



**REPORT**  
**PROJECT 107**  
**SEXUAL OFFENCES: PORNOGRAPHY AND**  
**CHILDREN**

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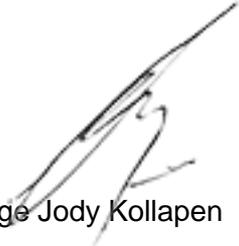
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To Mr RO Lamola, MP, Minister for Justice and Correctional Services

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's Report on Sexual Offences: Pornography and Children.



Judge Jody Kollapen

Chairperson: South African Law Reform Commission

Date: 30 August 2021



# **SOUTH AFRICAN LAW REFORM COMMISSION**

The South African Law Reform Commission (the Commission) was established by the South African Law Reform Commission Act 19 of 1973.

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## GLOSSARY

**‘App’** means computer software, or a program, most commonly a small, specific one used for mobile devices but can be used for non-mobile devices as well.<sup>1</sup> Originally software that was installed on a computer as a program was labelled an application and abbreviated as “app”.

**‘Child’** means a person below the age of 18 years.

**‘Data streaming’** means the transfer of data at a steady high-speed rate sufficient to support such applications as high-definition television (HDTV) or the continuous backup copying to a storage medium of the data flow within a computer. Data streaming requires some combination of bandwidth sufficiency and, for real-time human perception of the data, the ability to make sure that enough data is being continuously received without any noticeable time lag.<sup>2</sup>

**‘Domain name’** means an alphanumeric designation that is registered or assigned in respect of an electronic address or other resource on the Internet (as defined in the Electronic Communications and Transactions Act, 2002 (Act No 25 of 2002)).

**‘Domain name system’ (DNS)** means the mapping of Internet domain names to the Internet protocol network addresses they represent and allows websites to use names, rather than difficult-to-remember IP addresses.<sup>3</sup>

**‘Electronic Communications Service Provider (ECSP)’** means—

(a) any person who provides an electronic communications service to the public, sections of the public, the State, or the subscribers to such service, under and in accordance with an electronic communications service licence issued to that person in terms of the Electronic Communications Act, 2005, or who is deemed to be licenced or exempted from being licenced as such in terms of that Act; and

(b) a person who has lawful authority to control the operation or use of a private electronic communications network used primarily for providing electronic communications services for the owner’s own use and which is exempted from being licensed in terms of the Electronic Communications Act, 2005.<sup>4</sup>

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<sup>1</sup> Techopedia dictionary ‘App’. Available on [www.techopedia.com](http://www.techopedia.com). Accessed on 10 January 2019.

<sup>2</sup> Techtargget definitions ‘definition data-streaming’. Available on <https://searchnetworking.techtargget.com/definition/data-streaming>. Accessed on 12 September 2018.

<sup>3</sup> Techtargget definitions ‘definition domain name streaming’. Available on <https://www.techtargget.com/search/query?q=accessing&type=definition&pageNo=1&sortField=>. Accessed on 12 September 2018.

<sup>4</sup> As defined in the Cybercrimes Act 19 of 2020.

**‘Internet’** means the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions thereof.

**‘Internet Access Provider’** means any organisation that arranges for an individual or an organization to have access to the Internet.<sup>5</sup> For example Web Africa. These organisations operate within a regulated environment.

**‘Internet Protocol Television’ (IP TV)** means a service that provides television programming and other video content using the TCP/IP protocol suite as opposed to traditional cable or satellite signals.

**‘Internet Service Provider’<sup>6</sup> (ISP)** means a company that provides individuals and other companies access to the Internet and other related services such as Web site building and virtual hosting. An ISP has the equipment and the telecommunication line access required to have a point-of-presence on the Internet for the geographic area served. The larger ISPs have their own high-speed leased lines so that they are less dependent on the telecommunication providers and can provide better service to their customers. National ISPs: Axxess, Vox Telecom, Web Africa, Afrihost, MWEB and Telkom Internet.

**‘Lifecasting’** means the 24/7 broadcasting of events in a person’s life through digital media.<sup>7</sup>

**‘Source code’** means the combination of text and other characters comprising the content, both viewable and non-viewable, of a web page, including any website publishing language, programming language, protocol or functional content, as well as any successor languages or protocols.

**‘sexting’** means the ‘self-production of sexual images’, or as the ‘exchange of sexual messages or images’ and ‘the creating, sharing and forwarding of sexually suggestive nude or nearly nude images through mobile phones and/or the Internet’. Sexting is a form of self-generated sexually explicit content, and the practice is ‘remarkably varied in terms of context, meaning, and intention’.<sup>8</sup>

**‘streaming’** means a method of transmitting or receiving data (especially video and audio material) over a computer network as a steady, continuous flow, allowing

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<sup>5</sup> Techtarger definitions ‘Internet Access Provider’. Available on <https://www.techtarger.com/search/query?q=accessing&type=definition&pageNo=1&sortField=>. Accessed on 12 September 2018.

<sup>6</sup> Techtarger definitions ‘definition Internet Service Provider’. Available on <https://searchwindevelopment.techtarger.com/definition/ISP>. Accessed on 12 September 2018.

<sup>7</sup> Techtarger definitions ‘Lifecasting’. Available on <https://searchtelecom.techtarger.com/definition>. Accessed on 12 September 2018.

<sup>8</sup> Interagency Working Group on Sexual Exploitation of Children Terminology and Semantics *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* 28 January 2016 44.

playback to start while the rest of the data is still being received,<sup>9</sup> e.g. live performers or TV broadcast like Netflix.

**‘Transmission Control Protocol’ (TCP)** means the standard that defines how to establish and maintain a network conversation through which application programs can exchange data. TCP works with the Internet Protocol (IP), which defines how computers send packets of data to each other. Together, TCP and IP are the basic rules defining the Internet.

**‘Video on Demand’ (VoD)** means an interactive TV technology that allows subscribers to view programming in real time or download programs and view them later. A VoD system at the consumer level can consist of a standard TV receiver along with a set-top box. Alternatively, the service can be delivered over the Internet to home computers, portable computers, high-end cellular telephone sets and advanced digital media devices.<sup>10</sup>

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<sup>9</sup> Google dictionary ‘definition of streaming’. Accessed 2 March 2019.

<sup>10</sup> Techtargget definitions ‘Video on Demand’. Available on <https://searchtelecom.techtarget.com/definition/video-on-demand> Accessed on 12 September 2018.

## ABBREVIATIONS AND ACRONYMS

A list of abbreviations and acronyms is provided below largely as an information tool. In so far as possible the unabbreviated name is used in order to facilitate in context comprehension.

<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>BCCSA</b>	Broadcasting Complaints Commission of South Africa
<b>CPA</b>	Criminal Procedure Act
<b>CSEA</b>	Child sexual exploitation and abuse
<b>DBE</b>	Department of Basic Education
<b>DHA</b>	Department of Home Affairs
<b>DIRCO</b>	Department of International Affairs and Cooperation
<b>DOC</b>	Department of Communications
<b>DOH</b>	Department of Health
<b>DoJ&amp;CD</b>	Department of Justice and Constitutional Development
<b>DSD</b>	Department of Social Development
<b>ECSP</b>	Electronic Communications Service Provider
<b>FPA</b>	Films and Publications Act 65 of 1996
<b>ICASA</b>	Independent Communications Authority of South Africa
<b>ICTs</b>	Information and Communication Technologies
<b>ISPs</b>	Internet Service Providers
<b>ISPA</b>	Internet Service Provider's Association
<b>MMA</b>	Media Monitoring Africa
<b>NAB</b>	National Association of Broadcasters
<b>NCPR</b>	National Child Protection Register
<b>NGO</b>	Non-Governmental Organisation
<b>NPA</b>	National Prosecuting Authority
<b>NPAC</b>	National Plan of Action for Children
<b>NPO</b>	Non-profit organisation
<b>OPSC</b>	Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
<b>PCSA</b>	Press Council of South Africa
<b>SA Cellular Code</b>	South African Cellular Operators Association Code of Good Practice
<b>SACA</b>	South African Central Authority

**SADC** Southern African Development Community

**SAPS** South African Police Service

**Sexual Offences Act**

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32  
of 2007

**TIPA** Prevention and Combating of Trafficking in Persons Act 7 of 2013

**UNCRC** United Nations Convention on the Rights of the Child

**UNCRC Committee**

United Nations Convention on the Rights of the Child Committee

**UNICEF** United Nations Children's Fund

**VoD** Video on Demand

**WASPA Code** Wireless Application Service Providers' Association Code of Conduct

## EXECUTIVE SUMMARY

1. As part of the overarching investigation into the review of all sexual offences, this report seeks to provide recommendations for the review of the legislative framework that currently regulates the exposure of children to pornography and child sexual abuse material<sup>11</sup> within the larger framework of all statutory and common law sexual offences. The secondary aim is to consider the need for law reform in relation to the legislative framework governing children and pornography and where necessary to make recommendations in this regard.

2. The opportunities offered by the mass media to access a varied and vast amount of information, educational material and entertainment and to actively engage in remote communication using electronic tools do not come without risks. One of the risks that children face when engaging with the mass media and using electronic tools in South Africa is that they may intentionally seek or unintentionally be exposed to pornography or child sexual abuse material. The pornography accessed may be illegal or may only be legal for certain adults.<sup>12</sup>

3. Five areas of concern have been identified in this investigation and form the basis of this report:

- Access to or exposure of a child to pornography;
- Creation and distribution of child sexual abuse material;
- Self-generated child sexual abuse material created and distributed by a child;
- Grooming of a child and other sexual contact crimes associated with or which are facilitated by child sexual abuse material; and
- Investigation, procedural matters and sentencing.

4. This report aims to address some of the gaps in the manner in which the law currently regulates and protects children from being exposed to pornography or from being used to create child sexual abuse material. It incorporates submissions made to the South African Law Reform Commission (Commission) in response to its discussion

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<sup>11</sup> The Commission recommends changing the term 'child pornography' to 'child sexual abuse material' in this report. The change emphasizes the true nature of the material and the harm done to children to produce such material. In order to acknowledge the anomaly brought about by self-generated material these declaratory words are added to the term 'child sexual abuse material' to cater for such instances.

<sup>12</sup> Pending the operationalizing of the Films and Publications Amendment Act 3 of 2019 South African adults may legally only procure pornography from a dedicated adult store.

paper, responds to pertinent submissions and makes legislative and non-legislative recommendations. Its purpose is to make legislative proposals for law reform and to make suggestions for addressing implementation challenges underpinned by updated local and comparative research. This approach aligns with the expanded mandate of the Commission's Project 107: Sexual Offences umbrella project on sexual offences i.e. to encourage action by the appropriate government structures and to galvanise communities to participate in the fight against sexual violence.

5. The report has six chapters. Chapter one provides an overview of the investigation and includes reference to the legislative developments in a number of government departments in South Africa. Chapter two focuses on the access to or exposure of a child to pornography (legal adult sexual material). Chapter three looks at the phenomenon of children creating and distributing self-generated sexual material (commonly referred to as "sexting"). It seeks to make proposals for law reform that acknowledge the immaturity of some children whilst recognising the seriousness of this material falling into the hands of sexual exploiters or into the hands of a variety of third parties who may use the material for nefarious purposes. Chapter four investigates the creation and distribution of child sexual abuse material and addresses the need for uniform definitions and a central repository of crimes to deal with these sexual offences. Chapter five addresses the act of grooming a child and the use of pornography and child sexual abuse material in this process. Chapter 6 provides insight into some aspects of the investigation, procedures and sentencing in matters where children have been exposed to pornography or child sexual abuse material; have engaged in the creation or distribution of self-generated sexual material; or have been groomed through the use of pornography or child sexual abuse material to produce child sexual abuse material or to engage in sexual acts. The report contains the Commission's legislative and non-legislative recommendations. The former is contained in a draft Bill which provides an option as to the framing of certain proposed amendments. The report has taken the public response and input gleaned from public and expert workshops during the discussion paper phase into account in arriving at its final recommendations. The report (with draft legislation) is submitted to the Minister of Justice and Correctional Services for his consideration.

6. In summary, the Commission makes the following recommendations:

**6.1. “Child pornography” or “child sexual abuse material”**

The Commission recommends that the term “child pornography” be substituted with the term “child sexual abuse material” in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act) and in related legislation. This recommendation accords with the international recognition of this term. In line with this recommendation the revised terminology is used consistently throughout this report, unless the term ‘child pornography’ is referred to in a specific context, such as a quotation.

**6.2 Revision of the Sexual Offences Act definition of “child pornography” (child sexual abuse material)**

The Commission is of the view that for the purposes of this investigation a child should continue to be defined as a person under the age of 18 and not be revised downward to align with the age of sexual consent. The Commission recommends the revision of the definition of “child pornography” in the Sexual Offences Act to include live displays, sequences of images and any of the listed conduct that could be used to advocate, advertise or promote a child for sexual purposes. In line with this amendment the Commission recommends the repeal of the definition of “child pornography” in the Films and Publications Act 65 of 1996 (the Films and Publications Act) and the substitution thereof by reference to the proposed definition of “child sexual abuse material” in the Sexual Offences Act.

**6.3. Child sexual abuse material and related offences to be criminalised in a single statute, the Sexual Offences Act**

The Commission recommends that all offences relating to child sexual abuse material and children’s exposure to pornography be criminalised in the Sexual Offences Act. This means that all pertinent offences in the Films and Publications Act are to be deleted and re-enacted (with the necessary changes) in the Sexual Offences Act. The Commission neither supports the extension of section 24B of the Films and Publications Act brought about by the Films and Publications Amendment Act 3 of 2019 (the Films and Publications Amendment Act) nor the manner in which the Cybercrimes Act 19 of 2020 (the Cybercrimes Act), after repealing section 24B of the

Films and Publications Act, has sought to capture the crimes in section 24B of the Films and Publications Act, in its proposed clause 19A of the Sexual Offences Act.

#### **6.4. Alignment of the definitions of “child sexual abuse material” and “pornography”**

The Commission is of the view that the intention of the creator of child sexual abuse material or pornography is irrelevant in a definitional clause. The Commission has aligned both definitions in the Sexual Offences Act to reflect this. Some smaller amendments are also proposed for purposes of alignment, such as the inclusion of live performances.

#### **6.5. Providing for all technologies**

The Commission is mindful that all existing and newly created offences in the Sexual Offences Act should sufficiently provide for criminal acts committed through the use of present-day technologies such as the Internet, webcams, USB`s and mobile phones and technology yet to be developed. The aim is to draft legislative proposals in such a way that the crimes are not technology dependent or specific.

#### **6.6. Protecting children from exposure to pornography and child sexual abuse material**

The Commission recommends that legislation should comprehensively criminalise all acts of exposing children to pornography and content not suitable for children, in whatever manner, including through advertisement and enticement or by making use of misleading techniques. Unfortunately the full spectrum of such content falls outside the ambit of the present investigation and the Sexual Offences Act since it may not even constitute content of a sexual nature. The Commission endorses the continued criminalisation of child sexual abuse material and its classification as illegal. The Commission has considered, for purposes of adequate protection, the possibility of ensuring that all devices (new and second hand) could be issued or returned to a default setting that blocks inappropriate content, with an opt-in possibility depending on proof of age of the buyer/user as being 18 and older. Giving effect to this recommendation would serve to protect both the child and the provider, though regulations will be required to provide for effective implementation. Although, presented for consideration, the Commission has been alerted to the fact that the protection

provided at device level may be limited. It is further mindful of developments abroad which reflect a move towards multi-layered co-regulation of the online space necessitating collaboration between business, civil society and government. Based on these developments the Commission is of the view that a collaborative approach and solution should be sought by relevant government departments as well as between relevant government departments and regulatory bodies.

#### **6.7. Consensual self-generated child sexual abuse material by and of certain children**

The Commission is mindful of the need to differentiate between child sexual abuse material and the creation or sharing of consensual self-generated child sexual abuse material (sexting) in certain circumstances between children who may engage legally in sexual activity with one another, by providing for a non-prosecution clause for certain children.<sup>13</sup> The proposed clause has been framed as a stand-alone provision recognising the age parameters set by the Sexual Offences Act for legal sexual acts between adolescents. The Commission believes that clause 19D recognises children's rights within the context of their evolving capacity and aligns with the age of consent provisions in sections 15 and 16 of the Sexual Offences Act.

#### **6.8. Live display (performances) involving child sexual abuse material**

The Commission recommends that all aspects of the live display of child sexual abuse material, including the attendance or viewing thereof and the procurement of children to participate therein be criminalised. The Commission is of the view that the definition of "child sexual abuse material" has been sufficiently amended in its proposal to include any presentation of a live performance. The Commission agrees with the proposed inclusion in section 20 of the Sexual Offences Act of "live display", although termed "live performance", in the Cybercrimes Act. The formulation of the amendment to this section which currently aims to address using or benefiting from child pornography, however, differs from that of the Cybercrimes Act. Based on the support garnered during the workshops and from respondents to the proposed amendment to section 20 in the draft Bill, the Commission confirms its extension of the section to address instances where children are recruited, coerced or deceived to create, make or

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<sup>13</sup> Where deemed necessary, provision is made for discretionary referral to a probation officer.

produce child sexual abuse material, to assist therewith; or to participate in a live display involving child sexual abuse material.<sup>14</sup> This aligns with the United Nations Convention on the Rights of the Child Committee Guidelines.<sup>15</sup>

## 6.9 **Obligation to report commission of offences**

The Commission recommends the inclusion of an obligation to report the commission of offences pertaining to child sexual abuse material or exposure of children to pornography in the Sexual Offences Act. This obligation extends to electronic communication service providers and financial institutions that are aware that their systems or facilities are being used in the commission of an offence involving child sexual abuse material. The Commission recommends the removal of the reporting obligations in the Films and Publications Act relevant to child sexual abuse material and recommends the amendment of section 54 of the Sexual Offences Act, which legislates for the reporting obligation in respect of sexual offences against children or persons with mental disabilities to clearly also apply to a sexual offence involving child sexual abuse material. The Commission furthermore extends the reporting obligation to apply in respect of persons who, for whatever reason, are not able themselves to report the commission of a sexual offence against them.

## 6.10. **Evidential and procedural matters and sentencing**

The Commission is of the view that recommendations need to be made on the administrative process to be followed when dealing with these matters, especially with regard to the initial and subsequent contact with the child. These measures could be included in non-legislative recommendations aimed at specific role-players. The Commission, however, specifically proposes the inclusion of the following provisions in the Sexual Offences Act:

- an evidentiary clause (clause 59A) to aid courts in determining that the person in the child sexual abuse material is below the age of 18 or is depicted as such;
- a sentencing clause (clause 56A) for clause 19C offences, previously criminalised in the Films and Publications Act, and for a range of ancillary

<sup>14</sup> Delaine Naidoo, child Welfare SA: Gauteng; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Brendan Botha, Break-Free; M Porogo Commission for Gender Equality; and Adv T Buitendag, NPA.

<sup>15</sup> UNCRC Committee Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 10 September 2019 par 64.

orders that courts may deem appropriate to make for purposes of protecting children from a sexual offence committed against them, in addition to any sentence imposed;

- a clause (clause 61A) on the management of child sexual abuse material and pornography. In terms of this recommendation court officials and the police may not reproduce any such material except for purposes of evidence in criminal proceedings and must take all reasonable steps to prevent access to this material;
- a clause providing for a report that may serve to limit the reproduction of child sexual abuse material for evidentiary purposes; and
- for court orders regarding the seizure, forfeiture, disposal or destruction of evidence relating to child sexual abuse material or pornography, in clause 61B.

#### **6.11. Inter-sectoral management of child sexual abuse material and the exposure of children to pornography**

6.11.1 The Commission recommends that a multi-disciplinary approach should be followed to prevent, address and investigate child sexual abuse material and that directives and national instructions or standard operating procedures should either be developed or updated with a specific focus on the policing and prosecution of cases relating to child sexual abuse material. The Commission recommends the inclusion of the Departments of Basic Education, Higher Education and Communications and Digital Technologies in the Inter-sectoral Committee for the Management of Sexual Offence Matters as provided for in the Sexual Offences Act. It recommends that the Departments of Justice and Constitutional Development and Correctional Services, who are already members of the Inter-sectoral Committee, must issue directives regarding all matters relevant to sexual offence matters within the relevant department's purview. The Commission further recommends that the following aspects should be addressed or should receive renewed attention in the national instructions and any directives in respect of all role-players:

- 1 All role-players must develop suitability or psychometric screening programmes to screen persons applying to be involved in the investigation and management of cases involving child sexual abuse material.
- 2 All role-players must develop and provide inter-and intra-departmental or sector training for those who respond to complaints relating to child sexual abuse material first and follow-up investigation and management of cases involving

child sexual abuse material. Although section 66 of the Sexual Offences Act provides for training (including social context training) and it forms part of the National Prosecuting Authority training curriculum, it would seem that this aspect needs renewed attention.

- 3 A multi-disciplinary committee must ensure uniformity of data obtained from relevant government departments such as the South African Police Service and the National Prosecuting Authority Sexual Offences and Community Affairs (SOCA). The Commission recommends that record keeping should be standardised and that statistics should be segregated i.e. data on different crimes, according to the section of the Act, should be kept separately.
- 4 All role-players must develop debriefing programs and provide the service to persons responsible for the investigation and management of cases involving child sexual abuse material. The Commission particularly recommends mandatory support programmes or debriefing for all role-players dealing with sexual offences. The directives or national instructions should cause any official to engage in debriefing or a support programme at least twice a year and additionally for specific incidences.

6.11.2 The Commission further recommends that the South African Police Service fast track the establishment of their Victim Identification Data Base and that this data base should be linked to Interpol's International Child Sexual Exploitation Image Database.

6.11.3 Scrutiny of the content of the subsections contained in section 66 of the Sexual Offences Act revealed that there is significant repetition in terms of the areas identified for officials who are tasked with matters related to sexual offences within the context of the mandate of the identified departments. The Commission has heeded the recommendation that uniform areas such as multi-sectoral training, screening and preventative programmes should be clustered together in section 65 of the Sexual Offences Act and that section 66 of the Sexual Offences Act should be streamlined to avoid unnecessary repetition. The Commission therefore presents a Bill which contains options pertinent to section 66 of the Sexual Offences Act and the proposed corresponding schedules. The first and the Commission's preferred option is to streamline the subsections in section 66 of the Sexual Offences Act by retaining only the introductory obligations placed on the relevant Inter-sectoral committee members and delinking the open list of all matters which are reasonably necessary or expedient to dealing with sexual offence matters in dedicated schedules attached to the Bill. The second option amends the relevant subsections in section 66 by augmenting the list in

the particular subsection. It is anticipated that if the preferred option is selected that each committee member will bring about a dedicated revision of all existing instructions and directives and provide structure for the development of new directives for new members.

#### **6.12 Data retention and preservation orders**

Data retention and preservation provisions have increasingly become a point of discussion in the sphere of child protection online. The Commission recommends the repeal of section 27A(1)(b) of the Films and Publications Act and in its place recommends the enactment of clause 54(2) which places similar obligations on electronic communication service providers and financial institutions with the addition of allowing the South African Police Service reasonable time to investigate the matter before access is restricted. These provisions seek to ensure that digital evidence will be available to law enforcement when needed for the investigation and prosecution of illicit online activity.

#### **6.13. Miscellaneous matters**

As some of the proposed amendments to existing legislative provisions applicable to children in the Sexual Offences Act are almost identical in content to those applicable to people with mental disabilities, the Commission recommends that those sections should be similarly amended.

# DRAFT AMENDMENT BILL

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (CHILDREN: PORNOGRAPHY AND CHILD SEXUAL  
ABUSE MATERIAL) AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory  
summary of Bill published in Government Gazette No. .... of .....  
2021) (The English text is the official text of the Bill)*

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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B —2021]

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**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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**BILL****To amend—**

- the Films and Publications Act, 1996, so as to align the definition of ‘child pornography’ in this Act with that of the Criminal Law ((Sexual Offences and Related Matters) Amendment Act, 2007; provide for the circumstances and the manner in which an exception may be made to a prescribed refused classification; provide for the substitution of the term ‘child pornography’ with the term ‘child sexual abuse material’ wherever it appears;
- the Criminal Law Amendment Act, 1997 so as to provide for the substitution of the term ‘child pornography’ in Part III of Schedule 2;
- the Children’s Act, 2005 so as to provide for the substitution of the term ‘child pornography’ with the term ‘child sexual abuse material’ wherever it appears;
- the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to further provide for offences to protect children from exposure to inappropriate adult sexual content; provide for revised terminology that appropriately and accurately reflects the nature of the offence and the harm done to children by substituting the term ‘child pornography’ with the term ‘child sexual abuse material’; comprehensively provide for offences relating to child sexual abuse material in a single statute; provide for additional offences relating to child sexual abuse material;
- the Child Justice Act, 2008 so as to provide for the substitution of the

term ‘child pornography’ with the term ‘child sexual abuse material’  
wherever it appears;  
and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

**Amendment of section 1 of Act 65 of 1996**

1. Section 1 of the Films and Publications Act, 1996 is hereby amended—  
(a) by the substitution for the definition of “child pornography” of the following definition:

“child sexual abuse material” means “child sexual abuse material” as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);; and

(b) by the substitution of the definition of “publication” of the following definition:

“publication” means—

- (a) any newspaper, book periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript [**which has in any manner been duplicated**];
- (c) any drawing, picture, illustration or painting;
- (d) any print, photograph, engraving or lithograph;
- (e) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;
- (f) computer software which is not a film;
- (g) the cover or packaging of a film;
- (h) any figure, carving, statue or model; and
- (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet;”.

**Insertion of section 18C in Act 65 of 1996**

2. The following section is inserted in the Films and Publications Act, 1996 after section 18B—

**“Circumstances and manner in which an exception may be made to a prescribed refused classification**

**18C.** (1) In the event of child sexual abuse material the Board may only consider an exception to a prescribed refused classification if-

- (a) the film, game or publication is, objectively viewed, of substantial scientific, educational or artistic merit and is in the public interest;
- (b) the depiction, image, scene or description cannot be excised from the film, game or publication without such film, game or publication in a meaningful manner losing its merit and, in addition, would no longer be in the public interest;
- (c) where excision as contemplated in sub-clause (1)(b) is not possible, the application of any other technique that will serve to prevent viewing or having access to the depiction, image, scene or description will not be an effective measure;
- (d) the depiction, image, scene or description is not erotic, explicit or offensive;
- (e) a child had not been used in the creation thereof; and
- (f) the depiction, image, scene or description will not serve to promote the sexual abuse of children and will not violate or offend the sexual integrity or dignity of a child or of children in general.

(2) Where the Board grants an exception to a refused classification of a film, game or publication as provided for in subsection (1), it must—

- (a) appropriately classify the film, game or publication to—
  - (i) protect children from exposure to disturbing, harmful or age-inappropriate materials; and
  - (ii) inform adult viewers for purposes of making informed choices prior to viewing;
- (b) determined by the justification for the exception, impose restrictions in respect of the manner of distribution and the intended audience

(3) An exception granted in terms of subsection (1) does not—

- (a) exclude referral to a police official as prescribed in section 16(6) and 18(5) of this Act;
- (b) exclude a criminal prosecution; and

(c) in itself, serve as a valid defence in criminal proceedings”.

**Deletion of sections 24B, 27A(1)(b) and 30B(1)(b) of Act 65 of 1996**

3. Sections 24B, 27A(1)(b) and 30B(1)(b) of the Films and Publications Act, 1996 are hereby deleted.

**Substitution of the words “child pornography” in Act 65 of 1996**

4. The words “child pornography” are substituted for the words “child sexual abuse material”, wherever they appear, in the Films and Publications Act, 1996.

**Amendment of Part III of Schedule 2 of Act 105 of 1997**

5. Part III of Schedule 2 of the Criminal Law Amendment Act, 1997, is hereby amended by the substitution of the following Part—

**“Part III**

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.

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 sexual abuse material [**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.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

Any offence in contravention of section 36 of the Arms and Ammunitions Act, 1969 (Act No. 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in Section 39(2)(a)(i) of that Act.”

## Amendment of section 1 of the Act 38 of 2005

6. Section 1 of the Children’s Act, 2005 is hereby amended —
- (a) by the substitution for the definition of
- (i) “commercial sexual exploitation” of the following definition:
- ““commercial sexual exploitation”, in relation to a child, means the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or **[pornography]** child sexual abuse material as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person;”;
- (ii) “sexual abuse” of the following definition:
- ““sexual abuse”, in relation to a child, means—
- (a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
- (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
- (c) using a child in or deliberately exposing a child to sexual activities, child sexual abuse material as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or pornography; or
- (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child;”.
- (b) by the amendment of subsection (4)(a) of section 120 of the following subsection:
- “(4) In criminal proceedings, subject to the provisions of subsection (4A), a person must be deemed unsuitable to work with children—
- (a) on conviction of 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, 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 4, 5, 7, 8, 9, and involvement in these offences as provided for in section 10 or **[24A(5)]** of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or”;

#### **Amendment of section 1 of Act 32 of 2007**

7. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, (hereinafter referred to as the “principal Act”) is hereby amended—

(a) by the substitution for the definition of “child pornography” of the following definition:

“**child [pornography] sexual abuse material**” means any live display, image or sequence of images, however created or portrayed, or any description, text or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such live display, image, sequence of images, [or] description or presentation **[is intended to]** stimulates erotic or aesthetic feelings or not, including any such live display, image, sequence of images, [or] description or presentation of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs, **[or]** anus or breasts of such person;
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;

- (j) engaged in conduct, or activity characteristically associated with an act of sexual penetration [intercourse]; or
  - (k) showing or describing such person—
    - (i) participating in, or assisting or facilitating another person to participate in; or
    - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or
  - (l) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18, or that could be used to advocate, advertise or promote the use of a child for sexual purposes or that is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;”;
- (b) by the insertion after the definition of “Director of Public Prosecutions” of the following definitions:

“**electronic communications network**” means an electronic communications network as defined in section 1 of the Electronic Communications Act, 2005, and includes a computer system;

“**electronic communications service**” means any service which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services as defined in section 1 of the Electronic Communications Act, 2005;

“**electronic communications service provider**” means—

- (a) any person who provides an electronic communications service to the public, sections of the public, the State, or the subscribers to such service, under and in accordance with an electronic communications service licence issued to that person in terms of the Electronic Communications Act, 2005, or who is deemed to be licenced or exempted from being licenced as such in terms of that Act; and
- (b) a person who has lawful authority to control the operation or use

of a private electronic communications network used primarily for providing electronic communications services for the owner's own use and which is exempted from being licensed in terms of the Electronic Communications Act, 2005;”

“**financial institution**” means a ‘financial institution’ as defined in section 1 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017);”;

- (c) by the insertion after the definition of “genital organs” of the following definition:

“**Internet**” means “Internet” as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

- (d) by the insertion after the definition of “person who is mentally disabled” of the following definition:

“**police official**” means a member of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No.68 of 1995);” and;

- (e) by the substitution for the definition of “pornography” of the following definition:

“**pornography**” means any live display, image or sequence of images, however created or portrayed, or any description text or presentation of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature, whether such live display, image, sequence of images, description or presentation [that is intended to] stimulates erotic or aesthetic feelings or not, including any such live display image, sequence of images, or description or presentation of such person—

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs **[or]** anus or breasts of such person;

- (g) displaying any form of stimulation of a sexual nature of the **[female]** breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in conduct or activity characteristically associated with an act of sexual penetration [intercourse]; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;” and

(f) by the insertion after subsection (3) of the following subsections:

“(4) For purposes of this Act, a person is regarded as having knowledge of a fact if—

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of the fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact.

and “knows” or “knowing” must be construed accordingly.

(5) For purposes of this Act, a person ought reasonably to have known or suspected a fact if the conclusions that he or she sought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.”.

#### **Amendment of the title to Part 3 of Chapter 2 of Act 32 of 2007**

8. The title to Part 3 of Chapter 2 of the principal Act is hereby amended by

the substitution of the following title:

“Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing"), child **[pornography]** sexual abuse material or pornography to persons 18 years or older, or engaging sexual services of persons 18 years or older”;

**Substitution of section 10 of Act 32 of 2007**

9. Section 10 of the principal Act is hereby substituted for the following section:

**“Exposure or display of or causing exposure or display of child sexual abuse material or pornography to persons 18 years or older**

10. (1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, exposes or displays or causes the exposure or display of child **[pornography]** sexual abuse material to a complainant 18 years or older (“B”), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child **[pornography]** sexual abuse material to a person 18 years or older.”

(2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, exposes or displays or causes the exposure or display of pornography to a complainant 18 years or older (“B”) without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of pornography to a person 18 years or older.”.

**Amendment of the title to Part 2 of Chapter 3 of Act 32 of 2007**

10. The title of Part 2 of Chapter 3 of the principal Act is hereby amended by the substitution of the following title:

***“Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child [pornography] sexual abuse material or pornography to children, offences relating to child sexual abuse material and using, coercing, recruiting and deceiving of children for, [pornographic] purposes of, or benefiting from, child [pornography] sexual abuse material*”.**

**Amendment of section 18 of Act 32 of 2007**

11. Section 18 of the principal Act is hereby amended —

(a) by the substitution for paragraphs (b) and (c) of subsection (1) of the following paragraphs:

“(b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication, **[or]** film, game or other material that promotes or is intended to be used in the commission of a sexual act with or by “B”;

(c) supplies, exposes or displays to a third person (‘C’)—

(i) an article which is intended to be used in the performance of a sexual act;

(ii) child **[pornography]** sexual abuse material or pornography; or

(iii) a publication, **[or]** film, game or other material, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or”; and

(b) the substitution for subsection (2) of the following subsection:

“(2) A person (‘A’) who—

(a) supplies, exposes or displays to a child complainant (‘B’)—

(i) an article which is intended to be used in the performance of a sexual act;

(ii) child sexual abuse material **[pornography]** or pornography; or

(iii) a publication, **[or]** film, game or other material,

- with the intention to encourage, enable, instruct, or persuade B to perform a sexual act;
- (b) commits any act with or in the presence, whether physical or remote, of B or who describes the commission of any act to or in the presence, whether physical or remote, of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to—
- (i) perform a sexual act with A or a third person ('C');
  - (ii) perform an act of self-masturbation in the presence, whether physical or remote, of A or C or while A or C is watching;
  - (iii) be in the presence, whether physical or remote, of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
  - (iv) be exposed to child sexual abuse material **[pornography]** or pornography;
  - (v) be used for **[pornographic]** purposes of creating child sexual abuse material as contemplated in section 20(1); or
  - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;
- (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;
- (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B—
- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
  - (ii) during such meeting or communication or any subsequent meeting or communication to—
    - (aa) commit a sexual act with A;
    - (bb) discuss, explain or describe the commission of a sexual act; or
    - (cc) provide A, by means of any form of communication including electronic

communication, with **[any image, publication, depiction, description or sequence of] child [pornography] sexual abuse material** of B himself or herself or any other person; or

- (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B, is guilty of the offence of sexual grooming of a child.”.

### **Substitution of section 19 of Act 32 of 2007**

12. The following section is hereby substituted for section 19 of the principal Act:

**“Exposure or display of, or causing exposure or display of child sexual abuse material or pornography to children**

19. A person (‘A’) who unlawfully and intentionally exposes or displays or causes the exposure or display of [—
- (a) **any image, publication, depiction, description or sequence of ]child [pornography] sexual abuse material or pornography[;**
- (b) **any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or**
- (c) **any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law],**
- through any means to a child (‘B’), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child **[pornography] sexual abuse material or pornography** to a child.”.

**Insertion of sections 19A, 19B, 19C and 19D in Act 32 of 2007**

13. The following sections are hereby inserted after section 19 of the principal Act:

**“Providing access to or enticing a child to access child sexual abuse material or pornography**

**19A. (1) A person ('A') who unlawfully and intentionally entices a child ('B') to access child sexual abuse material or pornography by –**

**(a) advertising;**

**(b) providing or inviting access to; or**

**(c) distributing,**

**child sexual abuse material or pornography through any means, with or without the consent of B, is guilty of the offence of enticing a child to access child sexual abuse material or pornography.**

**(2) A person, including an electronic communications service provider ('A')—**

**(a) who unlawfully and intentionally provides a child ('B') with, or allows B to engage with, any form of technology or device including a mobile phone, that is capable of accessing the Internet, social media or other digital content, without ensuring that the default setting blocks access to child sexual abuse material and pornography, is guilty of the offence of making child sexual abuse material or pornography accessible to a child;**

**(b) who overrides, disables or circumvents or in any other manner removes the default setting blocking access to child sexual abuse material is guilty of the offence of making child sexual abuse material accessible to a person;**

**(c) who, in circumstances other than provided for in subsection (3) overrides, disables or circumvents or in any other manner removes the default setting blocking access to pornography is guilty of the offence of making pornography accessible to a child; or**

**(d) who fails to take reasonable steps to ensure that child sexual abuse material or pornography is not made accessible, exposed or displayed to a child ('B'), through any means, is guilty of the offence of negligently making accessible, exposing or displaying child sexual abuse material or pornography to a child.**

(3) The default setting blocking access to pornography may only be removed by the electronic communications service provider providing a service to that device upon request of the user of the device who must provide proof that she or he is over the age of 18 years.

(4) An electronic communications service provider who, when uninstalling the default setting fails to keep a register as prescribed in subsection (6) or as may be prescribed in subsection (7) is guilty of an offence.

(5) Any request to an electronic communications service provider for re-instatement of the default setting blocking access to pornography must be recorded in the register by the electronic communications service provider to reflect such reinstatement.

(6) Subject to any regulations made pursuant to subsection (7) a register must be kept containing—

- (a) the date of the application and removal of the default setting;
- (b) the International Mobile Equipment Identity number and a description of the device;
- (c) personal particulars of the applicant including the applicant's full name, contact number and residential address;
- (d) a copy of the applicant's identity document, driver's licence or passport;
- (e) a declaration by the applicant that the device will be used by him or her and he or she is aware that allowing a child to use the device constitutes a criminal offence;
- (f) the full printed name, identification number and signature of the person or employee responsible for removing the default setting; and
- (g) in the event of reinstatement of the default setting, the date thereof, the International Mobile Equipment Identity number and a description of the device and the name of the employee effecting the re-instatement.

