

REPUBLIC OF SOUTH AFRICA

**CRIMINAL LAW
(SEXUAL OFFENCES)
AMENDMENT BILL**

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No. 25282 of 30 July 2003)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 50—2003]

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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 law relating to certain sexual offences; to provide for the amendment and repeal of certain laws; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic, 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 to have their best interests considered to be of paramount importance;

WHEREAS 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 eradication of violence against women and children;

WHEREAS there is a high incidence of sexual offences in the Republic which in turn has a particularly disadvantageous impact on vulnerable persons, the society and the economy;

WHEREAS women and children are particularly vulnerable to sexual offences including prostitution;

AND WHEREAS the South African common law and statutory law fail to deal effectively and in a non-discriminatory manner with activities associated with sexual offences, thereby failing to provide adequate protection against sexual exploitation to complainants of such activities;

IT IS THE PURPOSE of this Act 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 strengthen the State's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions and interpretation of Act

1. (1) In this Act, unless the context indicates otherwise—
- “**act which causes penetration**” means an act contemplated in sections 2, 3 and 4; 5
 - “**child**” means a person below the age of 18 years;
 - “**complainant**” means the alleged victim of a sexual offence;
 - “**genital organs**” include the whole or part of male and female genital organs and further include surgically constructed or reconstructed genital organs; 10
 - “**indecent act**” means any act which causes—
 - (a) direct or indirect contact between the anus or genital organs of one person or, in the case of a female, her breasts and any part of the body of another person or any object, including any part of the body of an animal;
 - (b) exposure or display of the genital organs of one person to another person; or 15
 - (c) exposure or display of any pornographic material to any person against his or her will or to a child,
 but does not include an act which causes penetration;
 - “**mentally impaired person**” means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, and for purposes of sections 2, 3, 4, 6, 7 and 8 means a person affected by such mental impairment to the extent that he or she, at the time of the alleged commission of the offence in question, was— 20
 - (a) unable to appreciate the nature and reasonably foreseeable consequences of an indecent act or an act which causes penetration; 25
 - (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 offence**” means any offence in terms of this Act, excluding Schedule 2, and includes any common law sexual offence; 30
 - “**this Act**” includes the regulations made under section 25.
- (2) The provisions of Schedule 1 to this Act should at all times be taken into consideration in the application of the provisions of this Act.

Rape 35

2. (1) A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape. 40
- (2) An act which causes penetration is *prima facie* unlawful if it is committed—
- (a) in any coercive circumstance;
 - (b) under false pretences or by fraudulent means; or
 - (c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration. 45
- (3) Coercive circumstances, referred to in subsection (2)(a), include any circumstances where there is—
- (a) a use of force against the complainant or another person or against the property of the complainant or that of any other person;
 - (b) a threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or 50
 - (c) an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act. 55
- (4) False pretences or fraudulent means, referred to in subsection (2)(b), are circumstances where a person—

- (a) in respect of whom an act which causes penetration is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;
 - (b) in respect of whom an act which causes penetration is being committed, is led to believe that such an act is something other than that act; or 5
 - (c) intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.
- (5) The circumstances in which a person is incapable in law of appreciating the nature of an act which causes penetration referred to in subsection (2)(c) include circumstances where such a person is, at the time of the commission of such act— 10
- (a) asleep;
 - (b) unconscious;
 - (c) in an altered state of consciousness; 15
 - (d) under the influence of any medicine, drug, alcohol or other substance to the extent that the person’s consciousness or judgement is adversely affected;
 - (e) a mentally impaired person; or
 - (f) below the age of 12 years.
- (6) A marital or other relationship, previous or existing, is not a defence to a charge of 20 rape.
- (7) The common law relating to—
- (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and
 - (b) the offence of rape, except where the offence has been committed prior to the 25 commencement of this Act,
- is repealed.
- (8) Subject to the provisions of this Act, any reference to “rape” in any law must be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act in which case it must be 30 construed to be a reference to the common law offence of rape.
- (9) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, nor does it adjust the standard of proof required for adducing evidence in rebuttal.

Sexual violation 35

3. A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of the body of that person, other than the genital organs of that person, into or beyond the anus or genital organs of another person, is guilty of the offence of sexual violation. 40

Oral genital sexual violation

4. A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person, or the genital organs of an animal, into or beyond the mouth of another person, is guilty of the offence of oral genital sexual violation. 45

Applicability of provisions on rape to sexual violation and oral genital sexual violation

- 5.** The provisions of—
- (a) section 2(2), (3), (4) and (5) relating to the circumstances in which an act which causes penetration is *prima facie* unlawful; 50
 - (b) section 2(6) relating to marital or other relationships; and
 - (c) section 2(9) relating to defences at common law,
- apply with such changes as may be required by the context to the provisions of sections 3 and 4.

