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REPUBLIC OF SOUTH AFRICA

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**CHILDREN'S AMENDMENT ACT**

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IRIPHABHULIKI YASENINGIZIMU AFRIKA

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**UMTHETHO OCHIBIYELA  
AMALUNGELO ABANTWANA**

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**No 17, 2016**

**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_                Words underlined with a solid line indicate insertions in existing enactments.

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# ACT

**To amend the Children’s Act, 2005, so as to insert certain definitions; to provide that a person convicted of certain offences be deemed unsuitable to work with children; to afford a child offender an opportunity to make representations as to why a finding of unsuitability to work with children should not be made; to provide that the National Commissioner of the South African Police Service must forward to the Director-General all the particulars of persons found unsuitable to work with children; to provide for a child offender to apply in the prescribed manner to have their particulars removed from the Register; to provide for the review of a decision to remove a child without a court order; to extend the circumstances as to when a child is adoptable; to extend the effects of an adoption order by providing that an adoption order does not automatically terminate all parental responsibilities and rights of a parent of a child when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent; and to provide for matters connected therewith.**

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 38 of 2005, as amended by section 3 of Act 41 of 2007**

**1.** Section 1 of the Children’s Act, 2005 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of “commissioning parent” of the following definition:

“ **‘Constitution’** means the Constitution of the Republic of South Africa, 1996;”; and

## INCAZELO EFINGQIWE EJWAYELEKILE:

[ ] Amagama akubakaki abayisikwele abagqamile amele okukhishiwe emthethweni osebenzayo.

\_\_\_\_\_ Amagama adwetshelwe ngomugqa amele okufakiwe emthethweni osebenzayo.

# UMTHETHO

Ukuchibiyela uMthetho wamaLungelo abaNtwana, 2005, ukuze kufakwe izincazelo ezithile; ukubeka ukuthi umuntu olahlwe icala locansi athathwe njengomuntu okungafanele asebenze nabantwana; ngaphambi kokukhipha isinqumo sokuthi leyo ngane akufanele isebenze nabantwana, nikeza lowo onecala ithuba lokwethula izethulo zokuthi kungani lowo myalelo kungafanele ukhishwe; ukubeka ukuthi uKhomishana kaZwelonke woPhiko lwezeMisebenzi yamaPhoyisa aseNingizimu Afrika kufanele athumele kuMqondisi-Jikelele yonke imininingwane yabantu okutholakale bengakufanele ukuba basebenze nabantwana; ukubeka ukuthi onecala elibandakanya umntwana afake isicelo ngendlela enqunyiwe, sokuba imininingwane yabo isuswe kwiRejista; ukuhlinzekela ngokubuyekeza isinqumo sokuthatha umntwana ngaphandle komyalelo wenkantolo; ukunweba izimo zokuthathwa kwezintandane; ukunweba amandla omyalelo wokuthatha intandane ngokuhlinzekela ngokuba umyalelo wokuthatha intandane ngokubeka ukuthi umyalelo wokuthatha intandane awuqedi zonke izibophezelo namalungelo okuba umzali uma kukhishwa umyalelo wokuthathwa kwintandane ohambisana nomlingani noma nomuntu ohlala nalowo mzali womlingani ngokugcwele; kanye nokuhlinzekela izindaba ezihambisana nawo.

**UZOMISWA** iPhalamende laseRiphabhuliki yaseNingizimu Afrika, ngale ndlela elandelayo:—

**Ukuchibiyela isigaba 1 soMthetho wama-38 wezi-2005, njengoba uchitshiyelwe ngesigaba 3 soMthetho 41 wezi-2007**

**1.** Ngakho-ke isigaba soku-1 soMthetho wamaLungelo abaNtwana, 2005 (kulokhu owaziwa njengoMthethongqangi), siyachitshiyelwa—

(a) ngokushutheka ngemuva kwencazelo “umzali osayinde isivumelwane sokumitha ingane yomunye umuntu” le ncazelo elandelayo:

“**‘uMthethosisekelo’** uchaza uMthethosisekelo waseRiphabhuliki yaseNingizimu Afrika, 1996;”;

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- (b) by the insertion after the definition of “sexual abuse” of the following definition:

“**‘sexual offence’** means sexual offence as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), and any offence of a sexual nature in any other law;”.