(7) The Minister, in consultation with the Minister of Communications and Digital Technologies, and subject to section 67(a), may make regulations pertaining to the steps to be taken by electronic communications service providers as required in subsection 2(d) and pertaining to the register provided for in subsection (4).

(8) Access to the register may only be allowed upon an order of a court authorising access.

- (9) Any person who—
- (a) unlawfully and intentionally allows unauthorised access; or
  - (b) unlawfully and intentionally accesses a register without authorisation,

is guilty of an offence and liable upon conviction to a fine or two years` imprisonment or to both such fine and imprisonment

(10) Any magistrate or justice may issue an order authorising access to the register upon the written application of a commissioned police officer which sets out sufficient reasons for the need to have access to the register.

(11) An affidavit by an employee of an electronic communications service provider having access to the register and pertaining to the information on the register regarding any instrument identified by an International Mobile Equipment Identity number shall serve as prima facie proof of the contents thereof in any subsequent criminal proceedings and the provisions of section 212(1), (2), (3), (12) and (13) of the Criminal Procedure Act,1977, shall find application with the necessary changes required by the context.

### **Misleading techniques on the Internet**

**19B.** (1) A person who unlawfully and intentionally creates or uses any technique including embedding words, or digital images into the source code of a website, an advertisement or domain name, to deceive a person into viewing or being exposed to child sexual abuse material or pornography is guilty of the offence of creating or using a technique to expose a person to child sexual abuse material or pornography.

(2) For purposes of this section—

(a) 'domain name' has the meaning assigned to it in section 1 of the Electronic Communications and Transactions Act 2002 (Act No. 25 of 2002); and

(b) 'source code' means the combination of text and other characters comprising the content, both viewable and non-viewable, of a webpage, including any website publishing language, programming language, protocol or functional content, as well as any successor languages or protocols.

### **Offences relating to child sexual abuse material**

**19C.** (1) A person who unlawfully and intentionally creates, makes or produces child sexual abuse material, is guilty of the offence of creating,

making or producing child sexual abuse material.

(2) A person who unlawfully and intentionally—

- (a) downloads;
- (b) possesses;
- (c) accesses; or
- (d) views child sexual abuse material.

is guilty of the offence of downloading, possessing, accessing or viewing child sexual abuse material.

(3) A person who unlawfully and intentionally in any manner—

- (a) makes available;
- (b) distributes or allows for distribution;
- (c) transmits;
- (d) sells or offers for sale;
- (e) procures or offers to procure;

child sexual abuse material is guilty of the offence of making child sexual abuse material available.

(4) A person who unlawfully and intentionally advocates, advertises, encourages or promotes child sexual abuse material is guilty of the offence of promoting child sexual abuse material.

(5) A person who unlawfully processes or facilitates a financial transaction while having knowledge or a reasonable suspicion that such transaction will facilitate a contravention of subsections (1) to (4) is guilty of an offence.

### **Consensual self-generated child sexual abuse material by certain children**

**19D.** Where a child (A) is reasonably suspected of having committed an offence—

- (a) in terms of sections 19C(1) or 19C(2) and A is the child in the child sexual abuse material;
- (b) in terms of section 19 and—
  - (i) A is the child in the child sexual abuse material; and
  - (ii) the exposure or display is made to a child B, who is 12 years or older; and
  - (iii) B agreed to the exposure or display;
- (c) in terms of sections 19, 19C(1), 19C(2) or 20(1) and-

- (i) the child sexual abuse material is of another child B with or without A;
  - (ii) B agreed to the creation of the child sexual abuse material and
  - (iii) the exposure or display is only to B; and
  - (iv) B is 12 years or older;
- (d) in terms of section 10 if A is the only child in the image and the exposure or display is made to an adult person B,

A is not criminally liable for the offence and the investigating officer must refer the matter to the prosecutor who must, if satisfied that a *prima facie* case exists, that the prescribed circumstances are met and that the intervention of a probation officer is warranted, refer ('A') to a probation officer who must deal with A in accordance with the provisions of section 9 of the Child Justice Act, 2008 (Act No. 75 of 2008), with the necessary changes.

#### **Substitution of section 20 of Act 32 of 2007**

14. The following section is hereby substituted for section 20 of the principal Act:

**"Using, coercing, recruiting or deceiving children for or benefiting from child [pornography] sexual abuse material**

20. (1) A person ("A") who unlawfully and intentionally uses, requests, entices, recruits, coerces or deceives a child **[complainant]** ("B") through whatever means, with or without the consent of B, whether for financial or other reward, favour, benefit, [or] compensation or any other advantage to B or to a third person ("C") or not—

- (a) for purposes of creating, making or producing;
- (b) to [by ]create[ing], make[ing] or produce[ing]; [or]
- (c) to in any manner assist to create, make or produce;[,]
- (d) to provide of him- or herself; or
- (e) to participate in a live display involving,

**[any image, publication, depiction, description or sequence in any manner whatsoever of] child [pornography] sexual abuse material, is guilty of the offence of using, coercing, recruiting or deceiving a child for**

child **[pornography]** sexual abuse material.

(2) A **[Any]** person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child **[pornography]** sexual abuse material.”.

#### **Amendment of the title to Chapter 4 of Act 32 of 2007**

15. The title to Chapter 4 of the principal Act is hereby amended by the substitution of the following title:

***“Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material or pornography to persons who are mentally disabled and using, coercing, recruiting and deceiving persons who are mentally disabled for pornographic purposes or benefiting therefrom”.***

#### **Amendment of section 24 of Act 32 of 2007**

16. Section 24 of the principal Act is hereby amended—

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

“(a) supplies, exposes or displays to a third person (“C”)—

- (i) an article which is intended to be used in the performance of a sexual act;
- (ii) child **[pornography]** sexual abuse material or pornography; or
- (iii) a publication, **[or]** film, game or other material, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with a person who is mentally disabled (“B”); or”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) A person (‘A’) who—

- (a) supplies, exposes or displays to a person who is mentally disabled ('B')—
- (i) an article which is intended to be used in the performance of a sexual act;
  - (ii) child sexual abuse material **[pornography]** or pornography; or
  - (iii) a publication, **[or] film, game or other material**, with the intention to encourage, enable, instruct, or persuade B to perform a sexual act;
- (b) commits any act with or in the presence, whether physical or remote, of B or who describes the commission of any act to or in the presence, whether physical or remote, of B with the intention to encourage or persuade B or to reduce or diminish any resistance or unwillingness on the part of B to —
- (i) perform a sexual act with A or a third person ('C');
  - (ii) perform an act of self-masturbation in the presence, whether physical or remote, of A or C or while A or C is watching;
  - (iii) be in the presence, whether physical or remote, of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
  - (iv) be exposed to child sexual abuse material **[pornography]** or pornography;
  - (v) be used for pornographic purposes as contemplated in section 26(1); or
  - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;
- (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;
- (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B—
- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
  - (ii) during such meeting or communication or any subsequent

meeting or communication to—

- (aa) commit a sexual act with A;
- (bb) discuss, explain or describe the commission of a sexual act; or
- (cc) provide A, by means of any form of communication including electronic communication, with **[any image, publication, depiction, description or sequence of]** pornography of B himself or herself or any other person; or

(e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B, is guilty of the offence of sexual grooming of a person who is mentally disabled.”.

**Substitution of section 25 of Act 32 of 2007**

17. The following section is hereby substituted for section 25 of the principal Act:

**“Exposure or display of or causing exposure or display of child sexual abuse material or pornography to persons who are mentally disabled”**

25. A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of **[any image, publication, depiction, description or sequence of]** child **[pornography]** sexual abuse material or pornography through any means to a complainant who is mentally disabled (“B”), is guilty of the offence or exposing or displaying or causing the exposure or display of child **[pornography]** sexual abuse material or pornography to a person who is mentally disabled.”.

**Substitution of section 26 of Act 32 of 2007**

18. The following section is hereby substituted for section 26 of the principal Act:

**“Using, coercing, recruiting or deceiving persons who are mentally”**

**disabled for pornographic purposes or benefiting therefrom**

**26.** (1) A person (“A”) who unlawfully and intentionally uses, recruits, coerces or deceives a complainant who is mentally disabled (“B”) through whatever means, whether for financial or other reward, favour, benefit, [or] compensation or any other advantage to B or to a third person (“C”) or not—

- (a) for the purpose of creating, making or producing;
- (b) to[by] create[ing], make[ing] or produce[ing]; [or]
- (c) to in any manner assist to create, make or produce,
- (d) to provide of him- or herself; or
- (e) to participate in a live display involving,

**[any image, publication, depiction, description or sequence in any manner whatsoever, of] pornography or child [pornography] sexual abuse material**, is guilty of the offence of using, coercing, recruiting or deceiving a person who is mentally disabled for pornographic purposes.

(2) **[Any] A** person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from using, coercing, recruiting or deceiving a person who is mentally disabled for pornographic purposes.”.

**Substitution of section 54 of Act 32 of 2007**

**19.** The following section is hereby substituted for section 54 of the Principal Act:

**“Obligation to report commission of sexual offences against children or persons who are mentally disabled or otherwise unable to report or sexual offences involving child sexual abuse material and duties connected therewith**

- 54.** (1) A person who—
- (a) has knowledge, or has the reasonable belief or suspicion that a sexual offence has been or is being committed—
    - (i) against a child;

- (ii) against a person who is mentally disabled;
  - (iii) against a person who for whatever reason is not able to report the commission of the offence; or
  - (iv) that involves child sexual abuse material
- must without undue delay report such knowledge, reasonable belief or suspicion to a designated police official;
- (b) 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 imprisonment.

(2) An electronic communications service provider or financial institution that—

(a) knows or ought reasonably to know that its electronic communications system or facilities are being used to facilitate the commission of any sexual offence as contemplated in subsection (1) must—

- (i) without delay report the offence to a police official;
  - (ii) preserve any information which may be of assistance to a police official investigating the offence;
  - (iii) comply with any written request by a police official relating to the investigation and prosecution of such offence;
  - (iv) take all reasonable steps to prevent access to the child sexual abuse material by any person, unless instructed by a commissioned police officer in writing within two days of having reported the offence not to take such steps;
  - (v) not disclose the fact of having reported or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is, or must be made, other than in accordance with any legislative provisions or for purposes of legal proceedings or in terms of a court order;
- (b) fails to comply with any of the obligations contained in paragraph (a), is guilty of an offence.

(3) A person, electronic communications service provider or institution referred to in subsections (1) and (2)—

- (a) must provide reasons for that knowledge, reasonable belief or suspicion to a police official; and
- (b) who makes the report in good faith, is not liable to civil or criminal proceedings by reason of making such report.

**Amendment of section 56 of Act 32 of 2007**

20. Section 56 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) It is not a valid defense to a charge under section 20(1), in respect of a visual representation that—

- (a) the accused person believed that a person shown in the representation that is alleged to constitute child [pornography] sexual abuse material, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and
- (b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.”

**Amendment of section 56A of Act 32 of 2007**

21. Section 56A of the principal Act is hereby amended by the insertion after subsection (2) of the following subsections:

“(3) A person convicted of any offence in terms of section 19C is liable upon conviction to a sentence of 15 years’ imprisonment and in the event of a legal person, to a fine.

(4) If a person is convicted of an offence under section 19C, the court that imposes the sentence must consider, but is not limited to consider, the following factors which may serve in aggravation of sentence:

- (a) The quantity of child sexual abuse material that forms the basis of the conviction;
- (b) the nature of the material concerned, including the level of violence used, or depicted, the age of the child used or depicted, the extent of explicitness of the material and the degree of

invasiveness of any deed perpetrated or depicted to be perpetrated on a child;

- (c) the degree to which the accused contributed towards or participated in the commission of the offence;
- (d) the purpose for which the offence was committed; and
- (e) the relationship between the accused and the child involved including the existence of any expectation of trust or whether the accused acted in a position of authority or of taking care of the child.

(5) In addition to any sentence imposed and any order regards placement of the name of a person convicted of a sexual offence against a child including an offence involving child sexual abuse material on the National Register for Sex Offenders as provided for in section 50 and on the Child Protection Register as provided for in the Children's Act, 2005 (Act No. 38 of 2005) the court, subject to a pre-sentence report by a probation officer in consultation with a community corrections official, and for such period as may be determined by the court, whether of immediate effect, whilst serving a sentence or after the serving of the sentence imposed or as conditions of a suspended or partially suspended sentence, may make any order that will serve to protect a child or children in general, including any or all of the following orders—

- (a) that the convicted person may not visit, frequent, or reside in close proximity to any school, premises or places frequented by children;
- (b) that the convicted person may not access the Internet, or may have such qualified access as may be determined by the court;
- (c) that the convicted person may not have access to any device that is able to provide access to the Internet, or that the accused may have such qualified access to such device as may be determined by the court;
- (d) that the convicted person may not employ any child;
- (e) that the convicted person may only be in the presence of any specified child, or in the presence of any child or children in general, when accompanied by another adult person;
- (f) that the convicted person must submit to supervision and monitoring by a community correction official who may apply any

technique to limit access to the Internet, including social media platforms, for purposes of preventing access to children and/or child sexual abuse material;

- (g) that the convicted person must accede to any reasonable request by a community correction official for purposes of monitoring compliance with any order made;
- (h) that the convicted person must undergo such therapeutic interventions as the court may determine appropriate; and
- (i) that the convicted person must pay the cost of any therapeutic treatment needed by a child complainant in respect of the offence for which he or she has been convicted, and that such monies must be paid to the clerk of the court for disbursement to the service provider.

(6) The order referred to in subsection (5) must be accompanied by an order detailing the monitoring of the accused by the community correction official.

(7) Where the convicted person fails to comply with any of the orders imposed in terms of subsection (5) and where such order was not made a condition of a suspended sentence, the accused shall be guilty of an offence and liable to a fine or to imprisonment for a period of two years or both such fine and imprisonment.”.

#### **Insertion of section 59A of Act 32 of 2007**

22. The following section is hereby inserted after section 59 of the principal Act:

**“Evidence of age of child depicted in child sexual abuse material**

**59A.** (1) In criminal proceedings involving child sexual abuse material, the court may take judicial notice that the person in the child sexual abuse material is, or is depicted as being, under the age of 18.

(2) Subject to section (1), where it is disputed that the person in the child sexual abuse material is, or is depicted as being, under the age of 18, an affidavit or certificate issued pursuant to section 212(4)(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), will serve as *prima facie* proof of such age and the provisions of section

212(12) of the Criminal Procedure Act, 1977, will find application with the necessary changes required.”.

**Insertion of section 61A of Act 32 of 2007**

23. The following sections are hereby inserted after section 61 of the principal Act:

**“Management of Child Sexual Abuse Material or Pornography**

**61A.** (1) Police and court officials having child sexual abuse material or pornography, including any devices in or upon which child sexual abuse material is or might be stored, in their custody—

(a) must take all reasonable steps to prevent access thereto by anyone not having a right of access; and

(b) may not reproduce any such material except for purposes of evidence in criminal proceedings.

(2) Where the Judge or judicial officer presiding at criminal proceedings in which child sexual abuse material will serve as an exhibit or as evidentiary material, is informed by the prosecutor that a report has been prepared which explains in sufficient detail the child sexual abuse material and that, if presented in evidence, it could serve to dispense with the need to present the child sexual abuse material in evidence—

(a) the court must enquire from the legal representative of the accused if he or she consents to the report being presented in evidence in lieu of the child sexual abuse material. Where the accused consents, the police official who compiled the report must be called to give oral evidence regarding the contents of the report; and

(b) the court may of its own motion and must, where so requested by any of the parties, call for the child sexual abuse material to be presented in evidence at any stage of the proceedings.

(3) The Judge or judicial officer presiding at criminal proceedings in which child sexual abuse material, including any devices in or upon which child sexual abuse material is stored, serves as an exhibit or evidentiary material must issue directives for purposes of

ensuring the safe-keeping thereof pending the conclusion of the proceedings.

**Orders to keep secure, remove, disable access to, dispose of and destroy child sexual abuse material**

**61B.** (1) Upon the conclusion of the criminal proceedings, whether the accused is convicted or acquitted of any offence in terms of this Act that involves child sexual abuse material, the Judge or presiding magistrate, after having provided the prosecutor and accused an opportunity to address the court—

- (a) must make an order regards the management of the court record by the Clerk of the court, if the order is made by a magistrate, or by the Registrar of the High Court if the order is made by a Judge;
- (b) must make an order regards the management of any such child sexual abuse material or devices that served as evidence in the proceedings pending appeal and or review proceedings, including the manner of disposal and destruction thereof upon finalisation or abandonment of appeal or review proceedings;
- (c) may, upon application by the prosecutor, make an order that the police official charged with the investigation must destroy any part of, or all child sexual abuse material or any device upon which material is stored that had not been used as evidence in the proceedings and to provide the court with an affidavit to this effect, which affidavit shall be part of the court record;
- (d) must, where so justified by the evidence, direct the police official charged with the investigation to take the required steps for purposes of having any such material hosted by electronic communications service providers removed and access thereto disabled.”

**Amendment of section 63 of Act 32 of 2007**

**24.** Section 63 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) The Committee must **[shall]** consist of—
- (a) the Director-General: Justice and Constitutional Development, who will **[shall]** be the chairperson of the Committee;
  - (b) the National Commissioner of the South African Police Service;
  - (c) the National Commissioner of Correctional Services;
  - (d) the Director-General: Social Development;
  - (e) the Director-General: Health; **[and]**
  - (f) the National Director of Public Prosecutions[.];
  - (g) the Director-General: Department of Basic Education;
  - (h) the Director-General: Department of Higher Education and Training; and
  - (j) the Director-General: Department of Communications and Digital Technologies.”

**Amendment of section 65 of Act 32 of 2007**

**25.** Section 65 of the principal Act is hereby amended by—

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

- “(e) ensuring the different organs of state provide for—
- (i) appropriate and relevant training, including intra- and intersectoral training, on how to respond to allegations of sexual offences as part of its curricula, in-service and continuous training;
  - (ii) appropriate screening policies;
  - (iii) prevention programmes relating to sexual offences;
  - (iv) debriefing programmes including a focussed child sexual abuse material debriefing programme; and
  - (v) the manner in which any child sexual abuse material is kept secured to prevent unauthorised access, possession, reproduction and distribution, or loss or damage thereof;

for all employees who may manage, be exposed to or investigate cases involving sexual offences.”; and

(b) the substitution for subsection (3) of the following subsection:

“(3) The Minister must, after consultation with the cabinet members responsible for police [safety and security], correctional services, social development [and] health, basic education, higher education and training, communications and digital technologies and the National Director of Public Prosecutions—

(a) within one year after the implementation of this Act or any amendment thereof, submit reports to Parliament, by each Department or institution contemplated in section 63(2), on the implementation of this Act, and

(b) every year thereafter submit such reports to Parliament.”.

#### **Amendment of section 66 of Act 32 of 2007**

**26.** Section 66 of the principal Act is hereby amended<sup>16</sup>—

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

#### **Option 1**

“(a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Police and after consultation with the Minister, the National Director of Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health **[and]**, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, issue and publish in the *Gazette* national

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<sup>16</sup> Two options are listed under each of the subsections in section 66 of the principal Act, the first option of which relates to the streamlining of the subsections linked to Schedules 1 to 9 which separately list the obligations of relevant departments in terms of the principal Act; and the second option in which each subsection within section 66 is amended and expanded on without additional Schedules. Option 1 linked to the Schedules 1 to 9 is the Commission’s preferred option.

instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including those listed in Schedule 1 of the Act **[the following:**

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;**
- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;**
- (iii) the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;**
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;**
- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality;**
- (vi) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results; and**
- (vii) the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).;]**

## **Option 2**

“(a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Police and after consultation with the Minister, the National Director of Public

Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health [and], Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, issue and publish in the *Gazette* national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;
- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;
- (iii) the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality;
- (vi) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results;**[and]**
- (vii) the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (viii) the manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible
- (ix) the manner in which police officials must act in reports of alleged

cases involving child sexual abuse material and pornography:

- (aa) The expediency with which police officials are to react to the reporting of these cases;
- (bb) the manner in which these offences are to be investigated including the steps to be taken to have any child in the child sexual abuse material identified and traced;
- (cc) the manner in which the child victim is to be provided protection, whether identified or not;
- (dd) the manner of search for and seizure of evidence;
- (ee) the manner in which the child sexual abuse material or pornography should be kept in safe custody, stored and or disposed of; and
- (ff) the manner in which effect will be given to court orders relating to the evidence; and
- (x) the development and implementation of a standard operating procedure to determine the manner in which:
  - (aa) Undercover operations relating to sexual offences including those sexual offences involving child sexual abuse material must be conducted;
  - (bb) the circumstances, expediency and the manner in which an electronic communications service provider is to be instructed not to take steps to prevent access to the child sexual abuse material by any person, the steps to be taken and the reasonable period within which this is to occur; and
  - (cc) the service provider is to be instructed to take steps to prevent access after a request not to do so.”;

(b) the substitution for paragraph (a) in subsection (2) of the following paragraph:

**Option 1**

“(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health [and], Social

Development, Basic Education, Higher Education and Training and Communications and Digital Technologies, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including those listed in Schedule 2 of the Act [the following:

- (i) **The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;**
- (ii) **the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;**
- (iii) **the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provide for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;**
- (iv) **the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;**
- (v) **the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the**

- complainant or the complainant's family;**
- (vi) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16(2), dealing with consensual sexual violation with a child with the view to ensuring uniformity;**
  - (vii) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 38(1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity;**
  - (viii) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant; and**
  - (ix) . . .**
  - (x) the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).];**

## **Option 2**

“(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health [and], Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which sexual offence cases should be dealt with

- in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
- (ii) the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;
  - (iii) the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provide for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;
  - (iv) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
  - (v) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family;
  - (vi) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16(2), dealing with consensual sexual violation with a child with the view to ensuring uniformity;
  - (vii) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 38(1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity;

- (viii) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant; **[and]**
- (ix) . . .
- (x) the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (xi) the manner in which protection is provided to the victim, whether identified or not, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.
- (xii) the manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible;
- (xiii) the manner in which aspects relating to cases involving child sexual abuse material must be dealt with, including:
  - (aa) The circumstances in which ancillary orders provided for in section 56A(5) are to be sought and the steps to be taken for purposes of securing the required report.
  - (bb) the criteria, including factors relating to power and age differentials, to be considered in respect of section 19D.
  - (cc) the manner in which sexual offence cases involving child sexual abuse material must be dealt with, kept in custody, stored and/or disposed of when:
    - (aaa) A case docket is received from a member of the South African Police Service for consideration for prosecution;
    - (bbb) a case is serving before court during the trial;
    - (ccc) a case is concluded in court; or
    - (ddd) when a request for access to the material is received from the defence; and
- (xiv). the criteria to be used and circumstances in which the diversion of a child accused of a sexual offence involving child sexual abuse material or pornography should be considered and the

appropriate conditions of diversion.”;

(c) the substitution in subsection (3) for paragraph (a) of the following paragraph:

**Option 1**

“(a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with National Director of Public Prosecutions, the Directors-General: Justice and Constitutional Development **[and]**, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all medical practitioners and any other relevant persons when dealing with sexual offences cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, **[among others,]** to those listed in Schedule 3 of the Act. [—

- (i) the administering of Post Exposure Prophylaxis;**
- (ii) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;**
- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality;**
- (iv) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment;**
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided; and**
- (vi) the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in**

**terms of section 55A and any regulations made in terms of section 67(b) ].”;**

**Option 2**

“(a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with National Director of Public Prosecutions, the Directors-General: Justice and Constitutional Development **[and]**, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all medical practitioners and any other relevant persons when dealing with sexual offences cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, **[among others,]** to—

- (i) the administering of Post Exposure Prophylaxis;
- (ii) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;
- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality;
- (iv) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment;
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided; **[and]**
- (vi) the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (vii) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to an official employed

at a public health establishment or when a sexual offence is suspected or detected by such official during a medical assessment, examination or intervention;

- (viii) the manner in which respectful and supportive services are provided to the victim of a sexual offence including the manner in which their rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety in as far as is possible;
- (ix) the manner in which any child sexual abuse material must be secured to prevent unauthorised access, loss or damage; and
- (x) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided, including:
  - (aa) The forensic medical examination of victims and alleged offenders;
  - (bb) the determination of age where the child sexual abuse material involves unidentified victims or depictions; and
  - (cc) the manner in which any evidence, including child sexual abuse material, must be secured to prevent unauthorized access, loss or damage.”.

(d) the substitution for subsection (3A) of the following subsection:

**Option 1**

“(3A) The Director-General Social Development must, in consultation with the Minister of Social Development and after consultation with the Directors-General: Justice and Constitutional Development, Health, Basic Education, Higher Education and Training, and Communications and Digital Technologies, National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, **[issue]** develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as

set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference to those listed in Schedule 4 of the Act [the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)].”;

## Option 2

“(3A) The Director-General Social Development must, in consultation with the Minister of Social Development and after consultation with the Directors-General: Justice and Constitutional Development, Health, Basic Education, Higher Education and Training, and Communications and Digital Technologies, National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, **[issue]** develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference to —

- (a) the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (b) the manner and the expediency with which social workers are to respond to the disclosure or reporting of an alleged sexual offence;
- (c) the manner in which respectful and supportive services are provided to the victim; the rights of child victims to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety and well-being in as far as is possible;
- (d) the manner in which the child victim of a sexual offence including

child sexual abuse material should be protected and referred for other services if necessary including the circumstances when the offender, rather than the victim, should be removed from the communal residence;

- (e) the manner in which assistance in the investigation and prosecution of sexual offences, including matters relating to child sexual abuse material must be provided, including:
  - (i) The procedures that must be followed in the reporting of the sexual offence to a member of the South African Police Service; and
  - (ii) the procedures relating to the safe keeping of the evidence of the alleged sexual offence, including child sexual abuse material to prevent unauthorised access, loss or damage before handing it over to a member of the South African Police Service;
- (f) the manner in which therapy may be provided to a child victim that is required to testify in court proceedings;
- (g) the manner in which probation officers are to deal with children referred in terms of section 19D and any other child in conflict with the law for having committed a sexual offence or that involves child sexual abuse material; how such children are to be assessed; and the investigations required for purposes of the appropriate interventions to be recommended or for purposes of determining appropriate conditions of diversion; and
- (h) the manner in which to conduct investigations and compile a report when so required for purposes of assisting courts in making any ancillary order as provided for in section 56A(5).”;

- (e) the insertion after subsection (3A) of the following subsections:

### **Option 1**

“(3B) The Director-General Basic Education must, in consultation with the Minister of Basic Education and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Higher Education and Training and the Department of Communications and Digital Technologies, the National

Director of Public Prosecutions, and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to those listed in Schedule 5 of the Act.;

(3C) The Director-General Higher Education and Training must, in consultation with the Minister of Higher Education and Training and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to those listed in Schedule 6 of the Act.;

(3D) The Director-General Justice and Constitutional Development must, in consultation with the Minister and after consultation the Directors-General: Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble,

particularly those objects which have a bearing on complainants of such offences, with particular reference, to those listed in Schedule 7 of the Act.:

(3E) The Director-General: Department of Communications and Digital Technologies must, in consultation with the Minister of Communications and Digital Technologies and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education and Higher Education and Training, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to those listed in Schedule 8 of the Act.:

(3F) The National Commissioner of Correctional Services must, in consultation with the Minister and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to those listed in Schedule 9 of the Act.:

“(3B) The Director-General Basic Education must, in consultation with the Minister of Basic Education and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Higher Education and Training and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions, and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to—

- (a) facilitate and ensure continuous training of educators and learners on preventative measures;
- (b) the manner the child victim should be protected and referred for other services if necessary, including the manner in which the victim’s rights to equality, privacy, respect and dignity are to be realized and the steps to be taken to ensure the safety of the victim in as far as is possible;
- (c) the manner and expediency with which educators are to respond to a learner or educator reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service;
- (d) the manner and expediency with which educators are to respond to allegations of sexual abuse by an educator, contractor, employee, intern, volunteer or learner;
- (e) the manner in which a child alleged to have committed a sexual offence or in conflict with the law in respect of a sexual offence must be dealt with;
- (f) the manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided;
- (g) the manner in which evidence of the alleged sexual abuse, child sexual abuse material or any other evidence is to be kept secure

before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage; and  
 (h) the manner in which learners are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.

(3C) The Director-General Higher Education and Training must, in consultation with the Minister of Higher Education and Training and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to—

- (a) facilitate and ensure continuous training of educators and students on preventative and reactive measures;
- (b) the manner the child victim should be protected and referred for other services if necessary; including the manner in which the victim's rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the safety of the victim in as far as is possible;
- (c) the manner and expediency with which lecturers or staff at tertiary institutions are to respond to a student, lecturer or staff reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service;
- (d) the manner and expediency with which lecturers or staff are to respond to allegations of sexual abuse against a lecturer, staff, contractor, employee, intern, volunteer or student, including

- reporting the alleged sexual offence to the department and a member of the South African Police Service;
- (e) the manner in which the child in conflict with the law should be dealt with;
  - (f) the manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided;
  - (g) the manner in which evidence of the alleged sexual abuse, child sexual abuse material, pornography or any other evidence is to be kept secure before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage; and
  - (h) the manner in which students are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.

(3D) The Director-General Justice and Constitutional Development must, in consultation with the Minister and after consultation the Directors-General: Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to—

- (a) the manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and child sexual abuse material or pornography, must be dealt with including any copying and distribution thereof at all courts;
- (b) the manner in which victims are supported and protected within the court environment;

- (c) the manner in which victims are prepared for testifying in court;
- (d) the manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be kept in custody, stored and disposed of or destroyed; and
- (e) the manner in which an order contemplated in section 50(2)(a) (dealing with an order of a court to include the accused's name in the Register) must be forwarded to and received by the Registrar of the National Register for Sex Offenders so as to ensure the relevant data is captured.

(3E) The Director-General: Department of Communications and Digital Technologies must, in consultation with the Minister of Communications and Digital Technologies and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education and Higher Education and Training, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to—

- (a) the manner in which to raise public awareness and to educate the general public in the responsible use of the Internet, including available protective measures to prevent the inadvertent accessing of sexual material or any access to child sexual abuse material;
- (b) the manner in which to collaborate with relevant roleplayers providing or involved in electronic communications services for purposes of ensuring optimal protection to children from accessing child sexual abuse material or pornography, inclusive of minimum requirements that industry is to comply with and the

- monitoring of such measures; and
- (c) with reference to the classification of publications, films and games, including any other material to be regulated and classified by the Film and Publication Board—
- (i) the manner and the expediency with which an offence involving child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service;
  - (ii) the manner in which any child sexual abuse material or other material that constitutes a sexual offence, is to be kept secured to prevent loss or damage or unauthorised access, until handing it over to a member of the South African Police Service, including the manner in which further distribution and access of such material is to be prevented and restricted; and
  - (iii) when exercising a discretion not to refuse classification, the manner in which to protect a child victim, irrespective whether the child is identified or identifiable, inclusive of excision and blurring techniques and, irrespective the fact of classification, the manner and expediency with which the child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service.

(3F) The National Commissioner of Correctional Services must, in consultation with the Minister and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, to—

- (a) the manner in which sexual offence cases, including cases relating to child sexual abuse material, should be dealt with when detected or reported within the correctional services context;
- (b) the manner in which the victim within the correctional services facility is to be provided protection including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible;
- (c) the manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided;
- (d) the manner in which the child sexual abuse material or any other evidence is kept secured before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage;
- (e) the development and implementation of assessment tools and therapeutic programmes for persons convicted of sexual offences who are in the care of or monitored or provided with services by the department;
- (f) the manner in which to ensure that Parole Boards receive appropriate recommendations relating to the parole, supervision and necessary community therapeutic services for persons convicted of sexual offences; and
- (g) the manner in which to assist the probation officer for purposes of recommending appropriate ancillary orders as provided for in section 56A(5) including on the manner of monitoring thereof when so required.”; and

(f) by the substitution for paragraph (a) in subsection (4) of the following paragraph:

- “(a) The national instructions and directives by each Department or institution, contemplated in this section must be—
- (i) submitted to Parliament within six months after the commencement of this section, before publication in the *Gazette*: Provided that the first national instructions or directives giving effect to section 3 of the Judicial Matters Second Amendment Act, 2013 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2020, must be

- submitted to Parliament within six months after any regulations have been made in terms of section 67(b) and section 19A; and
- (ii) published in the *Gazette*.”.

#### **Amendment of section 67 of Act 32 of 2007**

**27.** Section 67 of the principal Act is hereby amended by the substitution for paragraph (a) in subsection (1) of the following paragraph:

**“67.** The Minister may—

- (a) after consultation with the cabinet members responsible for police **[safety and security]**, correctional services, social development, **[and]** health, basic education, higher education and training, communications and digital technologies and the National Director of Public Prosecutions, make regulations regarding—
- (i) any matter which is required or permitted by this Act to be prescribed by regulation;
- (ii) the intersectoral implementation of this Act; and
- (iii) any other matter which is necessary or expedient to be prescribed in order to achieve or promote the objects of this Act; and”.

#### **Amendment of long title of Act 32 of 2007**

**28.** The long title of the principal Act is hereby amended by the substitution—

- (a) for the fourth bullet of the following bullet:
- 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 sexual abuse material **[pornography]** and the engaging of sexual services of an adult;
- (b) for the sixth bullet of the following bullet:
- enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and

persons who are mentally disabled,<sup>17</sup> including specifically substituting the term ‘child pornography’ with the term ‘child sexual abuse material’ so as to provide for revised terminology that appropriately and accurately reflects the nature of the offence and the harm done to children, and including offences relating to sexual exploitation or grooming, [exposure to or display of pornography and the creation of child] and offences relating to child sexual abuse material as well as the exposure of children to pornography whether deliberate or otherwise, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation;

(c) for the ninth bullet of the following bullet:

- creating a duty to report sexual offences committed with or against children or persons who are mentally disabled or otherwise unable to report or sexual offences involving child sexual abuse material; and

(d) for the fifteenth bullet of the following bullet:

- making provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed **[by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation, enforcement and administration of this Act]** in order to achieve the objects of the Act;”

<sup>17</sup>

The advisory committee flags the need to change and expand the term ‘persons with mental disabilities’ to rather refer to all persons with disabilities as persons with physical disabilities are equally vulnerable. It further notes that as the terminology is fluid it may also be advisable to give attention to the manner in which reference is made to this vulnerable group of people.

**Amendment of preamble of Act 32 of 2007**

29. The preamble of the principal Act, is hereby amended by—

(a) the substitution for the fifth paragraph of the following paragraph:

“WHEREAS several international and regional legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, **[and]** the United Nations Convention on the Rights of the Child, 1989, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2003, and the African Charter on the Rights and Welfare of the Child 1990, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children;”; and

(b) the addition after the sixth paragraph of the following paragraph:

“AND WHEREAS, in an ever changing digital environment, an adequate response to address the easy distribution of pornography and child sexual abuse material is required for purposes of effectively protecting children and other vulnerable persons from harm, without unjustifiably limiting children`s rights to human dignity and privacy.

**Amendment of Index of Act 32 of 2007**

30. The Index to the principle Act is hereby amended —

(a) by the substitution for the title to Part 3 of Chapter 2 of the following title:

“Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing"), child **[pornography]** sexual abuse material to persons 18 years or older, harmful disclosure of pornography or engaging sexual services of persons 18 years or older”;

(b) by the substitution for item 10 for the following item:

“Exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material or pornography to persons 18 years or older”;

(c) by the substitution for the title to Part 2 of Chapter 3 of the following title:

“Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material or pornography to children, offences relating to child sexual abuse material and using, coercing, recruiting and deceiving of children for, **[pornographic]** purposes of, or benefiting from, child **[pornography]** sexual abuse material”;

(d) by the substitution for item 19 for the following item:

“Exposure or display of, or causing exposure or display of child **[pornography]** sexual abuse material or pornography to children”;

(e) by the insertion after item 19 of the following items:

“19A. Enticement to view or making child sexual abuse material or pornography accessible to children’  
‘19B. Misleading techniques on the Internet’  
‘19C. Offences relating to child sexual abuse material’  
‘19D. Consensual self-generated child sexual abuse material by certain children”

(f) by the substitution for item 20 for the following item:

“Using, coercing, recruiting and deceiving children for or benefiting from child **[pornography]** sexual abuse material”;

(g) by the substitution for the title of Chapter 4 of the following title:

“Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material or pornography to persons who are mentally disabled and using, coercing, recruiting and deceiving persons who are mentally disabled for pornographic purposes or benefiting therefrom”;

(h) by the substitution for item 25 for the following item:

“Exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material to persons who are mentally disabled”;

(i) by the substitution for item 26 for the following item:

“Using, coercing, recruiting and deceiving persons who are mentally disabled for pornographic purposes or benefiting therefrom”;

(j) by the substitution for the title to Part 1 of Chapter 7 of the following title:

“Miscellaneous offences: Obligation to report commission of sexual offences against children or persons who are mentally disabled or otherwise unable to report, or of sexual offences involving child sexual abuse material and attempt, conspiracy, incitement or inducing another person to commit a sexual offence”; and

**Option 1<sup>18</sup>**

(k) by the insertion of the following Schedules:

“Schedule 1;  
Schedule 2;  
Schedule 3;  
Schedule 4;  
Schedule 5;  
Schedule 6;  
Schedule 7;  
Schedule 8;  
Schedule 9;  
Schedule 10”;

**Option 2**

(k) by the insertion of the following Schedule:

“Schedule 1.”;

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<sup>18</sup> The Bill contains two options in respect of item 3(k) which relates to the two options provided for in the amendment of section 66 of the principal Act under item 23 and the Schedule to the Act.

