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**SUBMISSION TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT ON THE AMENDMENTS TO THE CRIMINAL LAW (SEXUAL
OFFENCES AND RELATED MATTERS) AMENDMENT ACT BY THE LAW TRUST
CHAIR IN SOCIAL JUSTICE, STELLENBOSCH UNIVERSITY**

9 July 2021

For Attention: Hon. S Shaikh, MP

Email: CLAAABill2021@parliament.gov.za

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SECTION 1: INTRODUCTION

1.1. Background To The Submission

The Law Trust Chair in Social Justice (CSJ) and Stellenbosch University in partnership with the Thuma Foundation is grateful for the opportunity to present written comments on amendments to the **Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B 16B 2020]**.

We were to engage with the Department of Justice and Constitutional Development (DOJCD) through Mr Henk Du Preez (Mr Dupreez) and Ms Joy Watson (Ms Watson) who provided contextual input behind the proposed amendments which were helpful in conceptualising this submission. We are also grateful to Deputy Minister John Jeffrey for offering to avail himself to explain the thinking behind the proposed amendments on a mutually suitable date

This submission is structured in two sections. Section 1 contains the general introduction and background, section 2, the executive summary and finally, section 3 deals with the tabular submission of comments.

The Department of Justice and Constitutional Development (DOJCD) has invited interested parties to submit written comments on proposed amendments to three GBV Bills (insert bills) According to Mr H. Du Preez, a representative from DOJCD, the amendments are in response to President Cyril Ramaphosa's address in September 2019 where government expressed a commitment to ending GBV and announced the five-point emergency plan which was to be implemented without further debate to address the scourge of GBV. One of those plans was to enhance the legal and policy framework to strengthen the state's response to the problem. The three bills are regarded as a package, prepared to comply with the president's request" (Du Preez, 2021).

The current Minister of Justice and Correctional Services under Minister Lamola and the current administration as headed by President Cyril Ramaphosa must be applauded for finally signalling an intention to intensify measures aimed at eradicating this country's GBV scourge.

This submission is a collaboration resulting from a virtual roundtable held by the Law Trust Chair in Social Justice on 05 July 2021. Present at the roundtable were government officials, GBV activists, civil society, and academics. The attendants agreed that it was past time that these GBV bills were amended to address the growing cases of different forms of GBV.

1.2. The Law Trust Chair In Social Justice

The submission stems from continuous social justice research that has been undertaken by the CSJ, the outcome of which includes the emergence of social impact conscious policy and legislation design as key to the transformative constitutionalism dictated by the Constitution.

A research output seeking to facilitate social impact conscious policy and legislation design is the Social Justice Impact Assessment Matrix (SIAM), an instrument designed to facilitate the leveraging of data analytics to predict the likely poverty and equality impact of any planned law, policy, programme, service or decision on any group identified by one or more of the grounds in section 9 of the Constitution.¹ It aims to eschew laws, regulations, policies and service delivery plans that may exacerbate social and economic inequality, including poverty. Where inevitable, the idea is to implement such policies and decisions, with a compensation strategy that will mitigate the unfair

¹ Outlined in T Madonsela "Law and the economy through a social justice lens" in R Parsons (Ed) *Recession, Recovery and Reform: South African Economy after Covid-19* (2020).

impact. The SIAM, which has parallels with government's Social and Economic Impact Assessment Systems (SEIAS), differs from SEIAS in that SIAM has an overt grounding in the constitutional social justice commitment and related equality duty and emphasises using sufficiently disaggregated data to predict the future as it relates to narrowing or widening the substantive equality and poverty gaps.

The working definition of the CSJ is that "social justice is about the equal enjoyment of all rights and freedoms regardless of human diversity reflected in the just, fair and equitable distribution of all opportunities, resources, benefits, privileges and burdens in a society or group and between societies. In a socially just society, it should not be harder for one group to thrive and easier for another." In the case of South Africa, the transformative constitutionalism mandate regarding social justice transcends avoiding disadvantage to one or more groups, the mandate incorporates an injunction to redress legacy imbalances between these groups. This message emerges loud and clear in the Constitutional Court's jurisprudence, the key case in this regard being *Minister of Finance v Van Heerden*.²

1.3. Literature Review on Gender Based Violence In South Africa

As Prof. Thuli Madonsela once told the audience at the University of KwaZulu Natal graduation ceremony, *"It is my considered view that the violence that we experience today and the deficit in ubuntu is part of the complex and ugly shadow of our past. In South Africa, apartheid left many people behind, and as we advance women, sometimes others feel left behind. But even if they are not left behind, some people were brought up to believe that women have less value than them and then when suddenly women have equal value, they feel something has been taken away from them,"* (Singh and Maqhina, 2019).