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#### Amendment of section 120 of Act 38 of 2005

#### 2. Section 120 of the principal Act is hereby amended—

- (a) by the insertion after subsection (1) of the following subsection:

“(1A) The provisions of subsection (1)(c) are not applicable to a person who was a child at the time of the commission of the alleged offence.”;

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- (b) by the substitution for subsection (4) of the following subsection:

“(4) In criminal proceedings, subject to the provisions of subsection (4A), a person must be [found] deemed unsuitable to work with children—

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- (a) on conviction of murder, **[attempted murder,]** rape, indecent assault or any sexual offence contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), assault with the intent to do grievous bodily harm **[with regard to a child]**, where a child is the victim of any such offence, or any attempt to commit any such offence, or possession of child pornography as contemplated in section 24B of the Films and Publications Act, 1996 (Act No. 65 of 1996), or offences in terms of section 8, 9, 10 or 24A(5) of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or

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- (b) if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 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 **[murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child]** an offence contemplated in paragraph (a).”;

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- (c) by the insertion after subsection (4) of the following subsection:

“(4A) If a court has, in terms of this Act or any other law, convicted a person of an offence referred to in subsection (4)(a) and such a person 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 subsection (4)(b) in respect of such person who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in subsection (4)(a) unless—

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- (a) the prosecutor has made an application to the court for such an order;
- (b) the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of committing an offence contemplated in subsection (4), against a child;
- (c) the person concerned has been given the opportunity to address the court as to why his or her particulars should not be included in the Register; and
- (d) 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.

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- (b) ngokushutheka ngemuva kwencazelo “ukuhlukumeza okuhambisana nocansi” le ncazelo elandelayo:

“**‘icala elibandakanya ucansi’** lichaza icala elibandakanya ucansi njengoba kuchaziwe kwi-*Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)*, nanoma iliphi icala eliwuhlobo lokunukubeza ngokocansi kunoma imuphi umthetho;”.

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## Ukuchibiyela isigaba 120 soMthetho wama-38 wezi-2005

### 2. Ngakho-ke isigaba sama-120 soMthethongqangi sichitshiyelwe—

- (a) ngokufaka endaweni yesigatshana (1) isigaba esilandelayo:  
 “(1A) Imbandela yesigatshana soku-(1)(c) ayiqondisile kumuntu owayeseyingane ngenkathi enza icala asolwa ngalo.”;
- (b) ngokufaka endaweni yesigatshana sesi-(4) isigaba esilandelayo:  
 “(4) Ezinyathelweni ezithinta ubulelesi, ngokulandela imibandela yesigatshana sesi-(4A), umuntu kufanele **[atholakale]** athathwe ngokuthi akufanele asebenze nabantwana—
- (a) uma elahlwe icala lokubulala, **[ukuzama ukubulala]**, ukunukubeza, ukushaya okuhambisana nocansi noma eliphi icala elibandakanya ucansi elivezwe kwi-*Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)*, noma ukushaya ngenhloso yokulimaza, **[ingane]**, lapho ingane kuyiyona ehlukeyezwe ilelo cala, noma omuphi umzamo wokwenza lelo cala, noma ukutholakala kwemifanekiso yocansi ebandakanya umntwana njengoba kuveziwe esigabeni sama-24B se-*Films and Publications Act, 1996 (Act No. 65 of 1996)*, noma amacala ngokwesigaba sesi-8, 9, 10 noma 24A(5) se-*Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013)*; noma
- (b) uma inkantolo ikhipha isinqumo futhi ikhipha imiyalelo ngokwemi-gomo yesigaba sama-77(6) noma sama-78(6) se-*Criminal Procedure Act, 1977 (Act No. 51 of 1977)*, sokuthi lowo muntu ugula ngekhandu noma unokukhubazeka emqondweni okwenza angaziqondi izinyathelo zomthetho zokuziphendulela ngendlela efanele noma ngesizathu sokugula ngomqondo noma sokukhubazeka ngokomqondo ngokobulelesi angabhekene nesenzo esihlanganisa **[ukubulala, ukuzama ukubulala, ukunukubeza, ukushaya okuhambisana nocansi noma ukushaya ngenjongo yokulimaza ingane]** icala elivezwe endimeni (a).”;
- (c) ngokushutheka isigatshana sesi-(4) kulesi sigatshana esilandelayo:  
 “(4A) uma inkantolo, ngokwalo Mthetho noma nganoma imuphi umthetho, ilahle ngecala umuntu owenze icala okukhulunywe ngalo esigatshaneni sesi-(4)(a) kanti lowo muntu wayeseyingane ngenkathi enza icala elinjalo, noma uma inkantolo yenze isinqumo bese yakhipha umyalelo okukhulunywe ngawo esigatshaneni sesi-(4)(b) maqondana nomuntu onjalo owayeseyingane ngenkathi enza icala asolwa ngalo, inkantolo ingangawukhipha umyalelo njengokuba kuvezeze esigatshaneni (4)(a) ngaphandle uma—
- (a) umshushisi esenze isicelo enkantolo ngomyalelo onjalo;
- (b) inkantolo isibheke umbiko owenziwe isikhulu esihlola iziboshwa ezidonsela izigwebo zazo ngaphandle okukhulunywe ngakho esigabeni sama-71 se-*Child Justice Act, 2008*, esibhekene namathuba okwenza icala elihlongozwe esigatshaneni sesi-(4), elibhekiswe enganeni;
- (c) umuntu othintekayo enikwe ithuba lokukhuluma nenkantolo echaza ukuthi yingani imininingwane yakhe kungamele ifakwe kuRejista; futhi
- (d) inkantolo yanelisekile ukuthi izimo ezizwakalayo neziphoqayo zibe khona zisekelwa umbiko onjalo nanoma ibuphi ubufakazi, obuvumela ukwenziwa komyalelo onjalo.