**Insertion of Schedules 1 – 9 in Act 32 of 2007**

**Option 1<sup>19</sup>**

31. Schedules 1 – 9 are inserted in the principle Act as follows —

**“Schedule 1**

**SOUTH AFRICAN POLICE SERVICE**

**(Section 66(1)(a))**

1. The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials.
2. The manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible
3. The manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued.
4. The manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).
5. The manner in which police officials must act to give effect to aspects covered in Chapter 5 – Services to victims of sexual offences and compulsory HIV testing of alleged sex offenders - :
  - (a) The circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
  - (b) The manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
  - (c) The manner in which police officials must deal with the

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<sup>19</sup> The options listed under item 26 relate to the options listed under section 66 of the principal Act, the first option which relates to the streamlining of section 66 linked to Schedules 1 to 9 and the second option in which each subsection within section 66 is amended and expanded on without additional Schedules.

outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality; and

(d) The manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results.

6. The manner in which police officials must act in reports of alleged cases involving child sexual abuse material and pornography:

(a) The expediency with which police officials are to react to the reporting of these cases;

(b) The manner in which these offences are to be investigated including the steps to be taken to have any child in the child sexual abuse material identified and traced;

(c) The manner in which the child victim is to be provided protection, whether identified or not;

(d) The manner of search for and seizure of evidence;

(e) The manner in which the child sexual abuse material or pornography should be kept in safe custody, stored and or disposed of; and

(f) The manner in which effect will be given to court orders relating to the evidence.

7. The development and implementation of a standard operating procedure to determine the manner in which:

(a) Undercover operations relating to sexual offences including those sexual offences involving child sexual abuse material must be conducted;

(b) The circumstances, expediency and the manner in which an electronic communications service provider is to be instructed not to take steps to prevent access to the child sexual abuse material by any person, the steps to be taken and the reasonable period within which this is to occur; and

(c) The service provider is to be instructed to take steps to prevent access after a request not to do so.

**Schedule 2**

**THE NATIONAL DIRECTORATE OF PUBLIC PROSECUTIONS**

(Section 66(2)(a))

1. The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped.
2. The manner in which protection is provided to the victim, whether identified or not, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.
3. The manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible, including:
  - (a) The criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;
  - (b) The criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provide for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;
  - (c) The circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
  - (d) The circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in

section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family.

4. The criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16(2), dealing with consensual sexual violation with a child with the view to ensuring uniformity.
5. The criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 38(1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity.
6. The information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the victim and relevant others.
7. The manner in which aspects relating to cases involving child sexual abuse material must be dealt with, including:
  - (a) The circumstances in which ancillary orders provided for in s56A(5) are to be sought and the steps to be taken for purposes of securing the required report.
  - (b) The criteria, including factors relating to power and age differentials, to be considered in respect of section 19D.
  - (c) The manner in which sexual offence cases involving child sexual abuse material must be dealt with, kept in custody, stored and/or disposed of when:
    - (i) a case docket is received from a member of the South African Police Service for consideration for prosecution;
    - (ii) a case is serving before court during the trial;
    - (iii) a case is concluded in court;
    - (iv) when a request for access to the material is received from the defence.
8. The criteria to be used and circumstances in which the diversion of a child accused of a sexual offence involving child sexual

abuse material or pornography should be considered and the appropriate conditions of diversion.

**Schedule 3**

**THE DEPARTMENT OF HEALTH**

(Section 66(3)(a))

1. The manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to an official employed at a public health establishment or when a sexual offence is suspected or detected by such official during a medical assessment, examination or intervention.
2. The manner in which respectful and supportive services are provided to the victim of a sexual offence including the manner in which their rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety in as far as is possible.
3. The manner in which health care professionals must act to give effect to aspects covered in Chapter 5 – Services to victims of sexual offences and compulsory HIV testing of alleged sex offenders:
  - (a) Matters relating to the administering of Post Exposure Prophylaxis.
  - (b) The manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results.
  - (c) The manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality.
4. The manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).
5. The manner in which any child sexual abuse material must be secured to prevent unauthorised access, loss or damage
6. The manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided,

including:

- (a) The forensic medical examination of victims and alleged offenders;
- (b) The determination of age where the child sexual abuse material involves unidentified victims or depictions;
- (c) The manner in which any evidence, including child sexual abuse material, must be secured to prevent unauthorized access, loss or damage.”;

#### **Schedule 4**

### **THE DIRECTOR-GENERAL SOCIAL DEVELOPMENT**

(Section 66(3A))

1. The manner and the expediency with which social workers are to respond to the disclosure or reporting of an alleged sexual offence;
2. The manner in which respectful and supportive services are provided to the victim; the rights of child victims to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety and well-being in as far as is possible.
3. The manner in which the child victim of a sexual offence including child sexual abuse material should be protected and referred for other services if necessary including the circumstances when the offender, rather than the victim, should be removed from the communal residence;
4. The manner in which assistance in the investigation and prosecution of sexual offences, including matters relating to child sexual abuse material must be provided, including:
  - (a) The procedures that must be followed in the reporting of the sexual offence to a member of the South African Police Service;
  - (b) The procedures relating to the safe keeping of the evidence of the alleged sexual offence, including child sexual abuse material to prevent unauthorised access, loss or damage before handing it over to a member of the South African Police Service;
5. The manner in which therapy may be provided to a child victim

that is required to testify in court proceedings

6. The manner in which probation officers are to deal with children referred in terms of section 19D and any other child in conflict with the law for having committed a sexual offence or that involves child sexual abuse material; how such children are to be assessed; and the investigations required for purposes of the appropriate interventions to be recommended or for purposes of determining appropriate conditions of diversion.
7. The manner in which to conduct investigations and compile a report when so required for purposes of assisting courts in making any ancillary order as provided for in section 56A(5).
8. The responsibilities and duties of officials in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).

#### **Schedule 5**

#### **THE DIRECTOR-GENERAL BASIC EDUCATION**

(Section 66(3B))

1. Facilitate and ensure continuous training of educators and learners on preventative measures.
2. The manner the child victim should be protected and referred for other services if necessary, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the safety of the victim in as far as is possible.
3. The manner and expediency with which educators are to respond to a learner or educator reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service.
4. The manner and expediency with which educators are to respond to allegations of sexual abuse by an educator, contractor, employee, intern, volunteer or learner.
5. The manner in which a child alleged to have committed a sexual offence or in conflict with the law in respect of a sexual offence must be dealt with.
6. The manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided.

7. The manner in which evidence of the alleged sexual abuse, child sexual abuse material, pornography or any other evidence is to be kept secure before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage.
8. The manner in which learners are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.

### **Schedule 6**

#### **THE DIRECTOR-GENERAL HIGHER EDUCATION AND TRAINING**

##### **(Section 66(3C))**

1. Facilitate and ensure continuous training of educators, lecturers or tutors and students on preventative and reactive measures.
2. The manner the child victim should be protected and referred for other services if necessary, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.
3. The manner and expediency with which lecturers or staff at tertiary institutions are to respond to a student, lecturer or staff reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service.
4. The manner and expediency with which lecturers or staff are to respond to allegations of sexual abuse against a lecturer, staff, contractor, employee, intern, volunteer or student, including reporting the alleged sexual offence to the department and a member of the South African Police Service.
5. The manner in which the child in conflict with the law should be dealt with.
6. The manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided.
7. The manner in which evidence of the alleged sexual abuse, child sexual abuse material, pornography or any other evidence is to

be kept secure before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage.

8. The manner in which students are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.

### **Schedule 7**

#### **THE DIRECTOR-GENERAL JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

(Section 66(3D))

1. The manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and child sexual abuse material or pornography, must be dealt with including any copying and distribution thereof at all courts.
2. The manner in which victims are supported and protected within the court environment.
3. The manner in which victims are prepared for testifying in court.
4. The manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be kept in custody, stored and disposed of or destroyed.
5. The manner in which an order contemplated in section 50(2)(a) (dealing with an order of a court to include the accused's name in the Register) must be forwarded to and received by the Registrar of the National Register for Sex Offenders so as to ensure the relevant data is captured.

### **Schedule 8**

#### **DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES**

(Section 66(3E))

1. The manner in which to raise public awareness and to educate the general public in the responsible use of the Internet,

- including available protective measures to prevent the inadvertent accessing of sexual material or any access to child sexual abuse material.
2. The manner in which to collaborate with relevant roleplayers providing or involved in electronic communications services for purposes of ensuring optimal protection to children from accessing child sexual abuse material or pornography, inclusive of minimum requirements that industry is to comply with and the monitoring of such measures.
3. With reference to the classification of publications, films and games, including any other material to be regulated and classified by the Film and Publication Board-
- (a) the manner and the expediency with which an offence involving child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service;
- (b) the manner in which any child sexual abuse material or other material that constitutes a sexual offence, is to be kept secured to prevent loss or damage or unauthorised access, until handing it over to a member of the South African Police Service, including the manner in which further distribution and access of such material is to be prevented and restricted;
- (c) when exercising a discretion not to refuse classification, the manner in which to protect a child victim, irrespective whether the child is identified or identifiable, inclusive of excision and blurring techniques and, irrespective the fact of classification, the manner and expediency with which the child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service.

### **Schedule 9**

#### **DEPARTMENT OF CORRECTIONAL SERVICES**

##### **(Section 66(3F))**

1. The manner in which sexual offence cases, including cases relating to child sexual abuse material, should be dealt with when

- detected or reported within the correctional services context.
2. The manner in which the victim within the correctional services facility is to be provided protection including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.
  3. The manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided.
  4. The manner in which the child sexual abuse material or any other evidence is kept secured before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage.
  5. The development and implementation of assessment tools and therapeutic programmes for persons convicted of sexual offences who are in the care of or monitored or provided with services by the department.

#### **Amendment of Act No. 75 of 2008**

32. The words “child pornography” are substituted for the words “child sexual abuse material”, wherever they appear, in the Child Justice Act, 2008.

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

33. This Act is called the Criminal Law (Children: Pornography and Child Sexual Abuse Material) Amendment Act, 20XX and comes into operation on a date fixed by the President by proclamation in the *Gazette*.



# CHAPTER 1: OVERVIEW OF THE INVESTIGATION

## A Introduction

1.1 This report seeks to review the legislative framework that currently applies to children in respect of pornography with a view to reforming the law in this regard. This investigation forms part of the overarching investigation into the review of all sexual offences, either found in statute or in the common law. In accordance with the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Children's Act 38 of 2005 (the Children's Act), and unless otherwise expressly stated, a 'child' is defined as a person under the age of 18 years.

1.2 The South African Law Reform Commission (the Commission) recognises that the use of information and communication technologies (ICTs) has been key to ensuring that children are provided with opportunities to learn, participate and create in the world around them.<sup>20</sup> The value of ICTs has particularly come to the fore in the wake of the global lockdown emanating from the containment response to the COVID-19 pandemic and in so doing launching the world firmly into the Fourth Industrial Revolution. For children with access to the Internet and data the "new-normal" has meant that schooling, socialising, recreation and related activities have been conducted virtually or online. It is anticipated that, in varying degrees, social online engagement will continue to flourish. The manner and level on which virtual educational engagement and support will continue to be provided will be dependent on various factors as children are re-integrated into physical attendance of schools, amidst measures, to contain the spread of COVID-19. With many more hours spent online primarily for education, the intrinsic value of ICTs is recognised. However, the need to identify risks and to place containment measures in place to address online risks deserves equal recognition. The subject matter of this investigation is narrowed down to the prevention and management of one of the negative outcomes or risks associated with the use of ICTs on the lives of children, namely exposure to pornography and creation of, distribution and exposure to child sexual abuse material.<sup>21</sup>

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<sup>20</sup> Watney M "Regulation of Internet Pornography in South Africa (part 1)" (2006) THRHR 227.228 with reference to Nel in Buys Cyberlaw@South Africa (2004) 210: 'The Internet not only provides convenient access to an almost unlimited and highly diverse library of information resources for educational purposes and facilitates communication, but it is also a source of concern over possible harm that might befall the youth as they use the Internet'.

<sup>21</sup> The use of the term 'child sexual abuse material' is explicated below in paragraphs 1.8 and 4.15.

1.3 Pertinent submissions received from respondents<sup>22</sup> to the discussion paper and contributions received during workshops<sup>23</sup> on the discussion paper form part of the report and will be referred to where relevant. The report includes draft legislative and non-legislative recommendations aimed at addressing concerns around the ease with which a child is able to access and view pornography through technology and the mass media and the attendant risks thereof.

1.4 The discussion paper identified five areas of concern which will be dealt with under the same headings in the report, namely:

- Access to or exposure of a child to pornography;
- Creation and distribution of child pornography (child sexual abuse material);
- Explicit self-images created and distributed by a child;
- Grooming of a child and other sexual contact crimes associated with pornography or which are facilitated by pornography or child sexual abuse material; and
- Investigation, procedural matters and sentencing.

1.5 As noted in the issue paper<sup>24</sup> and discussion paper<sup>25</sup> South Africa has ratified the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol) in 2003.<sup>26</sup> In order to ensure that South Africa meets its obligations in terms of the Optional Protocol and to ensure that the observations of the United Nations Committee on the Rights of the Child (the UN Committee on the Rights of the Child) were considered,<sup>27</sup> they were incorporated into the

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<sup>22</sup> Annexure A contains a comprehensive list of all respondents to SALRC Sexual Offences Discussion Paper (2019). 85 substantive submissions were received.

<sup>23</sup> Annexure B contains information relevant to the eight workshops held in Mthatha (Eastern Cape), Polokwane (Limpopo), Mbombela (Mpumalanga), Bloemfontein (Free State), Pietermaritzburg (KwaZulu Natal), Cape Town (Western Cape), Centurion (Gauteng) (for general stakeholders) and Centurion (for ICT and industry stakeholders) and two clarity seeking stakeholder meetings held with BASA, FIC and the Department of Justice and Constitutional Development Legislative Development Branch on the SALRC Sexual Offences Discussion Paper (2019).

<sup>24</sup> SALRC Sexual Offences Issue Paper (2015) par 3.11.

<sup>25</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.6

<sup>26</sup> Department: Women, Children and People with Disabilities *The UN Convention on the Rights of the Child* South Africa's Combined Second, Third and Fourth Periodic State Party Report to the Committee on the Rights of the Child (Reporting period: 1998 – June 2012) available at <http://children.pan.org.za/sites/default/files/attachments/Final%20>. Accessed on 10 June 2015.

<sup>27</sup> United Nations Committee on the Rights of the Child: Concluding observations on the report submitted by South Africa under article 12, par 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography CRC/C/OPSC/ZAF/CO/I 30 September 2016.

discussion paper for consideration. These observations were further examined during the workshops on the discussion paper with a view to incorporate pertinent observations into the draft legislation flowing from this investigation.

1.6 In this report the Commission has, either by way of legislative or non-legislative proposals, within its given mandate, sought to address the following areas identified by the UN Committee on the Rights of the Child in respect of South Africa, namely to:

- ensure that there is reliable data covering the offences under the Optional Protocol;<sup>28</sup>
- adopt a national response for preventing and addressing online child sexual exploitation and abuse<sup>29</sup> in close collaboration with relevant industry and organisations, including<sup>30</sup>a national policy to prevent and respond to online child sexual exploitation and abuse; a dedicated, victim-focused criminal justice system incorporating a national database linked to Interpol; appropriate support services for children affected by child sexual exploitation and abuse and a prevention strategy;<sup>31</sup>
- review the criminal law to provide for the consensual sharing of self-generated images by children; differentiate between adult and child offenders of child sexual abuse material; provide for the disposal of pornographic materials and strengthen awareness-raising programmes for children on risks related to the use of self-generated content through digital media and ICTs; and
- take all measures necessary to ensure that all reports and cases of the sale of children, child prostitution and child pornography are investigated effectively and that perpetrators are prosecuted and punished with appropriate sanctions commensurate with the gravity of their crimes.<sup>32</sup>

1.7 The Commission confirms that in respect of sexual offences (including online sexual exploitation) South Africa already has appropriate measures in place to address the

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<sup>28</sup> The details of which are found in the UN Committee on the Rights of the Child OPCS 2016 (2) par 6 and in the Discussion Paper. The finding that the 'nature of children's ICT use in the global South is less well understood' is confirmed by Phyfer J, Burton P and Leoschut L *South African Kids Online: Barriers, opportunities and risks. A glimpse into South African children's internet use and online activities. Technical Report 2016*. Cape Town, Centre for Justice and Crime Prevention (Executive Summary).

<sup>29</sup> The recommendation was made with reference to the Human Rights Council resolution on the Rights of the Child: information and communications technologies and child sexual exploitation (A/HRC/31/L.9/Rev.1 adopted on 23 March 2016) and the outcomes of the 2014 London and 2015 Abu Dhabi We Protect Summits.

<sup>30</sup> UN Committee on the Rights of the Child OPCS 2016 (2) par 27.

<sup>31</sup> UN Committee on the Rights of the Child OPCS 2016 (2) par 6.

<sup>32</sup> UN Committee on the Rights of the Child OPCS 2016 (2) par 32 (7).

concerns that the UN Committee on the Rights of the Child expressed around **extraterritorial jurisdiction** in respect of certain offences contained in domestic law,<sup>33</sup> and **extradition**.<sup>34</sup> As reflected in the discussion paper,<sup>35</sup> for the purpose of all sexual offences, which include child prostitution (criminalised in South Africa as sexual exploitation of children) and pornography offences, section 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act); section 30A of the Films and Publications Act 65 of 1996 (the Films and Publications Act); and section 12 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the Trafficking in Persons Act), establishes South Africa's reach over these offences when committed extra-territorially. The Commission notes that the absence of an extradition treaty does not prevent South African authorities from still requesting an extradition and it being granted and therefore it is not considered an insurmountable hurdle. The Commission flags other conduct listed in article 3 of the Optional Protocol, namely the sale of children; transfer of organs for sale; and forced labour, which falls outside of the scope of this investigation, for closer inspection. The Commission recommends that all reports and cases are accurately captured by all role-players in the criminal justice system as this will directly impact on the recording and investigation thereof. This may include a separate crime code for every specific crime including the different crimes relating to child sexual abuse material matters reported to the police.<sup>36</sup>

1.8 The UN Committee on the Rights of the Child's focus on the prosecution and punishment of offenders is of particular concern to the Commission. In addition, the Commission is of the view that provision should also be made for appropriate restorative and rehabilitative options for offenders as part of the sentencing response. The Commission further confirms that South Africa has already considered and enacted a Child Justice Act (Act 75 of 2008) and amendments to the Sexual Offences Act to ensure that the rights of children in conflict with the law are adequately protected: a child offender's name is no longer automatically placed on the National Sex Offenders Register<sup>37</sup> and the commission of consensual sexual acts by certain children is no longer criminalised.

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<sup>33</sup> UN Committee on the Rights of the Child OPCS 2016 (2) par 34 (8).

<sup>34</sup> UN Committee on the Rights of the Child OPCS 2016 (2) par 36.

<sup>35</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.11

<sup>36</sup> This will be further discussed below in chapter 6.

<sup>37</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.14

## B A note on terminology

1.9 Throughout this investigation the Commission has taken the stance that material or content defined as ‘child pornography’ is in the most part the memorialisation of child abuse increasingly in digital form.<sup>38</sup> In keeping with the global recognition that terminology should describe the harm that it seeks to address, the Commission provisionally recommended that the term “child sexual abuse material” should replace the term “child pornography” in the Sexual Offences Act and should be referred to as such in the discussion paper.<sup>39/40</sup> In doing so the Commission recognised the use of the term “child sexual abuse imagery” by the Internet Watch Foundation in its 2016 Annual Report<sup>41</sup> and the preference by the National Criminal Justice Training Centre to accurately reference this material.<sup>42</sup> This approach sought to ensure that such material is approached from a victim-centred perspective, confirming that these are materials which *will* abuse, degrade and exploit children portrayed as sexual objects and are not simply images of children who have *been* abused.<sup>43/44</sup> This approach further sought to cater for circumstances where a child has been abused or tricked to create an image or has voluntarily created self-generated material which has been distributed other than or further than intended, thereby recognising that the end destination of the material and the use thereof is ultimately not within the control of the creator. The proposed change in terminology is widely supported.<sup>45</sup> The content of the proposed definition of “child sexual abuse material” will be dealt with comprehensively in chapter four below.

1.10 In making this proposal the Commission flagged the anomaly of instances of voluntary creation and consensual peer-to-peer sharing of explicit material by children where

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<sup>38</sup> SALRC Sexual Offences Issue Paper (2015) 16.

<sup>39</sup> International Centre for Missing & Exploited Children (ICMEC) *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review* 2017 1st Edition ii.

<sup>40</sup> SALRC Sexual Offences Issue Paper (2015) 17.

<sup>41</sup> Internet Watch Foundation (IWF) *Annual Report* 2016 2. Available at [www.iwf.org.uk](http://www.iwf.org.uk).

<sup>42</sup> National Criminal Justice Training Center Webcast by Ale Levi, Lead Forensic Specialist, Homeland Security 3 June 2020.

<sup>43</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.16.

<sup>44</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.16.

<sup>45</sup> Cause for Justice; Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; and Crystal Clear Ministries International.

there is ostensibly no element of abuse or grooming<sup>46</sup> and for this reason proposed the use of the term “self-generated child sexual abuse material” to refer to the latter.<sup>47</sup> This matter will be further dealt with in chapter three below.

1.11 The Commission further chose to use the term “child exploiter” as opposed to the term “paedophile” which it explained is a clinical diagnosis of a person who is exclusively sexually attracted to children.<sup>48</sup> Louise Batty<sup>49</sup> submits that the word “abuser” should form part of this term i.e. “child sexual abuser” or “child abuser” but was not opposed to the additional inclusion of the word “exploiter” as long as it was linked to abuse.

1.12 At this juncture and after due consideration, the Commission confirms its preference for the terms “child sexual abuse material” and “self-generated child sexual abuse material”. The Commission is of the view that the word “exploiter” is wide enough to provide for a range of behaviours which would arguably include abuse, but would not be restricted thereto. The Commission confirms its recommendation that the term “child exploiter” should be used instead of the term “paedophile”.<sup>50</sup>

## **C Background and scope**

1.13 This investigation on pornography and children resulted from an extension of the investigation originally called “Sexual Offences by and Against Children”. At the request of the (then) Deputy Minister of Justice and the (then) Justice Parliamentary Portfolio Committee to also consider the position of adults who are affected by sexual violence, the Commission decided to expand the scope of the investigation to include all sexual crimes by and against adults. The investigation was renamed “Sexual Offences”. Owing to the vast nature of this investigation, the Commission decided to publish four separate sexual offence papers, with draft legislation where necessary. These dealt with the following areas: i) substantive law; ii) the procedural law pertaining to statutory and common law sexual offences, excluding both adult prostitution and pornography in respect of children; iii) adult prostitution; and iv) children and pornography.

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<sup>46</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.19.

<sup>47</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.20.

<sup>48</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.21.

<sup>49</sup> Representing the NPO Keep the dream.

<sup>50</sup> SALRC Sexual Offences Discussion Paper (2019) par 1.21.

1.14 In brief, the scope of Project 107<sup>51</sup> was reframed to

- codify the substantive law on sexual offences into an easily accessible and workable Act;
- develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences - this would protect the rights of victims while ensuring the fair management and trial of persons who are suspected, accused and convicted of committing a sexual offence;
- provide workable legal solutions for the problems surrounding adult prostitution; and
- improve the regulation of pornography, including on the Internet.

1.15 The first discussion paper was published in September 1999. It addressed the substantive law relating to sexual offences, and contained a draft Sexual Offences Bill.<sup>52</sup> It had both a child and adult focus, but excluded adult prostitution; and children and pornography. The second discussion paper was published in December 2001. It dealt with matters concerning process and procedure and it too focused on both adults and children, excluding adult prostitution; and children and pornography.<sup>53</sup> The content and recommendations of these discussion papers were drawn together to form the Report on Sexual Offences, which was published in December 2002, together with a consolidated draft Sexual Offences Bill. The Sexual Offences Act is the outcome of Parliamentary deliberations on the draft Bill. With regard to the third part of this investigation, an issue paper on adult prostitution was published in July 2002 and a discussion paper was published in May 2009. The Report on Sexual Offences: Adult Prostitution was approved by the Commission for submission to the (then) Minister of Justice and Correctional Services for his consideration in August 2014. The Minister released the report for publication and consideration by the Department of Justice and Constitutional Development in May 2017.

1.16 This report constitutes the final part of the investigation. It deals with pornography and its impact and effect on children. Following the promulgation of an amendment to the Films and Publications Act in 2007, the Commission decided to remove this part of the investigation from Project 107, as all concerns that had been raised during advisory committee meetings at that time had been addressed. However, this part of the investigation received renewed

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<sup>51</sup> South African Law Commission *Sexual Offences: Adult Prostitution* (Project 107) Issue Paper 19 (2002) 3.

<sup>52</sup> South African Law Commission *Sexual Offences: Substantive Law* (Project 107) Discussion Paper 85 (1999).

<sup>53</sup> South African Law Commission *Sexual Offences: Process and Procedure* (Project 107) Discussion Paper 102 (2001).

attention following a pre-investigation into pornography and the mass media. An issue paper was published for comment on 6 August 2015 followed by five workshops on the issue paper.<sup>54</sup> Work on the discussion paper was held in abeyance pending the publication of the Report on Sexual Offences: Adult Prostitution in 2017 and the ensuing engagement thereon. The discussion paper was published for comment on 11 April 2019. The publication of the paper was followed by eight workshops held in Centurion (Gauteng Province) for general stakeholders on 12 June 2019; Centurion (Gauteng Province) for experts, ICT and industry stakeholders on 13 June 2019; Cape Town (Western Cape Province) on 19 June 2019; Mthatha (Eastern Cape Province) on 25 June 2019; Bloemfontein (Free State Province) on 27 June 2019; Polokwane (Limpopo Province) on 2 July 2019; Mbombela (Mpumalanga Province) on 4 July 2019; and Pietermaritzburg (KwaZulu-Natal Province) on 11 July 2019. Four clarity seeking stakeholder meetings were held with the South African Banking Risk Information Centre (SABRIC) and the Banking Association of South Africa (BASA);<sup>55</sup> the Financial Investigation Centre (FIC), SABRIC and BASA;<sup>56</sup> the Department of Justice and Constitutional Development Legislative Development Branch<sup>57</sup> and Be In Touch on specific draft proposals in the Discussion Paper. The content of the discussion paper was presented to delegates of the African Regional Child Trauma Conference held in Cape Town from 18 – 20 August 2019; to viewers of the South African Broadcasting Corporation (SABC) on 6 June 2020 during a Live Webinar hosted by the United Nations International Children’s Emergency Fund (UNICEF) and the Department of Social Development on SABC: Online Child Safety: Engaging the Experts (as part of Child Protection Week); to viewers of the child protection webinar series hosted by Department of Social Development on child exploitation; and presented to learners, parents and teachers attending the virtual Brescia House School Conference “My brain matters – the impact of technology on the developing brain” on 26 November 2020.

#### 1.17 Knowledge has been gleaned from the following online engagements:

- Live Webinar: Keeping Your Child Exploitation Investigation Victim-Centered – National Criminal Justice Training Centre (NCJTC) Training: Lead Forensic Interview Specialist (Homeland Security) (3 June 2020);

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<sup>54</sup> The workshops were held in the following locations: Pretoria on 9 November 2015; Cape Town on 11 November 2015; Kimberly on 16 November 2015; Durban on 20 November 2015; Nelspruit on 25 November 2015. A community briefing was held in Cape Town on 4 November 2015 and a Kwa-Zulu Natal Childline focus group with youth was held on 18 November 2015.

<sup>55</sup> Meeting held at the Office of the SA Law Reform Commission on 22 August 2019.

<sup>56</sup> Meeting held at the Office of the FIC on 17 September 2019.

<sup>57</sup> Meeting held at the Office of the SA Law Reform Commission on 22 August 2019.

- International Society for the Prevention of Child Abuse and Neglect (ISPCAN) & Jelly Beans Webinar COVID-19 in Africa “Is Lockdown more dangerous than the virus?” Child Protection Week (June 2020);
- Webinar by Focus on the Family “Unlocking Pornography Addiction” (22 July 2020);
- Webinar by ISPCAN & World Vision International “COVID-19 Aftershocks: A Perfect Storm” (29 July 2020);
- Webinar launch of the University of Pretoria Centre for Child Law and University of the Witwatersrand (WITS) Institute for African Migration report "Child Trafficking in South Africa: Exploring the Myths and Realities" (21 August 2020);
- UKCIS Online Harms Webinar Series: Webinar 1:“Technology and mental health” (9 December 2020);
- UKCIS Webinar Online Child Sexual Abuse Research, Policy and Practice, 10 February 2021;
- Adam Smith Institute Webinar ‘Draft Online Safety Bill’ (25 May 2021) and
- Webinar launch of the Bureau of Market Research (UNISA) and UNICEF “Kids Online Survey” UNICEF South Africa Disrupting Harm Study Research Findings (3 June 2021).

## **D Methodology and purpose of the Report**

1.18 This report represents the Commission’s current thinking and opinions on the law relating to the manner in which the law currently regulates and protects children from being exposed to pornography or from being exploited to create child sexual abuse material and whether there is a need for law reform in this area of the law. It is underpinned by research and consultation at local, national and international levels during the issue and discussion phases of this investigation. It further takes into account compliance obligations under the Constitution and international human rights treaties to which South Africa is a signatory, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, the United Nations Convention on the Rights of the Child, 1989, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2003; the African Charter on the Rights and Welfare of the Child, 1990; and the African Union Convention on Cyber Security and Personal Data Protection, 2014, which place obligations on South Africa towards combating and, ultimately, eradicating abuse and violence against women and children. It assesses the impact of current law on persons and society and the extent to which current laws assist the country in meeting its human rights obligations. Particular attention is given to the need for protection

from exploitation and violence as required by regional and international agreements on cooperation to combat child sexual abuse material and other international instruments aimed at protecting children in general.<sup>58</sup>

1.19 The report has taken into account the public response to the discussion paper and the draft legislation contained therein. It has tested public opinion against the solutions identified by the Commission by way of an open call for written submissions and workshops for the general public and identified stakeholders. This report contains the Commission's final recommendations for reforming the law as it relates to children and pornography. The report, which contains a Bill, will be submitted to the Minister of Justice and Correctional Services for his consideration. It remains the prerogative of the Minister to implement the Commission's recommendations.

## **E Legislative framework in South Africa**

1.20 The current legislative framework in South Africa demonstrates a firm commitment to protecting children from the harm of being exposed to pornography and to protect children from being used for or exposed to child sexual abuse material or from engaging in the creation and distribution of this material themselves. The existing framework has been lauded internationally and meets the criteria listed by the International Centre for Missing and Exploited Children (ICMEC) for model legislation<sup>59</sup>. In addition to these laws the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act), Child Justice Act 75 of 2008 (Child Justice Act), the Children's Act, and the Trafficking in Persons Act provide related and specific protection to children within the social service and criminal justice system. Furthermore the recently enacted, but yet to be assented to, proclaimed and operationalised, Films and Publications Amendment Act 2019<sup>60</sup> and the Cybercrimes Act 19 of 2020, which has been assented to but is awaiting proclamation before being operationalised,<sup>61</sup> both bear

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<sup>58</sup> The need to adhere to international protocols and policies in relation to online child protection was endorsed by the Minister of Communications during the Second Reading debate of the Films and Publications Amendment Bill on 6 March 2018; Unrevised Hansard *Films and Publications Bill (Second Reading debate)* (6 March 2018) National Assembly 5.

<sup>59</sup> International Centre for Missing & Exploited Children (ICMEC) *Child Pornography: Model Legislation & Global Review* 8<sup>th</sup> Edition 2016.

<sup>60</sup> Awaiting assent from the President.

<sup>61</sup> Telephonic confirmation by the Department of Justice and Constitutional Development on 3 June 2021 that the regulations would be drafted promptly after being assented to by the President on 1 June 2021, Government Gazette No 44651 Vol.672.

testimony to government striving to better the legislative framework.<sup>62</sup> This investigation seeks to identify and address gaps in the current legislative framework regulating the exposure of children to pornography and related matters; seeks to identify and remedy behaviour not adequately covered by the law; and to make recommendations for the optimal implementation of the law in order to better protect children. The Commission agrees with the observation that if a difference is to be made, it is incumbent on all government departments and regulatory bodies to harmonise and collaborate all their efforts in the best interests of the child.<sup>63</sup>

## **F Outline of the Report**

1.21 The following chapter (Chapter two) considers concerns relating to children accessing or being exposed to pornography including what children are being exposed to; whether this exposure is inadvertent or deliberate; the effects of exposing children to pornography; and what the appropriate legal response to children at risk of exposure should be. It includes submissions received from respondents to the discussion paper on questions pertinent to this chapter; provides an overview of current law and concludes with an evaluation and recommendations aimed at reducing the risk of children accessing or being exposed to pornography.

1.22 Chapter three primarily focuses on unpacking the risks and legal challenges that arise from the creation and distribution around self-generated sexual material by children. It provides an overview of the current law; reflects legislative proposals contained in Bills before Parliament; and considers submissions received on when this material should be considered child sexual abuse material and what the legal response should be towards children engaging in this behaviour. In making its recommendation on this issue the Commission has given consideration to UNICEF's recommendation that the act of consensual self-generated child sexual abuse material by certain children should only be decriminalised in respect of possession and production of child sexual abuse images; should only be for children who have reached the age of consent and that the material may only be possessed and produced with their consent and only for private use.

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<sup>62</sup> A comprehensive exposition of the law is contained in the Issue Paper and Discussion Paper.

<sup>63</sup> Media Monitoring Africa and KAS Media Africa *Report on Online Regulation One Year On: What's changed?* 2017 24; Media Monitoring Africa "Multi-stakeholder workshop session to discuss online regulation" (29 June 2017).

1.23 Chapter four discusses some of the legislative concerns relating to the adequacy of the existing definition of child pornography (re-defined as “child sexual abuse material”) and the criminalising of offences related to the creation, possession and distribution of child sexual abuse material and sexual crimes associated with or which are facilitated by pornography. It provides an overview of pertinent submissions received from respondents and concludes with an evaluation and recommendations. In so doing it reflects relevant portions of the key international instruments including the UN Convention on the Rights of the Child, its Optional Protocol, and the Council of Europe’s Convention on Cybercrime which have been central in defining minimum international standards in protecting children online and combating sexual exploitation through online activities. It further discusses the relevant clauses in the Films and Publications Amendment Act 11 of 2019 and the Cybercrimes Act 19 of 2020 which seek to ensure the protection of children by way of either amending the Films and Publications Act or the Sexual Offences Act or enacting new offences. The role, responsibility, complicity and need for accountability of industry and parents form part of the recommendations contained in this chapter. The focus of this chapter is both legislative and non-legislative in order to provide a response which is aimed at prevention and reaction.

1.24 Chapter five focuses on the phenomenon of grooming. Children have been found to be particularly susceptible to online grooming as interaction with known and unknown people over social media, including dating sites forms part of some children’s daily socialisation and networking. This chapter considers the involvement of family members in the grooming of particularly young children. Submissions received in response to the discussion paper include evaluating the current law and whether this crime is adequately criminalised. In its recommendation the Commission affirms the current legislative response and the inter-sectoral approach underpinning the National Policy Framework as provided for by the Sexual Offences Act.

1.25 Chapter six discusses certain aspects pertaining to the investigation of matters relating to a child’s exposure to pornography or child sexual abuse material; highlights certain procedural matters that have been identified by respondents and advisory committee members as warranting attention and considers matters relating to sentencing and ancillary orders. A focal part of the chapter is the need for multi-disciplinary intervention in the response towards all sexual offences, including those discussed in this discussion paper.

## CHAPTER 2: ACCESS TO OR EXPOSURE OF A CHILD TO PORNOGRAPHY

### A Introduction

2.1 Research documented in the discussion paper shows that exposure to and viewing of pornography by children has an impact on the physical, emotional, psycho-social and developmental well-being of children. Exposure to and viewing of pornography by children has a ripple effect on a societal level where the normalisation of sexual violence in a culture with high levels of sexual violence against women and children exposes women and children to further violence and models a lack of compassion for victims of sexual violence.<sup>64</sup> This is of particular concern as intimate partner violence remains a serious problem in South Africa, with the President referring to it, in the context of the COVID-19 pandemic, as the second pandemic.<sup>65</sup>

2.2 At the outset of this chapter it is appropriate to recognise that the assumption that it is inherently risky to use the Internet or being online and that spending more time online due to the physical closure of schools during COVID lockdowns has increased the risk and harm to children is not substantiated by verifiable evidence.<sup>66</sup> It is common cause that the nature of the Internet has made it particularly easy to access or to be exposed to pornography and other adult content. Whereas child sexual abuse images are prohibited expressly in a number of countries, accessing or being exposed to pornography (legal adult content) is dealt with differently by countries.<sup>67</sup> Some of these measures include preventing direct access by way of establishing age verification as a gatekeeper; requiring adults to opt in to access pornography and protecting children from being exposed to or lured into watching

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<sup>64</sup> SALRC Discussion Paper par 2.176. The recently reported simulation of a rape ostensibly as “fun” by two school boys is a sad reflection of the tone deafness so prevalent in the country to the trauma that victims of sexual violence experience. Cape{town}etc “Activists outraged as Bishops boys make a mockery of rape” 13 March 2021 Available at <https://www.capetownetc.com/news/activists-outraged-as-bishops-boys-make-a-mockery-of-rape/> accessed on 25 March 2021.

<sup>65</sup> Parliament of the Republic of South Africa, Summary and analysis of the Domestic Violence Amendment Bill, Research Unit (G Nesbitt) 24 August 2020 3.

<sup>66</sup> UKCIS Webinar Online Child Sexual Abuse Research, Policy and Practice, 10 February 2021 (Victoria Baines).