Compelled or induced indecent acts

6. A person who unlawfully and intentionally compels, induces or causes another person to engage in an indecent act with—
- (a) the person compelling, inducing or causing the other person to engage in the act; 5
 - (b) a third person;
 - (c) that other person himself or herself; or
 - (d) an object, including any part of the body of an animal,
- in circumstances where that other person—
- (i) would otherwise not have committed or allowed the indecent act; or 10
 - (ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in section 2(5),
- is guilty of the offence of having compelled, induced or caused a person to engage in an indecent act and is liable upon conviction to a fine and imprisonment for a period not exceeding five years. 15

Defences to indecent acts or acts which cause penetration with certain mentally impaired persons

7. It is a defence to a charge of an indecent act or an act which causes penetration with a person who is mentally impaired if—
- (a) the mentally impaired person was over the age of 18 years at the time of the alleged commission of the offence and such mentally impaired person induced the commission of the act to which the charge relates; and 20
 - (b) the accused reasonably believed that the person who induced the commission of the act to which the charge relates was not so impaired and was above the age of 18 years at the time of the alleged commission of the offence in question. 25

Acts which cause penetration or indecent acts committed within view of certain children or certain mentally impaired persons

8. A person who intentionally commits an act which causes penetration or an indecent act with another within the view of a child below the age of 16 years or a person who is mentally impaired is guilty of the offence of having committed such an act within the view of a child or a mentally impaired person, as the case may be, and is liable upon conviction to a fine or imprisonment for a period not exceeding two years. 30

Acts which cause penetration or indecent acts with certain children with their consent 35

9. (1) A person who commits an act which causes penetration with a child who is older than 12 years of age, but below the age of 16 years is, despite the consent of that child to the commission of such an act, guilty of the offence of having committed such an act with a child and is liable upon conviction to a fine or imprisonment for a period not exceeding six years or to both a fine and such imprisonment. 40
- (2) It is a defence to a charge under subsection (1) if—
- (a) it is proved on a balance of probabilities that such child, or the person in whose care such child had been, deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence; and 45
 - (b) the accused reasonably believed that the child was over the age of 16 years.
- (3) The provisions of subsection (2) do not apply if—
- (a) the accused is related to such child within the prohibited incest degrees of blood or affinity; or
 - (b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration. 50
- (4) Any person who commits an indecent act with a child below the age of 16 years is, despite the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a child and is liable upon conviction to a fine or imprisonment for a period not exceeding four years or to both a fine and such imprisonment. 55

- (5) It is a defence to a charge under subsection (4) if—
- (a) (i) the accused was a person below the age of 16 years at the time of the alleged commission of the offence; and
 - (ii) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or
 - (b) it is proved on a balance of probabilities that such child or the person in whose care such child had been deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence, and the accused reasonably believed that the child was over the age of 16 years.
- (6) The provisions of subsection (5) do not apply if—
- (a) the accused is related to such child within the prohibited incest degrees of blood or affinity;
 - (b) such child lacked the intellectual development to appreciate the nature of an indecent act; or
 - (c) such child was below the age of 12 years at the time of the alleged commission of the offence.
- (7) A person may not be charged under this section if a marriage existed between that person and a child referred to in this section, unless the child concerned was below the age of 12 years at the time when that offence in terms of this section was allegedly committed.

Promotion of sexual offence with child

- 10.** A person who—
- (a) manufactures or distributes an article that promotes or is intended to promote a sexual offence with a child; or
 - (b) who supplies or displays to a child an article which is intended to be used in the performance of a sexual act with the intention to encourage or enable that child to perform such sexual act,
- is guilty of the offence of promoting a sexual offence with a child and is liable upon conviction to a fine or imprisonment for a period not exceeding six years or to both a fine and such imprisonment.

Child prostitution

- 11.** (1) A person who, in relation to a child, for financial or other reward, favour or compensation to such child or to any other person, intentionally—
- (a) commits an indecent act or an act which causes penetration with such child;
 - (b) invites, persuades or induces such child to allow him or her or any other person to commit an indecent act or an act which causes penetration with such child;
 - (c) makes available, offers or engages such child for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;
 - (d) supplies, recruits, transports, transfers, harbours or receives such child, within or across the borders of the Republic, for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;
 - (e) allows or knowingly permits the commission of indecent acts or acts which cause penetration by any person with such child while being a primary care-giver defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992), parent or guardian of that child;
 - (f) owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;
 - (g) detains such child, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of indecent acts or acts which cause penetration with such child by any person; or
 - (h) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts which cause penetration with such child by any person,
- is, in addition to any other offence of which he or she may be convicted, guilty of the offence of being involved in child prostitution and is liable upon conviction to a fine or

imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

(2) A person who intentionally receives financial or other reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child by another person is guilty of the offence of benefiting from child prostitution and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment. 5

(3) A person who intentionally lives wholly or in part on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with a child by another person is guilty of the offence of living from the earnings of child prostitution and is liable upon conviction to a fine or to imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment. 10

(4) A person, including a juristic person, who—

(a) makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; or 15

(b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child, is guilty of the offence of promoting child sex tours and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years. 20

(5) A person may not be convicted of an offence in terms of subsections (2) and (3) if that person is—

(a) a child; and

(b) not a person contemplated in subsection (1). 25

Prostitution of mentally impaired persons

12. (1) A person who, in relation to a mentally impaired person, for financial or other reward, favour or compensation to such mentally impaired person or to any other person, intentionally—

(a) commits an indecent act or an act which causes penetration with such mentally impaired person; 30

(b) invites, persuades or induces such mentally impaired person to allow him or her or any other person to commit an indecent act or an act which causes penetration with such mentally impaired person;

(c) makes available, offers or engages such mentally impaired person for purposes of the commission of indecent acts or acts which cause penetration with such mentally impaired person by any person; 35

