



SOUTH AFRICAN CHAPTER OF
International Association of Women Judges
advancing human rights and equal justice for all

A brief overview of the 3 GBVF Amendment Acts

Domestic Violence Amendment Act

Criminal Law (Sexual Offences and Related Matters) Amendment Act

Criminal and Related Matters Amendment Act

RCP Jakkie Wessels
6 Aug 2022

Domestic Violence Amendment Act

Not yet in operation

- New definitions
- Changes to current definitions
 - See 'domestic violence' def
- Obligation to report DV –
functionaries
- Arrest without warrant &
assistance to complainant
- Safety Monitoring Notice
- Electronic Service Provider
orders
- Electronic & online applications
- Integrated electronic depository
- Evidence – audio-visual link &
intermediary
 - s 51A & 51C MCA apply
- New Regulations & Forms
 - New application form
 - Additional forms incl. return of service and
return of non-service
 - Time periods
 - Can order alternative service



Criminal and Related Matters Amendment Act

Commencement
5 August 2022

Amend —

- **the Criminal Procedure Act, 1977**, to further regulate -
- the granting and cancellation of bail;
- the giving of evidence by means of closed circuit television or similar electronic media;
- the giving of evidence by a witness with physical, psychological or mental disability; the appointment,
- oath and competency of intermediaries; and
- the right of a complainant in a domestic related offence to participate in parole proceedings
- **the Criminal Law Amendment Act, 1997**, to further regulate
- sentences in respect of offences that have been committed against vulnerable persons,
- **the Magistrates' Courts Act, 1944 and the Superior Courts Act, 2013**,
- to provide for the appointment of intermediaries and
- the giving of evidence through intermediaries in proceedings other than criminal proceedings;
- the oath and competency of intermediaries; and
- the giving of evidence through audiovisual link in proceedings other than criminal proceedings;

Criminal (Sexual Offences and Related Matters) Amendment Act Amendment Act

**Commencement
31 July 2022**

- extend the ambit of the offence of incest;
- introduce a new offence of sexual intimidation;
- substitute the phrase “a person who is mentally disabled” or “persons who are mentally disabled” wherever the phrase appears with the phrase “a person with a mental disability” or “persons with mental disabilities”;
- further regulate the inclusion of particulars of persons in the National Register for Sex Offenders;
- extend the list of persons who are to be protected in terms of Chapter 6 of the Act;
- extend the list of persons who are entitled to submit applications to the Registrar of the National Register for Sex Offenders;
- further regulate the removal of particulars of persons from the National Register for Sex Offenders; and
- further regulate the reporting duty of persons who are aware that sexual offences have been committed against persons who are vulnerable,



Offences & Definitions

Amendments to the
Criminal Law (Sexual
Offences and Related
Matters) Amendment
Act, Act 32 of 2007

Criminal Law (Sexual Offences and Related Matters)
Amendment Act Amendment Act, 13 of 2021

(assented to 28 January 2022, commenced 31 July 2022)

Changes to definitions in section 1 Act 32/2007

- ‘**care giver**’ means any person who, in relation to a person [who is mentally disabled] with a mental disability, takes responsibility for meeting the daily needs of or is in substantial contact with such person;”;
- (b) by the substitution for the words preceding paragraph (a) of the definition of “**person who is mentally disabled**” of the following words: “
- ‘person [who is mentally disabled] with a mental disability’ means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—”; and
- (c) by the substitution for subparagraph (v) of subsection (3)(d) of the following subparagraph: “(v) a person [who is mentally disabled] with a mental disability.”

NOTE: see heading of Chapter 4 & s 23, s 24, s 25, s 26, s 30 – changed to *person with mental disability* no longer person who is mentally disabled

Amendment: s 12 offence - incest

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

Substitution

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

s 14A - Sexual intimidation

New offence: Part 5

- 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.