South Africa arguably has one of the world's most progressive constitutions. However, despite the human rights afforded to all citizens enshrined in the Constitution, South Africa has one of the highest rates of GBV and is characterised as having a culture of violence as a result of the history of apartheid and colonisation (van Niekerk and Boonzaier, 2016). This is confirmed by numerous stories in the media of fatal GBV cases. It is so prevalent that almost everyone we encounter knows of someone, if not themselves, who have been victims of GBV.

It is noteworthy and encouraging that the bills also seek to address the violence on campuses and educational institutions. In this regard, Mahabeer, notes that young women in institutions *"experienced feelings of vulnerability, silenced by ignorance, fear and powerlessness"*. (Mahabeer, 2021)

Thirdly, the discussion centred on the intersectionality of GBV where social norms are concerned. According to a study on Intimate Partner Violence (IPV) in two communities in the Western Cape, communities view IPV through the same lens as other forms of violence (van Niekerk and Boonzaier, 2016), with a culture of "kiss and make up" to be the norm. Race, class and other forms of female oppression (e.g. patriarchy) intersects with GBV.

² *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004)

Fourthly, the bills do not explicitly mention violence against LGBTQ+ citizens, despite its prevalence in South Africa. Legislation on GBV excludes other oppressed minorities whose rights are enshrined in the Constitution. *“The narrow focus on VAW in GBV intervention efforts results in the exclusion of violence against gender nonconforming (GNC) individuals, as well as others in the lesbian, gay, trans, queer, intersex, asexual (LGBTQIA+) community, and violence between men. A narrow application of the concept of GBV in prevention efforts may fail to address the full range of gendered violence, and therefore only be successful in preventing heteronormative and cis-gendered forms of GBV”* (Graaf, 2017).

I.4 Submission Overview

The gist of our submission is that we welcome the bill and commend the government for seeking to plug gaps in our national efforts at combating sexual violence and related injustices. Regarding improvements, the thrust of the submission relates to the theory of change underpinning the amendments. We have also requested improvements in definitions and formulations to reduce ambiguities.

It is also our considered view that amendments should include strategies that target a culture change in society and the criminal justice system. We also make recommendations that seek to help identify the causes and influencing factors behind GBV through profiling offenders that are captured through the justice system. We are also recommending that government should eschew narrowing vulnerability to age and disability when it comes to women and narrowing it to women when it comes to broader society. It is worth noting that all women are vulnerable to GBV despite age and that heightened vulnerability extends to groups such as older women and members of the LGBTQ community regardless of gender. This is one of the reasons planning with disaggregated data and acute social impact awareness is important.

I.5 Conclusion

The CSJ commends the amendments to the Act which enhances protection for complainants, promotes collaboration between implementing departments and enhances the practicality of the Act. However, for victims of domestic violence to be appropriately protected and for legal clarity, the concerns that have been raised in this submission need to be addressed.

Laws are only as good as their implementation. Indeed, at the opening of our roundtable on GBV it was stressed that most of us have heard of women who have been made to eat the Protection Orders meant to protect them, while some have been abused with the order but received little recourse from the authorities.

The National Strategic Plan on Gender-based Violence and Femicide, 2020 which is the overall policy framework for addressing GBV, is built on six pillars.(insert ref). These pillars are crucial for achieving the mandate of these amendments. The first pillar rests on accountability, coordination and leadership, aimed at holding our leaders to account, something that has been lacking in the past. The second pillar rests on prevention, rebuilding and social cohesion. The third pillar is justice, safety and protection. The fourth is around appropriate responses, care, support and healing, with the fifth pillar centering on economic power, working through the intersection between economic injustice and violence.

Lastly, the sixth pillar is research and information management, pertaining to data and evidence collection. This pillar is of particular importance to the CSJ, as it aligns with our social justice impact assessment matrix (SIAM) (as outlined in the background to CSJ above).