(d) supplies, recruits, transports, transfers, harbours or receives such mentally impaired person, within or across the borders of the Republic, for purposes of the commission of indecent acts or acts which cause penetration with such mentally impaired person by any person; 40

(e) allows or knowingly permits the commission of indecent acts or acts which cause penetration by any person with such mentally impaired person;

(f) owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of indecent acts or acts which cause penetration with such mentally impaired person by any person; 45

(g) detains such mentally impaired person, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of indecent acts or acts which cause penetration with such mentally impaired person by any person; or 50

(h) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts which cause penetration with such mentally impaired person by any person,

is, in addition to any other offence of which he or she may be convicted, guilty of the offence of being involved in the prostitution of a mentally impaired person and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment. 55

(2) A person who intentionally receives financial or other reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a 60

mentally impaired person by another person is guilty of the offence of benefiting from the prostitution of a mentally impaired person and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

(3) A person who intentionally lives wholly or in part on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with a mentally impaired person by another person is guilty of the offence of living from the earnings of the prostitution of a mentally impaired person and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment. 5

(4) Any person, including a juristic person, who—

- (a) makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual offence against a mentally impaired person, irrespective of whether that offence is committed; or 15
- (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a mentally impaired person, 20

is guilty of an offence and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years.

(5) A person may not be convicted of an offence in terms of subsections (2) and (3) if that person is not a person contemplated in subsection (1).

Extension of common law incest

13. An act which causes penetration as contemplated in sections 2, 3 and 4 applies to the common law offence of incest from the date of commencement of this Act. 25

Witness to be notified of protective measures

14. (1) The prosecution must inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent or guardian or a person *in loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section 15 and of the protective measures listed in paragraphs (a) to (g) of section 15(4) prior to such witness commencing with his or her testimony at any stage of the proceedings. 30

(2) The court must, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in that subsection and must note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court must ensure that the witness is so informed. 35

Vulnerable witnesses

15. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—

- (a) the complainant in the proceedings pending before the court; or 45
- (b) a child.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of— 50

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation; 55
- (f) race;
- (g) religion;

- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness. 5

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures: 10

- (a) Allowing such witness to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
- (b) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977, irrespective of any additional qualifying criteria prescribed by that section; 15
- (c) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977, irrespective of any additional qualifying criteria prescribed by that section; 20
- (d) prohibiting the publication of the identity of the complainant provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
- (e) any other measure which the court deems just and appropriate. 25

(5) Once the court has declared a child a vulnerable witness the court must direct that an intermediary referred to in subsection (4)(b) be appointed in respect of such witness unless the interests of justice justify not appointing an intermediary, in which case the court must record the reasons for not appointing an intermediary.

(6) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court must have regard to all the circumstances of the case, including— 30

- (a) any views expressed by the witness, but the court must accord such views the weight it considers appropriate in view of the witness's age and maturity;
- (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness; 35
- (c) the need to protect the witness's dignity and sense of safety and to protect the witness from traumatising; and
- (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings. 40

(7) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court must, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation. 45

Evidence of previous consistent statements and delay in reporting

16. A court, in criminal proceedings involving the alleged commission of a sexual offence, may not draw an inference solely on account of—

- (a) the fact that previous consistent statements have not been made; and
- (b) the length of any delay between the alleged commission of such offence and the reporting thereof. 50

Evidence of surrounding circumstances and impact of sexual offence

17. Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to prove— 55

- (a) whether a sexual offence is likely to have been committed—
 - (i) towards or in connection with the person concerned;
 - (ii) under coercive circumstances referred to in section 2(3);

- (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

Application of caution and requirement for corroboration

18. Despite the provisions of the common law, any other law or any rule of practice, a court must not treat the evidence of a witness in criminal proceedings pending before that court with caution and must not call for corroboration of evidence solely on account of the fact that the witness is—

- (a) the complainant of a sexual offence; or
(b) a child.

Drug and alcohol treatment orders

19. A court may, upon conviction of a person having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol or any drug and may benefit from treatment, grant an order in terms of section 296 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and such an order may be made in addition to any sentence, including a sentence of imprisonment which is not suspended.

Supervision of dangerous sexual offenders

20. (1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such person has—

- (a) more than one conviction for a sexual offence; 20
(b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
(c) been convicted of a sexual offence against a child, unless such person is a child himself or herself.

(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court may order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed or on parole, the Department of Correctional Services must ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence. 25 30

(3) For purposes of subsection (2) long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) A court may not make an order referred to in subsection (2) unless the court had regard to a report by a probation officer, social worker or other person designated by the court which report must contain an exposition of— 35

- (a) the suitability of the offender to undergo a long-term supervision order;
(b) the possible benefits of the imposition of a long-term supervision order on the offender;
(c) a proposed rehabilitative programme for the offender;
(d) information on the family and social background of the offender; 40
(e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and
(f) any other matter directed by the court.

(5) An order referred to in subsection (2) must specify—

- (a) that the offender is required to take part in a rehabilitative programme; 45
(b) the nature of the rehabilitative programme to be attended;
(c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and
(d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs. 50

(6) An order referred to in subsection (2) may specify that the offender is required to—

- (a) refrain from visiting a specified location;
(b) refrain from seeking employment of a specified nature; and
(c) subject himself or herself to a specified form of monitoring.

