

Editors' Note April 2014

Since the publication in February 2011 of our Commentary on the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter SORMA) up to end December 2013, much has changed to necessitate a fairly comprehensive update to the Commentary. Of the 31 chapters into which the Commentary was divided, only chapters 16, 18, 22, 24, 26 and 27 required no amendments. In the interim, the professional titles of some of the authors have changed; updates to chapters 1 and 19 reflect only these minute changes.

The many remaining chapters, listed below, required both extensive updates to reflect changes occasioned by new policies and guidelines, legislative amendments and case law that impacted on SORMA, as well as minor word changes and clarifications to the original material. Some chapters have been rearranged and new material added. Each of the below listed chapters thus deserves close reading anew. However, for ease of use, attention is drawn to important changes specifically prompted by new case law, new policies, and by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 and new legislation, such as the Prevention and Combating of Trafficking in Persons Act 7 of 2013, to each chapter listed below:

Chapter 2: Section 3: Rape

Section 1(1): The definition of 'sexual penetration' has been reaffirmed by the judgment in *MM v S* 2012 (2) SACR 18 (SCA). Attention is also drawn to *S v Manqxeke* (unreported) Eastern Cape High Court, Port Elizabeth, which noted that the definition of 'sexual penetration' provides for a situation where a woman forces a non-consensual man to penetrate her. There is also commentary on whether the phrase 'any act which causes' could include omission within the definition of rape.

Section 1(3)(a): In *S v Lunga and Others* (ZAFSHC 226) [2012] case no A292/2011, 6 December 2012, unreported, the court displayed understanding of the meaning of the word 'harm' to include coercive power relations in a prison rape.

Section 1(3)(b): The commentary update amplifies on the word 'inhibit' and makes reference to *Pretorius v S* 2013 (1) SACR 261 (WCC).

Section 1(3)(d)(ii): *S v McLaggan* (ZAECGHC 63) [2012] case no CC70/2011, 20 August, unreported, affirms that there can be no consent if the victim is unconscious.

Section 1(3)(d)(v): That mental disability vitiates consent is upheld in *Mazondwa v State* (ZAECGHC 30) [2013] case no 353/2012, 11 April 2013, unreported.

Section 3: This section creates the statutory offence of rape. However, prior to its amendment, SORMA failed to stipulate the nature and extent of penalties attach to the commission of the offence. This omission also applied to offences created or intended to be created in sections 4-11, 12(1), 13-14, 15(1), 16(1) and 17-26. Nor

did SORMA provide a general penalty clause. This omission was remedied by s 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 (hereafter the Amendment Act). The Amendment Act thus remedies not only the lacuna in s 3, but all the sections listed above. However, to prevent extensive repetition, extensive commentary on the impact of the legislative amendment is provided in chapter 2 (where it first becomes pertinent) and a truncated commentary thereon with a cross-reference to chapter 2 is provided in the relevant subsequent chapters. The updated commentary traces the jurisprudence regarding the principle of legality, prior to the Amendment Act of 2012, enumerating relevant case law, followed by the disparate findings of the Western Cape and South Gauteng High Courts in *Director of Public Prosecution, Western Cape v Prins* 2012 (2) SACR 67 (WCC); *S v Boo* (ZAFSHC) [2010] case no 14/2010, 12 August 2010, unreported; *S v Rikhotso* [2012] ZAGPJHC 106 case no SS105/11, 25 May 2012; and in *Matwa v S* [2012] ZAGPPHC 129 case no A443/2011, 13 June 2012, unreported, and culminating in the urgent appeal to the Supreme Court in *Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 183 (SCA). The promulgation of the Amendment Act later in 2012 finally unequivocally ensured that the principle of legality applied to all offences created by SORMA.

Chapter 3: Sections 4–7: Compelled rape, sexual assault, compelled sexual assault, and compelled self-sexual assault

This chapter required only a brief allusion to the impact of s 5 of the Amendment Act 6 of 2012 on ss 4-7 of SORMA (see Penalties). A cross-reference is provided to the expansive commentary regarding penalties in chapter 2.

Chapter 4: Sections 8–9: Compelling or causing a person 18 years or older to witness sexual offences, sexual acts or self-masturbation, and flashing to persons 18 years or older

Section 8(1): In *S v Rikhotso* (SS105/11) [2012] ZAGPJHC 106 (15 May 2012) the accused was charged with an offence created by s 8 of SORMA, however, the judgment does not deal with its application to s 8(1).

Sections 8(1) and (2): A brief comment on the meaning of the word to ‘watch’.

Section 8(3): Pretorius v S (A74/12) [2012] ZAWCHC 167 (7 September 2012) examines the linguistic meaning of the word ‘cause’. The update notes that *Pretorius v S* (supra) does not expound on the meaning of ‘self-masturbation’. *Pretorius v S* (supra) applied s 1(3)(b) to the facts of the case.