Consequently, research and knowledge creation are crucially important in addressing GBV to ensure the creation of new knowledge for understanding the reasons behind the high levels of violence in South African society. For example, how do cultural norms support or undermine GBV and for tracking the mental state of perpetrators to address the underlying causes of GBV.

We therefore stress the need for disaggregated data as this would assist in providing oversight. In particular, we need an anatomy of end users indicating all of their circumstances. It may also be a good idea for the bill to include a requirement for the collection of data from all found guilty of GBV with a view to using such data to elicit factors behind GBV, help develop early warning mechanisms and feed into efforts aimed at prevention. The role of mental health deficiencies is particularly worth considering. In addition, data becomes important in the context of the fiscal outlook as data driven planning improves impact efficiencies in solving the mischief laws aim to solve. We therefore submit that that consideration be given to using the SIAM as a tool can plug into the sixth pillar on research and information management, to lead to a better understanding of both services and prevention, as well as upstream approaches.

We look forward to engaging your department to achieve an end to GBV in this country.

Submitted by the Chair in Social Justice

University of Stellenbosch

09 July 2021.

I. Criminal Law (Sexual Offences and Related Matters) Amendment Bill

AMENDMENT	PURPOSE OF AMENDMENT	Happy with Amendment	Reformulate/ Ambiguous	Problematic	Suggested Inclusion
<p><u>Section 2</u></p> <p>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”.</p>	<p>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</p>	<p>While we agree with the extension of category of people whose name can be entered into the National Register for Sexual Offenders to include any persons convicted of sexual offences, we believe that this provision has been tainted by the use of the phrase “persons who are vulnerable”. As we shall argue below, the provision is problematic as it is restrictive. In our view, almost everyone, and women in particular, are vulnerable to sexual violence.</p>			

		Recommendation: The ambit of the phrase “persons who are vulnerable” should be revised.			
<p><u>Section 5</u></p> <p>(1) A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault.</p> <p><i>Deletion of subsection (2).</i></p>	<p>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.</p> <p>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</p>	We agree with this amendment.			
<p><u>Section 12</u></p> <p>(1) Persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship and</p>	<p>Section 12 of the principal Act criminalises incest, namely, acts of consensual</p>	We agree and welcome this amendment			

<p>who unlawfully and intentionally engage in an act of—</p> <p>(a) sexual penetration with each other; or</p> <p>(b) sexual violation with each other where one of them is a child, and the act of sexual violation was of such a nature that it was reprehensible for the adult person to have acted in that manner under the circumstances concerned.</p> <p>are, despite their mutual consent to engage in such act, guilty of the offence of incest.</p>	<p>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.</p>				
<p><u>Part 5 of Chapter 2</u></p> <p>Sexual intimidation</p> <p>14A. A person (“A”) who unlawfully and intentionally utters or conveys a threat to a complainant (“B”) that inspires a reasonable belief of imminent harm in B that a sexual offence will be committed against B, or a third party (“C”) who is a member of the family of B or any other person in a close relationship with B, is guilty of the offence of sexual intimidation and may be liable on conviction to the punishment to which a person convicted of actually committing a sexual offence would be liable.</p>	<p>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.</p>		<p>We welcome this amendment</p> <p>However; we humbly object to the inclusion of the phrase “imminent” for several reasons.</p> <p>First, the inclusion of “imminent” is too onerous in that it requires a victim to make a determination whether harm is imminent or not</p>		

			<p>before reporting such intimidation to the police. How should a victim determine whether harm is imminent or remote? Does this not put unnecessary burden on a victim? In our view, any threat of sexual violence has potential psychological effect on the person to whom it is directed even if it does not materialise. Therefore it should be punished by law.</p> <p>Second, we believe that given our context, particularly the fact that sexual violence is used as a weapon, we believe that any threat of sexual violence, whether</p>		
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			<p>imminent or remote should be taken seriously and should constitute a crime. Put differently, any threat that inspires a reasonable belief of harm (whether imminent or remote) meets the threshold to constitute a crime. We reiterate that even a remote threat of sexual violence can have a psychological effect on the victim. In its current form, the provision gives perpetrators the leeway to escape accountability on the basis that their threats of sexual violence were not imminent. We submit that the legislature should</p>		
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			<p>never leave room for perpetrators to use threats of sexual violence as any threat of sexual violence is reprehensible and should be punishable.</p> <p>Recommendation: We Recommend that the phrase “imminent” be removed from this clause.</p>		
<p><u>Section 40</u></p> <p>“‘employer’ means—</p> <p>(a) any—</p> <p>(i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or</p> <p>(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</p>	<p>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).</p>	<p>We agree with this amendment.</p>			