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(4B) In the event that a court finds that substantial and compelling circumstances exist which justify the making of an order as contemplated in subsection (4), the court must enter such circumstances on the record of the proceedings.”; and

(d) by the substitution for subsection (5) of the following subsection: 5

“(5) Any person who has been convicted of an offence contemplated in subsection (4)(a), whether committed in or outside the Republic during the five years preceding the commencement of this Chapter, is deemed to be unsuitable to work with children unless such person was a child at the time of the commission of the offence.”. 10

#### **Amendment of section 122 of Act 38 of 2005**

3. Section 122 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

“(1A) The National Commissioner of the South African Police Service must, in the prescribed manner, forward to the Director-General all the particulars of persons referred to in section 120(4) and (5) and of any criminal conviction contemplated in section 120(4A).” 15

#### **Amendment of section 128 of Act 38 of 2005**

4. Section 128 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 20

“(1) A person whose name appears in Part B of the Register, or a person who was under the age of 18 years when he or she committed the offence in respect of which the finding was made, may in terms of subsection (2) apply for the removal of his or her name and any information relating to that person from the Register.”. 25

#### **Amendment of section 150 of Act 38 of 2005**

5. Section 150 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“(1) A child is in need of care and protection if **[the] such a child—**”; and 30

(b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) has been abandoned or orphaned and **[is without any visible means of support]** does not have the ability to support himself or herself and such inability is readily apparent;” 35

#### **Insertion of section 152A in Act 38 of 2005**

6. The following section is hereby inserted in the principal Act after section 152:

##### **“Review of decision to remove child without court order**

**152A.** (1) When a matter contemplated in section 152(2)(c) is brought before court the presiding officer may— 40

(a) if he or she is satisfied, after considering all relevant information, that the police official or designated social worker, in removing the child, has satisfied the provisions of section 152(1), issue an order confirming the removal of the child; or

(b) if he or she is not satisfied that the police official or designated social worker, in removing the child, has satisfied the provisions of section 152(1), issue an order setting aside the removal and placement of the child. 45

(2) Where the court has issued an order contemplated in—

(a) subsection (1)(a) the presiding officer may, in addition, issue an order contemplated in section 151(2); or 50

(4B) Esimeni lapho inkantolo ithola ukuthi izimo ezizwakalayo neziphoyo zikhona okuvumela ukwenziwa komyalelo ovezwe esigatshaneni sesi-(4), inkantolo kumele ishicilele izimo ezifana nalezo kumarekhodi okuqhubekayo.”; futhi

- (d) ngokufaka endaweni yesigatshana sesi-(5) isigatshana esilandelayo: 5  
 “(5) Noma ubani olahlwe icala elivezwe esigatshaneni sesi-(4)(a), elenziwe eRiphabhuliki noma ngaphandle kwaseRiphabhuliki eminyakeni emihlanu ngaphambi kokuqala ukusebenza kwalesi Sahluko, uthathwa ngokuthi akufanele asebenze nabantwana ngaphandle uma lowo muntu ayeseyingane ngenkathi enza icala.”. 10

### Ukuchibiyela isigaba 122 soMthetho wama-38 wezi-2005

3. Isigaba se-122 soMthethongqangi sichitshiyelwe ngokushutheka ngemuva kwesigatshana soku-(1) kwesigatshana esilandelayo:

- “(1A) UKhomishana kaZwelonke woPhiko lwezeMisebenzi yamaPhoyisa kufanele, ngendlela enqunyiwe, athumele kuMqondisi-Jikelele yonke imininingwane yabantu abavezwe esigabeni se-120(4) kanye nesesi-(5) nanoma iziphi izigwebo zamacala ezivezwe esigabeni se-120(4A).” 15

### Ukuchibiyela isigaba 128 soMthetho wama-38 wezi-2005

4. Ngakho-ke isigaba se-128 soMthethongqangi sichitshiyelwe ngokufaka endaweni yesigatshana soku-(1) lesi sigatshana esilandelayo: 20

- “(1) Umuntu igama lakhe elivela kwiNgxenye B yeRejista, noma umuntu owayeneminyaka engaphansi kwe-18 ubudala ngesikhathi enza icala elakhishelwa isinqumo, ngokwemigomo yesigatshana sesi-(2) angafaka isicelo sokuba kukhishwe igama lakhe neminingwane ehambisana nalowo muntu kwiRejista.”

### Ukuchibiyela isigaba 150 soMthetho wama-38 wezi-2005

5. Isigaba se-150 soMthethongqangi sichitshiyelwe—

- (a) ngokufaka endaweni yesigatshana soku-(1) emagameni andulela indima (a) lawa magama alandelayo:  
 “(1) Ingane kufanele inakekelwe uma leyo ngane—”; futhi  
 (b) ngokufaka endaweni yesigatshana soku-(1) sendima (a) le ndima elandelayo: 30  
 “(a) yahlwa noma yafelwa abazali [ingakutholi ukwesekwa] ingenawo amandla okuziseka futhi ukungabi nalawo mandla kucace bha;”

### Ukushutheka isigaba 152A eMthethweni wama-38 wezi-2005

6. Ngakho-ke isigaba esilandelayo sishuthekwe kuMthethongqangi ngemuva kwesigaba 152: 35

#### **“Ukubuyekeza isinqumo sokuthatha ingane ngaphandle komyalelo wenkantolo**

**152A.** (1) Uma udaba oluvezwe esigabeni se-152(2)(c) lubikwa enkantolo owengamele enkantolo— 40

- (a) uma egculisekile, ngemuva kokubuka yonke imininingwane esemqoka, yokuthi iphoyisa noma usonhlalakahle oqokiwe, ekuthathweni kwengane, uhlangabezane nemibandela yesigaba se-152(1), angakhipha umyalelo oqinisekisa ukuthathwa kwaleyo ngane; noma 45  
 (b) uma engagculisekile ukuthi iphoyisa noma usonhlalakahle oqokelwe ukuthathwa kwengane, akhlangabezana nemibandela yesigaba se-152(1), angakhipha umyalelo ochitha ukuthathwa nokubekwa kwengane kwenye indawo.  
 (2) Uma inkantolo ikhiphe umyalelo ovezwe—  
 (a) esigatshaneni soku-(1)(a) umsebenzi ongamele, ukwengeza, angakhipha umyalelo ovezwe esigabeni se-151(2); noma 50

- (b) subsection (1)(b) the presiding officer may, in addition, order that the child be returned to its parent, guardian or care giver, as the case may be, or order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2).”

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#### **Amendment of section 155 of Act 38 of 2005**

7. Section 155 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) A children’s court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 152, 152A or 154 is in need of care and protection.”

#### **Amendment of section 159 of Act 38 of 2005**

8. Section 159 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 15  
 “An order made by a children’s court in terms of section 156, except an order contemplated in section 46(1)(c)—”; and  
 (b) by the substitution for subsection (3) of the following subsection:  
 “(3) **[No]** Subject to section 176(2), a court order referred to in subsection (1) [extends] may not extend beyond the date on which the child in respect of whom it was made reaches the age of 18 years.” 20

#### **Amendment of section 230 of Act 38 of 2005**

9. Section 230 of the principal Act is hereby amended by the deletion in subsection (3) of the word “or” at the end of paragraph (d) and the addition of the following paragraphs: 25

- “(f) the child is the stepchild of the person intending to adopt; or  
 (g) the child’s parent or guardian has consented to the adoption unless consent is not required.”