(7) A long-term supervision order made by a court in terms of this section must be reviewed by that court within three years from the date on which the order was implemented or within such shorter period as the court may direct upon referral by the

Commissioner of Correctional Services of such an order to that court for review at any time.

(8) Upon making a long-term supervision order in terms of this section, the court must explain to the victim, including the next of kin of a deceased victim, that they have the right to be present at the review proceedings referred to in subsection (7) and may make representations. 5

(9) A court which has granted a long-term supervision order in terms of this section may, upon evidence that a dangerous sexual offender has failed to comply with such order or with any condition imposed in connection with such order, direct that such offender be— 10

(a) warned to appear before that court or another court of similar or higher jurisdiction at a specified place and on a specified date and time; or

(b) arrested and brought before such court.

(10) Upon the appearance of a dangerous sexual offender at a court pursuant to the provisions of subsection (9), such court must conduct an inquiry into the reasons for such offender's failure to comply with a long-term supervision order or with any condition imposed in connection with such order and may— 15

(a) confirm the original order and any conditions imposed in connection with such order;

(b) vary or withdraw such order or any such condition; 20

(c) impose an additional condition or conditions;

(d) review the original sentence and impose an alternative sentence; or

(e) make any other order as the court deems fit.

(11) If a court has directed that a dangerous sexual offender is required to take part in a rehabilitative programme contemplated in this section, the court may order that such offender, upon being found by the court to have adequate means, must contribute to the costs of such programme to the extent specified by the court. 25

(12) A person who has been declared a dangerous sexual offender and who does not comply with a supervision order in terms of this section is guilty of the offence of not having complied with a supervision order and is liable upon conviction to a fine or imprisonment for a period not exceeding 12 months. 30

National Director of Public Prosecutions to decide whether police investigation should be discontinued

21. (1) The decision as to whether the investigation by a police official of a complaint that a sexual offence has been committed should be discontinued rests with the National Director of Public Prosecutions. 35

(2) The National Director of Public Prosecutions may delegate his or her powers in terms of this section to a Director of Public Prosecutions.

Extra-territorial jurisdiction

22. (1) A person who, while being a citizen of, or permanently residing in, the Republic, commits an act outside the Republic which would have constituted a sexual offence had it been committed within the Republic, is guilty of such an offence and is liable to the same penalty prescribed for such offence. 40

(2) A person may not be convicted of an offence contemplated in subsection (1) if such person has been acquitted or convicted in the country where that offence was committed. 45

(3) A prosecution may not be instituted under this section without the written consent of the Director of Public Prosecutions who has jurisdiction in the area where the person contemplated in subsection (1) is ordinarily resident.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained in terms of subsection (3), prosecution may be instituted in an appropriate court designated by such Director and such court has jurisdiction to try the matter as if the offence or offences had been committed within its jurisdiction. 50

Non-disclosure of conviction of sexual offence

23. A person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment which places him or her in a position of authority or care of children, or when offering or agreeing to take care of or supervise 55

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

National policy framework

- 24.** The Minister for Justice and Constitutional Development must— 5
- (a) prepare a national policy framework to guide the implementation, enforcement and administration of this Act in order to secure acceptable and uniform treatment of all sexual offence matters;
 - (b) review the policy framework at least once every five years; and
 - (c) when required, amend the policy framework.

Regulations 10

- 25.** The Minister for Justice and Constitutional Development, in consultation with the Ministers of Safety and Security, Correctional Services, Social Development and Health, may make regulations regarding—
- (a) any matter which is required or permitted by this Act to be prescribed by regulation; 15
 - (b) the inter-sectoral implementation of this Act; and
 - (c) any other matter which it is necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

Amendment and repeal of laws

- 26.** The Acts specified in Schedule 2 are amended or repealed to the extent set out in the third column of that Schedule. 20

Application of Act in relation to Sexual Offences Act, 1957

- 27.** In the event of any inconsistency between the provisions of sections 3, 10, 12, 12A, 20 and 21 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), insofar as those provisions relate to children, and any of the provisions of this Act, this Act takes precedence. 25

Short title and commencement

- 28.** This Act is called the Criminal Law (Sexual Offences) Amendment Act, 2003, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE 1

Guiding principles to be considered in the application of this Act and the adjudication of sexual offences generally