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

and 'employ', 'employing', 'employed' and 'employment relationship' have corresponding meanings.					
licencing authority' means- any authority which is responsible for granting licences or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a [child or a person who is mentally disabled] person who is vulnerable;		We agree with this amendment.			
person who is vulnerable' means a— (a) child or a person who is mentally disabled; (b) female under the age of 25 years who— (i) receives tuition at a higher education college, higher education institution or university college as defined in section I of the Higher Education Act, 1997 (Act No. 101 of 1997); (ii) receives vocational training at any training institute, other				We find this definition of vulnerable persons highly problematic. Given the prevalence of sexual violence, particularly on women in South Africa, how does one decide which groups constitute the most vulnerable? It is our view that given the scourge of sexual violence in South Africa,	We take note of and applaud the attempts by the legislature to deal with sexual violence in institutions of higher learning. This is done by including female students under the age of 25 in the category of "persons who are vulnerable". We however believe that the legislature can do more to address

<p>than the institutions referred to in subparagraph (i), or as part of their employment; or</p> <p>(iii) lives in a building, structure or facility used primarily as a residence for any of the persons referred to in subparagraphs (i) and (ii);</p> <p>(c) person who is being cared for or sheltered in a facility that provides services to victims of crime;</p> <p>(d) person with a physical, intellectual or sensory disability and who—</p> <p>(i) receives community-based care and support services, other than from a family member for;</p> <p>(ii) lives in a building, structure or facility used primarily as a residence for; or</p> <p>(iii) is cared for in a facility providing 24-hour care to, persons with physical, intellectual or sensory disabilities; or</p>				<p>everyone and women in particular are vulnerable regardless of their age, where they live or disability. This then raises the question why only these categories of persons are considered vulnerable? For example, it is difficult to argue that a 23-year-old person who is in an institution of higher learning or is staying in a building used primarily as a resident is more vulnerable than a 19 year-old who lives in an informal settlement. On the contrary, it can be argued that such a person is in a much safer environment than a person who</p>	<p>this problem. In particular, we implore the legislature to include provision (s) that deal with how institutions of higher learning should deal with sexual violence. The provision should clarify who, within these institutions has the duty to report sexual violence and whether such institutions have the power to deal with sexual offences.</p> <p>We also reiterate our objection to the narrow definition of “persons who are vulnerable” to the extent that it only encompasses females under the age of 25 years old. It is our view that all females, despite their age</p>
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<p>(e) person who is 60 years of age or older and who—</p> <p>(i) receives community-based care and support services, other than from a family member for;</p> <p>(iii) lives in a building, structure or facility used primarily as a residence for; or</p> <p>(iv) is cared for in a facility providing 24-hour care to, such persons;</p>				<p>lives in an informal settlement.</p> <p>Further, the reference to persons receiving “tuition from higher education college, higher education institution or university in (b) (i) and vocational training in (b) (ii) is also problematic. Does it mean that such persons are more vulnerable than a person who is not a child but is still receiving basic education but has to walk several kilometres to attend school? It is our view that there are many people out there who do not fall under the categories of “person who is vulnerable” as</p>	<p>or place of residence are vulnerable to sexual violence. We also want to highlight the fact that males, particularly members of the LGBTI+ are also victims of sexual violence.</p> <p>Recommendation: We recommend that instead of attempting to deal with sexual violence in institutions of higher learning under the rubric of “persons who are vulnerable”, the legislature must include provision(s) that specifically deals with sexual violence in such institution.</p>
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				<p>defined in the Bill but will, due to their unique circumstances, be more vulnerable than persons who fall under the categories provided.</p> <p>Further, we wonder whether there is evidence to prove that females who are younger than 25 years old in tertiary or vocational training institutions are more vulnerable than persons who are 25 years and older but still in the same institutions?</p> <p>While we applaud the legislature for responding to reports of sexual violence in institutions of higher learning, we believe that the definition of</p>	
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				<p>“person who is vulnerable” is highly problematic.</p> <p>Lastly, the specific reference to females in (b) (i) is problematic. The legislature should acknowledge that males, particularly members of the LGBTI+ are equally vulnerable to sexual violence. This is particularly the case if we consider the fact that people who belong to sexual minority groups are increasingly facing all forms of violence.</p> <p>Recommendation: The current limited definition of vulnerable persons needs to be revised as it fails to take into account that</p>	
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				more categories of persons are vulnerable to sexual violence in South Africa.	
sexual offence' means— (a) any— (i) sexual offence in terms of the law as it existed between 16 June 2003 and 15 December 2007; (ii) offence referred to in Chapters 2, 3 and 4 and sections 55 and 71 of this Act; (iii) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and (iv) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996); that was committed against a child or a person who is mentally disabled between the period of 16 June 2003 and the date of; and		We agree with this amendment.			