**Criminal and Related Matters
Amendment Act –
*Amendments to the Criminal
Procedure Act***

**Commenced
5 Aug 2022**

**Amendments of
Bail provisions**

Offences resorting under Domestic violence and Protection from Harassment, are now deemed as schedule 5 offences.

No police or prosecutor bail - offences where persons in domestic relationship

Section 60 CPA amendments

- **Section 60 (2) (d) substituted with the following paragraph:**
- **(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11)(a) [and], (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application.**
- **In section 60(4) included -**
- The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:
- **(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence**

- **Section 60(2A) substituted with the following**
- The court must, before reaching a decision on the bail application, take into consideration—
- **(a) any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and**
- **(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety.”;**

Inclusions s 60(5) CPA

- The factors in subsection(5) are expanded to include
- (b) any threat of violence which the accused may have made to any person against whom the offence in question was allegedly committed or any other person;
- (c) any resentment the accused is alleged to harbour against any person against whom the offence in question was allegedly committed or any other person;

- The factors in ss(5) are expanded to include in subsection (e) in respect of *'any disposition of the accused to commit..'* and (g) in respect of *'any evidence that the accused previously committed an offence..'*
- **(ii) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or**
- **(iii) an offence referred to in—**
 - **(aa) section 17(1)(a) of the Domestic Violence Act, 1998;**
 - **(bb) section 18(1)(a) of the Protection from Harassment Act, 2011; or**
 - **(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused,**

Inclusions – s 60(10) & s 60(11) CPA

- The following provision is included in s 60(10) -
- (10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: **Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.**
- 60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence —
- **(c) contemplated in section 59(1)(a)(ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.**

Bail – section 60(11B) CPA

- Section 60(11B) -
- (a) In bail proceedings the accused, or his or her legal adviser, is **compelled to inform the court whether—**
- (iii) an **order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011**, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and
- (iv) the accused is, or was at the time of the alleged commission of the offence, a **sentenced offender** who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.

Bail – section 60(12) CPA

- (12) (a) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to ***include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.***
- (b) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a ***domestic relationship***, as defined in section 1 of the Domestic Violence Act, 1998, with the accused, and ***a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused***, where after the provisions of that Act shall apply.

Additional grounds to cancel bail – s 68(1) CPA

- (cA) the accused has contravened any prohibition, condition, obligation or order imposed in terms of—
- (i) section 7 of the Domestic Violence Act, 1998;
- (ii) section 10(1) and (2) of the Protection from Harassment Act, 2011; or
- (iii) an order in terms of any other law,
- that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;
- (d) the accused poses a threat to the safety of the public, **any person against whom the offence in question was allegedly committed**, or of [a] **any other** particular person;

Additional grounds to cancel bail – s 68(1)CPA

- (eA) the accused has not disclosed that—
 - (i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;
 - (ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or
 - (iii) an order in terms of any other law,
- was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;
- (eB) the accused has not disclosed or correctly disclosed that he or she is or was, at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;

Additional grounds to cancel bail – s 68(2) CPA

- *(d)* the accused has contravened any prohibition, condition, obligation or order imposed in terms of—
 - (i) section 7 of the Domestic Violence Act, 1998;
 - (ii) section 10(1) and (2) of the Protection from Harassment Act, 2011; or
 - (iii) an order in terms of any other law,
- that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;
- *(e)* the accused has not disclosed or correctly disclosed that he or she is or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;
- *(f)* the accused has not disclosed that—
 - (i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;
 - (ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or
 - (iii) an order in terms of any other law,
- was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;

A blue graphic resembling a scroll, with a vertical bar on the left side and a small tab on the right side. The text is centered on the scroll.

*Procedural
Amendments*

A red speech bubble with a white outline, containing white text.