<sup>67</sup> SALRC Discussion Paper (2019) par 2.132.

pornography by criminalising the existence of misleading domain names which lure internet viewers (including children) into being exposed to pornography.<sup>68</sup>

2.3 The Sexual Offences Act criminalises exposing or displaying pornography, child pornography or any material of a “sexual nature” to a child,<sup>69</sup> irrespective of the manner of the exposure or display.<sup>70</sup> This would include material defined in the Films and Publications Act.<sup>71</sup> In South Africa pornography rated by the Film and Publication Board as X18 is permitted by law if it is sold to persons over the age of 18 in registered stores called “adult premises”.<sup>72</sup> This exemption does not extend to distribution of pornography online.<sup>73</sup> The Films and Publications Amendment Act 2019, which is set to come into operation on a date to be announced by the President,<sup>74</sup> seeks to, among others, regulate online distribution of films and games. Although it effectively legalises the online distribution of adult content i.e. classified as X18, or that which would have been so classified had it been submitted for classification, on all platforms including digital platforms, this is only in respect of registered online distributors.<sup>75</sup> The long title of the Act clearly stipulates one of the aims of the amendments in the Act as being to place obligations on internet access providers to curb the use of their services in propagating prohibited content.

2.4 The Films and Publications Amendment Act specifically requires that classification decisions be displayed in respect of films and games including those classified by a

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<sup>68</sup> SALRC Discussion Paper (2019) par 2.132.

<sup>69</sup> The relevant crimes are contained in section 19 of the Sexual Offences Act. The Sexual Offences Act further defines ‘pornography’ and ‘child pornography’; SALRC Sexual Offences Issue Paper (2015) par 3.46.

<sup>70</sup> Section 19 of the Sexual Offences Act.

<sup>71</sup> Mr Chetty (KINSA South Africa) is of the opinion that section 19 was included in the Sexual Offences Act for the reason that prohibitions against the exposure or display of materials of a sexual nature to children in the Films and Publications Act applies only to distributors, as defined in the Act, and not the general public. It was necessary to ensure that no person, whether a distributor or not, was allowed to unlawfully and intentionally expose children to risks of harm from materials of a sexual nature.

<sup>72</sup> An exposition of the relevant section is found in par 2.176 and further in the SALRC Sexual Offences Discussion Paper (2019).

<sup>73</sup> Section 24 of the Films and Publications Act as referenced by the Chief Executive Officer of the Films and Publications Board, 2021 Conference on Harmonisation of Content Regulation in Africa 24 March 2021.

<sup>74</sup> Presumably held in abeyance in anticipation of the issuing of the accompanying regulations. The draft Films and Publications Amendment Regulations, 2020 were published by the Department of Communications and Digital Technologies by way of Notice 361 of 2020 in the Government Gazette No 43495 on 3 June 2020 for general comment.

<sup>75</sup> Section 24A(3).

commercial online distributor and approved for sale or hire online.<sup>76</sup> The Amendment Act seeks to amend section 24 of the Films and Publications Act to allow for the online distribution of films or games classified as “X18” provided that a registered distributor has mechanisms in place to ensure that the material will not be distributed to children under the age of 18 and the classification details are clearly displayed throughout the screening thereof.<sup>77</sup> The distributor is also obliged to keep a register of all users.<sup>78</sup> The Films and Publications Act<sup>79</sup> already provides for prohibitions, offences and penalties related to the distribution and exhibition of films, games and publications. Specifically with regard to children, section 24A(4) of the Films and Publications Act makes it a crime for any person to distribute or exhibit any film, game or publication classified as “X18”; or any film, game or publication which contains depictions, descriptions or scenes of explicit sexual conduct<sup>80</sup>, unless such film, game or publication is a bona fide documentary or is of scientific, literary or artistic merit or is on a matter of public interest. Furthermore, it makes it a crime to not clearly display advisories during advertising or the showing of the film, game or publication itself. The fines connected to these offences have been upwardly revised and range from R50 000 to R750 000.

2.5 The Films and Publications Act, read together with the Films and Publications Amendment Act, further criminalises the intentional distribution or exhibition in public of a film or game without being registered by the Film and Publication Board. It also criminalises a person who does not have a licence to conduct the business of an adult premises and is not registered with the Film and Publication Board as a distributor or exhibitor of films and

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<sup>76</sup> Section 18I.

<sup>77</sup> Section 24(3).

<sup>78</sup> Section 24(3)(e) “the distributor shall keep, solely for his or her private records, a register of all instances where access was granted to a user, whose name, address and verifiable age must be noted in the register kept for that purpose”.

<sup>79</sup> Section 24A.

<sup>80</sup> “**explicit sexual conduct**” means graphic and detailed visual presentations or descriptions of any conduct contemplated in the definition of “sexual conduct” in this Act;’ and “**sexual conduct**” includes -

- (i) male genitals in a state of arousal or stimulation;
- (ii) the undue display of genitals or of the anal region;
- (iii) masturbation;
- (iv) bestiality;
- (v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
- (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
- (vii) the penetration of a vagina or anus with any object;
- (viii) oral genital contact; or
- (ix) oral anal contact;’

games, where such person conducts business with any film, game or publication which has been classified “X18” or would have been so classified had it been submitted for classification.<sup>81</sup>

2.6 Section 24C of the Films and Publications Act sets out certain obligations in respect of Internet access and service providers where they provide “child-oriented services” and, or “contact services”. Sections 24C(2) and (3) are pertinent to this chapter,<sup>82</sup> as they constitute an obligation to protect children against the commission of “any offence against a child”. This would include being exposed to pornography which is criminalised in terms of section 19 of the Sexual Offences Act i.e. being exposed to pornography or an act of an explicit sexual nature of an adult which may be disturbing or harmful to, or age-inappropriate, for children.<sup>83</sup> This is an offence irrespective of whether the child was a willing participant or not. Furthermore, although section 27A of the Films and Publications Act requires internet service providers to register with the Films and Publications Board, it is only enjoined in terms of this section to take steps to prevent its services from hosting or distributing “child pornography”. Non-compliance with these provisions is criminalised.

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<sup>81</sup> Section 24(3).

<sup>82</sup> For ease of reference it is included below:

‘(2) Any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet, shall-

- (a) moderate such services and take such reasonable steps as are necessary to ensure that such services are not being used by any person for the purpose of the commission of any offence against children;
- (b) prominently display reasonable safety messages in a language that will be clearly understood by children, on all advertisements for a child-oriented service, as well as in the medium used to access such child-oriented service including, where appropriate, chat-room safety messages for chat-rooms or similar contact services;
- (c) provide a mechanism to enable children to report suspicious behaviour by any person in a chat-room to the service or access provider;
- (d) report details of any information regarding behaviour which is indicative of the commission of any offence by any person against any child to a police official of the South African Police Service; and
- (e) where technically feasible, provide children and their parents or primary care-givers with information concerning software or other tools which can be used to filter or block access to content services and contact services, where allowing a child to access such content service or contact service would constitute an offence under this Act or which may be considered unsuitable for children, as well as information concerning the use of such software or other tools.

(3) Any person who fails to comply with subsection (2) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.’

<sup>83</sup> Section 24C(2)(a).

2.7 The legislative provisions with respect to the classification of adult content are repeated in the South African Cellular Operators Association Code of Good Practice (SA Cellular Code) as well as the Wireless Application Service Providers' Association Code of Conduct (WASPA Code). Through the operation of the codes the mobile operators and their content providers are bound by these provisions.<sup>84</sup> The Discussion Paper notes that it would appear that in spite of the prohibitions against exposure of children to pornography or adult content, exposure to or the ability of children to access pornography or legal adult content is still a problem.<sup>85</sup>

2.8 This chapter seeks to evaluate the proposals made by the Commission to address concerns relating to children accessing or being exposed to pornography<sup>86</sup> and the associated harm thereof, from a law reform and, where applicable, implementation perspective. The focus in this chapter is on the harmfulness, and not the legality or illegality of this content as such, in that exposing or allowing a child to access this content carries a probability of harm to the child. In order to regulate children's access to objectionable content, strategies and measures to minimise the risk of unwanted exposure needs to include both legislative and non-legislative measures. As the Commission's mandate provides for a holistic approach this chapter includes legislative and non-legislative recommendations.

2.9 By way of summary this chapter proposes a slight amendment of the definition of "pornography" in the Sexual Offences Act; makes provision for specific additional crimes in the Sexual Offences Act and provides among other recommendations that safety initiatives and messages should be effectively communicated and accessible to users and where apposite to their parents who may be illiterate. It highlights the need for establishing close working partnerships between the law enforcement authorities and the ICT industry and internet and wireless application service providers.

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<sup>84</sup> Lisa Thornton Inc Protecting Minors from Harmful Content via Mobile Phones, discussion paper presented for Lawyers for Human Rights Child Rights Project Focus Group on 29 March 2007 as reflected in the SALRC Sexual Offences Issue Paper (2015) par 3.116; SALRC Discussion Paper (2019) par 2.11.

<sup>85</sup> SALRC Discussion Paper (2019) par 2.11.

<sup>86</sup> Pornography in this context refers to material which is legal for adults (a person 18 years and older).

## **B Summary of proposals contained in the discussion paper**

2.10 In the discussion paper the Commission expressed the view that in order to adequately protect children from exposure to pornography, legislation should comprehensively criminalise all acts of exposing children to pornography and content not suitable for children, in whatever manner, including through advertisement and enticement or by making use of misleading techniques. It provisionally recommended that the Sexual Offences Act be amended to provide that all devices (new and second hand) be issued or returned to a default setting that blocks inappropriate content, with an opt-out possibility depending on proof of age of the buyer or user as being 18 and older. It further suggested that the Films and Publications Act could be amended to provide for a clean feed regime for material deemed unsuitable for children.

2.11 It noted that in order to avoid unintended consequences it would be necessary to engage internet service providers, non-governmental organisations (NGOs), and representatives from government to compile a whitelist for suitable content and a blacklist to block websites with banned material, one which is mandatory for illegal content and the other which operates on an “opt-out” system where the content is considered unsuitable for children. This would mean that illegal sexual content classified or deemed to be classified as “XX” or a “refused classification” i.e. “child pornography” as defined in the Films and Publications Act or as defined in the Sexual Offences Act would be blocked at source. Furthermore, that any film, game or publication classified or constituting material which would be classified “X18” by the Film and Publication Board; or amounts to ‘sexual conduct’ as defined in the Films and Publications Act or ‘pornography’ as defined in the Sexual Offences Act would have to be subjected to age verification to prevent a person under the age of 18 years from gaining access to it. This amounts to a clean feed or filtering at tier one level within South Africa. The Commission acknowledged that peer-to-peer sharing may still circumvent protective measures but that one cannot legislate for possible deviances to the general protection provided.

2.12 These recommendations were based on the current law which provides that pornography may only be distributed in terms of the Films and Publications Act at adult premises. Once the Films and Publications Amendment Act is operationalised, thereby regulating the distribution of pornography online, it would be on the basis that adults would

have to “opt-in” to online pornography by, amongst other things, providing proof that they are over the age of 18.

2.13 The Commission recommended that the definition of “pornography” in the Sexual Offences Act be amended to incorporate elements of the Films and Publications Act definitions of “sexual conduct”, “explicit sexual conduct” and “sexual violence” so as to protect children from exposure to pornography and explicit content not suitable for children. The Commission further recommended the removal of the words “that is intended to stimulate erotic feelings” in order to test the NPA’s submission made in response to the issue paper that the subjective criteria of intent should not be included in the definition of pornography as the nature of the image should not be made dependent on the intention of its creator.

2.14 The Commission further proposed the insertion of clauses 19A and 19B. Clause 19A seeks to criminalise the enticement of children to view or to make child sexual abuse material or pornography accessible to children. It is made up of two distinct parts. The first part is applicable to all persons advertising, providing access to, distributing or enticing a child to view this material. The presence or absence of consent of the child is expressly removed from this clause. The second part is applicable to all persons inclusive of a manufacturer or distributor of any technology or device or an electronic communications service provider who allows a child to engage with any device, mobile phone or technology with Internet access, without ensuring that a default block is activated to prevent exposure to pornography or child sexual abuse material or who uninstalls such a default block. It provides for an opt-out of the clean feed system by allowing an adult to remove such a block on provision of valid identification and having this captured in a register kept for this purpose. It further provides for an offence of negligent exposure where reasonable steps are not taken to ensure that a child is not exposed to this material. Clause 19 B criminalises the use of misleading techniques on the Internet and more specifically the embedding of words, or digital images into the source code of a website, an advertisement or domain name, to deceive a child into viewing or being exposed to child sexual abuse material or pornography.

2.15 As the protection provided to children in section 19 of the Sexual Offences Act is mirrored in section 25 of the Sexual Offences Act, prohibiting exposure of child sexual abuse material or pornography to persons who are mentally disabled, it was further recommended that section 25 of the Sexual Offences Act be similarly amended to provide protection to persons who are mentally disabled. It was further noted that section 54 of the Sexual Offences Act places an obligation on anyone with knowledge of the commission of a sexual

offence against children or persons who are mentally disabled to immediately report this knowledge to a police official. The Commission proposed the insertion of clause 54A to introduce an additional obligation to report offences under sections 19A, B and C on any person having knowledge or a suspicion of commission of offences contained in these clauses; and on electronic communications service providers or financial institutions that become aware that their systems or facilities are being used to commit these crimes. The Commission deals with the proposal relating to clause 54A in chapter four below as the primary offences relating to child sexual abuse material are dealt with in that chapter. For the purpose of clarity the Commission recommended that the term “police official” to whom the report is to be made be defined in the Sexual Offences Act, as is found in the South African Police Service Act, 1995 (Act No.68 of 1995).

2.16 From a non-legislative perspective the Commission advocated for substantive protection of children by broadcasters. It suggested that the Films and Publications Board and the Independent Communications Association of South Africa (ICASA) reconsider the manner and the accessibility in which adult movies and related advertisements are broadcast. The Commission endorsed the recommendation by the information and communication technologies (ICT) Policy Review Panel in respect of online regulation that external internet content providers should be regulated in the same way as local providers.<sup>87</sup> It posited that the Broadcasting Complaints Commission of South Africa (BCCSA) may need to broaden its mandate and redefine what “broadcasting” means. Further that, uniform content regulation may need to be explored.<sup>88</sup> The Commission concluded its observations in this regard by stating that an amendment to the Films and Publications Act could be considered to place a legislative obligation on broadcasters to classify content with a view to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.<sup>89</sup> The Commission questioned whether a uniform classification system would ensure consistent outcomes in the different regulatory regimes currently applicable to the Films and Publications Act and the Broadcasting Complaints Commission Codes. It further questioned whether an independent, self-regulatory and or co-regulatory classification body would be required.<sup>90</sup>

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<sup>87</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.183.

<sup>88</sup> MMA Report on Online Regulation One Year On: What's changed? 2017.

<sup>89</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.183.

<sup>90</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.184.

2.17 The Commission flagged the inadequacy of displaying adult material after the watershed periods and found that technology has advanced in such a way that watershed hours can no longer be used as a yardstick to ensure protection of children.<sup>91</sup> The Commission noted that the Code of Conduct for Subscription Broadcasting Service Licensees allows for a range of content which may be harmful to a child including child pornography, sexual conduct and violence as long as it is done in good faith and with a reason such as public interest. The Commission pointed out that this Code does not have the standing to exempt certain material such as child pornography for whatever reason it is used.<sup>92</sup> Furthermore, the Code does not align with the definitions used in the Sexual Offences Act or may be in conflict with section 19 of the Sexual Offences Act.

2.18 The Commission confirmed that parents, other adults and peers who expose children to pornography should be held liable within the current framework of the law. It ventured that deliberate exposure would be an offence and that negligent exposure could constitute a lack of care in terms of the Children's Act.<sup>93</sup>

2.19 The Commission ultimately found that in practice efforts to protect children from harm and exposure to harmful behaviour online will not be effective unless they form part of and are integrated into larger child and social protection efforts to provide a protective environment online and offline for children.<sup>94</sup> In other words - a multi-sectoral approach is needed to protect children. This would include capacitating parents and caregivers; boosting responsible digital citizenship; and rolling out awareness programmes. The Commission made preliminary non-legislative recommendations aimed at providing body positive effective relationship and sex education within the schooling system and awareness on the safe use of the internet for society in general.<sup>95</sup> It further provisionally recommended that Government, in partnership with internet access and service providers, should embark on a national awareness-raising campaign, underpinned by further research, to better inform parents, professionals and the public at large about what pornography is; young people's access and exposure to pornography; and responsible safe use of the internet. This should include a message to parents about their responsibilities affording both children and young people greater protection and generating a wider debate about the nature of pornography in

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<sup>91</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.185.

<sup>92</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.186.

<sup>93</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.188 and 2.189.

<sup>94</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.190.

<sup>95</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.194.

the 21st century and its potential impact. The Commission flagged the need to give specific attention to the preferred language of communication.

## **C Evaluation and recommendations**

2.20 The evaluation of the Commission's draft proposals relevant to this chapter will, as far as practicable, follow the sequence in which they are reflected in the draft Bill.

### **1 Amending the definition of "pornography" in the Sexual Offences Act**

2.21 The Commission's proposal to amend the definition of "pornography" to align it with the framing of the amended definition of "child sexual abuse material" and to remove the subjective criterion that for an image or description to constitute "pornography" it has to be coupled to the intention of the creator, was widely endorsed in the workshops and by respondents to the discussion paper.<sup>96</sup> The latter amendment reflected the Commission's preliminary proposal and enquiry as to whether the "intention" of the material should be inferred from the quality of the image, regardless of its nature, and not from the intention of its creator, as proposed by the National Prosecuting Authority. In its submission Cause for Justice expressed its support of the proposal and emphasises that:

the determination whether material is adult 'pornography' or not, should be an objective assessment and not be conditional on either the creator/producer/distributor's subjective intention or the intention of the material. It is of the view that the current definition provides an obvious and dangerous loophole which will endanger children and defeat the purpose of justice.

2.22 The Refugee Legal and Advocacy Centre, however, submits that the subjective criterion should remain as it would ensure that "innocent" material is not included in the scope of the definition. On the same point Media Monitoring Africa expresses the concern that removing the requirement of intention will give rise to strict liability in respect of some of the offences set out in the Sexual Offences Act. It argues that the "intention regarding the

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<sup>96</sup> Group 1 Gauteng Workshop; Anonymous Gauteng Workshop; ; Capt Banks, SAPS: SECI Unit; MJ Makgwatha, DPP PTA; M Porogo Commission for Gender Equality; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Tara Harris, Monash; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Adv T Buitendag, NPA; Adv P Smith, NPA; Adv Vuyo Ketelo, NPA; Liesl Stander, Cause for Justice; Ms Vatiswa Jodwana-Blayi NPA (SOCA); ; Adv Vuyokazi Xalisa, NPA; and Brendan Botha, Break-Free.

type of content being created is directly relevant, and is an inquiry that must necessarily inform the measures taken against the person". The Commission is of the view that the manner in which pornography is defined in the Sexual Offences Act is to clearly and objectively describe that which is the subject matter of the offence creating and other provisions. It does not criminalise pornography in and of itself. The context in which a child is exposed to pornography will therefore determine culpability, unlawfulness and accountability. For example, a teacher using pornographic material for educational purposes and the actions of a child exploiter exposing a child to naked statues with a view to groom the child would have different outcomes in terms of the crimes contained in the Sexual Offences Act. For this reason the Commission confirms its provisional recommendation to amend the definition in this way.

2.23 A number of workshop participants identified the need to remove the word "female" with reference to breasts in paragraph (g) of the definition thereby making the paragraph gender neutral and for the insertion of the word breasts in paragraph (f).<sup>97</sup> Another respondent submits that the term "sexual intercourse" in paragraph (j) should be changed to "a sexual act" to bring the language in alignment with the Sexual Offences Act.<sup>98</sup> The Commission agrees that the language should be aligned but that the correct terminology to be used is "an act of sexual penetration" and not a "sexual act". The latter term is not applicable as it includes non-penetrative and penetrative acts. Cause for Justice points out that the words "live display" and "sequence of images" have been omitted from the final phrase of the preamble of the definition. The Department of Social Development of the Western Cape Government submits that the word "aesthetic" should be included in the definition to align with the definition of "child sexual abuse material". These proposals have been taken on board, the oversight has been corrected, and the Commission has additionally inserted the word "text" into the definition to further align it with the definition of "child sexual abuse material". The revised definition provides as follows:

(f) by the substitution for the definition of "pornography" of the following definition:

"pornography" means any live display, image or sequence of images, however created or portrayed, or any description text or presentation of a

<sup>97</sup> Group 1 Gauteng Workshop; Capt Banks, SAPS: SECI Unit; Job Masina; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Media Monitoring Africa; Ministry of Social Development, Western Cape Government.

<sup>98</sup> Senior State Advocate.

person, real or simulated, who is 18 years or older, of an explicit or sexual nature, whether such live display, image, sequence of images, description or presentation [that is intended to] stimulates erotic or aesthetic feelings or not, including any such live display image, sequence of images, or description or presentation of such person –

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs **[or]** anus or breasts of such person;
- (g) displaying any form of stimulation of a sexual nature of the **[female]** breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in conduct or activity characteristically associated with an act of sexual penetration [intercourse]; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;”

2.24 At this juncture the Commission wishes to flag what seems to be an anomaly in the Sexual Offences Act for the attention of the Department of Justice and Constitutional Development. It is unclear why the Sexual Offences Act makes it a crime for an adult or a child to show pornography to a child but does not make it a crime for an adult to show pornography to another adult where they have not consented to it. The anomaly arises in that the Sexual Offences Act makes it a crime to flash (expose oneself in real-time) to another person (whether that person is an adult or a child) but does not provide for the same

with the non-consensual exposure of an adult to pornography.<sup>99</sup> Section 10 of the Sexual Offences Act expressly only includes exposure to child pornography. Furthermore, while seemingly geographically neutral and arguably broadly defined the offence of flashing may not extend to sexting by adults, i.e. the sending of self-generated exposure of the adult sender's genitals, colloquially referred to as "dick pics", without consent of another adult due to use of the word "flashing" which connotes a brief exposure.<sup>100</sup> Sexting between children will be dealt with in chapter 3 below.

2.25 The Cybercrimes Act provides for the insertion of section 11A into the Sexual Offences Act. This section, however, only provides for the harmful disclosure of pornography where the subject of the pornographic material is the victim and not the perpetrator. The same applies for section 18F of the Films and Publications Amendment Act, 2019 which only prohibits the distribution of private sexual photographs or films without the consent of the person "in the image". In other jurisdictions this would amount to what is understood as revenge pornography. The Commission is of the view that exposing pornographic material to an adult without their consent, irrespective of the subject, should be remedied by amending section 10 of the Sexual Offences Act as follows:

**Exposure or display of or causing exposure or display of child [pornography] sexual abuse material or pornography to persons 18 years or older**

10.(1) A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, exposes or displays or causes the exposure or display of child **[pornography] sexual abuse material** to a complainant 18 years or older ("B"), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child **[pornography] sexual abuse material** to a person 18 years or older.

(2) A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, exposes or displays or causes the exposure or display of pornography to a complainant 18 years or older ("B") without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of pornography to a

<sup>99</sup> Sections 9 and 22 of the Sexual Offences Act.

<sup>100</sup> This shortcoming has been raised in the United Kingdom Law Commission Harmful Online Communications: The Criminal Offences Consultation Paper 2020. Available at [www.lawcom.gov.uk](http://www.lawcom.gov.uk).

person 18 years or older.

## **2 Amending section 19 of the Sexual Offences Act**

2.26 The proposed amendment of section 19 of the Sexual Offences Act to bring it in line with the proposed definition of child sexual abuse material by substituting the terminology and broadening the exposure to “any means” was widely endorsed.<sup>101</sup> Esselaar Attorneys, however, submits that the manner in which section 19 is currently worded could result in a medical practitioner falling foul of the law if they were to display a medical condition to a child so that the child could identify the medical condition they have. Media Monitoring Africa also submits that the lack of intention in the definition of “child sexual abuse material” would in its view mean that a parent who displays an “innocent” image of their child with that child online would be committing an offence in terms of section 19. The Commission is of the view that these comments relate directly to the required elements of the offence, namely unlawfulness and intent and not the manner in which ‘child sexual abuse material’ is defined. It addresses this comment fully in chapter 4 below.

2.27 During the evaluation of the comment on this section the Commission considered the need for the retention of paragraphs (b) and (c) which cross refers to the Films and Publications Act. After consultation with the Department of Communications and Digital Technologies, the Commission is of the view that these paragraphs should be deleted from section 19.

2.28 At this point the Commission wishes to flag its concern around the extreme and inappropriate violence children are being exposed to online, through games and broadcasting. This form of violence is increasingly found in mainstream media. The Commission notes the findings in the Film and Publication Board Convergence Survey Report 2019/2020<sup>102</sup> that parents’ concern regarding exposure of their children to sexual content has overshadowed the danger of exposure to violence. The Film and Publication

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<sup>101</sup> Group 1 Gauteng Workshop; Anonymous Gauteng Workshop; Capt Banks, SAPS: SECI Unit; MJ Makgwatha, DPP PTA; M Porogo Commission for Gender Equality; Elmarie, Touch of Hope; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Tara Harris, Monash; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Adv T Buitendag, NPA; Adv P Smith, NPA; Adv Vuyo Ketelo, NPA; Liesl Stander, Cause for Justice; Ms Vatiswa Jodwana-Blayi NPA (SOCA); and Brendan Botha, Break-Free.

<sup>102</sup> Film and Publication Board Convergence Survey Launch MS Teams 12 February 2021.

Board has found that violence in video games translates into proclivity towards violence in real time. The Commission is of the view that addressing the exposure of children to violence and other harmful content (such as self-harm tutorials) which falls outside the scope of the present investigation is equally deserving of attention.

2.29 The amendment to section 19 of the Sexual Offences Act reads as follows:

“Exposure or display of, or causing exposure or display of child **[pornography]** sexual abuse material or pornography to children”

“19. A person (‘A’) who unlawfully and intentionally exposes or displays or causes the exposure or display of [—

(a) any image, publication, depiction, description or sequence of ]child **[pornography]** sexual abuse material or pornography[;

(b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or

(c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law],

through any means to a child (‘B’), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child **[pornography]** sexual abuse material or pornography to a child.”.

2.30 The Commission of Gender Equality supports the proposal that any protection provided for children should be mirrored for persons who are mentally disabled.

The mirrored amendment of section 25 reads as follows:

“Exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material to persons who are mentally disabled”

“25. A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of **[any image, publication, depiction, description or sequence of] child [pornography] sexual abuse material** or pornography through any means to a complainant who is mentally disabled (“B”), is guilty of the offence of exposing or displaying or causing the exposure or display of child **[pornography] sexual abuse material** or pornography to a person who is mentally disabled.”

### **3 Inserting clause 19A into the Sexual Offences Act to criminalise enticing a child to view or making child sexual abuse material or pornography accessible to a child**

2.31 Although no comment was received on the desirability of the heading of clause 19A the Commission considered whether there was a sufficient difference between section 19 and clause 19A. The difference between the proposed clause 19A contained in the discussion paper and section 19 of the Sexual Offences Act hinges around exposing or displaying of pornography or child sexual abuse material to a child as provided for in section 19, and advertising, providing access and distributing pornography or child sexual abuse material to a child in clause 19A – in other words enticing a child to view the material. The conclusion was reached that the heading of clause 19A should be changed to “Providing access to or enticing a child to access child sexual abuse material or pornography”.

2.32 The proposal to include clause 19A into the Sexual Offences Act was met with a mixed, if not contested, response. While all respondents agreed that exposure to child sexual abuse material is illegal and should not be accessible at all, others are of the opinion that exposure and access to legal content (pornography) should not be conflated. On the one hand clause 19A was welcomed by a number of workshop attendees and role-players in the criminal justice and social protection sphere and some software developers.<sup>103</sup> On the other hand it was met with some scepticism<sup>104</sup> and opposition by a few respondents operating businesses online as platform, content and service providers.<sup>105</sup>

<sup>103</sup> Delaine Naidoo, child Welfare SA: Gauteng; Princess Maarman, NPA (TCC); Ms Vatiswa Jodwana-Blayi NPA (SOCA); Benita Nel, Childline, Mpumalanga; Captain Ndubane, SAPS; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free.

<sup>104</sup> Netsweeper.

<sup>105</sup> Google; ISPA; the Wireless Application Service Providers’ Association (WASPA); Wireless Access Providers’ Association (WAPA).

2.33 Netsweeper comments that forcing device manufacturers to embed filtering software has the potential to create macroeconomic trade issues with multinational hardware vendors.<sup>106</sup> In its view the cost would not be comparable to the benefit as software based solutions are easily bypassed or removed by “tech savvy” children (irrespective of their economic standing). Netsweeper supports the recognition by electronic communications service providers of their social responsibility to provide a safe internet connection/experience to children and for content filtering at the electronic communication service provider level, which makes it unnecessary to embed on-device software.

2.34 In a similar vein ISPA (Internet Service Providers’ Association) and the Wireless Access Providers’ Association (WAPA) submit that general blocking by its Internet access and service providers is not the appropriate solution and anticipates a shift to blocking at electronic communications service provider level. While the Commission for Gender Equality supports a clean feed/adult filtering mechanism that is set as the default position, with the option to opt out of it should the user be an adult, it is concerned that there are limitations to the proposal as networks and Internet service providers might have limited capability. It is opposed to placing the responsibility solely on the end-user as it believes that there is an over-estimation of control and an assumption that the end-user is technically capable and has the technical knowledge to engage the necessary security measures.<sup>107</sup>

2.35 Google South Africa is of the view “that the consequences of this amendment are far-reaching with negative unintended consequences for both responsible innovation and legitimate expression online”. The reticence expressed by ISPA, WAPA and industry globally<sup>108</sup> is best understood against the backdrop of the existing position i.e. subscription to the Manilla Principles which essentially treats service providers as “mere conduits” and shields intermediaries from liability for third-party content which may be unlawful or potentially harmful. It is argued that the mere conduit principle that drives the exemption of liability underpins freely accessible information and freedom of expression.<sup>109</sup>

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<sup>106</sup> Similarly flagged by Research ICT Africa and the Association for Progressive Communications as a unintended consequence; WASPA.

<sup>107</sup> Endorsed by the Law Society of South Africa’s E-Law Committee.

<sup>108</sup> CERRE (Centre on Regulation in Europe) Public Webinar 23 February 2021 New ways of oversight for the digital economy.

<sup>109</sup> ISPA; Wireless Access Providers’ Association (WAPA).

2.36 The legislative impetus towards regulating the online environment in the UK has not gone unnoticed by the online role-players. Although the initial model proposed by the Online Harms Bill has been scuppered by implementation challenges, key industry players, regulatory authorities and academic experts are seeking alternative models of oversight of the platform economy.<sup>110</sup> Current thinking in this regard sees a symbiotic relationship between good law, a good regulator and good oversight. Whereas industry has seemed set on not being legally obligated to restrict content to protect children (some turning a blind eye to illegal content and others voluntarily engaging mechanisms to do so) it not only can restrict content, but through algorithms and artificial intelligence (AI) it can provide safety and be compliant by design. The calling to account of Pornhub for hosting child sexual abuse material and non-consensual adult content on its platform is a case in point. Two days after being “outed” in the media Pornhub reduced its content from 13 million videos to 4 million videos and a hastily crafted verification model for uploading content was implemented.<sup>111</sup>

2.37 Although preferred by some respondents<sup>112</sup>, take down notices for undesirable content are onerous and can only be applied for after the harm has been done. The focus in clause 19A is not on illegal content (child sexual abuse material) only but on online enticing of children to watch pornography (which may be legal for adults to watch online). A take down notice would not be appropriate in that case. The Commission agrees that some of ISPA’s<sup>113</sup> objections and identification of the shortcomings of blocking such as under-blocking or false negatives; failure to address the root cause; possibility for circumvention; and interference with the Internet infrastructure, do carry some merit. The UK has encountered similar shortcomings with the Online Safety Bill 2017 and has, after significant engagement with industry and child protection agencies, opted for a new regulatory framework establishing a duty of care on companies to improve the safety of their users online, overseen and enforced by OFCOM (the appointed regulator).<sup>114</sup> The aim is to keep the regulator well informed of the nature of online harms and measures being taken to

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<sup>110</sup> CERRE Public Webinar.

<sup>111</sup> Paul K “Pornhub removes millions of videos after investigation finds child abuse content” The Guardian 14 December 2020 available at <https://www.theguardian.com/technology/2020/dec/14/pornhub=purge-remves-unverified-videos-investigation-child-abuse> Accessed on 4 January 2021; The Guardian “Pornhub: Mastercard and Visa to block use of cards on site after child abuse allegations” 10 December 2020 available at <https://www.theguardian.com/us-news/2020/dec/10/pornhub-mastercard-visa-rape-child-abuse-images> Accessed on 4 January 2021..

<sup>112</sup> ISPA; Wireless Access Providers’ Association (WAPA) and MTN.

<sup>113</sup> As endorsed by Wireless Access Providers’ Association (WAPA).

<sup>114</sup> HM Government The Government Report on Transparency Reporting in relation to Online Harms December 2020 (2).

address it, give the regulator discretion on the most effective means for companies to meet their duty of care,<sup>115</sup> ensure that end users are empowered and that companies are held to account for keeping their users safe online.<sup>116</sup>

2.38 Following the UK Online Harms White Paper which is set to introduce mandatory transparency reporting for relevant companies, the UK Minister of State for Digital and Culture has established a multi-stakeholder Transparency Working Group with representatives from industry and civil society.<sup>117</sup> It seems evident that there is no single avenue to keeping children safe online and that safety is best approached through different mechanisms. The safety tech approach is multi-dimensional: at system level it provides for automated identification and removal of illegal content; at platform level providing for support for human moderators and age verification; and at device or endpoint level providing for user-initiated protection and network filtering.<sup>118</sup> After the publication of its Online Harms White Paper in December 2020 the UK is drafting a new Online Safety Bill.

2.39 Online companies will be placed under a duty of care to protect children from being exposed to illegal material (which goes much wider than child sexual abuse material and pornography).<sup>119</sup> The online safety “duty of care” rules are intended to cover not just social media giants like Facebook but a wide range of internet services — from dating apps and search engines to online marketplaces, video sharing platforms and instant messaging tools, as well as consumer cloud storage and even video games that allow relevant user interaction.<sup>120</sup> Peer to peer (P2P) services, online forums and pornography websites will also fall under the scope of the laws, as will quasi-private messaging services, according to

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<sup>115</sup> Merrick R “UK ‘porn block’: Government drops plan to stop children watching sex videos online” The Independent undated available at <https://www.independent.co.uk/news/uk/politics/porn-block-uk-ban-government-bill-website-delay-sex-a9158396.html>. Accessed on 4 January 2021.

<sup>116</sup> HM Government The Government Report on Transparency Reporting (2).

<sup>117</sup> HM Government The Government Report on Transparency Reporting (2). It is notable that organisations involved in the working group range from Childnet, the Coalition for a Digital Economy, Facebook, Google, the Home Office and the Internet Watch Foundation to mention but a few.

<sup>118</sup> University of East London Safer technology safer users The UK as a world leader is safety tech. Department of Digital, Culture, Media and Sport. UK Online Safety Technology Sectoral Analysis undated.

<sup>119</sup> Lomas N “Online Safety Bill, coming next year, will propose fines of up to 10% of annual turnover for breaching duty of care rules” Tech Crunch December 15, 2020 available at <https://techcrunch.com/2020/12/14/uk-online-harms-bill-coming-next-year-will-propose-fines-of-up-to-10-of-annual-turnover-for-breaching-duty-of-care-rules/UK> Accessed on 4 January 2021.

<sup>120</sup> Lomas “Online Safety Bill, coming next year” 2020.

a government press release.<sup>121</sup> “The new regulations will apply to any company in the world hosting user-generated content online accessible by people in the UK or enabling them to privately or publicly interact with others online”.<sup>122</sup>

2.40 The UK government is said to be promoting “a new age of accountability for tech to protect children and vulnerable users, to restore trust in this industry, and to enshrine in law safeguards for free speech.” According to Crawford “the clear direction of travel is towards technology companies having responsibility for user content, leaving behind the idea of social media and other online platforms being a 'mere conduit' for information.”<sup>123</sup> Companies will be expected to take a risk-based approach and to implement appropriate systems and processes to improve user safety. The focus will be on what steps a company has taken to improve safety overall as opposed to enforcement being taken in respect of individual pieces of content.<sup>124</sup> OFCOM, the body responsible for regulating broadcast content, will be responsible for overseeing the new regulatory framework.<sup>125</sup> If passed into law, this will represent the first comprehensive framework for tackling online harms in the world, and will undoubtedly bring about significant changes in the way online platforms are monitored and used.<sup>126</sup>

2.41 While Google, in its comment on the discussion paper, expresses the view that although all stakeholders share a responsibility in making a safer environment for children online and to reduce online threats, it submits that the primary role in evaluating and minimising risks of online harm should be the parent of the child. In this regard it references the approach endorsed by the Organisation for Economic Co-operation and Development (OECD) Guidelines.<sup>127</sup> In respect of clause 19A(1) Google questions what would constitute unlawfully and intentionally advertising, providing access to, distributing to a child, or enticing a child to view child sexual abuse material or pornographic content. It believes that the

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<sup>121</sup> Lomas “Online Safety Bill, coming next year” 2020.

<sup>122</sup> Lomas “Online Safety Bill, coming next year” 2020.

<sup>123</sup> Crawford L “The Online Safety Bill: part of the Government's strategy for a thriving digital economy” Hogan Lovells 18 December 2020 available at <https://www.engage.hoganlovells.com/knowledgeservices/insights/the-online-safety-bill-part-of-the-governments-strategy-for-a-thriving-digital-economy> Accessed on 4 January 2021.

<sup>124</sup> Crawford “The Online Safety Bill”.

<sup>125</sup> Crawford “The Online Safety Bill”.

<sup>126</sup> Crawford “The Online Safety Bill”.