<p>(b) any—</p> <p>(i) offence in terms of Chapters 2, 3 and 4 and section 55 of this Act;</p> <p>(ii) offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes; and</p> <p>(iii) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996;</p> <p>that was committed after the date of, the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021.”; and</p> <p>(e) by the deletion of the definition of “sexual offence against a child”.</p>					
<p><u>Section 41</u></p> <p>Prohibition on certain types of employment by certain persons who have committed sexual offences [against</p>	<p>***</p> <p>The prohibition on certain types of employment by</p>	<p>We welcome this amendment in that it removes persons who are vulnerable from the reach of sex</p>			

<p>children and persons who are mentally disabled]</p> <p>41. [(1)] A person who has been convicted of the commission of a sexual offence [against a child] or is alleged to have committed a sexual Offence [against a child] and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register, may not—</p> <p>(a) be employed to work with a [child] person who is vulnerable in any circumstances;</p> <p>(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] person who is vulnerable or places where [children]</p>	<p>certain persons who have committed sexual offences</p>	<p>offenders. However, we reiterate our objection to the limited definition of “persons who are vulnerable”.</p>			
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<p>persons who are vulnerable are present or congregate;</p> <p>(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</p> <p>(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.</p> <p>[(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</p>					
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<p>have been included in the Register, may not—</p> <p>(a) be employed to work with a person who is mentally disabled in any circumstances;</p> <p>(b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in a position of authority, supervision or care of a person who is mentally disabled, or which, in any other manner, places him or her in a position of authority, supervision or care of a person who is mentally disabled or where he or she gains access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate;</p> <p>(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</p>					
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<p>disabled are present or congregate; or</p> <p>(d) become the curator of a person who is mentally disabled.]”.</p>					
<p><u>Section 42</u></p> <p>(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.”</p> <p>(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.</p>	<p>***</p> <p>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;</p> <p>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.</p>	<p>We agree with this amendment.</p>			

<p>(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.</p> <p>(c) The Registrar may not delegate his or her function referred to in section 51 to any other person.</p> <p>(4) Any person may, subject to subsection (5), apply, in the prescribed form, to the Registrar to determine whether the particulars of any person have been included in the Register or not.</p> <p>(5) The Registrar in considering the application must be satisfied that the—</p> <p>(a) application is not frivolous or vexatious;</p> <p>(b) person who has submitted the application has an interest in the disclosure of the information; and</p> <p>(c) disclosure of the information is in the interest of an identifiable vulnerable person.</p> <p>(6) Except in so far as it may be necessary for the purposes of this Chapter, any person who willfully discloses or publishes</p>					
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any information to any other person which he or she has acquired as a result of an application contemplated in subsection (4) or in any other manner, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.					
<p><u>Section 43</u></p> <p>The objects of the Register are to protect [children and persons who are mentally disabled] persons who are vulnerable against sexual offenders by—;</p> <p>(a) establishing and maintaining a record of persons who</p> <p>(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</p> <p>(ii) are alleged to have committed a sexual offence [against a child or a person who is mentally disabled] in respect of</p>	<p>***</p> <p>Objects of the NRSO;</p>	<p>We agree with this amendment.</p>			

whom a court, whether before or after the commencement of this Chapter—					
<p><u>Section 44</u></p> <p>(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;</p>	***	We agree with this amendment.			
<p><u>Sections 44B</u></p> <p>“Access to Register by National Commissioner of South African Police Service</p> <p>44B. For the purposes of section 36D(2) of the Criminal Procedure Act, 1977, and section 15A(2) of the South African Police Service Act, 1995 (Act No. 65 of 1995), the National Commissioner of the South African Police Service may be granted access to the data base of the Register by the Registrar.</p> <p>Obligations of Director-General: Home Affairs and Registrar</p>	<p>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).</p> <p>The proposed new section 44C will require that the Director-General: Home</p>	We agree with this amendment.			