- In the application of the provisions of this Act and the adjudication of sexual offences generally, the following objectives must be considered: 5
- (a) Complainants should not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, birth status, sex, gender, sexual orientation, age and developmental level, disability, religion, conscience, belief, culture or language; 5
 - (b) complainants should be treated with dignity and respect; 10
 - (c) complainants should be ensured access to the mechanisms of justice;
 - (d) complainants should be informed of their rights and the procedures within the criminal justice system which affect them;
 - (e) complainants should have the right to express an opinion, to be informed of all decisions, and to have their opinion taken seriously in any matter affecting them; 15
 - (f) in addition to all due process and constitutional rights, complainants should have the right—
 - (i) to have present at all decisions affecting them a person or persons important to their lives; 20
 - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand;
 - (iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically reviewed; 25
 - (iv) to have procedures dealt with expeditiously in timeframes appropriate to the complainant and the offence;
 - (g) complainants should have the right to confidentiality and privacy and to protection from publicity about the offence; 30
 - (h) the vulnerability of children should entitle them to speedy and special protection and provision of services by all role-players during all phases of the investigation, the court process and thereafter;
 - (i) since the family and the community are central to the well-being of a child, consideration should be given, in any decisions affecting a child, to— 35
 - (i) ensuring that, in addition to the child, his or her family, community and other significant role-players are consulted;
 - (ii) the extent to which decisions affecting the offender will affect the child, his or her family and community;
 - (iii) the particular relationship between the offender and the child; 40
 - (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child;
 - (j) restorative and rehabilitative alternatives should be considered and applied unless the safety of the complainant and the interests of the community requires otherwise; 45
 - (k) a person who commits a sexual offence should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour;
 - (l) in determining appropriate sanctions for a person who has been found guilty of committing a sexual offence— 50
 - (i) the sanctions applied should ensure the safety and security of the victim, the family of the victim and the community;
 - (ii) the sanctions should promote the recovery of the victim and the restoration of the family of the victim and the community;
 - (iii) where appropriate, offenders should make restitution which may include material, medical or therapeutic assistance to victims and their families or dependants; 55
 - (iv) the child sexual offender should receive special consideration in respect of sanctions and rehabilitation;

- (v) the possibility of rehabilitating the sexual offender should be taken into account in considering the long-term goal of safety and security of victims, their families and communities;
- (vi) the interests of the victim should be considered in any decision regarding sanctions; 5
- (m) in order to avoid systemic secondary victimisation of the victim of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach should be followed;
- (n) all professionals and role-players involved in the management of sexual offence cases should be properly and continuously trained after going through a proper selection and screening process; and 10
- (o) cultural diversity should be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences should be no justification for or licence to commit a sexual offence or to exclude a criminal justice process. 15

SCHEDULE 2

LAWS AMENDED OR REPEALED BY SECTION 26

No. and year of law	Short title	Extent of repeal or amendment	
Act No. 23 of 1957	Sexual Offences Act	The repeal of sections 9, 11, 13, 14, 15, 18, 18A and 20A.	5
Act No. 51 of 1977	Criminal Procedure Act	<p data-bbox="954 479 1256 533">1. The substitution for section 18 of the following section:</p> <p data-bbox="976 562 1233 616">“Prescription of right to institute prosecution</p> <p data-bbox="976 640 1256 1249">18. The right to institute a prosecution for any offence, other than the offences of— <i>(a)</i> murder; <i>(b)</i> treason committed when the Republic is in a state of war; <i>(c)</i> robbery, if aggravating circumstances were present; <i>(d)</i> kidnapping; <i>(e)</i> child-stealing; [or] <i>(f)</i> rape; <i>(g)</i> <u>oral genital sexual violation</u>; or <i>(h)</i> <u>sexual violation</u>, 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.”.</p> <p data-bbox="954 1274 1256 1379">2. The amendment of section 145 by the substitution in subsection (1) for paragraph <i>(b)</i> of the following paragraph: “<i>(b)</i> An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial, <u>including, in the case where an accused is charged with a sexual offence—</u></p>	<p data-bbox="1268 533 1305 564">10</p> <p data-bbox="1268 663 1305 694">15</p> <p data-bbox="1268 792 1305 824">20</p> <p data-bbox="1268 922 1305 954">25</p> <p data-bbox="1268 1052 1305 1084">30</p> <p data-bbox="1268 1182 1305 1214">35</p> <p data-bbox="1268 1379 1305 1411">40</p> <p data-bbox="1268 1509 1305 1541">45</p> <p data-bbox="1268 1639 1305 1671">50</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(i) <u>experience or knowledge of child development;</u></p> <p>(ii) <u>knowledge of the impact of sexual offences on victims of such offences, the characteristics of sexual offenders; or</u></p> <p>(iii) <u>knowledge of the circumstances that may contribute to the vulnerability of victims of sexual offences.”.</u></p> <p>3. The amendment of section 154 by—</p> <p>(a) the substitution for subsection (5) of the following subsection: “(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 [not exceeding R1 500] or to imprisonment for a period not exceeding [one year] two years or to both [such] a 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 three years or to both a fine and such imprisonment.”; and</p> <p>(b) the addition of the following subsection: “(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 —</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(a) <u>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 indecent act towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; and</u> 5</p> <p>(b) <u>the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support.”.</u> 10</p> <p>4. The amendment of section 158 by the substitution in subsection (3) for the words preceding paragraph (a) of the following words: 15</p> <p>“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 <u>either—</u>”. 20</p> <p>5. The amendment of section 164 by the substitution for subsection (1) of the following subsection: 25</p> <p>“(1) Any person[who, from ignorance arising from youth, defective education or other cause, 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 <u>such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible:</u>” 30</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p data-bbox="954 282 1254 472">Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth[, the whole truth and nothing but the truth].”.</p> <p data-bbox="954 495 1254 600">6. The amendment of section 166 by the addition after subsection (3) of the following subsection:</p> <p data-bbox="975 600 1254 999">“(4) An accused in <u>criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness referred to in section 15 of the Criminal Law (Sexual Offences) Amendment Act, 2003, by stating the question to the court, which shall repeat the question accurately to the witness.</u>”.</p> <p data-bbox="954 1021 1254 1126">7. The amendment of section 170A by the addition after subsection (6) of the following subsections:</p> <p data-bbox="975 1126 1254 1603">“(7) If a court has directed that a vulnerable witness referred to in section 15 of the Criminal Law (Sexual Offences) Amendment Act, 2003, be allowed to give evidence through an intermediary, such intermediary may— <u>(a) convey the general purport of any question to the relevant witness;</u> <u>(b) inform the court at any time that the witness is fatigued or stressed;</u> <u>and</u> <u>(c) request the court for a recess.</u></p> <p data-bbox="975 1603 1254 1951">“(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 and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.”.</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>8. The addition after section 192 of the following section: <u>“Children competent to testify in criminal proceedings”</u> 192A. (1) All persons below the age of 18 years shall be presumed to be competent to testify in criminal proceedings and no such person shall be precluded from giving evidence unless he or she is found, at any stage of the proceedings, not to have the ability or the mental capacity, verbal or otherwise, to respond to questions in a way that is understandable to the court. (2) The evidence given by a person referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit. (3) The court shall note the reasons for a finding in terms of subsection (1) on the record of the proceedings.”.</p> <p>9. The amendment of section 195 by the substitution in subsection (1) for paragraph (a) of the following paragraph: “(a) any offence committed against the person of either of them or of a child of either of them <u>or of a child that is in the care of either of them;</u>”.</p> <p>10. The amendment of section 227 by— (a) the substitution for the heading of the following heading: <u>“Evidence of character and previous sexual history”;</u> (b) the substitution for subsection (1) of the following subsection:</p>