<sup>127</sup> It should however be noted that South Africa is not a member of this organization although it interacts with various subsidiary bodies of the organisation Department of International Relations and Cooperation available at [www.dirco.gov.za](http://www.dirco.gov.za) Accessed on 19 February 2021.

provision is overbroad and may have unintended consequences. For example, where a child uses a parent's mobile device and accesses pornographic content.<sup>128</sup> It confirms that Google's advertising policies do not allow certain kinds of adult content in advertising and destinations and does not allow for any form of content that promotes child sexual abuse imagery on its platforms at all. MTN suggests substituting the words "ensuring that the default setting blocks" with the words "taking reasonable steps to prevent access" in clause 19A(2)(a). Similarly, Legal Aid South Africa's E-Law Committee comments that there are currently no settings that can strictly "ensure" that such content is "blocked" and that it is unclear how the "unlawfulness" of the intentional provision of access to such devices would be assessed insofar as *mens rea* (intent) is concerned. It suggests that the word "ensure" should be substituted with "intended to limit or prevent access" as the clause may run the risk of being challenged by virtue of it requiring compliance with a technically impossible standard of protection.

2.42 Google questions how the default setting will be implemented, how this will prevent children from seeking or accessing sexual content online and whether the default block will only be applied to new devices or all devices. The Commission is of the view that the block at device level or endpoint level entails having software installed directly on end user devices in order to enforce the blocking policy. This would be a domain name server (DNS) block which would mean that the user's device would receive a message "server not found" and would not be able to connect to the webpage. Although the Internet Service Providers Association (ISPA)<sup>129</sup> is of the view that the real block should be at the source of content, it agrees that the block should be installed at the point of the end user. ISPA believes that the block should be end user controlled thereby allowing the end user to circumvent the content restrictions (very much the existing position). While the Wireless Application Service Providers' Association (WASPA) supports ISPA's position it suggests that a different approach be considered i.e. where devices that would be used by children be registered and then blocked or restricted from accessing adult content, as opposed to a default block.

2.43 WASPA identifies the following situations in which a block should be registered i.e. "when a consumer purchases a mobile phone; tablet; laptop; computer; television (or any other device that can connect to the internet) – and the device will be used by a person under the age of 18, a block needs to be registered on said device at a central registry designed for this purpose; or when a consumer enters into an agreement with a Mobile

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<sup>128</sup> Endorsed by Legal Aid South Africa's E-Law Committee.

<sup>129</sup> Endorsed by the Wireless Access Providers' Association (WAPA).

Network Operator for post-paid contract or a pre-paid contract – and the device will be used by a person under the age of 18, a block needs to be registered on said contract at a central registry designed for this purpose; or when a consumer enters into an agreement with an Internet Service Provider for the provision of services to access the internet - and the facility will be used by a person under the age of 18, a block needs to be registered on said facility at a central registry designed for this purpose.” It, however, cautions that in its view “solutions based on blocking are neither technically effective nor socially desirable”. WASPA specifically flags the negative financial impact on companies providing adult content services, which is a substantial contributor to our national GDP as part of digital products and services. ISPA further submits that Internet service providers should be able to voluntarily apply filtering measures as a service differentiator and that the provision of the service should be transparent and delivered on an opt-in basis (and not opt out as is proposed).<sup>130</sup>

2.44 The Commission recognises that requiring a block to be installed on a device will never reach all devices. For example, not all mobile phones are acquired new or are on contract. However, a substantial number of phones will be reached and a substantial portion of the problem will be addressed. Feature phones, on the lower end of the spectrum, cannot access the Internet and are therefore not a concern in this regard. This model would still allow children to obtain peer to peer material or material sent by an adult through social media but would not be material hosted on a website on the Internet. A large percentage of devices would be blocked and in time the cascade effect would ensure that a larger percentage of people would acquire blocked phones. Having said this the Commission agrees with the submission by Be In Touch and Dial a Nerd that this solution is limited based on the different ways children access pornography through different applications in spite of a default block.<sup>131</sup>

2.45 The Commission has deliberated on whether a block placed on a device would adequately protect a child from being exposed to pornography while online. It has

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<sup>130</sup> Endorsed by the Wireless Access Providers' Association (WAPA).

<sup>131</sup> Be In Touch (the South African partner of the UK company Yoti) endorses the need for multiple layers of safety. It is of the view that age verification or “age-gating” on its own provides a legal loophole for companies. It does not change children’s behaviour or remove the impact of the behaviour. It only serves to remove liability for the company. It flags the use of Apps in that random birth dates can be used. It promotes the use of biometric age verification as is being spearheaded by Yoti. It also favours child friendly devices pre-programmed with filters. It suggests that these devices could be cheap and easy to use e.g. Nokia 3310 with some smartphone and some internet capability with cheap data. BeIn Touch is of the view that from a profit perspective companies could offset the cost by way of “digital offsetting” similar to “carbon offsetting”.

considered that placing blocks or filters on devices that can access the Internet are already available but are rarely activated on these devices. It is of the view that there may be a number of reasons for this. One of the reasons, which could be relatively easily remedied, could be that mobile operators do not advertise the blocking possibilities available on their systems and are not forthcoming on the protective practices they apply which include voluntarily filtering for harmful material in conjunction with the Internet Watch Foundation. The OFCOM Report on Internet safety measures<sup>132</sup> found that the reason for parents not mediating their children's access to the Internet by employing parental controls range from trusting and supervising the child; a lack of awareness and understanding of parental controls and just not getting around to installing it amidst the flurry of other parental responsibilities.

2.46 The use of mobile devices by children and unrestrained access to the Internet and the risks posed thereby are evidenced in the recent findings by the UNICEF South Africa Disrupting Harm Survey.<sup>133</sup> The survey revealed that most children (95.3%) and parents (80.2%) in South Africa have access to the Internet via a mobile device.<sup>134</sup> Furthermore, that despite experiencing challenges with primarily Internet cost and poor network connections most children (56.4%) and parents (65.3%) use the Internet daily.<sup>135</sup> The presenter of the survey noted with concern that more than two-thirds (67.0%) of child participants who had seen sexual images were exposed to them on an online device and that South African children do engage in risky online behaviour and have negative online experiences, which increases their online vulnerability to exploitation and abuse.<sup>136</sup> Children who participated in the survey reported that during the year preceding the survey, 40.1% of them had unwanted exposure to sexual experiences and materials, while 20.4% of them experienced unwanted online sexual advances.<sup>137</sup> In comparison to the 2016 South African Kids Online study, 51.2% of child participants reported that they had seen sexual images online during the year preceding the survey.<sup>138</sup> In its latest review, Pornhub reports that for its 130 million users in

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<sup>132</sup> OFCOM Report on Internet safety measures: Strategies of parental protection for children online 15 January 2014 6; Films and Publications Board, 2021 Conference on Harmonisation of Content Regulation in Africa 24 March 2021.

<sup>133</sup> Webinar launch of the Bureau of Market Research (UNISA) and UNICEF "Kids Online Survey" UNICEF South Africa Disrupting Harm Study Research Findings (3 June 2021).

<sup>134</sup> UNICEF "Kids Online Survey".

<sup>135</sup> UNICEF "Kids Online Survey".

<sup>136</sup> UNICEF "Kids Online Survey".

<sup>137</sup> UNICEF "Kids Online Survey".

<sup>138</sup> UNICEF "Kids Online Survey".

2020, mobile devices made up 84% of all Pornhub's traffic worldwide.<sup>139</sup> According to anecdotal news reports South Africa was included in Pornhub's top 20 most frequent users list in 2017.<sup>140</sup> By 2019 South Africa is reported to have moved off the top 20 list to number 24.<sup>141</sup> This reported usage of pornography by South Africans coupled with the availability and wide spread use of mobile devices, motivated the Commission to focus on the exposure of children to pornography over mobile devices.<sup>142</sup>

2.47 The Commission has considered that a less intrusive option could be to include a warning or advertising around self-activated blocking on mobile devices during setup or to collaboratively incentivise operating systems like Google, Apple and Huawei to introduce an extra step in the start-up process to include the installation of a block in respect of adult content. Another less intrusive yet more coercive approach would be the approach suggested by Legal Aid South Africa's E-Law Committee. It suggests that as the distribution of devices is regulated by ICASA in respect of the procedure for the registration of suppliers of telecommunications facilities and equipment, it appears that the section may be more effective if it required manufacturers or regulated distributors of technological devices to ensure that child protective settings are applied as a default in the operating system settings of such devices at the time of manufacture or distribution and that such settings should only be capable of being removed using a password or similar code generally intended to be known only to the owner or controller of such device. Further that, a general offence be established only where any person removes such protective settings with the intention of enabling a child to have access to pornography or sexually abusive material or otherwise acts recklessly in such a manner that causes this content to be displayed to a child by means of such a device. The Commission notes that the ICASA equipment certification or homologation process relates to assessment of safety and other attributes of hardware and is not currently suitable for this purpose.

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<sup>139</sup> Pornhub The Pornhub Tech Review 8 April 2021 available at [pornhub.com](https://pornhub.com). Accessed on 18 May 2021.

<sup>140</sup> Zwane J "SA beats rest of continent in porn-watching" News 24 7 January 2017 available at <https://www.news24.com/news24/SouthAfrica/News/sa-beats-rest-of-continent-in-porn-watching-20170107> Accessed on 25 March 2021.

<sup>141</sup> Pornhub Pornhub Insights The 2019 Year in Review 11 December 2019 available at [pornhub.com](https://pornhub.com). Accessed on 18 May 2021.

<sup>142</sup> According to the Global Kids Online, one in two (47.6%) South Africans who access the internet tend to do so via their mobile phone Phyfer, J., Burton, P. & Leoschut, L. (2016). Global Kids Online South Africa: Barriers, opportunities and risks. A glimpse into South African children's internet use and online activities. Technical Report. Cape Town: Centre for Justice and Crime Prevention available at: [www.globalkidsonline.net/south-africa](http://www.globalkidsonline.net/south-africa).

2.48 Google questions the efficacy of placing responsibilities on manufacturers and distributors to implement the default setting in terms of sub-clause 19A(2). Group 2 of the Gauteng expert workshop and Netsweeper submits that reference to “a manufacturer or distributor of any technology” in clause 19A(2) should be replaced with “an electronic communications service provider”.<sup>143</sup> The Commission agrees with both Google and Netsweeper in this regard. Google further points out that “technology” has not been defined in the draft Bill and it remains to be seen how this term will be interpreted. As what is understood as “technology” is a dynamic concept, the Commission does not support defining it. It further submits that the proposed section 19A(2) is far too broad. In particular, the provision is far too stringent in that it does not provide for circumstances where a child may provide false verification, or where a child accesses a device that belongs to a user whose age has been verified, thereby placing unreasonable liability on a manufacturer, distributor or electronic communications service provider. The Commission does not agree that in these circumstances liability would be placed on manufacturers, distributors or electronic communications service providers.

2.49 Netsweeper submits that the word “uninstall” in sub-clauses 19A(2)(b) and (c) should be replaced with more inclusive terminology such as “override, remove, bypass, circumvent or any other manner remove”.<sup>144</sup> The Commission agrees that the obligation is best placed on electronic communications service providers and that the words “overrides, disables or circumvents or in any other manner removes” would cover a wider range of behaviour. The Commission is of the view that this may only be done by an authorised person who would need to record the removal in a register. Electronic communications service providers would further be required to maintain a central data base of opt outs similar to maintaining a registered data base under the Regulation of Interception of Communications and Provision of Communication related Information Act.

2.50 Group 2 of the Workshop on the discussion paper in Cape Town questions the proposed obligation in clause 19A(2)(a) to ensure that a device must have a default setting

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<sup>143</sup> Endorsed by ISPA; the Wireless Access Providers’ Association (WAPA); Adv Dorcas Shabangu, NPA (SOCA); Group 1 Gauteng Expert Workshop; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; Crystal Clear Ministries International; and Cause for Justice.

<sup>144</sup> Endorsed by Cause for Justice.

blocking child sexual abuse material and pornography. It reasons that it does not make provision for diverse family structures in South African society. For example, where grandparents care for small children and are not conversant with technology. Captain Ndubane of the South African Police Service is of the view that parents need to be empowered and should not pass their responsibilities of protecting their children to other role-players such as the education system. The Commission supports the submission that the important role that parents and caregivers play should not be negated and that this responsibility should be emphasised.<sup>145</sup> It, however, also recognises that the management of children’s exposure to content online may be hindered in many ways by the almost ever present and invisible nature of the content a child views, may access or be exposed to. This calls for a multi-pronged approach. It is notable that the National Child Care and Protection Policy 2019 not only endorses such an approach but documents the Government of the Republic of South Africa’s commitment to securing a continuum of care and protection services that respond to the needs and circumstances of children and their families. This includes being protected from “violence, abuse, neglect, exploitation and discrimination.”<sup>146</sup>

2.51 Google submits that the proposed default block is more stringent than the United Kingdom’s Digital Economy Act, 2017 as it restricts access to pornography through a default block on a device as opposed to placing a block on the content online subject to age verification. It submits that the United Kingdom’s Act further only prohibits a person from making pornographic material available on the Internet to persons in the United Kingdom on a commercial basis. The Commission agrees that the United Kingdom correctly identified the problem as the commercial promotion of pornography through free material. However, although it is of the view that the United Kingdom in theory correctly located the solution where the problem was, in practice the solution was not implementable. For this reason the Commission opted for placing a block on a device. It is apt to point out that the United Kingdom blocking proposal was situated at the content provider and not on the device and that the position in the United Kingdom has shifted significantly.

2.52 Due to identified challenges with implementation of part 3 of the United Kingdom’s Digital Economy Act 2017, requiring all adult internet users wanting to watch legal pornography to prove they are over 18 by providing some form of identification has not been

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<sup>145</sup> Department of Social Development National Child Care and Protection Policy 2019 9 recognises that “parents, families, and caregivers are the primary duty-bearers for the care, development and protection of their children, and that most parents, caregivers and families have the desire and capacity to provide care and protection.”

<sup>146</sup> Department of Social Development National Child Care and Protection Policy 2019 9.

enacted as it reportedly ran into legal, practical and technical difficulties.<sup>147</sup> Some of the challenges included breaching the right to privacy of adult users in that concerns were raised that their identities and browsing habits could be leaked. Furthermore, the resultant need to exempt social media sites from the ban was also raised over fears that it would result in the likes of Twitter and Reddit being blocked for adult content. As referred to above the United Kingdom has opted for an online harms regulatory regime. The aim is to give the appointed regulator (OFCOM) discretion on the most effective means for companies to meet their duty of care.<sup>148</sup> The Online Safety Bill, which is at white paper stage, seeks to change the United Kingdom's approach by including responsibility duties on platforms and service providers.<sup>149</sup> This approach is being met with some scepticism at its broad reach on the one hand and the absence of measures to address disinformation and misinformation on the other hand.<sup>150</sup> The change of tack and the delays in processing new legislation has also been met with frustration at the lack of online protection in the foreseeable future.<sup>151</sup> The United Kingdom government is facing legal action for not implementing age verification for legal pornography sites as provided for in the Digital Economy Act, having opted for "placing a burden on internet providers to protect users from 'harms' including viewing pornography while under age in the Draft Online Safety Bill."<sup>152</sup>

2.53 Google submits that if the default block does not meet the rigors of the limitation clause in the Constitution it may be in breach of the right to privacy and the right to freedom of expression. It expresses a preference for reliance on existing protective measures available on content sharing platforms such as YouTube which it says prohibits pornography and the use of tools like Safe Search that empowers users with controls to avoid pornography on Web Search. It reiterates its preference for protecting children through digital literacy and awareness which it believes will have a greater long-term impact on the protection of children online, coupled with other on-going mechanisms to enhance the protection of children online. Some of these mechanisms include safety initiatives and education. However, it notes that requiring safety initiatives and messages to be available in all official languages in South Africa may be unrealistic to impose on private service

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<sup>147</sup> Merrick "UK 'porn block'".

<sup>148</sup> Merrick "UK 'porn block'".

<sup>149</sup> Adam Smith Institute Webinar 'Draft Online Safety Bill' 25 May 2021.

<sup>150</sup> Adam Smith Institute Webinar 'Draft Online Safety Bill'.

<sup>151</sup> Grant H "UK government faces action over lack of age checks on adult sites" 5 May 2021 available at <https://www.theguardian.com/society/2021/may/05/uk-government-faces-action-over-lack-of-age-checks-on-pornography-websites/> Accessed on 6 May 2021.

<sup>152</sup> Grant "UK government faces action over lack of age checks on adult sites".

providers, given that there are 11 official languages in South Africa and platform providers would bear an unrealistic burden in attempting to comply with this.

2.54 The Commission recognises the investment Google continues to make in South Africa through the development of family safety technology and tools that are available on its platforms, such as SafeSearch, YouTube Safety Mode, Parental content administration on Blogger, YouTube Restricted Mode and Hashing Technology which seeks to proactively detect, report, hash and remove child sexual abuse material and nudity on Google services. ISPA's Online-Safety Project and WASPA's Code of Conduct aimed at protecting children from adult content and child abuse material is also recognised, as well as the partnership that MTN has with the Internet Watch Foundation. The fact that the Internet service provider industry has already taken various required and voluntary measures to inform, educate and protect users of their services deserves acknowledgement.<sup>153</sup>

2.55 The Commission also notes the mechanisms Google makes available to remove and report any child sexual abuse material it detects or which is reported to it. It further notes the response to the posting of "revenge porn" and the removal thereof and the support and collaboration shown to local law enforcement in respect of child safety-related requests. The Commission is pleased to be informed of Google's family friendly platforms and products such as YouTube Kids and Family Link which allows parents "to make their own choices regarding their children's online activity". While recognising that the "goal is to give kids an experience guided by their parents where they can build the skills to engage in smart and responsible online practices as they grow", the Commission is cognisant of the inequality in education and access to digital platforms that flows from the inequalities brought about by patriarchy and the inequalities underpinning our difficult past and present. The discussion paper reflects on this in some detail. Essentially a large number, if not the majority, of children do not have parents to provide the guidance spoken of and are affected increasingly by a digital divide which runs along the fault lines of poverty and vulnerability. While Google has embarked on an Online Child Safety Campaign with various key stakeholders in government, law enforcement and civil society, it has on its own account, in its submission, only managed to equip 3000 children with digital literacy in four of the nine provinces over the past few years. The UNICEF Disrupting Harm Survey confirms the scarcity of access to online education. The Survey revealed that less than half (only 41.4%) of the child participants reported that they had ever received information on online safety.<sup>154</sup> It is clear

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<sup>153</sup> The Wireless Access Providers' Association (WAPA).

<sup>154</sup> UNICEF "Kids Online Survey".

that despite online safety tools and awareness raising initiatives, the rate at which children are being exposed to pornography is increasing exponentially, making the protection of children through awareness-raising alone unlikely.<sup>155</sup> This again points to the need to have a multi-pronged approach which is inclusive of, but not solely reliant on awareness raising initiatives.<sup>156</sup>

2.56 Digital literacy is an important skill needed by children for responsible and safe digital citizenship. However, given their developing maturity the level of the online safety they receive should not be left in their hands. The Commission has taken note of the view expressed in the OECD Guidelines on the Protection of Children Online that placing a block on children accessing pornography online would “undermine the framework conditions that enable the Internet to operate as a global open platform for communication, innovation, economic growth, and social progress”. In this regard it is important to note that the Commission is not seeking to place a moratorium on pornography or trying to impede the online activity of adults. The Commission’s focus is to provide a safe online space for children. Google on its own account submits that pornography is not allowed on YouTube and that if present and reported by a member of the YouTube community will be removed. In spite of this prohibition and other efforts of content providers to provide a safe online space for children, research conducted by the Youth Research Unit at UNISA shows that a worrying number of children are being exposed to pornography online.<sup>157</sup> It would seem that more needs to be done to provide a safe online space.

2.57 The Commission agrees that even though a default block is placed on the devices they use, some children may still actively seek access to pornography and will find ways to do so. Notwithstanding this the Commission believes that legislating for a default block could serve as a sufficiently protective measure to pass Constitutional muster. The Constitutional Court in *De Reuck* found that when it comes to the right of freedom of expression and accessing child sexual abuse material “[E]xpression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a

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<sup>155</sup> The research done by the Youth Research Unit at the Bureau for Market Research of the past few years is instructive in this regard, including that shared during the Webinar launch of the UNICEF “Kids Online Survey”; awareness raising is flagged as one of the recommendations in ECPAT International The Landscape of Sexual Exploitation of Children in South Africa (2019) Bangkok: ECPAT International.

<sup>156</sup> A collaborative approach is supported by the UNICEF “Kids Online Survey”.

<sup>157</sup> Youth Research Unit, Bureau of Market Research, Unisa Online Sexual Exploitation of Children: Pornography and Sexting, Dr A Basson, 2017 Research Seminar Series 12 - 19 September 2017.

form of expression that is not protected as part of the freedom of expression in many democratic societies.” In light of this finding and the prominence of the rights of children in the Constitution and the fact that the default block does not deny access to pornography for adults but provides a conduit through which they may access it, it is likely that the limitation will withstand constitutional scrutiny.

2.58 The Commission is of the view that preventing children from accessing pornography is a sufficiently important objective that we should prioritise to do more than not to merely recommending the taking of informal steps such as informing or educating the child about the harms of pornography.<sup>158</sup> A clear message needs to be sent that it is a serious matter. Where blocks are in place, children would need to actively seek access to pornography. Persons who are not conversant with technology would be assisted by having a default block installed. If they have requested the removal of the block and wish to gift the device to a child, they would be conversant with the procedure to have it re-installed by the mobile operator that uninstalled it for example. It is the Commission’s view that the following minimum measures are required to provide a framework to prevent children from accessing pornography:

- (1) Installation of a block prior to activation of the device on the network or a software application with the capability of preventing the user of the device from viewing or accessing child sexual abuse material or pornography.
- (2) Provision of educational materials.
- (3) Signing of a declaration prior to activation of the device on the network which records that the consumer understands that certain content will not be available on the device.
- (4) Providing a mechanism to allow the automated updating of the software application to ensure continued effectiveness and removal of the software application where a subscriber has proved that they are over the age of 18.
- (5) Maintaining a register of the details of the blocks installed and uninstalled. This register would be analogous to or could possibly be an addition to the current collection and verification of customer information required under the Regulation of Interception of Communications and Provision of Communication-related Information Act and would be subject to similar confidentiality provisions. The collection and processing of this information would also be subject to the provisions of the Protection of Personal Information Act.

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<sup>158</sup> Prevention is a key theme in the Department of Social Development’s National Child Care and Protection Policy 2019 10.

2.59 Research ICT Africa and the Association for Progressive Communications submit that it has questions about how to define what content comprises pornography and how to implement the blocking of access of children to pornography effectively without blocking access to other benign or non-harmful content. They argue that clause 19A(2)(a) could severely inhibit a child's ability to access and use the Internet. Research ICT Africa and the Association for Progressive Communications submit that on a technical level, there are a number of ways of implementing clause 19A(2)(a), most of which may have very significant chilling effects on access to the Internet for children as well as adults. In accordance with its wording, it would need to be implemented at the device and software level, as well as at the network level.

2.60 Research ICT Africa and the Association for Progressive Communications state that:

Section 2(a) would also have to be implemented at a network level by electronic communications service providers. Electronic service providers like mobile phone operators and Internet service providers would be required to set-up filtering, blocking, and traffic analysis infrastructure and essentially provide two tiers of Internet access, one for adults and one for children, as well as authentication mechanisms to verify users. How this could successfully be implemented without introducing barriers to and increasing the prices of access has not been addressed by the SALRC. The Bill also leaves too much policy uncertainty as to how pornography and child sexual abuse material would be detected, and who would maintain such databases required to block content (like block lists) or software required to detect such content.

2.61 The Commission acknowledges the potential impact of this proposal on the cost to communicate in South Africa, as well as the critical importance of all South Africans having access to affordable communications services, particularly mobile data services. The Commission does not agree that a requirement to institute the proposed block would involve such costs and resources so as to amount to a barrier to entry into the market for electronic communications services. It is already the case that the offering of blocking services at network has been commercialised and the economies of scale realised by the mobile network operators in particular will, the Commission submits, make the cost of implementation and maintenance of the block negligible. Local mobile network operators already utilise deep packet inspection and related activities and, as noted elsewhere, MTN already implements a blocking list in respect of child sexual abuse material while all networks prohibit most adult content.

2.62 The Commission also acknowledges that blocking systems are not infallible and will require ongoing refinement but is not of the view that this is sufficient reason to reject them

given the importance of the objective of creating a safer online environment for children. Providers such as Google have provided submissions to the Commission on the advanced techniques utilised to detect pornography on its YouTube platform and there are independent third parties providing vetted blocking lists.

2.63 Research ICT Africa and the Association for Progressive Communications further submit that in addition to the technological implications of implementing such a system of default blocking:

the proposed amendments have significant implications for the personal computing freedom of adult persons. If all devices were to be issued with software that includes default settings blocking access to certain sites, and if the user needed to present identification to uninstall such software, it would mean that all software would need to be approved and modified by the law presumably through a state or state mandated authority. In order to uninstall some components of this software, individual persons would have to prove their age, while other components of the software would be illegal to uninstall regardless of the purpose. This would effectively amount to software mandated by a state authority and would infringe individuals' privacy rights.

In order to enforce the law, all software distribution channels would likely need to be approved and modified by a state authority. In addition to needing buy-in from major software vendors, the provision would be almost impossible to implement as software could still be bought or downloaded online. Without buy-in from major software vendors, access to the software repositories of Microsoft, Apple, Google, etc. would have to be blocked in South Africa.

There is also the question of Free and Open Source Software (FOSS), which encompasses software made available without charge by a developer community, much of which (e.g. the Linux operating system and the Apache web server software) is essential for the functioning of the modern Internet. The rigidly controlled software distribution channels proposed by the Bill would make much open source software illegal if it was not approved for use. A large amount, if not all, free software distribution channels would also need to be blocked in order to enforce the measures envisaged in the proposed Section 19A.

2.64 The Commission has noted these comments and also that it has not mandated approval of software by a state authority, envisaging instead an obligation on the ECSP to ensure that the necessary functionality is present rather than dictating a specific technological solution. The role of the state is seen as limited to providing and enforcing a legal obligation to prevent access to pornography rather than determining the manner in which this is to be done. The Commission is consequently of the view that the dangers identified above are overstated.

2.65 Research ICT Africa and the Association for Progressive Communications is further of the view that:

in addition to stifling individual software usage, innovation and the digital economy would be severely restricted if all software allowing access to the Internet needed to be pre-approved. Start-ups would have a very limited choice of software with which to run their businesses as well as to assemble their online infrastructures. In addition to being impractical to implement, section 19A would therefore inhibit individual and organisational software choice and usage as well as inhibit innovation in the digital economy.

2.66 Moreover Research ICT Africa and the Association for Progressive Communications strongly disagrees that providing access to a device “without ensuring that the default setting blocks access to child sexual abuse material or pornography” will result in harm and should therefore be criminalised. It disputes that the existence of online risks translates to actual harm. It concludes that “the ‘default provision’ is therefore not only technologically determinist and impractical from an implementation point of view, but wholly neglects not only children’s rights but adults’ rights too.” While it notes that protection and the mitigation of risk are important as far as marginalised communities are concerned, it argues that an empowering approach to children’s rights to participate and contribute to the information society are even more important. It suggests that the Commission needs to strike a better balance between efforts to increase opportunities for children and efforts to decrease risks.

2.67 The Commission agrees that online risk does not necessarily translate to harm and that in the words of Livingstone that “[B]uilding on the distinction between risk (a calculation based on the probability and severity of harm), and harm itself, research and policy on children’s online risk faces particular problems in measuring harm and, therefore risk.”<sup>159</sup> The Commission is of the view that in dealing with this very difficult aspect it is necessary to endorse the view that “the Internet is not intrinsically risky – it depends on the interaction between users and their socio-technological environment, and the ways in which this interaction has been shaped.”<sup>160</sup> The Commission further shares the view that a child needs to be empowered to take calculated risks in order to develop resilience.<sup>161</sup> Offline or real-time and online risk-taking, however, needs to be within defined parameters. Being exposed to pornography online is a risk in the sense that it is associated with a certain likelihood and magnitude of harm and would arguably fall outside of the parameters that society would

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<sup>159</sup> Livingstone, Sonia (2013) Online risk, harm and vulnerability: reflections on the evidence base for child Internet safety policy ZER: Journal of Communications Studies, 18 (35) pp 13-28 ISSN 1137-1102 available at <http://eprints.lse.ac.uk/62278/>

<sup>160</sup> Livingstone Online risk, harm and vulnerability (35).

<sup>161</sup> Livingstone Online risk, harm and vulnerability (24); the Department of Social Development’s National Child Care and Protection Policy (2019) 21 emphasises that certain families must receive support through public programmes to build children’s resilience where such families and households have a limited capacity to do so.

want a child to explore risk-taking measures in, particularly given the addictive, destructive and harmful properties of pornography that Doctors for Life International document in its substantially referenced submission.<sup>162</sup> The discussion paper also noted that the widespread availability of pornography on the open Internet through “tube” and other sites is part of a commercial strategy by international companies such as Mindgeek to enable addiction to pornography for the purpose of selling online advertising inventory.

2.68 Google questions the manner in which age verification in respect of clause 19A(2)(c) will take place in respect of uninstalling the proposed mandatory default block and whether a regulator would be appointed. It flags the breach of privacy risks associated with handling of personal information. It further submits that contrary to the assumption that all mobile subscribers are party to a contract, the majority of users are on a prepaid/pay as you go plan which does not require a contract with their provider. The Commission of Gender Equality emphasizes the same point and cautions that as many devices in South Africa do not originate from registered service providers, the limitations on Internet service providers should be taken into account. The Commission recognises that privacy risks will be governed by the Protection of Personal Information Act. The Commission recognises the need to provide clarity on the manner in which uninstalling of the block may be done and has drafted subsections (4) to (10) to address this gap, clearly identifying an electronic communications service provider as the relevant authorised person and to provide clarity on other modalities such as the keeping of the register and access thereto.

2.69 Clause 19A(2)(d) requires that a register be kept of all persons over 18 who wish to uninstall the default block. The National Commissioner of the South African Police Service submits that the register has a potential of imposing challenges on the Service as it is not clear as to who will monitor the compliance by the manufacturers and distributors. The Service has a responsibility to investigate reported cases. It is accordingly unclear whether the register will be accessible for purposes of investigation. In response to this concern the Commission has made provision for access to the register in the revised clause for the purposes of investigation. Google comments that registration would provide a free pass to collect personal information, which in its view will result in a number of privacy implications including announcing to government or the appointed regulator that they are viewing pornographic content. The Commission recognises that privacy risks will be governed by the Protection of Personal Information Act. Google is further concerned if the register is

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<sup>162</sup> Livingstone Online risk, harm and vulnerability (17).

hacked, it may bring about a social stigma on those whose names have been disclosed.<sup>163</sup> It flags the fact that the safety, security and anonymity of user's information have been contested in respect of the United Kingdom's Digital Economy Act, 2017. The Commission agrees that it is important that the content of a register of this nature should be kept confidential. By way of analogy section 24(3) of the Films and Publications Act Amendment Act legitimises local online distribution of adult material if registered as a distributor. The distributor must ensure that no one under 18 may access the material and that payment is effected by way of credit card. A private record of all instances of access granted and the name, age, address of whom access was granted to must be kept by the distributor. The CEO of the Film and Publication Board may have access if there is reason to believe that a child has gained access to the material.

2.70 In light of the enactment of the requirement of age verification by registered distributors for accessing pornography and the associated obligation to keep a register of access in the Films and Publications Amendment Act; and the evolving discussion in the United Kingdom and in fact globally the Commission is persuaded that a multi-dimensional approach to the online safety of children would produce the best results.<sup>164</sup> The need for legislation in light of the insufficiencies of self-regulation by some companies and the voluntary efforts of other companies to ensure that the online environment is safe for children is evident.

2.71 After significant deliberation the Commission is of the view that there are at least three ways in which to protect children from exposure to child sexual abuse material and particularly pornography in the online context and that they may not exist independently of one another. Firstly through legislation which could include a block at the point of the end user (although not fail safe); secondly persuading at least the major platforms to put codes in place so that mobile phones cannot link to their platforms without a pornography block when setting up the phone, which can be disabled by an adult; and thirdly legislatively placing obligations on electronic communications service providers through the Independent Communication Authority of South Africa (ICASA) and regulation. Currently this is done by the Department of Communications and Digital Technology through guidelines for recognition of industry representative bodies. It could be made a condition of electronic communications service provider's licenses and reseller licence exemptions with penalties if

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<sup>163</sup> WASPA shares the concern that private information is to be stored on an 'opt-in' central registry.

<sup>164</sup> CERRE Public Webinar; ECPAT International The Landscape of Sexual Exploitation (2019).

they do not oblige such as a fine or retraction of the license. This may be best housed in the regulations pertaining to licensing conditions under the Electronic Communications Act 36 of 2005. In this regard the Electronic Communications Act would need to include a direct obligation on licensees and license exempt persons.

2.72 If the option of placing a block by way of a filtering application (App) on the end user's device is employed then the Independent Communication Authority of South Africa (ICASA) could place an obligation on licensees when handing the device over that it must have certain applications installed and give the user an option as to which one should be installed. A consideration would be the cost involved in purchasing the software applied to the end user's device. Installation and updating could, however, be zero rated.

2.73 Consideration could be given to providing that wherever WiFi is provided free of charge to the public it must be blocked at network level so that pornography cannot be accessed. This could specifically be aimed at libraries, schools, guest houses, hotels and airports – where the WiFi is free or subsidised and where facilities are geared towards children for example Spur or McDonalds. Where there are already blocks installed on a device this would provide double safety with device level protection. This should be linked to full media campaigns on the measures being taken to provide a safe online experience for children.

2.74 Having regard to the current international debate on the need for co-regulation, the move towards layered online protection and the submissions received, the Commission proposes that clause 19A, which introduces a default block, as redrafted below, should be inserted in the Sexual Offences Act as one of the measures to address exposure of a child to pornography. It finds the legislative developments in the United Kingdom instructive and does not find merit in leaving children unprotected while a collaborative approach is crafted by role-players in the Department of Communities and Digital Technologies and industry. The Commission recommends that the Department of Communications and Digital Technology should build on and establish meaningful engagement with all role players in order to establish a collaborative online safety framework in the South African context.<sup>165</sup> The path established by the United Kingdom Transparency Working Group may be instructive in this regard. This may mean that in time a different legislative mechanism is crafted or facilitated by the Independent Communication Authority of South Africa (ICASA) through its Code of Conduct Regulations. It may also require distributors of pornography to

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<sup>165</sup> This approach is confirmed by recommendations shared in the UNICEF "Kids Online Survey".

register locally as commercial online distributors or face having Internet service providers making their site inaccessible. The Commission therefore provides for regulations to be issued by the Minister of Justice and Correctional Services in consultation with the Department of Communications and Digital Technologies and the inclusion of the Department of Communications and Digital Technologies in the Inter-sectoral Committee for the Management of Sexual Offence Matters.

2.75 The proposed clause reads as follows:

**“Providing access to or enticing a child to access child sexual abuse material or pornography**

**19A. (1) A person (‘A’) who unlawfully and intentionally entices a child (‘B’) to access child sexual abuse material or pornography by –**

- (a) advertising;**
- (b) providing or inviting access to; or**
- (c) distributing.**

**child sexual abuse material or pornography through any means, with or without the consent of B, is guilty of the offence of enticing a child to access child sexual abuse material or pornography.**

**(2) A person, including an electronic communications service provider (‘A’) –**

- (a) who unlawfully and intentionally provides a child (‘B’) with, or allows B to engage with, any form of technology or device including a mobile phone, that is capable of accessing the Internet, social media or other digital content, without ensuring that the default setting blocks access to child sexual abuse material and pornography, is guilty of the offence of making child sexual abuse material or pornography accessible to a child;**
- (b) who overrides, disables or circumvents or in any other manner removes the default setting blocking access to child sexual abuse material is guilty of the offence of making child sexual abuse material accessible to a person;**
- (c) who, in circumstances other than provided for in subsection (3) overrides, disables or circumvents or in any other manner removes the default setting blocking access to pornography is guilty of the offence of making pornography accessible to a child;**

(d) who fails to take reasonable steps to ensure that child sexual abuse material or pornography is not made accessible, exposed or displayed to a child ('B'), through any means, is guilty of the offence of negligently making accessible, exposing or displaying child sexual abuse material or pornography to a child.

(3) The default setting blocking access to pornography may only be removed by the electronic communications service provider providing a service to that device upon request of the user of the device who must provide proof that she or he is over the age of 18 years.

(4) An electronic communications service provider who, when uninstalling the default setting fails to keep a register as prescribed in subsection (6) or as may be prescribed in subsection (7) is guilty of an offence.

(5) Any request to an electronic communications service provider for reinstatement of the default setting blocking access to pornography must be recorded in the register by the electronic communications service provider to reflect such reinstatement.

(6) Subject to any regulations made pursuant to subsection (7) a register must be kept containing

(a) the date of the application and removal of the default setting;

(b) the International Mobile Equipment Identity serial number and a description of the device;

(c) personal particulars of the applicant including the applicant's full name, contact number and residential address;

(d) a copy of the applicant's identity document, driver's licence or passport;

(e) a declaration by the applicant that the device will be used by him or her and he or she is aware that allowing a child to use the device constitutes a criminal offence;

(f) the full printed name, identification number and signature of the person or employee responsible for removing the default setting; and

(g) in the event of reinstatement of the default setting, the date thereof, the International Mobile Equipment Identity serial number and a description of the device and the name of the employee effecting the reinstatement.

(7) The Minister, in consultation with the Minister of Communications and Digital Technologies, and subject to section 67(a), may make regulations pertaining to the steps to be taken by electronic communications service

providers as required in subsection 2(d) and pertaining to the register provided for in subsection (4).

(8) Access to the register may only be allowed upon an order of a court authorising access.

(9) Any person who—

(a) unlawfully and intentionally allows unauthorised access; or

(b) unlawfully and intentionally accesses a register without authorisation,

will be guilty of an offence and liable upon conviction to a fine or two years' imprisonment or to both such fine and imprisonment

(10) Any magistrate or justice may issue an order authorising access to the register upon the written application of a commissioned police officer which sets out sufficient reasons for the need to have access to the register.