<p>44C. (1) 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.</p> <p>(2) The Registrar must endorse the Register accordingly, where necessary."</p>	<p>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.</p> <p>The provision further requires that the Registrar must endorse the NRSO accordingly, where necessary.</p>				
<p><u>Section 45</u></p> <p>(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.</p> <p>(d) An employer must take reasonable steps to prevent an employee whose particulars are recorded in the Register</p>	<p>***</p>	<p>We agree with this amendment.</p>			

<p>from continuing to gain access to a [child or a person who is mentally disabled] person who is vulnerable in the course of his or her employment, including, if reasonably possible or practicable to transfer such person from the post or position occupied by him or her to another post or position: Provided that if any such steps to be taken will not ensure the safety of a [child or a person who is mentally disabled] person who is vulnerable the employment relationship, the use of services or access, as the case may be, must be terminated immediately.”.</p>					
<p><u>Section 46</u></p> <p>“(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</p>	***	We agree with this amendment.			

<p>conviction or finding to his or her employer.</p> <p>(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.”.</p>					
<p><u>Section 47</u></p> <p>“(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</p>	***	We agree with this amendment.			

terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.”.					
<p><u>Section 48</u></p> <p>“(2) (a) 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.</p> <p>(b) A person referred to in paragraph (a) who fails to comply with paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding seven years or to both a fine and such imprisonment.</p> <p>(c) A child who is in the custody and care of a person contemplated in paragraph (a) must, as soon as reasonably possible, be removed from the care of such person in accordance with Chapter 9 of the</p>	<p>***</p> <p>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.</p>	We agree with this amendment.			

Children's Act, 2005 (Act No. 38 of 2005)."					
<p><u>Section 49</u></p> <p>“(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;”.</p>	***	We agree with this amendment.			
<p><u>Section 50</u></p> <p>“(I) The particulars of the following persons must be included in the Register:</p> <p>(a) A person who in terms of this Act or any other law—</p> <p>(i) has been convicted of a sexual offence [against a child or a person who is mentally disabled];</p> <p>(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</p>	***	We agree with this amendment.			

<p>77(6) or 78(6) of the Criminal Procedure Act, 1977;</p> <p>(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</p> <p>(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</p> <p>(b) any person—</p> <p>(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];</p> <p>(ii) who, in any foreign jurisdiction, has been dealt with in a manner equivalent</p>					
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<p>to that contemplated in paragraph (a)(ii); or</p> <p>(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),</p> <p>whether committed before or after the commencement of this Chapter.”.</p> <p>(2) (a) A court that has in terms of this Act or any other law—</p> <p>(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</p> <p>(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</p>					
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<p>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,</p> <p>must, subject to paragraph (c), make an order that the particulars of the person be included in the Register.”;</p> <p>(2) (c) If a court has, in terms of this Act or any other law, convicted a person (“A”) of a sexual offence [referred 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—</p> <ul style="list-style-type: none"> (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 					
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<p>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;</p> <p>(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</p> <p>(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.”;</p> <p>S5(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</p>					
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a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence, as referred to in paragraph (a) of the definition of "sexual offence" in section 40, 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.

(6) The National Commissioner of the South African Police Service must, in the prescribed manner, [and at least three

<p>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, as referred to in paragraph (a) of the definition of "sexual offence" in section 40, 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.”;</p> <p>S7(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</p>					
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<p>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] , as referred to in paragraph (a) of the definition of “sexual offence” in section 40, and the Registrar must forthwith enter those particulars in the Register</p>					
<p style="text-align: center;"><u>Section 51</u></p> <p>Removal of particulars from Register</p> <p>51. (1) Subject to subsections (2), (2A) and (3), the particulars of a person—</p> <p style="padding-left: 40px;">(a) who—</p> <p style="padding-left: 80px;">(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</p>	<p>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).</p> <p>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</p>	<p>We agree with this amendment.</p>			