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No. and year of law	Short title	Extent of repeal or amendment
		<p>“(1) Evidence as to the character of an accused or as to the character of any [female] <u>person</u> against or in connection with whom any offence of an indecent nature 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 thirtieth day of May, 1961.”;</p> <p>(c) the substitution for subsection (2) of the following subsection:</p> <p>“(2) <u>No evidence as to any previous sexual [intercourse by, or any sexual] experience or conduct of any [female] person against or in connection with whom any offence of a sexual nature 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 [not] be adduced, and [such female shall not be questioned] no question regarding such sexual [intercourse or sexual] experience or conduct, [except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried]</u> shall be put to such person, the accused or any other witness at the proceedings pending before the court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question.” ;</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(d) the substitution for subsection (3) of the following subsection: “(3) Before an application for leave contemplated in subsection (2) is heard, the court [shall] <u>may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings [, and the court may direct that a female referred to in subsection (2) may not be present].</u>”;</p> <p>(e) the substitution for subsection (4) of the following subsection: “(4) The court shall, <u>subject to subsection (5), grant the application referred to in subsection (2) if satisfied that such evidence or questioning—</u> <u>(a) relates to a specific instance of sexual activity relevant to a fact in issue;</u> <u>(b) is likely to rebut evidence previously adduced by the prosecution;</u> <u>(c) 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;</u> <u>(d) is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right to privacy; or</u> <u>(e) is fundamental to the accused’s defence.”;</u> and</p> <p>(f) the addition after subsection (4) of the following subsection: “(5) The court shall not <u>grant an application referred to in subsection (2) if, in its opinion, such evidence or questioning—</u></p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>(a) <u>relates to the sexual reputation of the complainant and is intended to challenge or support the credibility of the complainant;</u> 5</p> <p>(b) <u>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—</u> 10</p> <p>(i) <u>is more likely to have consented to the offence being tried; or</u> 15</p> <p>(ii) <u>is less worthy of belief.”.</u> 20</p> <p>11. The amendment of section 238 by the substitution for subsection (1) of the following subsection: 25</p> <p>“(1) At criminal proceedings at which an accused is charged with incest— 30</p> <p>(a) it shall be sufficient to prove that the [woman or girl] <u>person on 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, [or] stepdaughter or stepson of the other party to the incest;</u> 35</p> <p>(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 <u>him or her and the other party to the incest.”.</u> 40</p> <p>12. The amendment of section 276A by— 55</p> <p>(a) the substitution in subsection (1) for paragraph (b) of the following paragraph: 60</p> <p>“(b) for a fixed period not exceeding [three] <u>five years.”;</u> and 65</p> <p>(b) the insertion after subsection (2) of the following subsection: 65</p>