(11) An affidavit by an employee of an electronic communications service provider having access to the register and pertaining to the information on the register regarding any instrument identified by an IMEI number shall serve as prima facie proof of the contents thereof in any subsequent criminal proceedings and the provisions of section 212(1), (2), (3), (12) and (13) of the Criminal Procedure Act 51 of 1977 shall find application with the necessary changes required by the context.;"

#### **4 Inserting clause 19B into the Sexual Offences Act to criminalise the use of misleading techniques on the Internet**

2.76 The proposal to amend the Sexual Offences Act by inserting clause 19B to criminalise the use of misleading techniques on the Internet was welcomed by a number of workshop participants and respondents.<sup>166</sup> The Commission considered the comment<sup>167</sup> that

<sup>166</sup> Anonymous Gauteng Workshop; Liesl Stander, Cause for Justice; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Benita Nel, Childline, Mpumalanga; Adv Dorcas Shabangu, NPA (SOCA); Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; and Crystal Clear Ministries International.

<sup>167</sup> Rianette Liebowitz, Gauteng Expert Workshop participant.

the clause may need to be expanded but is of the view that the clause as it stands is sufficiently broad to cover a pop-up on YouTube and comments with links to child sexual abuse material.

2.77 A few respondents submitted that the term “misleading techniques on the internet” should be defined or reconsidered as it may be too vague to enable sufficient policy certainty.<sup>168</sup> Since the offence creating clause provides the required clarity, the heading need not be redefined.

2.78 The Department of Justice and Constitutional Development suggests that the Commission considers introducing a separate part in the Sexual Offences Act dealing with child sexual abuse material and that clause 19B should be categorised as a miscellaneous clause. The Commission is of the view that the Department of Justice and Constitutional Development would be best placed to re-design the format of the Sexual Offences Act to make provision for separate parts. As such this would fall outside of the Commission’s mandate. The Commission agrees that the introductory word “Whoever” should be substituted with “person” for uniformity in the Bill.<sup>169</sup> The Commission has reconsidered the child protective focus of this clause. It is of the view that given the nature of the Internet, restricting the protective function of this clause to children may provide an unintended defence from the outset rendering this offence meaningless. It would not be possible to determine whether a child or an adult would be misled by such techniques. The Commission is of the view that the reach of the clause should be extended to all persons.

2.79 The Commission recommends the insertion of the following clause in the Sexual Offences Act:

**Misleading techniques on the Internet**

**19B. (1) A person who unlawfully and intentionally creates or uses any technique including embedding words, or digital images into the source code of a website, an advertisement or domain name, to deceive a person into viewing or being exposed to child sexual abuse material or pornography is guilty of the offence of creating and using a technique to expose a person to child sexual abuse material or pornography.**

<sup>168</sup> Rianette Liebowitz, Gauteng Expert Workshop participant; Research ICT Africa and the Association for Progressive Communications.

<sup>169</sup> Group 1 Gauteng Expert Workshop.

(2) For purposes of this section:

(a) 'domain name' has the meaning assigned to it in section 1 of the Electronic Communications and Transactions Act 2002 (Act No. 25 of 2002);

and

(b) 'source code' means the combination of text and other characters comprising the content, both viewable and non-viewable, of a webpage, including any website publishing language, programming language, protocol or functional content, as well as any successor languages or protocols.;

2.80 The Commission recommends the inclusion of a definition of Internet to differentiate between the Internet (capital "I") which refers to the interconnected system of networks that connects computers around the world using the TCP/IP<sup>170</sup> and includes future versions thereof; and the internet (lowercase "i") which refers to a group of computers or a computer system interface. For the sake of clarity the Commission further recommends the inclusion of the definition of "electronic communications service provider" and the related interpretational definitions of "electronic communications network" and "electronic communications service", which are mirrored in the Cybercrimes Act. The recommended definitions read as follows:

“electronic communications network” means an electronic communications network as defined in section 1 of the Electronic Communications Act, 2005, and includes a computer system;

“electronic communications service” means any service which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services as defined in section 1 of the Electronic Communications Act, 2005;”

“electronic communications service provider” means—

(a) any person who provides an electronic communications service to the public, sections of the public, the State, or the subscribers to such service, under and in accordance with an electronic communications service licence issued to that person in terms of the Electronic Communications Act, 2005, or who is deemed to be licenced or

<sup>170</sup> “TCP/IP” means the Transmission Control Protocol Internet Protocol used by an information system to connect to the Internet.

exempted from being licenced as such in terms of that Act; and  
(b) a person who has lawful authority to control the operation or use of a private electronic communications network used primarily for providing electronic communications services for the owner's own use and which is exempted from being licenced in terms of the Electronic Communications Act, 2005;”

“Internet” means “Internet” as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

## **5 Multi-sectoral approach**

2.81 Cause for Justice supports the recommendations in relation to developing a multi-sectoral multi-disciplinary national response (with national directives, instructions and standing operating procedures) to prevent and address what it refers to as online child sexual exploitation and abuse (“CSEA”). It further endorses a national unified strategy involving close co-operation and collaboration between government, industry and organisations, and all other role-players, as vital. The Commission endorses a collaborative approach and supports Google’s suggestion that online safety content should be integrated into the national school curriculum. The Commission encourages Google to activate its offer of support and partnership to government in this regard as this collaboration is not dependent on the enactment of legislation.

2.82 The Commission notes that the Minister of Communications and Digital Communications launched a comprehensive review of existing broadcasting policy through the publication of a Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 in October 2020. A central proposal of this Draft White Paper is to subsume the current definition of broadcasting (i.e. linear) into a broader category of “audio and audio-visual content services” (AACVS), which also includes on-demand content services and video-sharing platform services (VSPS). This last category would include providers such as YouTube and TikTok, which would be able to provide VSPS in South Africa under a licence exemption. Proposals in the Draft White Paper relating to online content control are limited to the context of (a) local content quotas and (b) protection of children and consumers required by video sharing platform services (the well-known platforms will generally already be compliant with these requirements).

2.83 It is evident that close working partnerships between parents, educators, law enforcement authorities, the Department of Communications and Digital Technology, ICASA, electronic communications service providers, the Film and Publication Board and the Department of Justice and Correctional Services should be established with the aim of protecting children from being exposed to pornography.<sup>171</sup> Any collaboration should be coupled with a national awareness raising campaign and transparency around what measures they are employing to protect children. This will be dealt with in more detail in chapter 6.

2.84 In the context of this chapter it is important to take heed of Media Monitoring Africa's view that a distinction should be made between pornography and other forms of sexual content. Media Monitoring Africa submits that children will, and should, seek relevant sexual material to understand their sexuality, identity and personality. It explains that sexuality is a core element to who we are as people, and that children of the appropriate age should not be given the incorrect impression that this is something that is either bad or of which to be ashamed. Media Monitoring Africa suggests that government, particularly the Department of Basic Education (DBE) needs to ensure that children have access to relevant and appropriate sexual materials, to avoid children needing to seek out information online that might lead them to inappropriate forms of pornography. The Commission for Gender Equality in turn suggests that the Department of Basic Education should include information on access and exposure to pornography as part of its curriculum.

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<sup>171</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.171.

## **CHAPTER 3: CONSENSUAL SELF-GENERATED CHILD SEXUAL ABUSE MATERIAL OF CERTAIN CHILDREN**

### **A Introduction and background**

3.1 The phenomenon of children generating naked or sexual material consensually; and the distribution and complexities thereof is dealt with in a dedicated chapter in the discussion paper.<sup>172</sup> The Commission opted to use the term “consensual self-generated child sexual abuse material” to differentiate between consensual generation of sexual material of themselves and circumstances where children generate sexual material of themselves due to coercion, grooming or compensation. Legally speaking the primary consequence for a child who voluntarily generates sexual material of him or herself is that distributing this material or making or possessing material of another child, with that child’s consent, may lead to a charge being brought against the child for any number of child pornography related offences, including possessing or exposing another child to child pornography, and may result in a conviction for a serious criminal offence, although the child would be dealt with within the remit of the Child Justice Act 75 of 2008.

3.2 It may at this point be appropriate to explore the status and relationship of this project in relation to the Cybercrimes Act and the Films and Publications Amendment Act. Both of these laws deal with similar content i.e. “revenge pornography” and child sexual abuse material, although from a different vantage point and with a different outcome. This not only causes the possibility of a defence of double jeopardy being raised but perpetuates, particularly in the case of the Films and Publications Amendment Act, the blurring of stakeholder roles. As stated above, a central theme of the mandate given to the Commission and consequently one of the core aims of Project 107 is to codify all sexual offences in one statute. Enacting and duplicating sexual crimes in legislation other than in the Sexual Offences Act runs contrary to this aim. The Commission’s advisory committee of experts has keenly followed the trajectory of these two laws and has reached the conclusion that it would still be best, for the complainant, the accused and various role-players in government and civil society, for these matters to be addressed in a single sexual offences statute.

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<sup>172</sup> Chapter 3 of the SALRC Sexual Offences Discussion Paper (2019).

3.3 This chapter seeks to address concerns relating to children either self-generating or creating and distributing explicit material of themselves or of another child within the context of intimate relationships or for distribution to peers or other third parties where there is consent between the parties. This chapter contains a brief overview of the preliminary proposals contained in the discussion paper and an evaluation of pertinent submissions received from respondents. The Commission recommends the enactment of a stand-alone provision to provide that in certain circumstances the sharing of consensual material of legal sexual activity between certain children is not criminalised. This clause gives recognition to the age parameters set by the Sexual Offences Act for legal sexual acts between adolescents.

## **B Summary of proposals contained in the discussion paper**

3.4 The Commission's draft recommendations gave regard to the stance taken by the United Nations Children's Fund (UNICEF) that consensual self-generated child pornography by certain children should only be decriminalised in limited circumstances i.e. only for personal use between consenting children and only in respect of images; the United Nations Convention on the Rights of the Child's (UNCRC's) advisory to decriminalise only consensual sharing between children and the expert opinion of Chetty warning of the serious but unintended consequences of these images falling into the wrong hands when distributed.<sup>173</sup> The Commission concluded that very limited decriminalisation should be provided for, but that, given the often nuanced scenarios that come into play, the provisions of the Child Justice Act would sufficiently cater for those instances where a diversion, rather than a full prosecution, would be the preferred manner to deal with a child in conflict with the law.<sup>174</sup> Consequently the discussion paper differentiated between creating and distributing consensual self-generated child sexual abuse images (material) in certain circumstances, either by providing for a non-offence (decriminalising); by providing defences to certain children; or by providing for a lesser offence.

3.5 Three options were presented for consideration in the discussion paper. Option 1 provided for an amendment to section 20 and section 56 of the Sexual Offences Act

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<sup>173</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.1.

<sup>174</sup> SALRC Sexual Offences Discussion Paper (2019) par 7.7 Executive Summary.

providing a defence whereby a self-image could be displayed or shown to another child in a consensual lawful relationship and where it depicts another child only to that child; option 2 provided for an amendment of section 19 and section 56 of the Sexual Offences Act allowing for distribution of such images but only within the age limit of consent, for private use and only to the child that meets the criteria and or is in the image; and option 3 provided for a lesser offence for certain children by proposing the insertion of clause 19A in the Sexual Offences Act to regulate the consensual exposure, display or distribution of child sexual abuse material of a child to a child. The Commission expressed its preference for Option 1 (no distribution allowed, but the child would be able to only display or show the image to another child in a consensual lawful relationship and where it depicts another child only to that child). With regard to all three options and with a view to emphasise the seriousness of this behaviour the Commission recommended that once a child turns 18 (becomes an adult) there should be no defence for the continued possession or distribution of the material (even if it is of the adult as a child).<sup>175</sup>

3.6 Risks associated with children creating explicit self-images were identified such as the unintended circulation and viewing of the material by persons other than those the material was intended for; and the use thereof for bullying, revenge or extortion. An additional consideration highlighted in both the issue paper and discussion paper is that self-images immortalise the subject of the image as a child in perpetuity,<sup>176</sup> and may adversely affect a child's well-being, reputation and future prospects.<sup>177</sup> These images also complicate the work of law enforcement. The detection and integration of these images into databases of victims may cause international law enforcement agencies like Interpol to spend unnecessary time trying to identify the child in the image instead of focussing on bad actors who abuse and or create and use images of children for nefarious intentions.<sup>178</sup> An added complication is that over time consensual images may change from consensual to non-consensual images depending on the circumstances. Furthermore, some children do not meet the criteria of innocent children who are engaging in what may be considered to be developmentally normative behaviour or are innocent bystanders who are exposed to images of this nature. Some are in fact active producers and distributors thereof.<sup>179</sup>

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<sup>175</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.46.

<sup>176</sup> Bulger et al Where policy and practice collide 2017 8; CJCP Issue Paper "Legal responses to cyber bullying and sexting in South Africa 3.

<sup>177</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.18.

<sup>178</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.21.

<sup>179</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.25.

3.7 In order to address this matter from a holistic perspective the Commission identified non-legislative remedies such as the need to raise awareness and for education on the risks involved in this behaviour. To give effect to this recommendation the Commission recommended the inclusion of the Department of Education in the Inter-sectoral Committee for the Management of Sexual Offence Matters provided for in the Sexual Offences Act;<sup>180</sup> pointed out the need for guidelines on the use and risks involved in using the Internet and that these guidelines be included in the national education curriculum.

3.8 In the discussion paper the Commission recognised that the (then) Films and Publications Act Amendment Bill<sup>181</sup> and the Cybercrimes Bill<sup>182</sup> both addressed privately generated explicit images but to a limited extent. The provisions have remained unchanged in the enacted Films and Publications Act Amendment Act and the Cybercrimes Act. Outside of the clear prohibition of child pornography in the Films and Publications Act and Sexual Offences Act, both pieces of legislation are silent on the creation and distribution of self-explicit or intimate images of and by children, opting for provisions which seemed to include all persons in respect of what can be termed revenge pornography or distribution of explicit or intimate images without consent.

3.9 While it is trite that the Sexual Offences Act and the Films and Publications Act unequivocally criminalise what is termed “child pornography” and the definition of “child pornography” is common to both laws, the use of the terms “private sexual photographs and films” in section 18F of the Films and Publications Amendment Act and “intimate image” and the defining thereof in section 16 of the Cybercrimes Act indicates that what is being prohibited is not pornography or child pornography although what is described may fall within these definitions. The discussion paper suggested that this may lead to legal uncertainty as to whether children (not expressly excluded from these prohibitions) may distribute consensual intimate images and private sexual photographs and films.

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<sup>180</sup> Section 63 of the Sexual Offences Act.

<sup>181</sup> Section 18F prohibits distribution of private sexual photographs and films in certain circumstances. Enacted as the Films and Publications Amendment Act 3 of 2019.

<sup>182</sup> Proposes the insertion of section 10A prohibits the harmful disclosure of pornography and clause 16 prohibits the distribution of a data message of an intimate image without consent. Enacted as the Cybercrimes Act 19 of 2020.

## C Evaluation and recommendations

3.10 Although neither the Cybercrimes Act nor the Films and Publications Amendment Act differentiates between children and adults in the section criminalising the disclosure of a data message of an intimate image<sup>183</sup> and the prohibition against distribution of private sexual photographs and films,<sup>184</sup> sections 10 and 19 of the Sexual Offences Act and the amended section 24B expressly criminalises the creation, production, procuring and possession of “child pornography”<sup>185</sup> and related behaviour. These sections could arguably be read together thereby excluding children from the ostensible legalisation of online distribution of intimate images and the criminalisation thereof where consent to do so is absent. The Films and Publications Board has confirmed that an interpretive approach reading these sections together should be followed. However, sufficient uncertainty exists to make it unclear whether certain children who may engage in legal sexual acts have legal standing to consensually share, distribute or possess intimate images online or not. Although outside of the scope of this paper it is notable that the use of the terms “intimate image” and “private sexual photographs and films”, is arguably broad enough to capture conduct such as “upskirting” and “downblousing”.<sup>186</sup>

3.11 A number of respondents support the Commission’s preferred option that allows for the displaying of or showing of (not distribution of) an intimate image of a child to another child with whom the child may legally engage in a sexual act and, where it depicts another child, only to that child.<sup>187</sup> Group 3 of the Gauteng workshop, however, submits that making “sexting” (in the context of children sending intimate images to one another) an offence stigmatises normal sexual experimentation. The view is held that the focus should rather be on teaching healthy sexual development. The holding of awareness-raising programmes for children to understand the context and consequences of sending self-generated images, spearheaded by the Department of Basic Education found support.<sup>188</sup> Michelle Kiggen, however, cautions that it is not helpful for educators to focus only on sexual behaviour which

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<sup>183</sup> Section 16 of the Cybercrimes Act.

<sup>184</sup> Section 18F read together with section 24 E of the Films and Publications Amendment Act.

<sup>185</sup> As defined in the Sexual Offences Act.

<sup>186</sup> Cambridge Advanced Learner’s Dictionary & Thesaurus, Cambridge University Press defines the terms “upskirting” and “downblousing” as “the practice of secretly videotaping and taking photographs underneath women’s skirts and dresses and down their blouses”. Available at <https://dictionary.cambridge.org/dictionary/english/upskirting>. Accessed on 29 April 2021.

<sup>187</sup> Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Adv Vuyokazi Xalisa, NPA; and Brendan Botha, Break-Free.

<sup>188</sup> Adv Vuyokazi Xalisa, NPA.

is legal for children, but rather to focus on the broader legal context. In her view educational programmes should be clearer with a focus on socially acceptable behaviour for children.

3.12 In contrast Danny Myburgh<sup>189</sup> questions the need for a non-prosecution clause for this behaviour. He argues that this would make certain child sexual abuse material legal. He questions how law enforcement will determine the context and conduct search and seizures and how they will enforce this clause. He submits that there should be no exception and that websites and service providers should be actively shut down if found to be hosting such material.

3.13 A few respondents expressed concern that clause 56(9) may be challenged on the grounds of vagueness.<sup>190</sup> The National Commissioner of the South African Police Service points out that as the procedure provided for in section 9 of the Child Justice Act only deals with children under the age of 10, he is unclear on the procedure to be applied to children older than 10 years of age. The Commission has taken note of the collective comment on vagueness and has reframed the clause to provide greater clarity. It has, however, retained the words “with the necessary changes” to indicate that the procedure provided for in section 9 of the Child Justice Act, which applies to children lacking in criminal capacity, should be applied to all children falling within the ambit of clause 56(9) irrespective of age. It stands to be noted that the upward revision of the age of criminal capacity from 10 years of age to 12 has been enacted but is yet to be put in effect.<sup>191</sup>

3.14 Some respondents submitted that the word “convicted” should be substituted with the word “prosecuted” as the decision to refer the child to a probation officer should be determined on the intention to divert or prosecute the child based on the Child Justice Act.<sup>192</sup> The Commission agrees that the word “convicted” is not fitting. However, it is of the view that the word “prosecuted” as is used in the Child Justice Act in the phrase “may not be prosecuted” goes too far and causes problems in practice. In practice it is not a criminal offence and the child must be referred directly to the probation officer. After reconsideration

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<sup>189</sup> Cyanre, Gauteng Expert Workshop.

<sup>190</sup> Department of Justice and Constitutional Development; Adv T Buitendag; Major General Linda; SAPS FCS Unit; Job Masina; Tara Harris, Monash; Liesl Stander, Cause for Justice; and Sarah Buffkins, NPA.

<sup>191</sup> Section 7(1) of the Child Justice Act as substituted by section 4 of the Child Justice Act Amendment Act 28 of 2019 is set to become law from a date yet to be proclaimed.

<sup>192</sup> Carli van Wyk, Cause for Justice; Juanita Wright, The Salvation Army; Nomfundo Lilyrose Mtobi, NPA; Sarah Buffkins, NPA; Group 4, Cape Town Workshop; NPA; and Alida van der Mescht, JellyBeanz.

the Commission believes that the use of the words “is not criminally liable” is better suited since it serves to decriminalise and therefor de-stigmatise the child whilst still recognising the commission of an offence.

3.15 The view was further held that it would not be appropriate to use the word “consent” but rather “agree” as a child would not necessarily know what he or she is going to be shown and would therefore not be able to give informed consent.<sup>193</sup> The Commission supports the redrafting of the clause to address any possible vagueness and the substitution of the word “consent” with “agree”. Advocate Buitendag questions whether paragraph (a) which serves to confirm that creating and possession of “selfies” is not a crime, is intended to be a blanket defence to all offences listed in section s 19C(1) and (2) and if so if this is not too broad.<sup>194</sup> Given the limited circumstances in which the child may be prosecuted, the Commission is of the view that the provision is quite restrictive. Group 3 of the Nelspruit workshop submits that a mere request to provide a “selfie” should be punishable. This is provided for in the proposed amendments to section 20.

3.16 It is submitted that although a child may be involved in distributing consensual self-images the child may deny that they are doing so<sup>195</sup> or not view the behaviour as problematic.<sup>196</sup> The Commission for Gender Equality suggests that an enquiry should be conducted before the matter is referred to a probation officer.<sup>197</sup> Similarly, the Department of Justice and Constitutional Development believes that enforcement mechanisms need to be strengthened and that a child needs to admit that they have engaged in this activity. Having considered these submissions it stands to be noted that although these submissions would be pertinent to a diversion process as provided for in the Child Justice Act, the procedure proposed by the Commission is an alternative measure and does not need to meet the formal requirements of the Child Justice Act for purposes of a diversion. The referral is a process similar to that provided for in the Child Justice Act where the child lacks criminal capacity.

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<sup>193</sup> Department of Justice and Constitutional Development; Adv T Buitendag; Major General Linda; SAPS FCS Unit; Job Masina ; Group 3 Polokwane Workshop; Tara Harris, Monash; Adv P Smith, NPA; Brendan Botha, Break-Free; Group 3 Gauteng Workshop; and Michelle Kiggen.

<sup>194</sup> Endorsed by Job Masina.

<sup>195</sup> Department of Justice and Constitutional Development.

<sup>196</sup> M Porogo Commission for Gender Equality.

<sup>197</sup> M Porogo Commission for Gender Equality

3.17 Bertha Bresler of Stop Trafficking of People submits that if there are two or more children involved, that both or all of the children should be referred to the probation officer i.e. the child who has created the image and the child who consented thereto. Some respondents agree that the focus should be on the child “victim” and “offender”.<sup>198</sup> Some of these respondents, however, propose that a child who has engaged in this behaviour should be debriefed and educated on informed consent by a social worker.<sup>199</sup> This should include assessing if the child understands the nature of the material. The Commission is of the view that the approach to be followed requires a fine balance between recognising the legal sexual autonomy of a child, child protection and the best interests of the child. The criminalising of both children for consensual sexual behaviour has been ventilated in the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*<sup>200</sup> case and would not be an appropriate remedy. The aim with the clause is to provide for exactly the opposite.

3.18 Michelle Kiggen further suggests that a sub-clause should be included to provide for the situation where a child has previously been referred to the probation officer regarding offences in terms of section 19 or 20(1) and that such child should be added to a juvenile register whose name may be expunged when the child turns 18 years without further offence or transferred to the National Register for Sex Offenders in the event of further sexual offences in terms of the Sexual Offences Act. The Commission disagrees since the referral of the child to the probation officer is for intervention purposes in circumstances where the child cannot be held criminally liable.

3.19 Tara Harris submits that sexting should be aligned with offline legal sexual engagement as provided for in sections 15 and 16 of the Sexual Offences Act and that the age should therefore be revised downwards to the age of 16.<sup>201</sup> The Commission is of the view that the downward revision to the age of 16 would cause an interpretational challenge as a “child” for purposes of child sexual abuse material and most other offences is defined as being under the age of 18. The Commission, however, agrees with Professor Skelton that the manner in which the clause is currently framed may expose too many children to the risk of prosecution. For this reason the Commission has revised the clause in such a way that it

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<sup>198</sup> Liesl Stander, Cause for Justice; R Kemp, Western Cape Education Department; and Sarah Buffkins, NPA.

<sup>199</sup> Liesl Stander, Cause for Justice; and R Kemp, Western Cape Education Department.

<sup>200</sup> 2013 ZACC 35.

<sup>201</sup> Endorsed by Liezl Africa, Cape Town Workshop in so far as the alignment with sections 15 and 16 of the Sexual Offences Act.

gives recognition to the age parameters set by the Sexual Offences Act for legal sexual acts between adolescents. Furthermore, the Commission supports the proposal made by Professor Skelton that the clause should be framed as a stand-alone provision as it seeks to provide clarity around non-prosecution and not to serve as a defence. The Commission also agrees that referral to a probation officer should be discretionary and not the default position for all such cases.<sup>202</sup> The Commission therefore recommends that the clause be reframed and inserted in the Sexual Offences Act as clause 19D.

3.20 The Commission heeds the caution voiced by Tara Harris of Monash that although certain behaviour may be decriminalised, the response could still be seen as stigmatising. It believes that the proposed clause 19D provides sufficient recognition of the rights of the child to document legal sexual behaviour within parameters that at the same time provides recognition and protection for the child(ren) portrayed in the material and other children who may be exposed to such material non-consensually. The difficulty in approaching this matter with the necessary sensitivity is that underage sexting and child sexual abuse material objectively depict the same behaviour. The challenge that lawmakers face is that whereas the initial or primary creation of the material is consensual and depicts legal sexual behaviour; the secondary material or further distribution thereof outside of the consensual relationship may be used for exploitation. The Commission believes that clause 19D recognises children's rights within the context of their evolving capacity; aligns with the age of consent provisions in sections 15 and 16 of the Sexual Offences Act and the approach followed in the matter of the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*<sup>203</sup> which sought to balance the autonomy and protection of children. By expressly providing that children are not criminally liable for producing and possessing certain images of themselves this clause further aligns with the guidance of the United Nations Convention on the Rights of the Child Committee<sup>204</sup> and the most up to date general comment published by the UN Committee on the Rights of the Child.<sup>205</sup>

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<sup>202</sup> Professor Ann Skelton; Group 3 Gauteng Workshop; Tara Harris, Monash; and Adv Buitendag.

<sup>203</sup> 2013 ZACC 35.

<sup>204</sup> CRC Committee, guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, CRC/C/156, par 67 as quoted by Witting "Child sexual abuse in the digital era" 64.

<sup>205</sup> United Nations Convention on the Rights of the Child's Committee on the Rights of the Child General Comment No.25 (2021) on children's rights in relation to the digital environment 2 March 2021 par 118.

3.21 Participants of group 3 of the Polokwane workshop question whether measures need to be put in place to regulate the possession and distribution of consensual self-generated child sexual abuse material once the child turns 18? The Commission is of the view that once the child turns 18 the person is no longer exempted from criminal liability and the material should be destroyed.

3.22 The Commission recognises that exposure to pornography (adult content) and exposure thereof by children to other children is a common theme under adolescents. The Commission is mindful that if a child is charged in terms of section 19 of the Sexual Offences Act i.e. exposure or display of or causing exposure or display of pornography or “child pornography” to children, this charge will fall under Schedule 3 of the Child Justice Act.<sup>206</sup> Offences listed in this schedule are considered to be serious offences and provide for the possible arrest of children facing a charge under this schedule. The child will face the same charge an adult would. This means that prior to appearing at a preliminary inquiry the child may be remanded in detention or be released under the care of parents or caregivers. The Commission supports the view that a distinction needs to be made between material that is consensually made by children and material that is made without consent (which may include offences committed against children by other children). It further supports the approach that material which is captured without consent or knowledge and that which is distributed or threatened to be distributed without the consent of the child in the image should be dealt with in terms of existing crimes in the Sexual Offences Act, the child to be dealt with in terms of the Child Justice Act.

3.23 The Commission is of the view that attention should also be given to child recipients of consensual self-generated sexual material of children. Currently they are not allowed to be complacent and are enjoined to report the receipt of the images or videos promptly, even when receipt of the material was unsolicited. The need for a defence for unsolicited receipt where the recipient is technically in possession of the image or video<sup>207</sup> is addressed in paragraph 4.9. In summary the Commission is of the view that a specific defence is not needed since, depending on the circumstances, this might constitute a defence in any event.<sup>208</sup>

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<sup>206</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.44.

<sup>207</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.43.

<sup>208</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.196.

3.24 It is evident that online expression of sexual behaviour by children poses risks which may potentially result in harm.<sup>209</sup> The likelihood of these images falling into the wrong hands when distributed may have unintended but serious consequences for the child involved and is according to the expert opinion of Chetty a likely outcome of such behaviour.<sup>210</sup> The Commission therefore finds merit in the expression that prevention is better than cure. The Commission believes that a key intervention to ensure that risks do not turn into harm is to educate children on the risks of online behaviour and safety with a particular focus on online sexual exploration. The Commission supports awareness raising and resilience building for adolescents not to engage in behaviour which may be harmful online.<sup>211</sup> It further supports the provision of information, education and guidance before and while a child engages with digital devices that provide access to the Internet or social media.<sup>212</sup> It also supports active intervention, education and early awareness programs for children and their caregivers or parents.<sup>213</sup> The Commission has expanded on the theme of education and awareness raising by including a recommendation for multi-sectoral training, provision of prevention programmes and awareness raising by placing a generic obligation on the state in the proposed amendment to section 65 in paragraph 6.56 below.<sup>214</sup>

3.25 The Commission confirms its provisional recommendation that the Department of Education partners with relevant stakeholders to draft guidelines on the use and risks involved in using the Internet and that these guidelines should be included in the national education curriculum.<sup>215</sup> A specific section should be dedicated to the child's rights and responsibilities in respect of the child's and other children's sexuality and the consequences of creating, possessing and distributing explicit self-images. In the event that children have not heeded the information or guidance given, the Commission agrees that some protections should be provided for children who engage in developmentally normative sexual conduct, in

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<sup>209</sup> Witting "Child sexual abuse in the digital era" 43.

<sup>210</sup> Chetty referenced in the SALRC Sexual Offences Discussion Paper (2019) par 3.43.

<sup>211</sup> Laurie Penny, *Teenage girls and the pill*, New Statesman America, 2 November 2010 as referenced by Witting "Child sexual abuse in the digital era" 66; UNICEF "Kids Online Survey".

<sup>212</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.40.

<sup>213</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.40.

<sup>214</sup> See proposed clause 65(1)(e) in the Bill; multi-sectoral training is further endorsed by the recommendations contained in the ECPAT International The Landscape of Sexual Exploitation of Children (2019).

<sup>215</sup> SALRC Sexual Offences Discussion Paper (2019) par 3.41.

line with the constitutional imperative in section 28(2) of the Constitution that a child's best interests must be of paramount importance in all matters concerning the child.<sup>216</sup>

3.26 The recommended clause provides as follows:

**Consensual self-generated child sexual abuse material by certain children**

**19D. Where a child (A) is reasonably suspected of having committed an offence -**

- (1) in terms of sections 19C(1) or 19C(2) and A is the child in the child sexual abuse material;
- (2) in terms of section 19 and-
  - (a) A is the child in the child sexual abuse material; and
  - (b) the exposure or display is made to a child B, who is 12 years or older; and
  - (c) B agreed to the exposure or display;
- (3) in terms of sections 19, 19C(1), 19C(2) or 20(1) and-
  - (a) the child sexual abuse material is of another child B with or without A;
  - (b) B agreed to the creation of the child sexual abuse material and
  - (c) the exposure or display is only to B; and
  - (d) B is 12 years or older;
- (4) in terms of section 10 if A is the only child in the image and the exposure or display is made to an adult person B,

A is not criminally liable for the offence and the investigating officer must refer the matter to the prosecutor who must, if satisfied that a *prima facie* case exists, that the prescribed circumstances are met and that, the intervention of a probation officer is warranted, refer ('A') to a probation officer who must deal with A in accordance with the provisions of section 9 of the Child Justice Act, 2008 (Act No. 75 of 2008), with the necessary changes.

<sup>216</sup>

SALRC Sexual Offences Discussion Paper (2019) par 3.42 and the United Nations Convention on the Rights of the Child's Committee on the Rights of the Child General Comment No.25 (2021) on children's rights in relation to the digital environment 2 March 2021 par 3.

## CHAPTER 4: CHILD SEXUAL ABUSE MATERIAL (CHILD PORNOGRAPHY)

### A Introduction and background

4.1 Crimes involving the creation, possession and distribution of child sexual abuse material<sup>217</sup> in the Films and Publications Act are defined as sexual crimes in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act). Child sexual abuse material is defined in section 1 of the same Act as ‘child pornography’. The acts of parents who create, publish and distribute naked images of their own children, the non-consensual distribution of self-generated child sexual abuse material or “revenge” pornography by children; the creation of sexual content (not of themselves) by children; and online sexual coercion and extortion fall within the category of crimes involving child sexual abuse material. Once consensual or “innocently taken” material is distributed wider than the intended audience, this material takes on a life of its own, often providing new material for people with ulterior motives. World Vision reports that the lockdown (stay at home orders) associated with the COVID-19 pandemic are set to cause a spike in violence against children, including sexual violence.<sup>218</sup> Research shows that there has been widespread school closure across Africa in response to the pandemic and 97% of respondents reported school closures in their countries, and 95% of these noted that all schools had been forced to close.<sup>219</sup> This was seen as an appropriate decision, as 92% of respondents expressed that the closures were essential.<sup>220</sup> Ironically, while such measures are aimed at keeping children protected, these measures have instead isolated many children in homes that are unsafe.<sup>221</sup>

4.2 The extent of the risk posed to children is documented by the United Kingdom Home Office in its Online Harm White Paper, which records that in a month-long period during lockdown, the Internet Watch Foundation and its partners blocked at least 8.8 million

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<sup>217</sup> The preferred term ‘child sexual abuse material’ as used in this report in place of the term ‘child pornography’ is discussed further down in this chapter.

<sup>218</sup> World Vision COVID-19 Aftershocks 2020.

<sup>219</sup> eLearning Africa The Effect of Covid-19 on Education in Africa and its Implications for the Use of Technology September 2020 4.

<sup>220</sup> eLearning Africa The Effect of Covid-19 on Education in Africa 4.

<sup>221</sup> World Vision COVID-19 Aftershocks 2020 4.

attempts by United Kingdom internet users to access videos and images of children suffering sexual abuse.<sup>222</sup> Children not only face the real danger of being abused at home, but having the abuse captured for distribution online for financial or other gain. They also face the danger of being lured, coerced or deceived into uploading material of a sexual nature online. The most recent report from EUROPOL has noted that demand for child pornographic content has been on the increase during the COVID-19 pandemic.<sup>223</sup> The Commission agrees with the Commission for Gender Equality that parents and caregivers, being the first line of defence in the protection of children, should not be complicit in their abuse or placing them at risk by the innocent creation and distribution of child sexual abuse material.

4.3 The vulnerability of children and the need to protect them from being used for or exploited through the use of child sexual abuse material is recognised by all who engaged with the discussion paper. Internationally the need to define and criminalise this behaviour, using accurate terminology, has become increasingly pressing. This chapter seeks to address legislative concerns relating to the adequacy of the existing definition of child pornography (child sexual abuse material)<sup>224</sup> and the criminalising of offences related to the creation, possession and distribution of child sexual abuse material and sexual crimes associated with or which are facilitated by pornography. It provides a summary of the preliminary proposals contained in the discussion paper; an analysis of pertinent comment received from respondents and from working groups during the workshops held on the discussion paper; and concludes with recommendations after each topic.

4.4 Against the backdrop of the discussion paper and the comment received thereon the Commission reiterates its stance that in an ever changing digital environment, an adequate response to address the creation and distribution of child sexual abuse material is required for purposes of effectively protecting children and other vulnerable persons from harm, without unjustifiably limiting children`s rights to human dignity and privacy. Where appropriate, amendments made to the Sexual Offences Act in respect of children have been mirrored to extend protection to persons with mental disabilities, in line with the present structure of the Sexual Offences Act. The Commission recommends that the term “child

<sup>222</sup> ‘Millions of attempts to access child sexual abuse online during lockdown’ Internet Watch Foundation, 2020 (last viewed in November 2020) as quoted by the Home Office in the Online Harms White Paper: Full Government Response to the consultation available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944310/Online\\_Harms\\_White\\_Paper\\_Full\\_Government\\_Response\\_to\\_the\\_consultation\\_CP\\_354\\_CCS001\\_CCS1220695430-001\\_\\_V2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944310/Online_Harms_White_Paper_Full_Government_Response_to_the_consultation_CP_354_CCS001_CCS1220695430-001__V2.pdf). Accessed 15 January 2021.

<sup>223</sup> World Vision COVID-19 Aftershocks 2020 9.

<sup>224</sup> Par 1.16 above explains the development of the term ‘child pornography’ to the preferred term of ‘child sexual abuse material’.

pornography” in the Sexual Offences Act should be changed to “child sexual abuse material” to reflect the true nature of the material and what it may be used for; that in alignment with the Films and Publications Amendment Act 11 of 2019 (the Films and Publications Act) that this definition should be incorporated in and applied to the Films and Publications Act 65 of 1996 (the Films and Publications Act), thereby creating a uniform definition for use in the Sexual Offences Act and the Films and Publications Act; and that the definition appropriately reflects that , for the purposes of defining child sexual abuse material, the intended audience of the child sexual abuse material is irrelevant.

4.5 The Commission further recommends that the definition of child sexual abuse material should include a live display and a sequence of images. The Commission confirms its viewpoint that the role of the Film and Publication Board is to classify content and that the Films and Publications Act should not be the primary vehicle to provide for sexual offences, even if the crimes involve pornography and child sexual abuse material. Sexual offences are preferably to be addressed in a single statute. The Sexual Offences Act furthermore already provides for some offences involving child sexual abuse material such as using a child for purposes of child sexual abuse material and benefitting therefrom in whatever manner. It recommends the repeal of sections 24B; 27A(1)(b) and 30B(1)(b) of the Films and Publications Act and the introduction of a raft of offences relevant to child sexual abuse material in the proposed clause 19C.