COMMENCED
5 Aug 2022

Amendment – section 161(2) CPA

(2) In this section the expression '*viva voce*' shall—

- (a) in the case of a **[deaf and dumb]** witness lacking the sense of hearing or the ability to speak, be deemed to include gesture-language **[and,]**; and
- (b) in the case of a witness under the age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition, which inhibits the ability of that witness to give his or her evidence *viva voce*, **be deemed to include demonstrations, gestures or any other form of non-verbal expression.**

Amendments to s 170A CPA

Testimony through
Intermediaries

**As from 5
August 2022**

S 170A(1) CPA substituted with the following subsection:

- (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—
 - (a) under the biological or mental age of eighteen years;
 - (b) who suffers from a **physical, psychological, mental or emotional condition**; or
 - (c) who is an **older person** as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006),
- to **undue psychological, mental or emotional stress, trauma or suffering** if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.”



Additional categories

ss(11) - Oath to be taken by the intermediary

(11) Subject to subsection (13), any person who is competent to be appointed as an intermediary in terms of subsection (4)(a) must, before commencing with his or her functions in terms of this section, take an oath or make an affirmation subscribed by him or her, in the form set out below before the judicial officer presiding over the proceedings:

- ***'I, do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall, truly and correctly to the best of my knowledge and ability—***
- ***(a) perform my functions as an intermediary; and***
- ***(b) convey properly and accurately all questions put to witnesses***
- ***and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court'.***

Note: PRESCRIBED
OATH

Appointment of intermediary- Enquiry into competency

(12) (a) Subject to subsection (13), before a person is appointed to perform the functions of an intermediary—

- (i) in a magistrate's court for any district or for any regional division, the **magistrate presiding** over the proceedings; or
- (ii) in a Superior Court, the **judicial officer presiding** over the proceedings,
- **must enquire** into the competence of the person to be appointed as an intermediary.

Note: new

PRESCRIBED COMPETENCY INQUIRY & ASPECTS TO ENQUIRY INTO

Appointment of intermediary- *aspects that must be considered in competency enquiry* – s 170A(12)(b) CPA

- The **enquiry must include**, but is not limited to, the person's—
 - (i) fitness as a person to be an intermediary;
 - (ii) experience which has a bearing on the role and functions of an intermediary;
 - (iii) qualifications;
 - (iv) knowledge which has a bearing on the role and functions of an intermediary;
 - (v) language and communication proficiency; and
 - (vi) ability to interact with a witness
 - under the biological age of eighteen years
 - under the mental age of eighteen years
 - who suffers from a
 - physical condition,
 - Psychological condition
 - mental condition or
 - emotional condition, or
 - who is an older person as defined in section 1 of the Older Persons Act, 2006.

No longer
one size fits
all

Appointment of intermediary- certificate of competency

ALTERNATIVE
to in court
enquiry

- (13) (a) The head of a court may, at his or her discretion and after holding an enquiry contemplated in subsection (12),
- issue a certificate in the form prescribed by the Minister by notice in the *Gazette*, to a person whom he or she has
 - Notice still to be published with prescribed certificate
- found to be competent to appear as an intermediary in the court concerned.

NOTE: s 170(13)(e) For the purposes of this section, “head of a court” means the most senior judicial officer of that court.

Appointment of intermediary- Certificate of competency

- (13) (b) Before the head of a court issues the certificate referred to in paragraph (a),
- he or she must cause the person who has been found competent to be appointed as an intermediary to take the oath or make the affirmation referred to in subsection (11) and
- must endorse the certificate with a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

Certificate of competency - effect

- (c) A certificate contemplated in paragraph (a) may be accepted as proof—
- (i) of the competency of a person to be appointed as an intermediary in the court concerned; and
- (ii) of the fact that the person has taken the oath or made the affirmation contemplated in subsection (11),

Certificate of competency - impact

- for purposes of this section, in **any subsequent proceedings** in terms of this Act, **before the court concerned in respect of which a certificate contemplated in paragraph (a) was issued by the head of a court** and
- it is **not necessary** for the magistrate or the judicial officer presiding over the proceedings of the court in question
 - **to administer the oath or affirmation or**
 - **to hold an enquiry into the competence of the person to be appointed as an intermediary.**

