviction for a sexual offence **[against a child or a person who is mentally disabled]** to the Registrar as contemplated in section 50(6);
- (f) the manner in which the Director-General: Health must forward particulars of persons who are subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, as the result of an act which constituted a sexual offence **[against a child or a person who is mentally disabled]** to the Registrar as contemplated in section 50(7)(a);”.

Short title

15. This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020.