		<p>“(2A) Punishment imposed under paragraph (h) or (i) of subsection 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 accredited treatment programme, the cost of which shall be borne by the convicted person himself or herself or the State if the court is satisfied that the convicted person has no adequate means to bear such cost.”</p> <p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>13. The amendment of section 335A—</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding [one year] two years or to both [such] a 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 three years or to both a fine and such imprisonment.”; and</p> <p>(b) by the addition after subsection (2) of the following subsection:</p> <p>“(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.”</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> <p>55</p> <p>60</p> <p>65</p>
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<p>Act 32 of 1944</p>	<p>Magistrates' Courts Act</p>	<p>14. The amendment of section 93<i>ter</i> by the substitution for subsection (1) of the following subsection:</p> <p>“(1) The judicial officer presiding at any trial may, if he or she deems it expedient for the administration of justice—</p> <p>(a) before any evidence has been led; or</p> <p>(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,</p> <p>summon to his or her assistance any one or two persons who, in his or her opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him or her as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his or her discretion summon one or two assessors to assist him or her: <u>Provided further that if an accused is standing trial on a charge of having committed any sexual offence, whether together with other charges or not, the judicial officer may at that trial be assisted by at least one assessor who has experience or knowledge of child development or knowledge of the impact of sexual offences on victims of such offences, the characteristics of sexual offenders or the circumstances that may contribute to the vulnerability of victims of sexual offences.</u>”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> <p>55</p> <p>60</p>
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<p>Act 68 of 1969</p>	<p>Prescription Act</p>	<p>15. The amendment of section 12 by— <i>(a)</i> the substitution for subsection (1) of the following subsection: “<u>(1) Subject to the provisions of subsections (2), [and] (3), (4) and (5), prescription shall commence to run as soon as the debt is due.</u>”; and <i>(b)</i> the addition after subsection (3) of the following subsections: “<u>(4) Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.</u> <u>(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than they were actually instituted.</u>”.</p>	<p>5 10 15 20 25 30</p>
<p>Act No. 71 of 1991</p>	<p>Businesses Act</p>	<p>16. The amendment of Item 2 of Schedule 1 by the addition after paragraph <i>(h)</i> of the following paragraph: “<u><i>(i)</i> providing facilities for persons to have sexual intercourse.</u>”.</p>	<p>35 40</p>
<p>Act No. 105 of 1997</p>	<p>Criminal Law Amendment Act</p>	<p>17. The amendment of Schedule 2 by— <i>(a)</i> the insertion in Part I after paragraph <i>(d)</i> of the offence of “Murder” of the following offence: “<u>Oral genital sexual violation of a person under the age of 16 years.</u>”; <i>(b)</i> the substitution in Part I for paragraphs <i>(b)</i> and <i>(c)</i> of the offence of “Rape” of the following paragraphs: “<u><i>(b)</i> where the victim— (i) is a [girl] person under the age of 16 years;</u></p>	<p>45 50 55 60</p>

		<p>(ii) is a physically disabled [woman] <u>person</u> who, due to <u>his or her</u> physical disability, is rendered particularly vulnerable; or</p> <p>(iii) is a mentally ill [woman] <u>person</u> as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973); or</p> <p>(c) involving the infliction of grievous [bodily] harm.”;</p> <p>(c) the addition in Part I after paragraph (c) of the offence of “Rape” of the following offence: <u>“Sexual violation involving the infliction of grievous harm.”</u>; and</p> <p>(d) the substitution for Part III of the following Part: “PART III Rape in circumstances other than those referred to in Part I. Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm. <u>Sexual violation.</u> <u>Oral genital sexual violation of a person under the age of 16 years or older.</u> 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.”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p>
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MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW (SEXUAL OFFENCES) AMENDMENT BILL, 2003

1. PURPOSE OF BILL

The Criminal Law (Sexual Offences) Amendment Bill, 2003, emanating from the South African Law Reform Commission's report on sexual offences, aims to widen the scope of the crime of rape and to create numerous new offences related to sexual misconduct. It also addresses aspects of sentencing for sexual offenders and certain evidentiary matters.

2. OBJECTS OF BILL

2.1 **Clause 1(1)** of the Bill contains certain definitions and clause 1(2) refers to Schedule 1 to the Bill which contains certain guiding principles relating to the adjudication of sexual offences.

2.2 **Clauses 2 to 4** aim to codify offences that are characterised by acts of sexual penetration. Three distinct offences are introduced, namely, **rape** (clause 2), **sexual violation** (clause 3) and **oral genital sexual violation** (clause 4).

2.3 A person will be guilty of rape in terms of **clause 2(1)** if that person unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person. The gender specific nature of common law rape is addressed whereby it will be possible for a man to be convicted of the rape of another man. Subclause (2) provides that a penetrative act will be *prima facie* unlawful if it is committed under coercive circumstances, false pretences or by fraudulent means, or in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

2.4 The second sexual penetrative act to be criminalised is that of **sexual violation**. A person will, in terms of **clause 3**, commit sexual violation if that person causes penetration of any object into or beyond the genital organs or anus of another person. The relevant object may include any part of the body of an animal or any part of the body of the offender (excluding the genital organs of that offender).

2.5 The third sexual penetrative act to be criminalised is that of **oral genital sexual violation**. **Clause 4** criminalises any act that causes penetration to any extent whatsoever by the genital organs of the offender (or the genital organs of an animal) into or beyond the mouth of another person.

2.6 **Clause 5** ensures that certain principles contained in clause 2 are also made applicable to the offences referred to in clauses 3 and 4. These principles are the provisions relating to the circumstances in which an act which causes penetration is unlawful and the provisions relating to marital or other relationships and the provision relating to defences at common law.

2.7 **Clause 6** deals with compelled or induced indecent acts. An "indecent act" is defined in clause 1 as any act, that, for example, causes exposure or display of any pornographic material to any person against his or her will, or to a child. A person who unlawfully and intentionally compels, induces or causes another person to, for example, engage in an indecent act with that person or a third person will be guilty of an offence.

2.8 **Clause 7** aims not only to eliminate the derogatory technical terms "idiot" and "imbecile" as contained in section 15 of the Sexual Offences Act, 1957 (Act No. 23 of 1957), but also to increase the protection of persons who are particularly vulnerable because of mental impairment.