<p>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;</p> <p>(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</p>	<p>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.</p>				
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<p>prison or the period of suspension has lapsed; or</p> <p>(iii) is alleged to have committed a sexual offence [against a child or a person who is mentally disabled] in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of [five] 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</p> <p>(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,</p>					
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<p>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.</p> <p>(2) The particulars of a person who has—</p> <p>(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] 18 months, whether the sentence was suspended or not; or</p> <p>(b) (b)two or more convictions of a sexual offence [against a child or a person who is mentally disabled],</p> <p>may not be removed from the Register.</p> <p>(2A) A person falling into the categories contemplated in subsection (1) or (2). who was a child at the time of the</p>					
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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**

<p>case may be,] is pending against him or her; or</p> <p>(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—</p> <p>(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</p> <p>(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.</p> <p>(2B) The periods applicable in subsection (1) should be reduced by half if the person</p>					
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was a child at the time of the commission of the offence.

(3)

(a) A person falling into the categories contemplated in subsection (1) may apply, in the prescribed manner, to the Registrar to have his or her particulars removed from the Register.

(b) The Registrar must, after considering the application, remove the particulars of the person contemplated in paragraph (a) from the Register, unless the person concerned has [an investigation or] a charge relating to a sexual offence **[against a child or a person who is mentally disabled]** pending against him or her and the relevant **[investigation or]** case has not yet been finalised, in which event the finalisation of the application must be postponed until the Registrar has, in the prescribed manner, received information on the outcome of the **[investigation or]** case.

(c) The Registrar may, at the request of a person whose particulars are

<p>included in the Register, remove those particulars from the Register, if the Registrar is satisfied that the entry of those particulars in the Register was clearly in error.</p> <p>(4) Any person who has qualified for the removal of his or her particulars from the Register before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2021, may submit an application to the Registrar in terms of subsection (3)(a) and the Registrar must consider the application as if the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2021, had not commenced.</p>					
<p><u>Section 53</u></p> <p>(1) (1) The Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health, if applicable, make regulations relating to</p> <p>(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</p>	***	We agree with this amendment.			

<p>for a sexual offence [against a child or a person who is mentally disabled] to the Registrar as contemplated in section 50(5)(a);</p> <p>(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); and</p> <p>(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)</p>					
<p><u>Section 54</u></p> <p>Obligation to report commission of sexual offences against [children or] persons who are [mentally disabled] vulnerable.</p> <p>(1) [(a)] A person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed</p>	<p>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.</p> <p>The section draws a distinction between the</p>			<p>We agree with this amendment. We understand the mischief which the legislature is trying to address, that is situations where cases of sexual violence</p>	<p>While this provision clarifies the offence that can be committed by a natural person who fails to report sexual violations, there is no clarity as to what happens is a</p>