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on ss 8-9 of SORMA are briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 5: Section 10: Exposure or display of child pornography to persons 18 years or older

An update to the commentary on the meaning of ‘child pornography’ makes clear that sexual arousal is not a determinant of what constitutes child pornography.

Paragraph (1) of subsection 1(1): With regard to the meaning of the words 'within the context', the updates note that the classification guidelines for the Classification of Films, Interactive Computer Games and certain Publications have been reissued in GN 804 in GG 35765 of October 2012.

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on s 10 of SORMA is briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 6: Section 11: Engaging sexual services of persons 18 years or older

Section 20(1A)(a) of the 1957 Sexual Offences Act: Attention is drawn to the fact that prisoners who provide sexual services for reward, with the necessary *mens rea*, may be committing prostitution.

Section 20(1A)(a) of the 1957 Sexual Offences Act: Notwithstanding the total criminalisation of prostitution in South African law, the Labour Appeal Court found in *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC) that sex workers were entitled to labour rights.

Section 11 of SORMA: Amendment Act 6 of 2012 amends s 11 by inserting the words 'the offence of' between the words 'is guilty of' and 'engaging the sexual services of a person', thus ensuring that s 11 creates an offence that attracts penalties.

Penalties: The application of s 56A(1), introduced by the Amendment Act 6 of 2012, is clarified.

Chapter 7: Section 12: Incest

Section 12(1): The update note that if a child is one of the parties to incest, the child may raise the defence stipulated in s 56(4) of SORMA.

Section 12(1): With regard to adoption, the commentary is updated to reflect the latest provisions of the Children's Act 38 of 2005.

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on s 12 of SORMA is briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 8: Sections 13–14: Bestiality and sexual act with corpse

This chapter required only a brief update on the impact of s 5 of the Amendment Act 6 of 2012 on ss 4-7 of SORMA (see Penalties). A cross-reference is provided to the expansive commentary regarding penalties in chapter 2.

Chapter 9: Sections 15–16: Consensual sexual acts with certain children

Regarding Constitutional issues: This chapter alerts the reader to the conflict between a child's right to be protected and a child's right to autonomy and how this affects ss 15 and 16 of SORMA.

Regarding the definition of a 'child': The update comments fulsomely on the definition of 'child'. Note the latest case law: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Others* Case 73300/10 [2013] ZAGPPHC 1 (2013) 1 SACJ 41.

Section 16(2) and (3): Note the role of the **Provincial** Director of Public Prosecution.

Sections 15 and 16: The constitutional challenge raised by the *Teddy Bear Clinic High Court* case (supra) and the subsequent declaration of the constitutional invalidity of aspects of these two sections — *Teddy Bear Clinic and Another v Minister of Justice and Constitutional Development and Another* 2013 (12) BCLR 1429 (CC) receives fulsome explication. Note also the confusion regarding the relevance of *Geldenhuis v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC).

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on s 12 of SORMA is briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 10: Section 17: Sexual exploitation of children

Section 17(1): Similar to s 11, the updated commentary makes clear that the Amendment Act 6 of 2012 amends s 17(1) by making the sexual exploitation of a child an explicit offence. The result is that s 56A(1), as introduced by the Amendment Act, becomes applicable to this offence (see Penalties).

Chapter 11: Section 18: Sexual grooming of children

Section 18(2): A brief opinion why the offence of sexual grooming is not defined in s 18(2).

With regard to the impact of grooming: Commentary on *S v Mugridge* SE 2006-09-13 case no CC48/06.

With regard to minimum sentencing legislation: Commentary on the importance of placing evidence of grooming before the court for sentencing purposes: see *S v Thabethe* TPD 2009-01-23 case no CC468/2006.

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on s 18 of SORMA is briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 12: Sections 19–20: Exposure or display of child pornography or pornography to children, and using children for or benefiting from child pornography

Note that for greater clarity, this chapter has been rearranged with new material added.

Section 19(1): The updates explicitly state the elements of the offence in s 19(1). Regarding the definition of child pornography (s 1(1) of SORMA: The reader is referred to the updates to chapter 5 regarding the term ‘child pornography’.

Section 20(1): Clarification of this subsection regarding the consent of the child and the **irrelevance** of reward, favour or compensation.

Section 20(2): The **relevance** of a reward, favour or compensation in this subsection.

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on ss 19 and 20 of SORMA are briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 13: Sections 21–22: Compelling or causing children to witness sexual offences, sexual acts or self-masturbation, and flashing to children

Section 21: With regard to other children witnessing sexual offences, sexual acts or self-masturbation commentary is provided on new case law: *Currin v S* (AR499/10) [2012] ZAKZPHC 46 (1 August 2012) and *S v Rikhotso* (SS 105/11) [2012] ZAGPJHC 106 (25 May 2012).

Section 22: Although the accused in *Currin v S* (supra) exposed his genitals to the children present, the judgment makes no pronouncement on s 22 since the accused was not charged with this offence.