Certificate of competency – not prohibiting enquiry by court

NOTE

- *(d)* Paragraph *(c)* must **not be construed as prohibiting** a magistrate or a judicial officer presiding over proceedings **from holding an enquiry, at any stage of the proceedings,** regarding the **competence of a person to act as an intermediary.**

NEW sections:
sections 51A, 51B and 51C
in Magistrates Court Act
and
sections 37A, 37B and 37C
in Superior Courts Act

As from 5
August
2022

***Use of intermediaries in other
proceedings than criminal cases***

Evidence through intermediaries in proceedings other than criminal proceedings – s 37A SCA & s 51A MCA.

- A court may, on application by any party to proceedings in terms of Part II of this Act before the court, or of its own accord and subject to subsection (4), appoint a competent person as an intermediary in order to enable a witness—
- *(a)* under the biological or mental age of 18 years;
- *(b)* who suffers from a physical, psychological, mental or emotional condition; or
- *(c)* who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006),
- to give his or her evidence through that intermediary, if it appears to that court that the proceedings would expose such a witness to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings

Evidence through intermediaries in proceedings other than criminal proceedings

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary, except examination by the court, may take place in any manner other than through that intermediary.

- (b) The intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

Evidence through intermediaries in proceedings other than criminal proceedings

(3) If a court appoints an intermediary in terms of subsection (1), the court may direct that the relevant witness gives his or her evidence at any place—

- (a) which is informally arranged to set that witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, the intermediary, as well as the witness, during his or her testimony.

Evidence through intermediaries in proceedings other than criminal proceedings

- (4) (a) The Minister may, by notice in the *Gazette*, determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
- (b) An intermediary appearing at proceedings in terms of this section who is not in the full-time employment of the State must be paid such traveling and subsistence and other allowances in respect of the services rendered by him or her as prescribed by the rules made by the Rules Board for Courts of Law under the Rules Board for Courts of Law Act, 1985.
 - Rules re S&T, allowances were send out for comment earlier in 2022, already approved by Rules Board but still to be approved & published by Minister

Evidence through intermediaries in proceedings other than criminal proceedings

- (5) A court must provide reasons for refusing any application or request for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings.
- (6) An intermediary referred to in subsection (1) may be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.

Evidence through intermediaries in proceedings other than criminal proceedings

(7) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court, is absent for any reason, becomes unable, in the opinion of the court, to act as an intermediary or dies, the court may, in the interests of justice and after due consideration of the arguments put forward by the parties—

- (a) postpone the proceedings in order to obtain the intermediary's presence;
- (b) summons the intermediary to appear before the court to advance reasons for being absent;
- (c) direct that the appointment of the intermediary be revoked and appoint another intermediary; or
- (d) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.

(8) The court must immediately give reasons for any direction or order referred to in subsection (7)(c) or (d), which reasons must be entered into the record of the proceedings.

Oath and competency of intermediaries: s 37B SCA & s 51B MCA

- (1) Subject to subsection (3), any person who is competent to be appointed as an intermediary in terms of section 51A(4)(a) must, before commencing with his or her functions in terms of section 51A, take an oath or make an affirmation subscribed by him or her, in the form set out below, before the judge/magistrate presiding over the proceedings:
- ***'I,, do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall truly and correctly, to the best of my knowledge and ability—***
 - ***(a) perform my functions as an intermediary; and***
 - ***(b) convey, properly and accurately, all questions put to witnesses***
- ***and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court'.***

Note –
prescribed
oath

Inquiry into competency of intermediaries

- (2) (a) Subject to subsection (3),
- before a person is appointed to perform the functions of an intermediary in a
- High court, magistrate's court for any district or for any regional division,
- the judicial officer presiding over the proceedings
- **must enquire into the competence of the person to be appointed as an intermediary.**