4.6 The Commission does not support the extension of section 24B of the Films and Publications Act brought about by the Films and Publications Amendment Act, 2019 Act or the manner in which the Cybercrimes Act has sought to capture the crimes in section 24B of the Films and Publications Act in its proposed clause 19A of the Sexual Offences Act. The Commission similarly removes the reporting obligations in the Films and Publications Act relevant to child sexual abuse material and amends section 54 of the Sexual Offences Act, which legislates for the reporting obligation in respect of sexual offences against children or persons with mental disabilities to clearly also apply to a sexual offence involving child sexual abuse material. The Commission furthermore extends the reporting obligation to apply in respect of persons who, for whatever reason, are not able themselves to report the commission of a sexual offence against them.

4.7 Underpinning the recommendations in this chapter is the reality that child sexual abuse and exploitation is not a problem that can, or should, be addressed only through the criminal justice system or after an offense has been committed. For this reason a number of

non-legislative recommendations aimed at preventative measures are contained in this chapter.

## **B Summary of proposals contained in the discussion paper**

4.8 In its discussion paper the Commission provisionally recommended that the term “child pornography” should be substituted with the term “child sexual abuse material” in the Sexual Offences Act and in related legislation. This was done in recognition of the global shift away from the categorisation of child sexual abuse material as a form of pornography or erotica, and the international trend towards accurately reflecting the true nature of the crimes committed against the child, i.e. sexual abuse, exploitation and in some instances, torture of children.<sup>225</sup>

4.9 As the Commission provisionally recommended that all offences relating to child sexual abuse material and children’s exposure to pornography should be criminalised in the Sexual Offences Act, its recommendations on this matter included that the current definition of “child pornography” in the Films and Publications Act should be deleted and that the proposed amended definition of “child pornography” in the Sexual Offences Act as proposed by it should be included by reference and be used to interpret what is understood as child sexual abuse material in the Children’s Act. This recommendation was based on the need for simplification, accessibility and to promote implementation of the law.<sup>226</sup> It further proposed that all pertinent offences in the Films and Publications Act contained in section 24B of the Films and Publications Act should be deleted and re-enacted (with the necessary changes) in the Sexual Offences Act.<sup>227</sup>

4.10 The Commission recognised key international instruments including the UN Convention on the Rights of the Child, its Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the Council of Europe’s Convention on Cybercrime, the European Union Directive 2011/93/EU and the African Charter on the Rights and Welfare of the Child as being central in providing

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<sup>225</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.77.

<sup>226</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.135.

<sup>227</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.147– the same recommendation is contained in the Cybercrimes Act.

a criminal law framework for member states of the Global Alliance Against Child Sexual Abuse Online<sup>228</sup> and for defining the minimum international standards in protecting children online and combating sexual exploitation through online activities.<sup>229</sup> The Commission, in addition to acknowledging the call by the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography for the worldwide criminalisation of the production, distribution, exportation, transmission importation, intentional possession and advertising of child pornography, took particular note of Article 9 of the European Convention on Cybercrime which obligates its member states to criminalise the production distribution, making available, offering for distribution, transmitting, procuring and possession of child pornography through or in a computer system.<sup>230</sup> While the Commission recognised that the Films and Publications Act does make provision for this, the view was held that in addition to broadening the crimes contained in the Films and Publications Act this should be done through the vehicle of the Sexual Offences Act.

4.11 The Commission recommended the alignment of the definition of child sexual abuse material and pornography to reflect that the intention of the creator of the material is irrelevant to the defining thereof and amended the definitions in the Sexual Offences Act to reflect this. It further held that creators of artistic or aesthetic images or descriptions of children, particularly in electronic format, which could be used as child sexual abuse material should be alerted to and educated about the consequence of and possibility of abuse of the images as a result of distributing such material.<sup>231</sup> Further that where parents breach their responsibility towards their children by creating, publishing or distributing explicit images of their children and these images and the conduct of the parents meet the elements of the crimes pertaining to child pornography whether in the Sexual Offences Act or the Films and Publications Act, a charge of creating, possessing and distributing “child pornography” would be appropriate.<sup>232</sup>

4.12 The Commission flagged the anomaly and challenge, that children who create self-generated sexual material and adults who create or distribute explicit material of their children (such as a photograph of a naked baby in a bath), posed to law enforcement agencies. The intent and context of most visual material is not ascertainable from the image

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<sup>228</sup> South Africa is not listed as a member state of the Global Alliance.

<sup>229</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.78.

<sup>230</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.78.

<sup>231</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.187.

<sup>232</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.192.

itself. The Commission re-emphasised the seriousness of children creating child sexual abuse material by recommending that once a child turns 18 there will be no defence for the continued possession of consensually created child sexual abuse material (dealt with above in chapter 3).

4.13 The Commission included a raft of offences in its proposed clause 19C to include the offences catered for in the existing section 24B of the FPA and offences additional thereto. It further provided that all criminal offences relating to child sexual abuse material could be committed through the use of present-day technologies such as the internet, webcams, USB's, mobile phones and any technology yet to be developed; and it proposed including live performances involving child sexual abuse material in the definition of "child sexual abuse material". Although the Commission was of the view that all aspects of live performances involving child sexual abuse material were adequately catered for in the definition of child sexual abuse material, it provisionally tabled a separate offence which includes the attendance or viewing of child sexual abuse material and the procurement of children to participate therein in order to criminalise the recruiting, coercion or deception of a child to participate in a live performance involving child sexual abuse material. Alternatively it recommended that section 20 of the Sexual Offences Act should be amended to criminalise pornographic performances and flagged the need to criminalise the presence of children in adult pornographic performances.

4.14 The discussion paper interrogated the occurrence of children distributing consensually made child sexual abuse material (explicit sexual material) of other children without consent and engaging in behaviour colloquially referred to as "revenge pornography".<sup>233</sup> The Commission noted the application of the Child Justice Act to crimes committed by children in respect of section 20 of the Sexual Offences Act which addresses the use of a child in the creation of child sexual abuse material. It noted that while section 20 of the Sexual Offences Act criminalises the using of a child for purposes of creating, making or producing child pornography, it does not criminalise the distribution thereof. Although it criminalises a person who may gain financially or in any form from the commission of these acts as benefiting from 'child pornography', it does not specifically criminalise the act of coercion or deception to obtain the images or material.<sup>234</sup> As the offence of grooming, found in section 18 of the Sexual Offences Act, was found not to address this behaviour, the

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<sup>233</sup> The provisional endorsement of a defence for children who create images of consensual child sexual abuse material is dealt with in chapter three above.

<sup>234</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.252.

Commission recommended that a clause addressing coercion, deception or recruitment for purposes of section 20 should be included in this section of the Sexual Offences Act. The Commission further considered the need for a defence for unsolicited receipt of child sexual abuse material. Since this might constitute a defence in any event, depending on the circumstances, the Commission makes no recommendation in this regard.<sup>235</sup>

4.15 The Commission further recommended the inclusion of an obligation to report the commission of offences pertaining to child sexual abuse material or exposure of children to pornography in the Sexual Offences Act by all persons, electronic communications service providers and financial institutions, by way of a proposed clause 54A. This obligation extends to electronic communication service providers and financial institutions that are aware that their systems or facilities are being used in the commission of an offence involving child sexual abuse material.

4.16 On an implementation level the Commission endorsed the need for training of police officers and other members of law enforcement agencies; increasing child protection efforts; strengthening law enforcement; the need for awareness raising and capacitating of educators, parents and child care-givers; and regional and international cooperation to combat sexual exploitation through travel and tourism. It flagged the proposal of an integrated national strategy incorporating close cooperation and partnership between the government and the internet industry and the innovative and practical interventions being implemented in the first 1000 days program piloted in the Western Cape by the Provincial Department of Health's Parent Infant and Child Health and Wellness division.<sup>236</sup>

4.17 In light of the criticism of global social media companies for either not taking down or viewing illegal or dangerous content as seriously as it should, the Commission flagged the need for social media companies operating in South Africa to review their community standards, the way in which these standards are being interpreted and implemented, including the training and seniority of those who are making decisions on content moderation, and the way in which the context of the material is examined.<sup>237</sup>

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<sup>235</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.196.

<sup>236</sup> Western Cape Government "First 1000 days Grow, love and play" available at [www.westerncape.gov.za](http://www.westerncape.gov.za). Accessed on 17 September 2020.

<sup>237</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.260.

4.18 With reference to the judgement in *S v Ferreira*<sup>238</sup> the Commission flagged an apparent anomaly in the Films and Publications Act definition of “publication” which requires duplication of any writing or typescript for it to constitute a publication and suggested that it be amended by deleting the requirement of duplication. As this has not been addressed in the Films and Publications Amendment Act it is again flagged for attention.

4.19 In the discussion paper the Commission held that as neither “child pornography” nor “pornography” is defined in the Children’s Act, that it would be contrary to the rule governing legislative drafting to define these words. No amendments to this effect were recommended.

## **C Evaluation and recommendations**

4.20 As has been done in the chapters above, the evaluation of the Commission’s draft proposals will follow the sequence of the topics in the discussion paper and in so far as it pertains to a particular topic and the sequence in which they are reflected in the draft Bill.

### **1 Definition of “child sexual abuse material”**

#### **(a) A uniform definition across legislation**

4.21 The Commission’s proposal to incorporate the Sexual Offences Act definition of “child pornography” into the Films and Publications Act instead of the definition contained in the Films and Publications Act is mirrored in the Films and Publications Amendment Act, 2019. As the Sexual Offences Act definition of “child pornography” contains terms which are expressly defined in the Sexual Offences Act such as “sexual offence”, “sexual violation” and “sexual penetration” it is understood that these definitions are incorporated into the Films and Publications Act understanding of “child pornography” by reference. The submissions received on the discussion paper contain widespread support for a uniform definition and for the definition of child pornography in the Sexual Offences Act to be applied to the Films and Publications Act.<sup>239</sup> Most importantly the proposed uniform application of the Sexual

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<sup>238</sup> *S v Ferreira* Case number: CC193/2015 as referenced in SALRC Sexual Offences Discussion Paper (2019) par 4.136.

<sup>239</sup> Group 1 Gauteng Workshop; Group 4 Gauteng Workshop; Group 1 Expert Gauteng Workshop; Group 3 Gauteng Workshop; MJ Makgwatha, DPP PTA; Anonymous Gauteng workshop; agree with change to child sexual abuse material – Capt Banks, SAPS: SECI Unit; Group 3 Pietermaritzburg Workshop; M Porogo Commission for Gender Equality; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; The Octavia Ephraim Foundation; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky;

Offences Act definition is endorsed by the Department of Communications and Digital Technology<sup>240</sup> which administers the Films and Publications Act and drafted the Films and Publications Amendment Act, 2019 which contains an identical amendment.<sup>241</sup> The Commission confirms its recommendation in this regard. As neither of the aforementioned laws has been enacted the Commission would be remiss not to include this recommendation in its Bill. If the laws are enacted before the draft Bill in this report is considered it will act as confirmation for the need for this amendment. The recommended amendment to the Films and Publications Act reads as follows:

Section 1 of the Films and Publications Act, 1996 is hereby amended —

(a) by the substitution for the definition of “child pornography” of the following definition:  
“child sexual abuse material” means “child sexual abuse material” as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);”;

4.22 The abovementioned incorporation of the Sexual Offences Act definition of “child pornography” into the Films and Publications Act by both these laws should, however, be evaluated against the Commission’s proposed substitution of the term “child pornography” with the term “child sexual abuse material” and the proposed amendment of the Sexual Offences Act definition. The Commission has proposed the revision of this terminology and

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Nicola Arend; Tara Harris, Monash; Adv T Buitendag, NPA; Adv P Smith, NPA; Adv Vuyo Ketelo, NPA; Liesl Stander, Cause for Justice; Nomfundo Lilyrose Mtobi, NPA; Princess Maarman, NPA (TCC); JE Krafft, NPA; Cynthia du Toit, Child Welfare Bloemfontein & Childline Free State; Samantha Britz, CGE; Ms Sonkosi Lorrinda, NPA (SOCA); Ms Vatiswa Jodwana-Blayi NPA (SOCA); Nthabiseng Moleko, Commission for Gender Equality; L Jekwa, NPA; Adv Vuyokazi Xalisa, NPA; Benita Nel, Childline, Mpumalanga; PB Nkosi, NPA, Brigadier Magagula, SAPS; Brendan Botha, Break-Free; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; Crystal Clear Ministries International; Google; The Refugee Legal and Advocacy Centre; and the South African Police Service.

<sup>240</sup> As the submission is a joint submission by the (then) Department of Communications, the (then) Department of Telecommunications and Postal Services and the Film and Publication Board it is referenced as a submission by the Department of Communications and Digital Technologies to reflect the merging of the two departments.

<sup>241</sup> It is noted that the Department of Communications and Digital Technologies is of the view that the Sexual Offences Act definition does not cater for animation. It however did not address this shortcoming in the Films and Publications Amendment Act. This comment will be dealt with below under the evaluation of the definition of ‘child pornography’.

the definition in order to appropriately and accurately reflect the nature of the offence and the harm done to children. The substitution of the terminology in the long title of the Sexual Offences Act and proposed related amendments; the proposed amendment of the Preamble to the Sexual Offences Act and the proposed amendment of the content of the existing definition of “child pornography” in the Sexual Offences Act will be dealt with in this order below.

**(b) Amendment of the long title of the Sexual Offences Act**

4.23 The amendment of the long title of the Sexual Offences Act to substitute the term “child pornography” with “child sexual abuse material” in the Sexual Offences Act was met with general approval.<sup>242</sup> While the substitution was supported by the Southern African Catholic Bishops’ Conference in principal, it submits that the term “child abuse material” should be used and Research ICT Africa and the Association for Progressive Communications jointly suggest the use of the word “content” instead of “material”.<sup>243</sup> They submit that the use of the word “content” would be in line with international developments pertaining to platform liability and other forms of harmful content. They further submit that the term “material”, could have other unintended, broader interpretations and meanings not suited to this context. While supporting the use of the word “content”, Lorise Diamond of the Commission for Gender Equality suggests that the term “child sexual abuse exploitative content” may be more suitable. The Commission has carefully considered trends in the child protection movement internationally and is of the view that using the term “exploitative content” would stretch the meaning of the term wider than intended. As no examples are given to substantiate the proposed changes the Commission is hesitant to step outside of

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<sup>242</sup> Group 1 Gauteng Workshop; Group 4 Gauteng Workshop; Group 1 Expert Gauteng Workshop; Group 3 Gauteng Workshop; Group 3 Cape Town Workshop; Nelspruit Workshop; Elmarie, Touch of Hope; Job Masina; MJ Makgwatha, DPP PTA; Anonymous Gauteng workshop; agree with change to child sexual abuse material – Capt Banks, SAPS: SECI Unit; Group 3 Pietermaritzburg Workshop; M Porogo Commission for Gender Equality; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; The Octavia Ephraim Foundation; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Nicola Arend; Tara Harris, Monash; Adv T Buitendag, NPA; Adv P Smith, NPA; Adv Vuyo Ketelo, NPA; Liesl Stander, Cause for Justice; Nomfundo Lilyrose Mtobi, NPA; Princess Maarman, NPA (TCC); JE Krafft, NPA; Cynthia du Toit, Child Welfare Bloemfontein & Childline Free State; Samantha Britz, CGE; Ms Sonkosi Lorrinda, NPA (SOCA); Ms Vatiswa Jodwana-Blayi NPA (SOCA); Nthabiseng Moleko, Commission for Gender Equality; L Jekwa, NPA; Adv Vuyokazi Xalisa, NPA; Benita Nel, Childline, Mpumalanga; PB Nkosi, NPA, Brigadier Magagula, SAPS; Brendan Botha, Break-Free; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Cause for Justice; The Refugee Legal and Advocacy Centre; Liesl Stander, Cause for Justice; Ms Sonkosi Lorrinda, NPA; Colin Mashele, DoC, Gauteng Expert Workshop; and Media Monitoring Africa.

<sup>243</sup> The use of the word ‘material’ was also explored by the workshop participants in the Polokwane Workshop.

broader international views. The Commission is aware that End Child Prostitution in Asian Tourism (ECPAT) has announced that internationally preference is being given to the word “exploitation” in view of the understanding that the line between “exploitation” and “abuse” is blurring with most abuse and exploitation occurring within a circle of trust and with sexual abuse progressing to sexual exploitation.<sup>244</sup>

4.24 End Child Prostitution in Asian Tourism (ECPAT) reports that there is a move towards changing the name of the Optional Protocol to reflect sexual exploitation instead of reference to “child pornography”.<sup>245</sup> Linked to this is a discussion to move away from the term child sexual abuse material towards using the term sexual exploitation because exploitation is understood to reflect “exchange” and not “for reward”. This would include emotional exchange as opposed to only financial exchange.<sup>246</sup> Although the replacement terminology is still under consideration the UN Convention on the Rights of the Child Committee strongly advises against the use of the term “child pornography”.<sup>247</sup> Replacement terminology includes the “use of children in pornographic performances and materials”, “child sexual abuse material” and “child sexual exploitation material”.<sup>248</sup> The Commission is of the view that it is important to recognise that the Children’s Act has a specific understanding of the word “abuse” and the Sexual Offences Act uses the term “sexual exploitation of children” to refer to child prostitution. Although the Optional Protocol refers to child pornography and prostitution, Interpol has verbalised a preference for the term child sexual abuse material.

4.25 While noting that there is a progression in the use of terminology towards incorporation of the word “exploitation” and that rationalisation of terminology contained in the Children’s Act and related legislation may be called for, the incorporation of this word would necessitate broader changes to the Sexual Offences Act and the Children’s Act which do not form part of the scope of the current investigation. As a result of the current limited mandate the use of exploitative wording would impact on other sections in the Sexual Offences Act. Admittedly the word “abuse” in the term child sexual abuse material may be problematic in respect of lewd pictures for example. However, although it may not be a picture of abuse it could be used for abuse. “Exploitation” does not have the same impact as

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<sup>244</sup> Launch of End Child Prostitution in Asian Tourism (ECPAT) Briefing Paper on Sexual Exploitation of Children in South Africa, Pretoria, 29 October 2019.

<sup>245</sup> ECPAT Briefing Paper on Sexual Exploitation of Children in South Africa.

<sup>246</sup> ECPAT Briefing Paper on Sexual Exploitation of Children in South Africa.

<sup>247</sup> UNCRC Committee Guidelines regarding the implementation of the OPCRC par 60.

<sup>248</sup> UNCRC Committee Guidelines regarding the implementation of the OPCRC par 60.

“abuse”. It is not using someone but misuse i.e. abuse. The underpinning rationale for using the correct terminology is to accurately reflect the true nature of the material. In the view of the Commission the more appropriate term would be child sexual abuse material. The need to accurately describe child sexual abuse material is emphasized by the sobering concern raised by ECPAT that when it comes to exploitation, children in South Africa would seem to be in a vulnerable position as English is widely spoken, corruption is rife and South Africa has been identified as one of the most unequal countries in the world.<sup>249</sup>

4.26 A few dissenting voices comment that changing the terminology may create confusion as “pornography is the known term”,<sup>250</sup> and is not used in international and regional instruments.<sup>251</sup> The international shift towards the use of appropriate terminology is, however, addressed above. The comment that the Films and Publications Act should also be amended to use the term child sexual abuse material wherever it appears in the Act is noted.<sup>252</sup> Based on the above analysis, the Commission recognises the need to change terminology and supports the move towards using the term child sexual abuse material.

4.27 The comment that the amendment of legislation such as the Films and Publications Act should be incorporated in the long title is noted.<sup>253</sup> The amendment of the sixth bullet of the long title to effect this change of terminology and to explain the purpose of the amendments to the Sexual Offences Act elicited some comment. The Commission for Gender Equality and Cause for Justice recommend that for the sake of uniformity the same terminology should be used across legislation and that the requisite amendments should be made in this regard. The Refugee Legal and Advocacy Centre proposes the addition of the words “whether deliberate or otherwise” so that the addition to this bullet reads “and offences relating to child sexual abuse material as well as the exposure of children to inappropriate adult sexual content whether deliberate or otherwise”. The Commission finds merit in this proposal and supports the inclusion of these words.

4.28 During the workshops the point was raised that use of the words “inappropriate adult sexual content” instead of the word “pornography” in the sixth bullet of the long title was too

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<sup>249</sup> Launch of ECPAT Briefing Paper on Sexual Exploitation of Children in South Africa, Pretoria, 29 October 2019.

<sup>250</sup> Cynthia du Toit, Child Welfare Bloemfontein & Childline Free State; Jade Aspelng, Group 2, Cape Town Workshop; Group 1, Mbombela Workshop; and Group 3 Polokwane Workshop.

<sup>251</sup> Commission for Gender Equality.

<sup>252</sup> Anonymous respondent.

<sup>253</sup> Civilian Secretariat for the Police Service.

broad. The Commission agrees that the original word “pornography” should be retained. The purpose of retaining the word “pornography” would be to provide certainty and to avoid subjective interpretation. The distribution of inappropriate adult sexual content is subject to classification and addressed in the Films and Publications Act.

4.29 The Commission further recommends the amendment of the ninth bullet of the long title of the Sexual Offences Act to expressly reflect that the duty to report sexual offences extends to offences involving child sexual abuse material and in respect of persons who are otherwise unable to report such offences. The duty to report is dealt with in more detail below. As the Commission has recognised and incorporated the role of additional Government departments to ensure a clear pathway of services to victims of sexual offences, specifically in respect of child sexual abuse material and exposure to pornography, specific reference to the existing agencies and departments has been removed from the fifteenth bullet of the long title. The recommended amendment to the long title of the Sexual Offences Act reads as follows:

#### **Amendment of long title of Act 32 of 2007**

The long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (hereafter referred to as the principal Act), is hereby amended by the substitution —

“(a) of the fourth bullet of the following bullet:

- 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 sexual abuse material **[pornography]** and the engaging of sexual services of an adult;

(b) of the sixth bullet of the following bullet:

- enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled,<sup>254</sup> including specifically substituting the term ‘child pornography’ with the term ‘child sexual abuse material’ so as to provide for revised terminology that appropriately and accurately reflects the nature of

<sup>254</sup>

The advisory committee flags the need to change and expand the term ‘persons with mental disabilities’ to rather refer to all persons with disabilities as persons with physical disabilities are equally vulnerable. It further notes that as the terminology is fluid it may also be advisable to give attention to the manner in which reference is made to this vulnerable group of people.

the offence and the harm done to children, and including offences relating to sexual exploitation or grooming, [exposure to or display of pornography and the creation of child] and offences relating to child sexual abuse material as well as the exposure of children to pornography whether deliberate or otherwise, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation;

- (c) of the ninth bullet of the following bullet:
- creating a duty to report sexual offences committed with or against children or persons who are mentally disabled or otherwise unable to report or offences involving child sexual abuse material; and
- (d) of the fifteenth bullet of the following bullet:
- making provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed **[by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation, enforcement and administration of this Act]** in order to achieve the objects of the Act;”

**(c) Amendment of the Preamble to the Sexual Offences Act**

4.30 The Commission has considered the Preamble to the Sexual Offences Act and recommends that the fifth paragraph of the Preamble should be reformulated to reflect international instruments relevant to the combating of child sexual abuse material, i.e. the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2003 and the African Charter on the Rights and Welfare of the Child. This is deemed necessary to emphasise the important objective of protecting children from exposure to pornography and to give recognition to the fluid nature of obligations under international instruments to bring about on-going protection to children. The sixth paragraph of the Preamble is also reformulated to allow for the expanded reporting

proposed in the amendment to section 54 of the Sexual Offences Act.<sup>255</sup> The recommended amendment of the Preamble to the Sexual Offences Act reads as follows:

The preamble of the principal Act, is hereby amended by —

(a) the substitution of the fifth paragraph of the following paragraph:

“WHEREAS several international and regional legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, **[and]** the United Nations Convention on the Rights of the Child, 1989, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2003, and the African Charter on the Rights and Welfare of the Child, 1990 place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children;”;

(b) the addition after the sixth paragraph of the following paragraph:

“AND WHEREAS, in an ever changing digital environment, an adequate response to address the easy distribution of pornography and child sexual abuse material is required for purposes of effectively protecting children and other vulnerable persons from harm, without unjustifiably limiting children`s rights to human dignity and privacy.”

**(d) Amendment of the definition of “child pornography” (child sexual abuse material) in the Sexual Offences Act: general**

4.31 The Commission carefully considered comments received on amendments to the Sexual Offences Act definition of “child pornography”. As discussed above the proposed amendments to the definition include the substitution of the term “child prostitution” with the term “child sexual abuse material”. The proposal to amend the Sexual Offences Act definition of “child pornography” has received wide support.<sup>256</sup> Workshop attendees and

<sup>255</sup> Comment to this effect was received from MMA.

<sup>256</sup> Group 1 Gauteng Workshop; Group 4 Gauteng Workshop; Group 1 Expert Gauteng Workshop; Group 3 Gauteng Workshop; Group 3 Cape Town Workshop; Nelspruit Workshop; Elmarie, Touch of Hope; Job Masina; MJ Makgwatha, DPP PTA; Anonymous Gauteng workshop; Capt Banks, SAPS: SECI Unit; Group 3 Pietermaritzburg Workshop; M Porogo Commission for Gender Equality; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; The Octavia Ephraim Foundation; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Nicola Arend; Tara Harris, Monash; Adv T Buitendag, NPA; Adv P Smith, NPA; Adv Vuyo Ketelo, NPA; Liesl Stander, Cause for Justice;

respondents identified a few additional areas needing attention. These will be dealt with below.

4.32 Some workshop participants are of the view that the definition may need additional revision so as to reflect what is considered sexual in African culture. For example, whereas breasts are not considered sexual in nature in most African communities, the upper thigh is considered to be sexually imbued.<sup>257</sup> The Commission is of the view that the definition is wide enough to include the upper thigh under paragraph (h) in respect of “lewd acts” or as an act that would be included in the open ended list provided through the use of the word “including”. For this reason it need not be expressly included. The view is held that the definition should include child sex dolls,<sup>258</sup> as well as the manufacturing and distribution thereof. The Commission agrees but is of the view that an addition is not necessary as child sex dolls are covered by the words “description or presentation” of a person, “real or simulated” in the existing definition.<sup>259</sup> The Department of Justice and Constitutional Development<sup>260</sup> comments that the word “presentation” should be omitted from the definition as it is of the view that the definition is too wide and international standards should be considered. It, however, together with the Department of Communications and Digital Technology questions whether anime<sup>261</sup> is covered by the definition.

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Nomfundo Lilyrose Mtobi, NPA; Princess Maarman, NPA (TCC); JE Krafft, NPA; Cynthia du Toit, Child Welfare Bloemfontein & Childline Free State; Samantha Britz, CGE; Ms Sonkosi Lorrinda, NPA (SOCA); Ms Vatiswa Jodwana-Blayi NPA (SOCA); Nthabiseng Moleko, Commission for Gender Equality; L Jekwa, NPA; Adv Vuyokazi Xalisa, NPA; Benita Nel, Childline, Mpumalanga; PB Nkosi, NPA, Brigadier Magagula, SAPS; Brendan Botha, Break-Free; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Cause for Justice; The Refugee Legal and Advocacy Centre; Liesl Stander, Cause for Justice; Ms Sonkosi Lorrinda, NPA; Benita Nel, Childline, Mpumalanga; E.K, DSD; Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; Crystal Clear Ministries International; Google; the Refugee Legal and Advocacy Centre; and the South African Police Service.

<sup>257</sup> Group 1, Mbombela Workshop.

<sup>258</sup> Group 1 and 3 of the Cape Town Workshop; Group 2 Gauteng Workshop; Adv S Robbertse, Department of Justice and Constitutional Development; and Group 2 Gauteng Expert Workshop

<sup>259</sup> Endorsed by Group 3 of the Gauteng Workshop; Delaine Naidoo, Child Welfare SA: Gauteng

<sup>260</sup> Gauteng Expert Workshop

<sup>261</sup> A style of Japanese film and television animation, typically aimed at adults as well as children. As defined by Google dictionary. Accessed 7 January 2021.

4.33 In a related question, the Cape Town Workshop attendees question whether the definition caters for Hentai<sup>262</sup> or an adult depicted as a child? The application of the definition to animation or non-existent children is a particular concern voiced by the UN Committee on the Rights of the Child in its guidelines.<sup>263</sup> In its assessment of the definition of “child pornography” the court held in *De Reuck*<sup>264</sup> that the term “person” covers imaginary depictions of a child. The Commission is of the view that the definition in its existing form therefore caters for animation. Animation is an image or sequence of images. The definition covers material “however created” and includes simulated descriptions or presentations. The definition also caters for an adult depicted as a child as it includes the words “...depicted or described or presented as being, under the age of 18 years ...”. Some respondents suggest that broadcasting should also be included in the definition as the definition does not curtail the broadcasting of child sexual abuse material.<sup>265</sup> While others point out that “sex talk” is catered for in described child sexual abuse material and that cyber-sex is catered for in live streaming/display.<sup>266</sup> The Commission agrees that if the “sex talk” is speech it would be a description and would be covered by the definition. As there may be a gap with child sexual abuse material contained in a text, the Commission recommends the inclusion of “text” in the definition. Any “cyber-sex”, “sex talk” or sexual texting would constitute a sexual conversation. Where this occurs between an adult and a child this could constitute the offence of grooming of a child. The text would be the record of the child sexual abuse material.

**(e) Amendment of the definition of “child pornography” (child sexual abuse material) in the Sexual Offences Act: intention of the author**

4.34 An expert in pornography addiction<sup>267</sup> expresses support for the manner in which the existing definition expressly does not couple the defined material to erotic or aesthetic feelings or stimulation. He explains that the material is not always used for erotic or aesthetic

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<sup>262</sup> A genre of Japanese manga and anime characterized by overtly sexualized characters and sexually explicit images and plots. As defined by Google dictionary. Accessed 7 January 2021.

<sup>263</sup> UNCRC Committee Guidelines regarding the implementation of the OPCRC par 63.

<sup>264</sup> *De Reuck v DPP & Others* [2003] JOL 11909 (CC); *De Reuck v DPP (WLD)* 2004 (1) SA 406 (CC); *Tascoe Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*, (CCT 03/5).

<sup>265</sup> The Commission for Gender Equality; Group 3 of the Gauteng Workshop; M Porogo Commission for Gender Equality; Tara Harris, Monash; Adv T Buitendag, NPA; and Adv P Smith, NPA.

<sup>266</sup> Group 3 of the Gauteng Workshop.

<sup>267</sup> Brendan Botha, Break-Free; endorsed by RIA; APC; and Cause for Justice.

feeling or stimulation and should therefore not be linked to the intent of the creator.<sup>268</sup> However, some respondents suggest that the intent of the creator should play a role so as to avoid criminalising images which are culturally acceptable or are not abusive, such as a naked child playing in a bath.<sup>269</sup> The Refugee Legal and Advocacy Centre submits that the inclusion of the words “that a reasonable person would regard as being offensive...” as found in the Australian definition of “child pornography material” could be considered for inclusion. It argues that this would provide the court with discretion to determine on a case by case basis whether the material constitutes child sexual abuse material or not.

4.35 Media Monitoring Africa also expresses its reservations on the absence of reference to the intent of the creator and suggests that the criminalising of persons for innocent content could be averted by distinguishing between the initial creation and or display of the image or other material in circumstances where this is done without the intention to engage in child sexual abuse material or child pornography, on the one hand, and the subsequent uses of the image or other material in a manner that would constitute an offence in terms of the Sexual Offences Act on the other hand. Media Monitoring Africa further suggests that an exemption should be built into the definition providing that this material would not fall foul of this definition if it is “a bona fide documentary or is of scientific, literary, artistic or educational merit or is on a matter of public interest” as is provided for in the Films and Publications Amendment Act, 2019. Citing the Constitutional Court case of *De Reuck*<sup>270</sup> and the judgments handed down by the Films and Publications Appeal Tribunal in *Out in Africa: South African Gay and Lesbian Film Festival and The Film and Publication Board* (the appeal in respect of the film XXY, hereafter referred to as “XXY”)<sup>271</sup> and *Spier Films SA, Jamil XT Qubeka and The Film and Publication Board* (the appeal against the classification of the film Of Good Report, hereafter referred to as “Of Good Report”),<sup>272</sup> Professor Skelton comments that the Appeal Tribunal judgments seem to favour recognising an “art defence”, suggesting support for an exemption in this regard.

<sup>268</sup> Endorsed by Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; and Crystal Clear Ministries International.

<sup>269</sup> The Refugee Legal and Advocacy Centre; and the Commission for Gender Equality.

<sup>270</sup> *De Reuck v DPP & Others* [2003] JOL 11909 (CC); *De Reuck v DPP (WLD)* 2004 (1) SA 406 (CC); *Tascoe Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*, (CCT 03/5).

<sup>271</sup> Film and Publication Review Board 1/2009.

<sup>272</sup> Film and Publication Review Board 2/2013.

4.36 In order to consider these views, it is necessary to consider the legislative context in which the *De Reuck* and the Appeal Tribunal judgments were made. It is also pertinent to point out at the outset of this analysis that the Commission has not proposed any change to this part of the current definition and that the formulation of this definition has not been constitutionally challenged since enactment in 2007.<sup>273</sup>

4.37 Given that the Sexual Offences Act definition of “child pornography” is to be expressly incorporated by reference into the Films and Publications Act through an identical amendment contained in the Films and Publications Amendment Act, it is important to note that the Appeal Tribunal judgments were handed down while the definition in the Films and Publications Act found application. This meant that the guidelines and framework set out in the Constitutional Court case of *De Reuck* also found application. In the “Of Good Report” matter the Appeal Tribunal argued in favour of a context sensitive analysis (as is done in the guidelines provided by *De Reuck*). In seeking to balance the need to combat child pornography with freedom of expression and other rights such as dignity and reputation, the Appeal Tribunal found that if the film intended aesthetic sentiments and in context is not intended to stimulate sexual arousal in the target audience, it does not constitute child pornography.

4.38 The Appeal Tribunal in XXY recognised that the Sexual Offences Act definition of “child pornography” was drafted with a clear intent to “depart from the reasoning of the court in *De Reuck*”.<sup>274</sup> This conclusion was reached in XXY based on the following analysis:

The word includes’ is omitted, and the requirement that the film or publication be objectively deemed to appeal to the erotic as opposed to the aesthetic – the gravamen of the *De Reuck* reasoning – is expressly excluded.<sup>275</sup>

4.39 One of the problematic areas the Sexual Offences Act sought to address was the application of the dictionary meaning of “pornography” to interpret the meaning of ‘child pornography’. When the court in *De Reuck* could not find a definition of “child pornography” in the dictionary it used the Oxford definition of “pornography” and stated without clear

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<sup>273</sup> This despite the side comment proffered by the Film and Publication Board Appeal Tribunal n XXY that in both *De Reuck* and *Print Media SA v Minister of Home Affairs 2012 ZACC 22* par 92 “serious questions may arise about the constitutionality of any definition of child pornography and sexual conduct, which excludes the qualification that the film must intend to stimulate erotic as opposed to aesthetic sentiments.”

<sup>274</sup> XXY par 21.

<sup>275</sup> XXY par 21.

justification that this definition has a corresponding primary meaning for “child pornography” which, if regard is had to the developing understanding of this material in an international context, is not the case.<sup>276</sup> Based on the application of the dictionary definition of “pornography”, the court held in *De Reuck* that:

The stimulation of erotic rather than aesthetic feelings is an essential element of the definition of child pornography. Any image that predominantly stimulates aesthetic feelings is not caught by the definition. It does require, however, that the image viewed objectively and as a whole has as its predominant purpose the stimulation of erotic feelings in certain human beings who may conveniently be referred to as the target audience.<sup>277</sup>

4.40 The Appeal Tribunal in *Of Good Report* noted that in view of the *De Reuck* analysis the material had to be predominantly erotic as opposed to aesthetic to constitute pornography and child pornography and that if “*the material cannot be classified as pornography, it will not be deemed to be child pornography.*” Further that, “*the test is whether the scene or scenes are intended to stimulate sexual arousal in the target audience*”. However, *De Reuck* also expressly stated that “[E]vidence of the intention of the author is irrelevant” to determine the predominant purpose of the material;<sup>278</sup> and that “It must be emphasised that the image need not, and in most instances will not, stimulate erotic feelings in the reasonable viewer.”<sup>279</sup>

4.41 The definition of “child pornography” in the Sexual Offences Act sought to address the *De Reuck* judgment by using the word “means” instead of “includes” to introduce the definition. The Commission is of the view that the use and retention of the word “means” in the Sexual Offences Act definition should be considered exhaustive and therefore falling outside of the interpretation given in *De Reuck*. In other words, the use of the word “means” in the Sexual Offences Act definition restricts the definition to the content of the definition and therefore excludes any other definition (dictionary or otherwise). The Sexual Offences Act definition further expressly provides that it is irrelevant whether the material is intended to stimulate aesthetic or erotic feelings. It incorporates an open ended list of sexual conduct (which is defined separately in the Films and Publications Act as a closed list). The “including” list from paragraphs (a) to (k) contains various penetrative and non-penetrative sexual acts. The images referred to in paragraph (l) read together with the beginning of the definition would need to be “explicit” or of a “sexual nature”. The Commission is of the view

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<sup>276</sup> *De Reuck* par 20.

<sup>277</sup> *De Reuck* par 32.

<sup>278</sup> *De Reuck* par 32.

<sup>279</sup> *De Reuck* par 32.

that the application of the Sexual Offences Act definition of “child pornography” would mean that the considerations canvassed in *De Reuck* would be rendered obsolete.

4.42 It is important to note that the court in *De Reuck* held that a “legitimate purpose” defence may be abused;<sup>280</sup> and that “[T]he result of a “legitimate purpose” defence would then be that “*people may exploit the defence as a cover. Such persons pose a reasonable risk of harm.*”<sup>281</sup> The court therefore expressed the preference for an exemption application. With regard to lawyers, judicial officers and police officers possessing these images the court states that although there is no express justification or exemption, it does not follow that they are committing an offence by being in possession of the material.<sup>282</sup> It held that:

*[T]he determination of whether they do involves questions concerned with the issues of lawfulness, mens rea, justification, necessity and the constitutional concept of a fair trial.*

4.43 The Commission agrees that justification is to be considered not within the definition of the subject matter but within the definitional requirements of the offences themselves. Unlawfulness is required for all offences, which may be excluded by grounds of justification. Defences such as necessity, *de minimis*, public authority, etc., are not fixed but develop in light of the legal convictions of the community as informed by the values of the Constitution.<sup>283</sup> In addition, where intent is required, consideration has to be given to the requirement of knowledge of unlawfulness. Similarly, within the realm of the regulatory framework provided for in the Film and Publications Act(s), clauses providing for exemption from the limitations or prohibitions imposed on material (films or publications or games) which fall within the definition of child sexual abuse material (child pornography) should be the vehicle to justify lesser measures, not because the material is not child pornography.