2.9 **Clause 8** criminalises the intentional commission of an act of sexual penetration or an indecent act within the view ("in the presence") of a child below the age of 16 years or a mentally impaired person.

2.10 **Clause 9** replaces the existing section 14 of the Sexual Offences Act, 1957. In terms of this clause it is an offence to have sexual intercourse (in the wider sense), or to commit an indecent act, with a consenting child below the age of 16 years. In cases of penetrative sexual acts with a consenting child only one defence is available, namely, that the accused was deceived into reasonably believing that the child was over the age of 16. When an "indecent act" is committed with a consenting child (between the ages of 12 and 16 years) the same defence is available, as well as the additional defence that both parties are younger than 16 years of age, and the age difference between them is not more than three years.

2.11 Certain practices exist whereby certain sex offenders “groom” children prior to committing sexual offences with them. The process of “grooming” includes the provision or display of articles used to perform sexual acts to or with children. Children deserve legislative protection in this regard and **clause 10** therefore deals with the promotion of sexual offences with children.

2.12 **Clause 11** deals with the phenomenon of child prostitution. A complete ban is placed on child prostitution and anyone involved in the sexual exploitation of children will face severe criminal sanction. Living off or benefiting from the earnings of child prostitution and sex tourism involving children is criminalised.

2.13 **Clause 12** regulates the prostitution of mentally impaired persons, and is similar in content to clause 11.

2.14 **Clause 13** incorporates the new definition of sexual penetration so as to make the common law offence of incest gender neutral and it expands the ambit of sexual intercourse.

2.15 **Clauses 14 to 22** of the Bill deal with procedural aspects associated with the prosecution of sexual offence cases. Clause 14 places an obligation on the prosecution to notify certain witnesses that they may be declared to be vulnerable witnesses in terms of clause 15.

2.16 **Clause 15** deals with vulnerable witnesses, and is aimed at improving the quality of the evidence given by witnesses, improving witnesses’ experience of testifying in court and encouraging witnesses to come forward. A court may determine that protective measures should be applied in respect of a vulnerable witness, that may include—

- * giving evidence by way of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977;
- * giving evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;
- * proceedings taking place *in camera* as provided for in section 153 of the Criminal Procedure Act, 1977; and
- * prohibiting the publication of any information as provided for in section 154 of the Criminal Procedure Act, 1977.

2.17 Statements that were made by witnesses prior to testifying in criminal proceedings are prohibited in terms of the common law rule against “self-corroboration”. One of the exceptions to this rule includes the admission of evidence that the complainant in a sexual case made a complaint soon after the alleged offence, the so-called “first report”. **Clause 16** clearly provides that a negative inference may not be drawn only from the absence of a previous consistent statement relating to the offence, or from a delay in reporting the alleged offence.

2.18 **Clause 17** deals with evidence of surrounding circumstances and the impact of a sexual offence on the complainant. Clause 17 should be read with two other proposed amendments contained in Schedule 2 to the Bill, namely, the amendment of section 145 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and section 93*ter* of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944). The amendment to section 145 of the Criminal Procedure Act, 1977, is aimed at ensuring that a presiding officer in a sexual offence case may be assisted by an assessor who has knowledge or experience of child development, the impact of sexual offences on victims and the characteristics of sexual offenders. A similar amendment is introduced into section 93*ter* of the Magistrates’ Courts Act, 1944, which also deals with assessors.

2.19 **Clause 18** provides that, notwithstanding the common law and any rule of practice, a court may not treat the evidence of a witness in criminal proceedings pending before that court with caution and shall not call for corroboration of evidence, merely because that witness is—

- * the complainant in a sexual offence case; or
- * a child.

2.20 The provisions of section 296 of the Criminal Procedure Act, 1977, regulate the prevention of drug and alcohol abuse. **Clause 19** links treatment for drug or alcohol abuse to section 296 of the Criminal Procedure Act, 1977, and allows a court to order that the sex offender undergo treatment in addition to a sentence of imprisonment.

2.21 **Clause 20** makes provision for the declaration of a person as a “dangerous offender”, if that person has—

- * more than one conviction for a sexual offence;
- * been convicted of a sexual offence that was accompanied by violence or threats of violence; or
- * been convicted of a sexual offence against a child, unless such person is a child himself or herself.

The court may then issue a “long term supervision order” against the offender. The purpose of the order is to ensure that, if the offender is released from detention before serving his or her full term of imprisonment, including release on parole, he or she will remain under supervision until the expiry of the full term of the sentence.

2.22 **Clause 21** places an obligation on the National Director of Public Prosecutions to decide whether an investigation into an alleged sexual offence should be discontinued.

2.23 **Clause 22** deals with extra-territorial jurisdiction. Customary international law permits every state to apply its jurisdiction against its own citizens even when they are situated outside its boundaries. However, as there is a presumption against the extra-territorial operation of criminal laws, clause 22 contains a provision expressly conferring jurisdiction on the South African courts.

2.24 **Clause 23** places an obligation on a person who has been convicted of a sexual offence to disclose that information if he or she applies for employment which will place him or her in a position of authority or care of children.

2.25 The Bill also contains special provisions regarding the implementation of the legislation and dealing with the creation of a national policy framework.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The South African Law Reform Commission consulted widely during the course of its investigation and solicited comments from a variety of interested parties in the public and private sectors.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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