Inquiry into competency of intermediaries

- (2) *(b)* The enquiry contemplated in paragraph *(a)* must include, but is not limited to, the person's—
 - **(i) fitness as a person to be an intermediary;**
 - **(ii) experience, which has a bearing on the role and functions of an intermediary;**
 - **(iii) qualifications;**
 - **(iv) knowledge, which has a bearing on the role and functions of an intermediary;**
 - **(v) language and communication proficiency; and**
 - **(vi) ability to interact with**
 - **a witness under the biological or mental age of 18 years or**
 - **a witness who suffers from a physical, psychological, mental or emotional condition, or**
 - **a witness who is an older person as defined in section 1 of the Older Persons Act, 2006.**

Issuing of competency certificate

- (3) (a) The head of a court may, at his or her discretion and after holding an enquiry contemplated in subsection (2), issue a certificate in the form prescribed by the Minister by notice in the *Gazette*, to a person whom he or she has found to be competent to appear as an intermediary in a superior court, magistrate's court for a district or for a regional division.
- (b) Before the head of a court issues a certificate referred to in paragraph (a), he or she must cause the person who has been found competent to be appointed as an intermediary, to take the oath or make the affirmation referred to in subsection (1) and must endorse the certificate with a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

Competency certificate

- (3) (c) A certificate contemplated in paragraph (a) may be accepted as proof of the—
 - (i) competency of a person to be appointed as an intermediary; and
 - (ii) fact that the person has taken the oath or made the affirmation contemplated in subsection (1),
- for purposes of this section, in any subsequent proceedings in terms of this Act, before a superior court /magistrate's court for a district or for a regional division and it is not necessary for the judicial officer presiding over the proceedings in question to administer the oath or affirmation or to hold an enquiry into the competence of the person to be appointed as an intermediary.

Oath and competency of intermediaries

- *(d)* Paragraph *(c)* **must not be construed as prohibiting** a magistrate **from holding an enquiry**, at any stage of proceedings, regarding the competence of a person to act as an intermediary.
- *(e)* For the purposes of this section, **“head of a court”** means the most senior judicial officer of that court.

Changes to the categories of
persons competent to act as
intermediaries

***NB: New Notice not yet
published***

PERSONS COMPETENT TO BE APPOINTED AS INTERMEDIARIES

- Similar categories will be used for both criminal proceedings and other proceedings
- Currently the following categories have been determined by the Minister:
 - Paediatricians (registered in terms of the Health Professions Act, 1974 (the HPA))
 - Psychiatrists (registered in terms of the HPA)
 - Clinical, counselling and educational Psychologists (2 years' experience and registered in terms of the HPA)

PERSONS COMPETENT TO BE APPOINTED AS INTERMEDIARIES

- Family Counsellors appointed in terms of the Mediation in Certain Divorce Matters Act, 1987, and falls under any of the categories listed in the determination
- Social Workers, including retired social workers (2 years' experience and registered in terms of the Social Service Professions Act, 1978 (the SSPA)
- Educators, including former and retired educators (3 years' experience and registered in terms of the SA Council of Educators Act)
- Child youth care workers (3 years' experience registered in terms of SSPA

PERSONS COMPETENT TO BE APPOINTED AS INTERMEDIARIES

- The following **additional categories** of persons competent to be appointed as intermediaries:
 - General practitioners and family physicians (3 years' experience and registered in terms of the HPA)
 - Occupational therapists, speech therapists, audiologists, physiotherapists, art therapists (3 years' experience and registered in terms of the HPA)
 - Professional nurses, including former and retired nurses (3 years' experience in paediatric or psychiatric ward and registered in terms of the Nursing Act, 2002)