Penalties: The impact of s 5 of the Amendment Act 6 of 2012 on ss 21 and 22 of SORMA are briefly outlined, with a cross-reference to the expansive commentary regarding penalties in chapter 2.

Chapter 14: Sections 23–26: Sexual offences against persons who are mentally disabled

Section 23 (1): The commentary alerts the reader to the fact that Amendment Act 6 of 2012 amends this subsection to make explicit that the exploitation of a person who is mentally disabled is an offence.

Penalties: The offences created by ss 23-26 now attract penalties.

Chapter 15: Sections 28–29: Services for victims of sexual offences

This chapter has been fairly extensively rewritten to provide greater clarity on a range of issues, particularly post-exposure prophylaxis (PEP). The reader is alerted to the fact that the list of the locations of designated public health facilities where PEP and HIV testing is administered free of charge to sexual offence survivors has been made public by GN R545 in GG 34420 of July 2011.

Chapter 17: Sections 40–53: National Register for Sex Offenders

Section 40: With regard to the definition of 'employee' see the following new labour court cases: *City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council and Others* (2012) 33 ILJ 191 (LC) and *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 ILJ 738 (LC).

Section 42(3): Regarding the establishment of the National Register for Sex Offenders, the update points out that the Register came into effect on 30 June 2009. The update provides Register data as at January 2013.

Section 50(1): The update notes that the *S v RB; S v DK and Another* 2010 (1) SACR 447 (NCK) ruled on whether the names of minor offenders must appear in the Register.

Section 50(2): Note the important update regarding the Western Cape High Court declaring s 50(2) unconstitutional: *Johannes v S TSOC* 73/12.

Section 51(1): *S v RB; S v DK and Another* 2010 (1) SACR 447 (NCK) impacts on this subsection as well.

Chapter 20: Sections 56(1) and 56A: Defences and sentencing

Section 56(7): deleted by Act 6 of 2012 and replicated verbatim in section 56A(2).

Section 56A: inserted by way of Act 6 of 2012 to remedy the omission of penalty clauses from various offences in the Act. Section 276 of the Criminal Procedure Act is brought into application where a penalty is not prescribed by SORMA or another Act.

Chapter 21: Section 56 subsections (2)–(6) and subsection (8): Defences relating to children and mentally disabled persons

The updated commentary clarifies that the Constitutional Court ruling in the *Teddy Bear Clinic and Another v Minister of Justice and Constitutional Development and Another* 2013 (12) BCLR 1429 (CC) also impacts on subsections 56(2)–(6) (regarding defences and sentencing where a child is involved) and subsection 56(8) (regarding defences and sentencing where a mentally disabled person is involved).

Chapter 23: Sections 58–60 and amendment in terms of s 68(2): matters pertaining to evidence

Sections 59 and 60: New cases that speak to the cautionary rule are highlighted: *S v Leve* 2011 (1) SACR 87 (ECG) and *S v Hanekom* 2011 (1) SACR 430 (WCC).

Section 227(6) of the Criminal Procedure Act of 1977: For an application of this section the update points to *S v Mkhize* 2012 (2) SACR 90 (KZD).

Chapter 25: Sections 62–65: National policy framework

This chapter has been expansively rewritten to set out and comment on the National Policy Framework, provided for by s 62 of SORMA, which was Gazetted in July 2013.

Chapter 28: Section 68(2) and Schedule: Repeal and amendment of laws — Amendment of s 158 of the Criminal Procedure Act 51 of 1977

The update draws attention to new case law regarding the court's responsibilities to ensure that a witness, particularly a child witness, understands the court oath: *Bessick v S A539/2010 High Court (C)* 29 May 2012.

Chapter 29: Section 68(2) and Schedule: Repeal and amendment of laws — prescription of claims relating to sexual offences

When it commences, the Prevention and Combating of Trafficking in Persons Act 7 of 2013 will repeal the relevant 'interim' measures in SORMA. The updated commentary of this chapter explains this in detail.

Chapter 30: Section 69: Transitional Provisions

The constitutional challenge to s 69 has, subsequent to the first publication of the commentary, been settled by the Constitutional Court in *S and Another v Acting Regional Magistrate, Boksburg and Another* 2011 (2) SACR 274 (CC).

Chapter 31: Sections 70-71: Transitional provisions relating to trafficking in persons for sexual purposes

With regard to the 'interim' provisions in SORMA relating to the trafficking of persons for sexual purposes the update draws attention to the fact that, at the time of writing, the commencement date for the Prevention and Combating of Trafficking in Persons Act 7 of 2013 has yet to be Gazetted.

Finally, the updated chapters have credited, and the editors would like to thank, the new authors who gave of their expertise: Dawn Coleman of the National Prosecuting Authority of South Africa (Chapters 5 and 12), Omowamiwa Kolwolea researcher at the Centre for Law and Society, University of Cape Town (Chapter 6) and Carina du Toit of the Centre for Child Law at the University of Pretoria (Chapters 9 and 21).

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