

**MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT
ACT AMENDMENT BILL, 2020**

1. PURPOSE OF BILL

- 1.1 On 18 September 2019, the President expressed the country's commitment to address the scourge of gender-based violence and femicide that have reached endemic proportions in South Africa. The President also announced a 5-point emergency plan, which is to be implemented without delay, to tackle gender-based violence. One of the points is enhancing the legal and policy framework in order to strengthen the response of the State to this problem.
- 1.2 One of the measures identified is the tightening of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) ("the principal Act"), in particular the legislation regulating the National Register for Sex Offenders ("the NRSO").
- 1.3 Chapter 6 of the principal Act aims to regulate the management and administration of the NRSO. Chapter 6, in short, requires that the particulars of persons who have been convicted of sexual offences against children and persons who are mentally disabled must be recorded in the NRSO. Chapter 6 places a prohibition on the aforementioned persons to work with or to be placed in circumstances where they have access to children or persons who are mentally disabled. Relevant employers are required to vet existing employees and those who apply for work, against the NRSO in order to determine whether they are suitable to work with children or persons who are mentally disabled, or not.

2. OBJECTS OF BILL

- 2.1 The Bill aims to—
 - (a) extend the ambit of the offence of incest;
 - (b) introduce a new offence of sexual intimidation;
 - (c) amend Chapter 6 of the principal Act so as to—
 - (i) expand the scope of the NRSO to include the particulars of all sex offenders and not only offenders against children and persons who are mentally disabled;
 - (ii) expand the list of persons who are to be protected to include other vulnerable persons, namely, certain young women, persons with physical, mental or intellectual disabilities and persons over 60 years of age who, for example, receive community based care and support services;
 - (iii) increase the periods for which a sex offenders' particulars must remain on the NRSO before they can be removed from the Register;
 - (iv) extend the list of persons who are entitled to submit applications to the Registrar of the National Register for Sex Offenders; and
 - (d) further regulate the reporting duty of persons who are aware that sexual offences have been committed against persons who are vulnerable.
- 2.2 Section 2 of the principal Act deals with the objects of the Act. The amendments that are reflected in clause 1 of the Bill are of a consequential nature in order to align the objects section of the principal Act with the proposed extension of the ambit of Chapter 6 of the principal Act (see paragraph 2.1(c)(i) and (ii) above).
- 2.3 The common law principle that a threat to harm another, which constitutes assault, was confirmed in section 5(2) of the principal Act which provides that a person who inspires the belief in another person that he or she will be sexually violated, is guilty of the offence of sexual violation. The question was raised why the principle could not be extended to include other sexual offences. Clause 2 of the Bill, to be read with clause 4, therefore aims to delete section 5(2) of the principal Act and to replace it with a new offence with a wider ambit.

- 2.4 Section 12 of the principal Act criminalises incest, namely, acts of consensual sexual penetration between persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship. The proposed amendment that is reflected in clause 3 of the Bill aims to extend the ambit of section 12 to include acts of sexual violation where children are involved.
- 2.5 Clause 4 of the Bill aims to introduce a new section 14A in the principal Act in order to extend the protection currently afforded to persons contemplated in section 5(2) of the principal Act (see paragraph 2.3 above). Clause 4 aims to introduce a new offence of sexual intimidation in order to prohibit persons from intimidating others into believing that they will be subjected to, or forced to, commit certain sexual offences.
- 2.6 Section 40 of the principal Act defines certain terms for purposes of Chapter 6 and clause 5 reflects proposed consequential amendments to the definitions of “employer” and “licencing authority” and the insertion of two new definitions, namely, that of a “person who is vulnerable” and of a “sexual offence”. The inclusion of the aforementioned definitions is aimed at extending the ambit of Chapter 6 beyond the current protection afforded to children and persons who are mentally disabled to also include other persons who are vulnerable (see paragraph 2.1(c)(ii) above).
- 2.7 Clauses 6 to 9, 11 to 16 and 18 aim to effect consequential amendments and a few technical amendments to the following sections of the principal Act—
- (a) section 41, the prohibition on certain types of employment by certain persons who have committed sexual offences;
 - (b) section 42, the establishment of the NRSO and the designation of a Registrar for the NRSO, with the exception that certain particulars of affected persons will be publicly available;
 - (c) section 43, the objects of the NRSO;
 - (d) section 44, persons entitled to apply for a certificate from the Registrar;
 - (e) section 45, obligations of employers in respect of employees;
 - (f) section 46, obligations of employees;
 - (g) section 47, obligations in respect of licence applications;
 - (h) section 48, obligations in respect of applications for fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship;
 - (i) section 49, contents of the NRSO;
 - (j) section 50, persons whose names must be included in the NRSO and related matters; and
 - (k) section 53, Regulations pertaining to the NRSO, respectively, by replacing the phrase “child or person who is mentally disabled” where-ever it appears with the term “person who is vulnerable” in order to ensure that the sections are aligned to the proposed extension of the ambit of Chapter 6 of the principal Act.
- 2.8 Clause 7 of the Bill aims to amend section 42 of the principal Act in order to provide for applications to be submitted to the Registrar of the NRSO by persons who have an interest in the wellbeing of vulnerable persons.
- 2.9 Clause 10 aims to introduce two new provisions in the principal Act. The proposed new section 44B deals with access to be granted to the National Commissioner of the South African Police Service for the purposes of complying with section 36D(2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and section 15A(2) of the South African Police Service Act, 1995 (Act No. 65 of 1995). The proposed new section 44C will require that the Director-General: Home Affairs must inform the Registrar in writing whenever a person’s change in identity has been formally approved and recognised by the Department of Home Affairs by providing the Registrar with that person’s old and new identity details. The provision further requires that the Registrar must endorse the NRSO accordingly, where necessary.