PERSONS COMPETENT TO BE APPOINTED AS INTERMEDIARIES

- The following **additional categories** of persons competent to be appointed as intermediaries:
- Early childhood development practitioners employed by an early childhood development centre registered with the relevant government department (10 years experience)
- Community Trauma counsellors who are employed by an NGO (10 years experience)

PERSONS COMPETENT TO BE APPOINTED AS INTERMEDIARIES

NOTE

- *Persons whose names appears on registers contemplated by these provisions are not competent to be appointed as intermediaries:*
 - section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)

For Competency Inquiry in Court & for Competency Certification – JP, RCP & Chief Magistrate that is head of administrative region

Proof of
qualifications
& current registration
experience & knowledge –
specific category of witnesses
language proficiency
Clearance certificate of NRSO

CERTIFICATION WILL SPECIFY

competency in terms of s 170A
CPA &/ s 51A MCA/s37C SCA
For that court level

For Specify category of witnesses

- under the biological age of 18
- Under the mental age of 18 years
- who suffers from a physical condition
 - Psychological condition
 - mental condition
 - emotional condition,
- witness who is an older person (s 1 of the Older Persons Act, 2006)

Period that certificate will be valid

*Remote link
Audio-visual testimony*

Amendments s 158 CPA &
inclusion of new s 51C MCA
& s 37C SCA

Commenced
5 Aug 2022

Audio-Visual testimony – s 158 CPA

- Section 158 of the Criminal Procedure Act, 1977, is amended—
- The substitution in subsection (2) (a) with the following paragraph:
- **“(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.”**; and
- The addition of the following subsection:
- **(6) For purposes of this section, a witness who is outside the Republic and who gives evidence by means of closed circuit television or similar electronic media, is regarded as a witness who was subpoenaed to give evidence in the court in question.**

Evidence through audiovisual link in proceedings other than criminal proceedings - s 51C MCA & s 37C SCA

*New
provision*

- (1) A court may, on application by any party to proceedings in terms of Part II of this Act before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, may give evidence by means of audiovisual link.

Evidence through audiovisual link in proceedings other than criminal proceedings

- (2) A court may make an order contemplated in subsection (1) only if—
- (a) it appears to the court that to do so would—
 - (i) (aa) prevent unreasonable delay;
 - (bb) save costs;
 - (cc) be convenient; or
 - (dd) prevent the likelihood that any person might be prejudiced or harmed if he or she testifies or is present at such proceedings; and
 - (ii) otherwise be in the interests of justice;
 - (b) facilities thereof are readily available or obtainable at the court; and
 - (c) the audiovisual link that is used by the witness or at the court enables—
 - (i) persons at the courtroom to see, hear and interact with the witness giving evidence; and
 - (ii) the witness who gives evidence to see, hear and interact with the persons at the courtroom.

Evidence through audiovisual link in proceedings other than criminal proceedings

- (3) The court may make the giving of evidence in terms of subsection (1) subject to such conditions as it may deem necessary in the interests of justice.
- (4) The court must provide reasons for—
 - (a) allowing or refusing an application by any of the parties; or
 - (b) its order and any objection raised by the parties against the order, as contemplated in subsection (1).
- (5) For purposes of this Act, a witness who gives evidence by means of audiovisual link is regarded as a witness who was subpoenaed to give evidence in the court in question.
- (6) For purposes of this section “**audiovisual link**” means facilities that enable both audio and visual communications between a witness and persons at a courtroom in real-time as they take place.