#### **Amendment of section 242 of 38 of 2005**

10. Section 242 of the principal Act is hereby amended by the deletion in subsection (2) of the word “and” at the end of paragraph (c), the insertion of the word “and” at the end of paragraph (d) and the addition of the following paragraph: 30

- “(e) does not automatically terminate all parental responsibilities and rights of the parent of a child, when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent.” 35

#### **Amendment of Table of Contents of Act 38 of 2005**

11. The Table of Contents after the long title of the principal Act is hereby amended by the insertion after “152. Removal of child to temporary safe care without court order” of the following:

- “152A. Review of decision to remove child without court order”. 40

#### **Short title and commencement**

12. This Act is called the Children’s Amendment Act, 2016, and comes into operation on a date determined by the President by proclamation in the *Gazette*.



- (b) esigatshaneni soku-(1)(b) umsebenzi owengamele, ukwengeza, angakhipha umyalelo wokuba ingane ibuyiselwe kumzali, umqaphi noma oyinakekelayo noma omunye wabo noma akhiphe umyalelo othi umbuzo wokuthi ngabe ingane iyakudinga yini ukunakekelwa nokuvikelwa ibuyiselwe kusonhlalakahle oqokiwe ukuba aphe nye njengoba kuveziwe esigabeni se-155(2).” 5

#### Ukuchibiyela isigaba 155 soMthetho wama-38 wezi-2005

7. Ngakho-ke isigaba se-155 soMthethongqangi sichitshiyelwe ngokufaka endaweni yesigatshana soku-(1) lesi sigatshana esilandelayo:

- “(1) Inkantolo equla amacala abantwana kufanele inqume ukuthi ngabe ingane ethintekayo ezinyathelweni zomthetho ngokwemigomo yesigaba sama-47, 151, 152, 152A noma 154 iyakudinga ukunakekelwa nokuvikelwa.” 10

#### Ukuchibiyela isigaba 159 soMthetho wama-38 wezi-2005

8. Ngakho-ke isigaba se-159 soMthethongqangi sichitshiyelwe—

- (a) ngokufaka endaweni yesigatshana soku-(1) emagameni andulela indima (a) lawa magama alandelayo: 15  
 “Umyalelo okhishwe inkantolo equla amacala abantwana ngokwemigomo yesigaba se-156, ngaphandle komyalelo ovezwe esigabeni sama-46(1)(c)—”; futhi
- (b) ngokufaka endaweni yesigatshana sesi-(3) isigatshana esilandelayo: 20  
 “(3) [No] Ngokwesigaba se-176(2), umyalelo wenkantolo ovezwe esigatshaneni soku-(1) [weqela] akufanele weqe udlule usuku lokufika eminyakeni eyi-18 yobudala kuleyo ngane okhishelwe yona.”

#### Ukuchibiyela isigaba 230 soMthetho wama-38 wezi-2005

9. Ngakho-ke isigaba se-230 soMthethongqangi sichitshiyelwe ngokususa isigatshana sesi-(3) igama “noma” ekupheleni kwendima (d) nokwengezwa kwalezi zindima ezilandelayo:

- “(f) ingane iyingane ezalwa umlingani womuntu ofisa ukuyithatha; noma  
 (g) umzali wengane noma umqaphi uvumile ukunikezela ngengane kwabathatha izintandane ngaphandle uma leyo mvume ingadingeki.” 30

#### Ukuchibiyela isigaba 242 soMthetho wama-38 wezi-2005

10. Ngakho-ke isigaba sama-242 soMthethongqangi sichitshiyelwe ngokususa esigatsheni sesi-(2) igama “kanye” ekupheleni kwendima (c), ukushutheka igama “kanye” ekupheleni kwendima (d) kanye nokwengeza le ndima elandelayo:

- “(e) akuqedi umsebenzi namalungelo okuba umzali wengane, uma kukhishwa umyalelo wokuthatha ingane ohambisana nomlingani noma umlingani womzali wengane.” 35

#### Ukuchibiyela Okuqukethwe uMthetho wama-38 wezi-2005

11. Ngakho-ke okuqukethwe ngemuva kwesihloko esichazayo soMthethongqangi kuchitshiyelwe ngokushutheka ngemuva “152. Ukususwa kwengane okwesikhashana endaweni yokunakekela ngaphandle komyalelo wenkantolo” kwafakwa lokhu okulandelayo:

- “152A. Ukubuyekeza isinqumo sokuthatha ingane ngaphandle komyalelo wenkantolo”.

#### Isihloko esifingqiwe kanye nokuqala ukusebenza komthetho

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12. Lo Mthetho ubizwa ngokuthi uMthetho oChibiyela amaLungelo abaNtwana, 2016, futhi uzoqala ukusebenza ngosuku oluzonqunywa uMongameli ngesimemezelo kuSomqulu.