<p>against a [child] person who is vulnerable as defined in section 40 must report such knowledge, reasonable belief or suspicion immediately to a police official.</p> <p>[(b)] (2)(a) A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in [paragraph (a)] subsection (1), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.</p> <p>[(2) (a) A person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled must report such knowledge, reasonable belief or suspicion immediately to a police official.</p> <p>[(b) A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. (c)]</p> <p>[(b)] A person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal</p>	<p>reporting requirement in respect of a child and a person who is mentally disabled.</p> <p>A person who has “knowledge” that a sexual offence was committed against a child must report such knowledge immediately to the police.</p> <p>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.</p> <p>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.</p>			<p>are not reported. We acknowledge that the provision in the Principal Act was quite onerous when it comes to reporting sexual violence committed against children. It required a person to report sexual offences only if they have “knowledge” that a sexual offence has been committed. We acknowledge that this requirement was too restrictive. Sexual offences by their nature take place in secluded places. As such it is almost difficult for a person to have “knowledge” that sexual offences have occurred unless they are an eyewitness, or the victim have</p>	<p>juristic person is the one that becomes aware of such violations. This specifically applies to vulnerable persons who are in tertiary institutions, stay in a residence or a facility intended for children or people with disability. Institutions may have protocols that must be followed to address sexual violence, including internal mechanisms of dealing with such matters. As such a person who becomes aware of sexual violence first may face the dilemma of complying with internal protocols while at the same time complying with the provision</p>
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proceedings by reason of making such report.				<p>confided in them. Therefore, we applaud the legislature for widening the circumstances under which a person may report sexual violence.</p> <p>Further, we acknowledge that there still some cultural or religious norms that still prevent victims from reporting incidences of sexual violence even if the victims want such a case to be reported. This provision will ensue that such persons are heard and do not suffer in silence</p> <p>The shielding of whistle-blowers from civil or criminal proceedings for</p>	<p>that criminalises failure to report sexual violence. We implore the legislature to clarify who will be held accountable if institutions fail to report sexual violence against a vulnerable person.</p>
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				<p>reporting sexual violence will encourage people to come upfront to report sexual violence.</p> <p>Having said that, we wish to raise several issues which we think are problematic with this provision.</p> <p>First, we take note that this provision takes away the initiative of reporting sexual violence from the complainant. Ideally, every case of sexual violence should be reported to the police by victims themselves, and in an ideal world, all victims of sexual violence should be free to do so. However, we</p>	
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				<p>should acknowledge that for one reason or the other, victims of sexual violence may not want to open cases against perpetrators. For instance, the perpetrator against a vulnerable person may be a breadwinner in a family. In other circumstances, the victim of sexual violence may be uncomfortable with revealing that they have been violated. Others may not report because they do not want to suffer the trauma of testifying and going through the judicial processes. There is also evidence that some victims decide not to</p>	
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				<p>report cases of sexual violence because of the manner in which the police handle such cases which leaves the victims unsafe and uncomfortable or for fear of retribution from the perpetrator. Lastly, some victims may delay to open cases because they are simply not ready to come out as victims of sexual violence and face the perpetrator in court. While all these situations hamper the fight against sexual violence, they are unfortunately everyday realities.</p> <p>The impact of this provision as stated above takes away the initiative of opening a case</p>	
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				<p>from the victim. This means that a person who has knowledge of or suspects that a vulnerable person has suffered sexual violence is compelled to report even if the victim is not prepared to report such violations. This has far-reaching implications. First, we take note that this provision could have some implications on the victim's right to privacy.</p> <p>Second, this has an effect on the victim's agency. There are theories out there that suggest that victims of sexual violence will have to take the initiative in obtaining justice. This provision</p>	
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				<p>takes away that initiative from the victim.</p> <p>Third, while this provision is likely to result in more cases being reported, it will, unfortunately, not result in successful investigations or prosecutions. For example, the victim may refuse to cooperate or testify in court. One question that arises here is, will the victim not be charged of contempt of court if they refuse to testify?</p> <p>Fourth, this could also endanger the victim.</p> <p>Where a victim stands to lose something if the perpetrator is convicted (e.g</p>	
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				<p>where the perpetrator is the breadwinner), they may even deny being violated or confiding in the person who made the report. Will the person who made the report still be immune from criminal or civil proceedings?</p> <p>Lastly, this provision will discourage victims from seeking healthcare assistance after suffering sexual violence. This is because confidentiality is no longer guaranteed as the healthcare workers are now compelled to report such sexual violations.</p> <p>Recommendation: We acknowledge</p>	
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				the dilemma faced by the legislature here. Our recommendation is that the legislature finds a middle ground between ensuring that people will not harbour knowledge or suspicions of commission of sexual violence and the interests of the victims.	
<p><u>Section 56</u></p> <p>(4)A person ('A') may not be convicted of an offence in terms of section 12 if, at the time when the sexual act [of sexual penetration] was first committed—</p> <p>(a) A was below the age of 18 years; and</p> <p>(b) the other person ('B') exercised power or authority over A or a relationship of trust existed between A and B.”.</p>	<p>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.</p> <p>Since the ambit of section 12 is to be extended to</p>	We agree with this amendment.			

	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.				
<u>Long title of Act 32 of 2007</u> ‘creating new statutory offences, for adults, by criminalising the compelling or causing the witnessing of certain sexual conduct and certain parts of the human anatomy, the exposure or display of child pornography, [and] the engaging of sexual services of an adult and sexual intimidation	***	We agree with this amendment			
<u>Index of Act 32 of 2007</u> Part 5 Sexual intimidation 14A. Sexual intimidation; and <u>Items</u> 44B. Access to Register by National Commissioner of South African Police Service	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	We agree with this amendment			

44C. Obligations of Director-General: Home Affairs and Registrar'	the Registrar to be inserted in the principal Act.				
<u>Short title and commencement</u> This Act is called the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021, and comes into operation on a date fixed by the President by proclamation in the Gazette.	***	We agree with this amendment			

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