Amendments to the Criminal Law Amendment
Act, Act 105 of 1997
to further regulate sentences in respect of
offences that have been committed against
vulnerable persons



Amendments to Schedule 2

PART I: Murder, when -

- Murder, when-
- **(a)(iii) a person under the age of eighteen years;**
 - **New inclusion to cater for murder of children specifically**
- **(g) the death of the victim resulted from physical abuse or sexual abuse, as contemplated in paragraphs (a) and (b) of the definition of “domestic violence” in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim.**
 - **New inclusion – will cover intimate partner femicide**
- **Attempted murder, in circumstances referred to in paragraphs (a) to (g) of the offence of "murder".**
 - **new inclusion**

Current 'domestic relationship' definition DVA, 1998

means a relationship between a complainant and a respondent in any of the following ways:

- (a) They are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they share or recently shared the same residence

PART I: Rape (s 3 Act 32/2007) & Compelled Rape (s 4 Act 32/2007) when committed-

- in the circumstances where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by-
 - any co-perpetrator or accomplice; or
 - a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,
- irrespective of whether or not the co-perpetrator or accomplice
 - **has been convicted of, or**
 - **has been charged with, or**
 - **is standing trial**
- in respect of, the offence in question;
 - **Changed wording to clarify**

PART I: Rape (s 3 Act 32/2007) & Compelled Rape (s 4 Act 32/2007) when committed-

- in the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted
 - in the execution or furtherance of a common purpose or conspiracy and
 - evidence adduced at the trial of the accused proves that
 - the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim,
- irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy
 - has been convicted of, or
 - has been charged with, or
 - is standing trial
- in respect of, the offence in question;
 - **Changed wording to clarify**

PART I: Rape (s 3 Act 32/2007) & Compelled Rape (s 4 Act 32/2007) when committed-

- by the accused who-
 - has previously been convicted of the offence of rape or compelled rape; or
 - has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape, irrespective of-
 - whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;
 - the date of the commission of any such offence of which the accused has so been convicted;
 - whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;
 - whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or
 - whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions; or
 - **Changed and expanded wording to clarify**

PART I: Rape (s 3 Act 32/2007) & Compelled Rape (s 4 Act 32/2007)

- where the victim-
 - is a person under the age of **18 years**;
 - **Previously under 16 years**
 - is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);
 - is a person with a disability who, due to his or her disability, is rendered vulnerable;
 - is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
 - is or was in a **domestic relationship**, as defined in section 1 of the Domestic Violence Act, 1998, with the accused; or
 - **New inclusion**
- involving the infliction of grievous bodily harm.

New offences in Part II

- Attempted murder in circumstances other than those referred to in Part I.
 - **New addition**
- Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Part I.
 - ***Moved from part III to part II***
- Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23, or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively
 - ***Moved from part III to part II***

Changes and additions: Part III

- Assault with intent to do grievous bodily harm-
 - (a) on a child-
 - (i) under the age of 16 years; or
 - **(ii) either 16 or 17 years of age and the age difference between the child and the person who has been convicted of the offence is more than four years; or**
 - **(b) where the victim is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.**
- **New additions – (a)(ii) & (b)**

Retrospectivity and minimum sentences

- Retrospectivity in sentencing is addressed in s 35(3)(n) of the Constitution which guarantees an accused person's right to a fair trial through enjoying
 - ***'the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'***
- *S v Leburu* 2005 (1) SACR 286 (NC), where the increase in the general jurisdiction of regional courts was preferred to the minimum-sentences legislation (Act 105 of 1997) in terms of which a lower maximum applied. The judgment was based on the number of absurdities which would otherwise arise
- *S v Willemse* 1999 (1) SACR 450 (C); *S v Hlongwane* 2000 (2) SACR 681 (W) at 682*i*.
 - Act 105/97 not applicable to crimes committed prior to date of commencement
- *S v Shaik* 2008 (1) SACR 1 (CC) considered the position of an "ongoing offence", which commenced before the advent of the Act but continued afterwards. The Court held (at paras 81, 82) that there was no chance of success for an appeal based on the ground that the Act did not apply retrospectively, especially since the threshold of R500 000 in schedule 2 was exceeded by acts committed *after* the commencement of the Act.