- 2.10 Section 48 of the principal Act, similar to other provisions of the Chapter, places an obligation on persons who submit applications for fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship to disclose that they have been convicted of sexual offences. However, section 48, in contrast to other sections of the Chapter, does not criminalise the non-disclosure of convictions of sexual offences where applications, for example to become foster parents, are submitted. Clause 14 therefore aims to amend section 48 of the principal Act by introducing an offence in respect of the non-disclosure of previous convictions for sexual offences.
- 2.11 Section 51 of the principal Act deals with the removal of a person's particulars from the NRSO. Clause 17 of the Bill aims to double those periods in respect of which a person's particulars must remain on the Register except for a person who has been convicted of two or more sexual offences (such a person's particulars may never be removed from the Register). The proposed amendment is aimed at enhancing the protection afforded by the NRSO by ensuring that the particulars of persons remain for a longer period on the Register, namely, from 5 to 10 and from 10 to 20 years, respectively, in the case of first offenders. The particulars of persons who have been convicted of more than one sexual offence may not be removed from the NRSO. In respect of persons who were children at the time of conviction the prescribed periods will remain the same as is currently provided for in the principal Act.
- 2.12.1 Section 54 of the principal Act deals with the obligation to report the commission of a sexual offence against a child or a person who is mentally disabled. The section draws a distinction between the reporting requirement in respect of a child and a person who is mentally disabled. A person who has "knowledge" that a sexual offence was committed against a child must report such knowledge immediately to the police. A person who, on the other hand, has "knowledge, reasonable belief or suspicion" that a sexual offence was committed against a person who is mentally disabled must report it immediately to the police.
- 2.12.2 It was proposed that the provision should be aligned so that the reporting duty in the case of reasonable belief or suspicion should apply to all persons who are vulnerable as defined in Chapter 6 of the amended principal Act. Clause 19 therefore aims to amend section 54 of the principal Act accordingly.
- 2.13 Section 56(4) of the principal Act, among others, provides that a person may not be convicted of an offence in terms of section 12 (*incest*) if, at the time when the act of "sexual penetration" was first committed, he or she was below the age of 18 years and the other person exercised power or authority over him or her or a relationship of trust existed between the two parties. Since the ambit of section 12 is to be extended to offer greater protection to children where acts of sexual violation is committed with them, clause 20 aims to amend section 56(4) by replacing the reference to "sexual penetration" with "sexual act" which encompasses both sexual penetration and sexual violation. Clause 21 aims to amend the long title of the principal Act which is self-explanatory.
- 2.14 Clause 22 aims to amend the index to the principal Act so as to ensure that the index includes reference to the new provisions dealing with sexual intimidation, access to Register by National Commissioner of South African Police Service and the obligations of Director-General: Home Affairs and the Registrar to be inserted in the principal Act.
- 2.15 Clause 23, namely, the short title and commencement clause is self-explanatory.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department received inputs from the Registrar of the NRSO, PACSEN (a Lobby Group for children with special educational needs), the Commission for Gender Equality, the MEC for Social Development of the Western Cape, the Centre for Child Law, Professor Ann Skelton, Dr Joan van Niekerk, the United Nations Office for Drugs and Crime, ASIJKI, the Centre for Applied Legal Studies and a combined input from the organisations Rape Crisis: Cape Town, Lawyers for Human Rights and Judges Matter.

4. IMPLICATIONS FOR PROVINCES

None.

5. IMPLICATIONS FOR PROVINCES

None.

6. FINANCIAL IMPLICATIONS FOR STATE

The extension of the ambit of Chapter 6 of the principal Act will lead to an increase in the number of particulars of persons to be included in the NRSO and therefore will give rise to an increase in the workload of the National Commissioner of the South African Police Service, the Director-General of Health and the National Commissioner of Correctional Services and the Registrar of the NRSO. The number of applications for certificates to be processed by the Registrar of the NRSO. The aforementioned increase in the workload of the functionaries concerned is not quantifiable at this stage and therefore also not the concomitant financial impact of such an increase.

7. PARLIAMENTARY PROCEDURE

- 7.1 The Constitution prescribes the classification of Bills. Therefore, a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 7.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 7.3 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] Z4CC10*, confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*. The test entails that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 7.4 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 7.5 The issue to be determined is whether the proposed amendments as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 7.6 The Bill aims to—
 - (a) extend the ambit of the offence of incest;
 - (b) introduce a new offence of sexual intimidation;
 - (c) amend Chapter 6 of the principal Act so as to—
 - (i) expand the scope of the NRSO to include the particulars of all sex offenders and not only offenders against children and persons who are mentally disabled;

- (ii) expand the list of persons who are to be protected to include other vulnerable persons, namely, young women, persons with physical, mental or intellectual disabilities and persons over 60 years of age who, for example, receive community based care and support services; and
 - (iii) increase the periods for which a sex offenders' particulars must remain on the NRSO before they can be removed from the NRSO; and
- (d) further regulate the reporting duty of persons who are aware that sexual offences have been committed against children.

7.7 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.

7.8 The Department of Justice and Constitutional Development is of the view that the provisions of the Bill do not, in substantial measure, fall within the functional areas listed in Schedule 4. The Department is therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

7.9 It is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.