Consequential / Ancillary Orders: Registers

- National Sex Offender Register (Act 32/2007)
- Children's Act – Child Protection Register
- Firearms Control Act – Register
- Older Person's Act – Register
- Corrupt activities – tender - Register

Commenced 31
July 2022

Amendments to the Criminal Law (Sexual
Offences and Related Matters
Amendment Act, Act 32 of 2007

NRSO amendments

Changes – National Register for Sex Offenders

- Section 2 of the principal Act is amended by the substitution for paragraph (g) of the following paragraph:
- “(g) establishing a National Register for Sex Offenders in order to establish a record of persons who are or have been convicted of any ‘**sexual offences**’, as defined in section 40, so ***as to prohibit such persons from being employed in a manner that places them in a position to work with or have authority or supervision over or care of persons who are vulnerable.***”.
- Note changes in section 40 – definition of employer & licencing authority changed – also changed to ***persons who are vulnerable***
 - **no longer only children & persons with mental disability**
- Also same changes to s 41

'person who is vulnerable' definition s 40

NEW

- **(a) child or a person with a mental disability;**
- **(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 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);
 - (ii) receives vocational training at any training institute, other than the institutions referred to in subparagraph (i), or as part of their employment; or
 - (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);
- **(c) person who is being cared for or sheltered in a facility that provides services to victims of crime;**

'person who is vulnerable' definition s 40

NEW

- **(d) person with a physical, intellectual or sensory disability** and who—
 - (i) receives community-based care and support services, other than from a family member for;
 - (ii) lives in a building, structure or facility used primarily as a residence for; or
 - (iii) is cared for in a facility providing 24-hour care to, persons with physical, intellectual or sensory disabilities; or
- **(e) person who is 60 years of age or older** and who—
 - (i) receives community-based care and support services, other than from a family member for;
 - (ii) lives in a building, structure or facility used primarily as a residence for; or
 - (iii) is cared for in a facility providing 24-hour care to, such persons;”;

Section 50 – who to include in NRSO

- (a) A court that has-
 - (i) convicted a person of a **sexual offence** and, after sentence has been imposed by that court for such offence, **in the presence of the convicted person**; or
 - (ii) made a finding and given a direction in terms of **section 77(6) or 78(6)** of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence, in the presence of that person,
- must, subject to paragraph (c), make an order that the particulars of the person be included in the Register.

'sexual offence' definitions 40

NEW

- (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), (child pornography)
- that **was committed** against a **child or a person with a mental disability** **between the period of 16 June 2003 and the date of;**
- the **commencement** of the Criminal Law (Sexual Offences and Related Matters) Amendment Act **Amendment Act, 2021.**
 - **5 Aug 2022**

'sexual offence' definition s 40

NEW

- (b) any—
 - (i) offence referred to in **sections 3 to 10, 12 to 26 and 55** of this Act;
 - (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
 - (iii) contravention since 16 June 2003 of section 24B(1) or (3) of the Films and Publications Act, 1996;
 - **NOTE: s 24B deleted by s 58 of the Cybercrimes Act, Act 19/2020 wef 1 December 2021**
- **that was committed after the date of the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021.**
 - **5 Aug 2022**

***Amendment to
section 299A
Criminal
Procedure Act***

**Commenced
5 Aug 2022**

s 299A CPA Right of complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision

- (1) **When a court sentences a person to imprisonment for-**
 - (a) murder
 - (b) rape or compelled rape
 - (c) robbery, where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;
 - (d) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7
 - (e) kidnapping;
 - (f) any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs (a) to (e);
 - (g) offences as provided for in sections 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013; or
 - **(h) a period exceeding seven years for any offence, which that person committed against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with that person,**
 - **New inclusion**

**it shall inform the complainant;
if he or she is present
that he or she has a right, s
subject to the directives issued by the
Commissioner of Correctional Services
under subsection (4), to make
representations when placement of
the prisoner on parole, on day parole
or under correctional supervision is
considered or to attend any relevant
meeting of the parole board.**

Thank you!

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advancing human rights and equal justice for all