4.44 The Commission is of the view that the Sexual Offences Act seeks to provide an objective definition against which to measure whether material constitutes child sexual abuse material or not. The Commission is further of the view that arguing that certain material which is considered justifiable is not child sexual abuse material i.e. incorporating an exemption into the definition, although the material objectively falls within the definition is

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<sup>280</sup> *De Reuck* par 81.

<sup>281</sup> *De Reuck* par 82.

<sup>282</sup> *De Reuck* par 84.

<sup>283</sup> Snyman CR Criminal Law 4 ed (2002) 97-8; Burchell Principles of Criminal Law 3 revised ed (2006) 229.

artificial. The crimes involving child sexual abuse material specify the elements of the offence which include those of unlawfulness and criminal intent (*mens rea*).

4.45 In line with the above views it is also fitting at this point to note that the proposed amendments by the Films and Publications Amendment Act to sections 16 and 18 of the Films and Publications Act, which currently contain an outright prohibition against any form of “child pornography”, is set to bring about a significant change. The amendments introduce an exception to the prohibition, in that material which meets the definition of “child pornography”, but which constitutes a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest sufficient justification might exist for it to be allowed but the material must then be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.<sup>284</sup>

4.46 The Films and Publications Amendment Act further provides for self-classification, which would include determining whether publications, films or games which constitute “child pornography” are deemed prohibited or whether there is justification on the grounds that it is a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest. If this is the case they may be allowed but must be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials. There is no requirement to refer such publication, game or film to the Film and Publication Board for classification or referral to the police. However, this may be implicit in the application of the classification guidelines determined by the Film and Publication Board.

4.47 In concluding this point the Commission agrees with the definition provided for in the Sexual Offences Act excluding artistic or erotic considerations since neither the intention of the producer of the child sexual abuse material nor that of the possessor is relevant to whether material constitutes “child sexual abuse material”. Similarly, using the predominant purpose of the material to determine the illegality thereof conflates the definition with legislating for an offence. Since the present definition is clear in this respect, the Commission merely proposes the words “is intended to” in the definition, these being superfluous. The proposed reformulation would ensure that the definition would objectively define what constitutes child sexual abuse material and in that form be incorporated as the objectively determined subject matter of the relevant offences - creating clauses. The

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<sup>284</sup> Section 16(5) and 18(5).

analysis of rights, harm and what would be considered justifiable is to be determined by applying ordinary criminal law principles. The aim of the revised terminology is to accurately reflect the nature of the material and the harm done to children and, of the slightly revised definition, to accurately determine the subject matter.

4.48 Since the Films and Publications Act does not provide for exceptions to a refused classification as far as *child sexual abuse material* (child pornography) is concerned, exceptions were justified (as discussed above with reference to the decisions in *De Reuck*, *XXY* and *Of Good Report*), based upon the interpretation of the definition of child pornography, so as to exclude from the definition of child pornography, material that is predominantly aesthetic. The Commission deliberated extensively on the possible need to provide for some very limited exception in the Films and Publications Act, the definition (both in terms of the proposal in this report and in terms of the amendment of the definition by the Cybercrimes Act) no longer allowing for such interpretation. Taking into account the guidelines provided for by the Film and Publication Appeal Tribunal in the judgements of *XXY* and *Of Good Report*, the Commission proposes the insertion of clause 18C in the Films and Publications Act. The Commission also noted with concern the very broad terms in which the Films and Publications Amendment Act, 2019, provides for exceptions and records its disagreement with these provisions. Should this latter Act become operative, the Commission recommends urgent revision of the exception clauses (in the amended sections 16 and 18) along the lines of the proposed clause 18C.

**(f) Amendment of the definition of “child pornography” (child sexual abuse material) and amendment of section 20 of the Sexual Offences Act: ‘live display’**

4.49 The inclusion of live displays in the definition of child sexual abuse material was met with a mixed response. While some workshop attendees and respondents welcomed the inclusion,<sup>285</sup> the Department of Justice and Constitutional Development<sup>286</sup> comments that it does not fit in with “material” and that a separate offence would be better suited. Cause for Justice supports the inclusion of live display in principal but has urged the Commission to

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<sup>285</sup> Major General Linda, SAPS; Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; Crystal Clear Ministries International; Google; Cause for Justice; and the South African Police Service.

<sup>286</sup> Gauteng Expert Workshop.

thoroughly interrogate the proposed amended definition to ensure that the technological phenomena of streaming (including instances of live streaming) is adequately covered by the definition. If it is found that the incorporation of the words “sequence of images” leave any loopholes that can be misused to argue that certain instances of streaming does not fall within the ambit of the definition, the definition must be amended to specifically address this *lacuna*.

4.50 Research ICT Africa and the Association for Progressive Communications caution against highlighting specific technologies such as live displays in order to remain relevant and to avoid future redundancy. Research ICT Africa and the Association for Progressive Communications support a broad definition which would cover all existing and future content and technologies.<sup>287</sup> In this regard Cause for Justice proposes that in order to further strengthen the definition of child sexual abuse material the words: “relayed, conveyed or distributed” should be inserted after the word: “portrayed”. It submits that the manner or technology whereby the end user or viewer accesses or views or engages with the filmed/recorded content (or real-time activity that is being filmed/recorded), should not detract from the nature of the material. A related suggestion was made to change the term “live display” to “real time” display and to define it in the Sexual Offences Act.<sup>288</sup> A similar suggestion was made to define “live display”.<sup>289</sup> Some workshop participants are of the view that including a “live display” could be exclusionary and that paragraph (f) “unduly displaying” should cover live displays.<sup>290</sup>

4.51 It stands to be noted that the updated Schedule to the Cybercrimes Act seeks to amend the Sexual Offences Act by inserting a definition of “live performance” which reads:

‘live performance involving child pornography’ means an event where a child is used to create, make or produce child pornography;’.

4.52 The addition proposed by the Schedule to the Cybercrimes Act to section 20 of the Sexual Offences Act remains unchanged. The addition reads as follows:

“(3) Any person who unlawfully and intentionally—  
(a) attends;  
(b) views; or

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<sup>287</sup> This approach is endorsed by Media Monitoring Africa.

<sup>288</sup> Dr Lynette Roux, Clinical Psychologist.

<sup>289</sup> Adv Vuyo Ketelo, NPA.

<sup>290</sup> Group 2 of the Cape Town Workshop.

(c) participates in, a live performance involving child pornography, is guilty of the offence of attending, viewing or participating in, a performance involving child pornography.

(4) Any person (“A”) who unlawfully and intentionally recruits a child complainant (“B”), with or without the consent of B, whether for financial or other reward, favour or compensation to B or a third person (“C”) or not, for purposes of—

(a) creating, making or producing of child pornography, is guilty of the offence of recruiting a child for child pornography; or

(b) participating in a live performance involving child pornography, as contemplated in subsection (3), is guilty of the offence of recruiting a child for participating in a live performance involving child pornography.”.

4.53 The Commission believes that a “live display” is the same as an image or sequence of an image and should therefore form part of the definition of child sexual abuse material. For the purpose of the definition the target audience looks at or views the live display of child sexual abuse material in real time. In order to provide certainty in this regard “live display” is included by name in the proposed reformulation of the definition. The Commission does not support this aspect of child sexual abuse material being defined independently of the definition of child sexual abuse material as is proposed in the Cybercrimes Act.

4.54 For the purpose of context the amendment of section 20 of the Sexual Offences Act proposed in the discussion paper will be dealt with here. The Commission agrees with the proposed inclusion in section 20 of the Sexual Offences Act of “live display”, albeit termed “live performance”, in the Cybercrimes Act. The formulation of the amendment to this section which currently aims to address using or benefiting from child pornography, however, differs from that of the Cybercrimes Act. Based on the support garnered during the workshops and from respondents to the proposed amendment to section 20 in the draft Bill, the Commission confirms its extension of the section to address instances where children are recruited, coerced or deceived to create, make or produce child sexual abuse material, to assist therewith; or to participate in a live display involving child sexual abuse material.<sup>291</sup> This aligns with the United Nations Convention on the Rights of the Child Committee Guidelines.<sup>292</sup> At the instance of the Commission of Gender Equality the words “request” and “entice” are included. As the definition includes “live display” it is included in the reference to child sexual abuse material wherever it appears in this section.

<sup>291</sup> Delaine Naidoo, Child Welfare SA: Gauteng; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Brendan Botha, Break-Free; M Porogo Commission for Gender Equality; and Adv T Buitendag, NPA.

<sup>292</sup> UNCRC Committee Guidelines regarding the implementation of the OPCRC par 64.

4.55 The inclusion of the act of participation is unique to a “live display” and is therefore independently listed as such. This would mean that it would be a specific offence to recruit, coerce or deceive a child to participate in a live display of child sexual abuse material and therefore that preparatory acts to the live display would be criminalised. There may be no record of the live display making it difficult to prove that the live display occurred. The inclusion of the actions of viewing and attending “live displays” is endorsed by a number of submissions received,<sup>293</sup> and is included in the Cybercrimes updated amendment of section 20 of the Sexual Offences Act.

4.56 Media Monitoring Africa, however, voices its concern that the breadth of the amendment proposed in the discussion paper may undermine the central purpose of this recommendation. Media Monitoring Africa points out that in particular, persons may receive child sexual abuse material without requesting or wanting to receive it. An example of this may be a video of child sexual abuse material shared via a WhatsApp group, which a person inadvertently views without being a complicit participant to the offence. As such, Media Monitoring Africa submits that in respect of viewing child sexual abuse material, the draft Bill should include a requirement of intention, in respect of which the offender must intend to view child sexual abuse material and engage with the material in an unlawful manner. The Commission finds merit in the inclusion of criminalising viewing “live displays”. The act of viewing child sexual abuse material (which includes a “live display”) is, however, already an offence in terms of the proposed sub-clause 19C(1). The Commission is of the view that it is not necessary to include “attending” a “live display” as the viewing of the “live display” would not be possible without being present, whether physically or remotely. Unlawfulness and intent are requisite elements of this offence thereby addressing the concern raised by Media Monitoring Africa.

4.57 The Department of Communication and Digital Technology further observes that section 20 currently only applies to a child. It suggests that the use of an adult actor to depict child sexual abuse material should also be criminalised.<sup>294</sup> The use of an adult to depict a child is already included in the definition of child sexual abuse material. Section 20 seeks to provide protection to children who are used for the purposes of creating child sexual abuse

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<sup>293</sup> Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; Crystal Clear Ministries International; and Cause for Justice.

<sup>294</sup> Colin Mashele DoC, Gauteng Expert Workshop.

material. Children are expressly and in spite of ostensible consent on their part, not criminalised in this section. Depending on the context, the adult used to depict a child could be charged with creating child sexual abuse material. For this reason the Commission is of the view that a gap is not created by the omission of adult actors from section 20 of the Sexual Offences Act.

4.58 The Commission is of the view that the language used in the definition is sufficiently neutral i.e. “however created or portrayed” to incorporate future techniques, for example the use of a hologram. This should be read together with the words “any” description or presentation. The framing of the definition in this way aligns with the UNCRC Committee Guidelines which suggest that a definition should reflect the broad range of material available in a variety of media, both online and offline.<sup>295</sup>

4.59 The Minister of Social Development: Western Cape flags the inconsistent use of the word “child” and “child complainant” which is evident in section 20 of the Sexual Offences Act. The Commission observes that section 1 of the Sexual Offences Act defines “child” as a person under the age of 18 and “complainant” as the alleged victim of the sexual offence. Further that, sections 3 to 7 of the Sexual Offences Act use the term “complainant” in respect of a “person”. Sections 15 and 16 are age specific and use the term “child complainant”. The Department of Justice and Constitutional Development has explained to the Commission that in its view the only deviation is section 19 and that this could be amended. However, if this amendment is effected, the word “complainant” would need to be deleted in sections 17 to 21. The Commission has decided to delete the word “complainant” in section 20 but not to effect these changes in the other sections, as it falls outside of its mandate. It is, however, of the view that the word “complainant” should be removed from these sections as it can lead to confusion and is not appropriate in this context. The same scrutiny should be applied to sections relating to people with mental disabilities. Section 10 should also be flagged in this regard.

4.60 The proposed amendment to section 20 has otherwise been reframed in order to exclude repetitiveness. It reads as follows:

**Substitution of section 20 of Act 32 of 2007**

The following section is hereby substituted for section 20 of the principal Act:

<sup>295</sup> UNCRC Committee Guidelines regarding the implementation of the OPCRC par 61.

**“Using, coercing, recruiting or deceiving children for or benefiting from child [pornography] sexual abuse material**

20. (1) A person (“A”) who unlawfully and intentionally uses, requests, entices, recruits, coerces or deceives a child **[complainant]** (“B”) through whatever means, with or without the consent of B, whether for financial or other reward, favour, benefit, **[or]** compensation or any other advantage to B or to a third person (“C”) or not –

- (a) for purposes of creating, making or producing;
- (b) to [by ]create[ing], make[ing] or produce[ing]; [or]
- (c) to in any manner assist to create, make or produce;[,]
- (d) to provide of him- or herself; or
- (e) to participate in a live display involving,

**[any image, publication, depiction, description or sequence in any manner whatsoever of]** child **[pornography] sexual abuse material**, is guilty of the offence of using, coercing, recruiting or deceiving a child for child **[pornography] sexual abuse material**.

(2) A [Any] person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child **[pornography] sexual abuse material**.

**(g) Amendment of the definition of “child pornography” (child sexual abuse material) in the Sexual Offences Act: “unduly displaying” vs innocent pictures**

4.61 Group 2 of the Cape Town Workshop comments that the term undue display may be a source of confusion as sex education on school tablets or images sent to a doctor for a diagnosis may be considered “undue display”.<sup>296</sup> A number of workshop attendees and respondents question the use of the word “unduly” in paragraph (f) which reads “unduly displaying the genital organs, anus or breasts of such person”.<sup>297</sup> Some workshop attendees suggest that the words “unduly”, “lewd” and “aesthetic” should be defined.<sup>298</sup>

<sup>296</sup> Group 2 of the Cape Town Workshop.

<sup>297</sup> Brigadier Magagula, SAPS; Group 4, Cape Town Workshop; Group 1, Mbombela Workshop; and Esselaar Attorneys.

<sup>298</sup> Elmarie, Touch of Hope; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Nicola Arend; and Group 4 Gauteng Workshop.

When regard is had to the ordinary dictionary meanings of the words “undue” and “unduly”, it is clear that provision is made for those instances where possibly lawful material such as training material is excessively or disproportionately explicit or explicit at a level that is not warranted, appropriate, necessary, acceptable or reasonable and, if lewd, then, even though not depicting or describing an act or a body part as listed in the definition, it has a sexual connotation in a socially unaccepted, offensive, obvious or rude way. The Commission is consequently of the view that the words “undue”, “unduly” and “lewd” should remain their ordinary dictionary definitions finding application. Since the word “aesthetic” is of no real consequence, further refinement is not required.

4.62 However, the Commission firmly recommends that clear protocols need to be in place in circumstances where the creation, use or possession of child sexual abuse material may be justified. For example, where medical practitioners consult online and where such images are stored digitally or where social workers, medical officials or any other professional in the field of child abuse may have to retain records of child sexual abuse material (e.g. medical examination forms such as the prescribed J88’s). Medical professionals and those dealing with this material in an official capacity should carefully consider how they deal with this material as it is per definition child sexual abuse material and they need to deal with it in a very limited scope, always keeping in mind the best interests of the child and taking the utmost care to protect the sexual integrity, dignity and privacy of the child involved.

***(h) Amendment of the definition of ‘child pornography’ (child sexual abuse material) in the Sexual Offences Act: erotic poses***

4.63 A suggestion was made that with the inclusion of the word “breasts” in paragraph (f) of the definition, paragraphs (f) and (g) should be compressed into one paragraph as reference is made to breasts in both paragraphs.<sup>299</sup> The Commission, however, disagrees as paragraph (g) provides for the act of stimulation of the breasts as opposed to paragraph (f) which provides for the undue display of breasts. Some respondents are of the view that erotic poses (clothed or unclothed) should be included in paragraph (h) of the definition.<sup>300</sup> This suggestion is qualified by the imperative that children should not fall foul of this

<sup>299</sup> Group 3 of the Cape Town Workshop; and Minister of Social Development: Western Cape.

<sup>300</sup> Capt Banks, SAPS: SECI Unit; Elmarie, Touch of Hope; Yonika Murigan, Kaspersky; Group 4 Gauteng Workshop; Group 1 Gauteng Workshop; Group 1 Gauteng Expert Workshop; Carol-Ann Cromhout, First Distribution/Kaspersky; Group 1 Gauteng Expert Workshop; Group 3 Cape Town Workshop; Major General Linda, SAPS; and Nicola Arend.

paragraph.<sup>301</sup> The Octavia Ephraim Foundation comments that this should include swimwear and child modelling.<sup>302</sup> The Commission is of the view that the suggestive acts provided for in paragraph (h) is wide enough to include the various poses referred to.

**(i) Amendment of the definition of “child pornography” (child sexual abuse material) in the Sexual Offences Act: gaming**

4.64 Some respondents submit that gaming is not included in the definition.<sup>303</sup> The Commission is of the view that although gaming by definition would not fall in the definition of child sexual abuse material, an image or presentation of child sexual abuse material in a game would be covered by the definition.

**(j) Amendment of the definition of “child pornography” (child sexual abuse material) in the Sexual Offences Act: additional areas**

4.65 The Commission has considered and supports the suggestion to substitute the term “sexual intercourse” with the term “act of sexual penetration” in paragraph (j). The latter term is already defined in the Sexual Offences Act and includes penetrative sexual intercourse. The former term is not defined in the Sexual Offences Act. At this juncture the Commission wishes to flag, for the attention of the Department of Justice and Constitutional Development, the problematic nature of the term “sexual violation” which is used as the descriptor for non-penetrative sexual behaviour. Currently, for the purpose of the Sexual Offences Act, the definition of a “sexual act” is made up of two components which are penetrative and non-penetrative. The view is held that labelling of what may constitute legal non-penetrative sexual activity as “sexual violation” taints the definition thereof since it implies that even innocent acts constitute, per definition, actions in breach of the law and does not show respect for what may be considered normal sexual activity.

4.66 Another area requiring the attention of the Department of Justice and Constitutional Development is the point raised by End Child Prostitution in Asian Tourism (ECPAT) that the Sexual Offences Act does not clearly criminalise sexual acts with a child under 12 as rape or

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<sup>301</sup> Group 1 Gauteng Workshop; Group 1 Gauteng Expert Workshop; Carol-Ann Cromhout, First Distribution/Kaspersky; Group 1 Gauteng Expert Workshop; and Yonika Murigan, Kaspersky.

<sup>302</sup> Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation) ; and Group 1 Gauteng Expert Workshop.

<sup>303</sup> Group 3 Pietermaritzburg Workshop; an anonymous respondent; and Minister of Social Development: Western Cape.

sexual assault.<sup>304</sup> The Commission holds a contrary view: the Sexual Offences Act clearly criminalises sexual acts with children under 12 as rape or sexual assault in that it defines, in section 1 thereof, that a child below the age of 12 years cannot legally consent to such acts whilst section 57 explicitly states that children under 12 years are incapable of consenting to a sexual act.

4.67 The recommended amendment of the definition of “child pornography” in the Sexual Offences Act and the insertion of clause 18C in the Films and Publications Act reads as follows:

**Amendment of section 1 of Act 32 of 2007**

““child **[pornography]** sexual abuse material” means any live display, image or sequence of images, however created or portrayed, or any description, text or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such live display, image, sequence of images, [or] description or presentation **[is intended to]** stimulates erotic or aesthetic feelings or not, including any such live display, image, sequence of images, [or] description or presentation of such person –

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs, **[or]** anus or breasts of such person;
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in conduct, or activity characteristically associated with an act of sexual penetration [intercourse]; or
- (k) showing or describing such person –
  - (i) participating in, or assisting or facilitating another person to participate

<sup>304</sup> Launch of ECPAT Briefing Paper on Sexual Exploitation of Children in South Africa, Pretoria, 29 October 2019.

- in; or
- (ii) being in the presence of another person who commits or in any other manner being involved in,  
any act contemplated in paragraphs (a) to (j); or
- (l) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under18, or that could be used to advocate, advertise or promote the use of a child for sexual purposes or that is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;”;

The amendment of the Films and Publications Act by the insertion of the following clause:

**Circumstances and manner in which an exception may be made to a prescribed refused classification**

18C. (1) In the event of child sexual abuse material the Board may only consider an exception to a prescribed refused classification if-

- (a) the film, game or publication is, objectively viewed, of substantial scientific, educational or artistic merit and is in the public interest;
- (b) the depiction, image, scene or description cannot be excised from the film, game or publication without such film, game or publication in a meaningful manner losing its merit and, in addition, would no longer be in the public interest;
- (c) where excision as contemplated in sub-clause (1)(b) is not possible, the application of any other technique that will serve to prevent viewing or having access to the depiction, image, scene or description will not be an effective measure;
- (d) the depiction, image, scene or description is not erotic, explicit or offensive;
- (e) a child had not been used in the creation thereof; and
- (f) the depiction, image, scene or description will not serve to promote the sexual abuse of children and will not violate or offend the sexual integrity or dignity of a child or of children in general.

(2) Where the Board grants an exception to a refused classification of a film, game or publication as provided for in subsection (1), it must-

- (a) appropriately classify the film, game or publication to-

- (i) protect children from exposure to disturbing, harmful or age-inappropriate materials; and
- (ii) inform adult viewers for purposes of making informed choices prior to viewing.
- (b) determined by the justification for the exception, impose restrictions in respect of the manner of distribution and the intended audience
- (3) An exception granted in terms of subsection (1) does not -
  - (a) exclude referral to a police official as prescribed in section 16(6) and 18(5) of this Act;
  - (b) exclude a criminal prosecution; and
  - (c) in itself, serve as a valid defence in criminal proceedings.

## 2 Amendment of the definition of “publication” in the Films and Publications Act

4.68 As the Films and Publications Amendment Act has not addressed the gap identified in the judgement in *S v Ferreira*<sup>305</sup> the Commission confirms the need to remove the loophole caused by the additional qualification requiring that “any writing or typescript” needs to be duplicated as per the definition of “publication” in the Films and Publications Act.<sup>306</sup> The Department of Communications and Digital Technology has submitted that it has noted this proposal and will consider the amendment in its next Films and Publications Amendment Bill. If this amendment is brought about before the draft Bill in this paper is considered, it will also act as confirmation for the need of this amendment. The proposed amendment to the Films and Publications Act reads as follows:

Section 1 of the Films and Publications Act, 1996 is hereby amended —

...

(b) by the substitution of the definition of “publication” of the following definition:

<sup>305</sup> *S v Ferreira* Case number: CC193/2015 as per par 4.136.

<sup>306</sup> This proposal was endorsed by Group 1 Gauteng Workshop; Capt Banks, SAPS: SECI Unit; MJ Makgwatha, DPP PTA; Delaine Naidoo, child Welfare SA: Gauteng; The Octavia Ephraim Foundation; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Tara Harris, Monash; Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation); Liesl Stander, Cause for Justice; Ms Sonkosi Lorrinda, NPA (SOCA); Ms Vatiswa Jodwana-Blayi NPA (SOCA); Nthabiseng Moleko, Commission for Gender Equality; L Jekwa, NPA; Brendan Botha, Break-Free.

“publication” means-

- (a) any newspaper, book periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript [**which has in any manner been duplicated**];
- (c) any drawing, picture, illustration or painting;
- (d) any print, photograph, engraving or lithograph;
- (e) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;
- (f) computer software which is not a film;
- (g) the cover or packaging of a film;
- (h) any figure, carving, statue or model; and
- (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet;”.

### 3 Repeal of section 24B of the Films and Publications Act

4.69 The Commission confirms its viewpoint that the role of the Film and Publication Board is to classify content and not to create crimes involving child sexual abuse material; and that all offences involving pornography and child sexual abuse material should be addressed in the Sexual Offences Act. For this reason the discussion paper proposed that sections 24B, 27A and 30B(1)(b) of the Films and Publications Act should be repealed.

4.70 The Commission’s proposal to repeal section 24B of the Films and Publications Act in order to deal with all crimes relating to sexual offences, including those of child pornography in the Sexual Offences Act received general support.<sup>307</sup> Cause for Justice and the Minister of Social Development: Western Cape made their support dependent on the proposed sections being equally or more effective as section 24B. Whereas the Cybercrimes Act affirms the Commission’s recommendation to repeal section 24B of the Films and Publications Act, to insert offences contained in section 24B Films and Publications Act and additional offences in the Sexual Offences Act by way of clause 19A and to amend section 20 of the Sexual Offences Act by way of the Schedule to the Bill, the Films and Publications Amendment Act retains and provides for an extension of section 24B of the Films and Publications Act.

<sup>307</sup> Cause for Justice; Commission for Gender Equality; Department of Justice and Constitutional Development; and Minister of Social Development: Western Cape.

4.71 The amendments, relevant to this chapter, which were brought about by the Bill which preceded the Films and Publications Amendment Act remain unchanged. As indicated in the discussion paper<sup>308</sup> the Act amends the heading of section 24B to “Offences and penalties in respect of child pornography and sexual exploitation of children”. It further amends section 24B(1) of the Films and Publications Act by clarifying that each of the subsections (a) to (c) which collectively criminalise unlawful possession, creating, producing, contributing to, or assisting in the creation or production of child pornography or importing, taking steps to procure, obtaining or accessing or knowingly assisting in, or facilitating, importing, procuring, obtaining or accessing of child pornography are expressly applicable to child pornography.

4.72 It furthermore inserts sub-clause (4) which contains a range of penalties applicable to these offences. It is still unclear why the term “sexual exploitation” is inserted in the heading as it is not used or defined in the Amendment Act and also not defined in the Films and Publications Act. This term is, however, used in the Sexual Offences Act but is used in the context of the prostitution of children.<sup>309</sup> In light of the integration of the Sexual Offences Act definition of “child pornography” into the Films and Publications Act the inclusion of this term may cause interpretational challenges. Although the Department of Communications and Digital Technology retains and expands section 24B of the Films and Publications Act it has acknowledged that the words “coerce” and “deceive”, as proposed in the discussion paper for inclusion in section 20 of the Sexual Offences Act, have been omitted and as such will receive consideration in the next Films and Publications Amendment Bill.

4.73 In order to give effect to the centralising of all sexual offences in the Sexual Offences Act, the Commission is of the view that section 24B of the Films and Publications Act should be repealed and the offences included in the Sexual Offences Act where sexual offences are best placed. The proposed clauses 19A, 19B, 19C and 19D of the Bill include a range of offences relevant to this investigation. The proposed clause 19C, however, specifically incorporates and expands on the offences relevant to child sexual abuse material. As the proposed clause 19C seeks to include offences catered for in the existing section 24B of the Films and Publications Act and to augment the same, it will be dealt with in this chapter. Clauses 19A and 19B are dealt with above in Chapter 2. The recommended repeal and amendment of these sections of the Films and Publications Act reads as follows:

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<sup>308</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.157.

<sup>309</sup> Section 17 of Sexual Offences Act.

**Deletion of sections 24B, 27A(1)(b) and 30B(1)(b) of Act 65 of 1996**

Sections 24B, 27A(1)(b) and 30B(1)(b) of the Films and Publications Act, 1996 are hereby deleted.

**Substitution of the words “child pornography” in Act 65 of 1996**

The words “child pornography” are substituted for the words “child sexual abuse material”, wherever they appear, in the Films and Publications Act, 1996.

#### **4 Insertion of clause 19C in the Sexual Offences Act: Offences relating to Child Sexual Abuse Material**

4.74 A number of workshop participants support the content and incorporation of clause 19C into the Sexual Offences Act.<sup>310</sup> Cause for Justice qualifies its support for the inclusion of the proposed offences subject to the proviso that the word “unlawful” is defined or omitted. It argues that unlawfulness is found in “breaking the law” or not adhering to the legal requirement/prohibition and is therefore superfluous. The Commission does not agree with this comment. The requirement of unlawfulness is a general prerequisite for liability in criminal law and, while conduct might match the description of the crime, such conduct might still be justifiable and therefore not unlawful. As Burchell explains:

[D]espite having perpetrated prohibited conduct or having caused a consequence prohibited by law, an accused may nevertheless escape criminal liability by raising or leading evidence of a recognized defence excluding the unlawfulness of the conduct.<sup>311</sup>

4.75 Group 3 of the Pietermaritzburg Workshop suggests that assisting to commit the offences in sub-clause 19C(1) should be included to align with the repealed offence in section 24B of the Films and Publications Act.<sup>312</sup> The same group submits that clause 19(C)(3) should be aligned with the Films and Publications Act which uses the words “takes steps to procure, knowingly assists to” etc. which seems wider. The Commission is of the

<sup>310</sup> Adv T Buitendag, NPA; Adv P Smith, NPA; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Tara Harris, Monash; The Refugee Legal and Advocacy Centre; and Adv S Robbertse, Department of Justice and Constitutional Development Gauteng Expert Workshop.

<sup>311</sup> Burchell J Principles of Criminal Law Juta 5<sup>th</sup> Edition 2016 114.

<sup>312</sup> Endorsed by an anonymous respondent.

view that the action of assisting is already provided for in section 55 of the Sexual Offences Act. In addition, section 155 of the Criminal Procedure Act explicitly provides for participants and accessories to be charged with the relevant substantive offence. The same group proposes that the words exchange or offers for exchange should be included as this describes what often happens. The Commission is also requested to consider the inclusion of the word “buys” to align with the words “sale” and “sells”.<sup>313</sup> The Commission is of the view that all of these acts are already provided for within the terms possess and distribute or an attempt thereto and further expansion is not required.

4.76 The Commission for Gender Equality submits that as parents and caregivers are the first line of defence in the protection of children, they should not be complicit in their abuse or placing them at risk. In this regard the Commission for Gender Equality comments that the proposed clause 19C(3) which refers to “allows child sexual abuse material to be distributed, made available.....” should be read to apply to parents who actively allow children access to child sexual abuse material. The Commission is of the view that it is applicable and that parents would indeed fall within, and are not excluded from, the ambit of this section. It further submits that the Independent Communications Association of South Africa (ICASA), the Broadcasting Complaints Commission of South Africa (BCCSA) and the Film and Publication Board should ensure that their standards and rules be brought in line with the proposed amendments to the Sexual Offences Act, so as to ensure that uniform standards and rules apply to broadcasting.<sup>314</sup> This will be discussed under the non-legislative recommendations to align the collective response of all role-players.

4.77 The Refugee Legal and Advocacy Centre’s suggestion that the proposed sub-clause 19C(4) should be reformulated to better align with the Commission’s intention reads as follows:

A person who unlawfully and intentionally arranges or knowingly attends or participates in a live performance involving child sexual abuse material is guilty of an offense.

While an anonymous respondent submits that sub-clause 19(C)(4) should be amended to include “views, watches, instructs”.

4.78 As discussed above under the exposition of the amendment to section 20, the Commission has included “live display” in the definition of child sexual abuse material and

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<sup>313</sup> Endorsed by an anonymous respondent.

<sup>314</sup> A submission to the same effect was made by Group 3 Cape Town Workshop.

introduced a stand-alone offence in section 20. For this reason sub-clause (4) has been omitted from the reframed Bill. As “live-display” constitutes child sexual abuse material the viewing thereof is criminalised under the proposed sub-clause 19C(2).

4.79 The Banking Association of South Africa (BASA), South African Banking Risk Information Centre (SABRIC) and an anonymous Senior State Advocate enquire whether sub-clause 19C(6) includes financial processes such as PayPal and Crypto currency. The Commission is of the view that the term “financial transaction” is wide enough to include a range of transactions which are not limited to those performed by traditional banking institutions. SABRIC further submits that the banking industry processes large volumes of transactions daily which cannot be monitored manually making it improbable that a bank will be able to detect that a financial transaction is being used to facilitate a crime pertaining to a child or child abuse material. It also submits that the information available to banks discloses only a limited amount of information regarding the transaction. For these reasons, detecting and reporting a predicate offence is very challenging and improbable. Furthermore, in compliance with section 29 of the Financial Intelligence Centre Act, banks are already obliged to report transactions that are suspicious in nature to the Financial Intelligence Centre (FIC). SABRIC<sup>315</sup> submits that it would prefer to retain the status quo in which all suspicious transactions are to be referred to the Financial Intelligence Centre (FIC) which would in turn report the same to the police if deemed necessary. Alternatively that the proposed clause 19C(6) be re-worded to make reference to the Financial Intelligence Centre (FIC) legislation. However, BASA and SABRIC submit that if the sub-clause is retained, the word “unlawfully” should be omitted and that the words “while having knowledge or having reason to suspect that such a financial transaction ...” should be included in the offence. BASA explains that the word “unlawful” is redundant in this section, as it is the lawful processing or facilitation of a financial transaction per se that facilitates a contravention. For the reasons as discussed in par 4.74 above, the Commission does not agree with this comment.

4.80 The Minister of Social Development: Western Cape flags the use of the word “facilitate” which is used twice in sub-clause 19C(6). The Commission is of the view that this word should be retained in both places as it serves a specific purpose where it is used.

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<sup>315</sup> Endorsed by The Banking Association of South Africa (BASA), The South African Banking Risk Intelligence Centre (SABRIC) and Financial Intelligence Centre (FIC).

4.81 Group 4 of the Cape Town Workshop enquires whether a person who finds child sexual abuse material or an attorney who is handed child sexual abuse material, or a medical practitioner who is sent material which constitutes child sexual abuse material commits the offence of possession of child sexual abuse material. A related question is whether it would be a crime for such a person to retain or destroy the child sexual abuse material. It is of the opinion that an attorney is placed in an unenviable position and would have to report the child sexual abuse material. It acknowledges that an exemption for professionals would not suffice as some professionals may be offenders. The view is proffered that the lawfulness and intent of the person would be central to an understanding of liability. It is also important to note that unlawfulness is a pervasive and ever-present requirement of all criminal liability under South African law. It is required for every crime, without exception, and where it is not expressed in the definition of an offence, it is regarded as a “silent” requirement and is simply read-in. Another point worth noting is that when offences are created, it is not at all conventional to stipulate all possible defences, certainly not those defences which must be read in as a function of the requirement of unlawfulness. As Snyman notes: “Normally the legislature does not add words such as ‘unless the accused acted in self-defence, necessity, an official capacity or in obedience to orders’”.<sup>316</sup> The reason is – as Snyman goes on to explain – that there are criteria that go beyond the definitional requirements of the offence – beyond the “letter of the law”.<sup>317</sup> These are value judgments based, as discussed, on the legal convictions of the community as informed by the Constitution. This matter is dealt with further below under the discussion of the insertion of clause 54A in the Sexual Offences Act.

4.82 The Commission recognises that the updated Cybercrimes Act contains a revised clause 19A which seeks to incorporate offences relating to child pornography into the Sexual Offences Act in the stead of section 24B of the Films and Publications Act, also including a number of the proposals discussed above. The Commission is of the view that clause 19C is better suited to this end. The Commission has, however, streamlined the offences and removed sub-paragraphs 19C(3)(f) to (j) so as not to duplicate what is provided for in section 20 of the Sexual Offences Act. The Cybercrimes Act further seeks to amend section 17 of the Sexual Offences Act by the addition of the following subsection: “(7) Any person who unlawfully and intentionally in any manner advocates, advertises, encourages or promotes the sexual exploitation of a child, is guilty of an offence.” In the context of section 17 and

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<sup>316</sup> CR Snyman Criminal Law 4 ed (2002) 95; J Burchell Principles of Criminal Law 3 revised ed (2006) 229 as quoted by Grant J Critical Criminal Law Live (2018) 79.

<sup>317</sup> CR Snyman Criminal Law 4 ed (2002) 99 as quoted by Grant J Critical Criminal Law Live (2018) 79.

particularly section 17(1) this behaviour is restricted to the prostitution of a child<sup>318</sup> and the term “sexual exploitation” therefore has a particular meaning in the Sexual Offences Act which does not extend to the broader understanding of exploitation in other jurisdictions. The Commission therefore does recommend the inclusion of sub-clause (4) below to specifically address advocating, advertising, promoting or encouraging child sexual abuse material. The recommended clause 19C reads as follows:

**Offences relating to child sexual abuse material**

**19C. (1) A person who unlawfully and intentionally creates, makes or produces child sexual abuse material, is guilty of the offence of creating, making or producing child sexual abuse material.**

**(2) A person who unlawfully and intentionally —**

**(a) downloads;**

**(b) possesses;**

**(c) accesses; or**

**(d) views child sexual abuse material.**

**is guilty of the offence of downloading, possessing, accessing or viewing child sexual abuse material.**

**(3) A person who unlawfully and intentionally in any manner —**

**(a) makes available;**

**(b) distributes or allows for distribution;**

**(c) transmits;**

**(d) sells or offers for sale;**

**(e) procures or offers to procure;**

**child sexual abuse material is guilty of the offence of making child sexual abuse material available.**

**(4) A person who unlawfully and intentionally advocates, advertises, encourages or promotes child sexual abuse material is guilty of the offence of promoting child sexual abuse material.**

**(5) A person who processes or facilitates a financial transaction while having knowledge or a reasonable suspicion that such transaction will facilitate a contravention of subsections (1) to (4) is guilty of an offence.;**

<sup>318</sup> Section 17 replaces the repealed sections of the Sexual Offences Act, 1957 which criminalised the prostitution of children.

## 5 Repeal of section 27A of the Films and Publications Act

4.83 In recognising the development of the Cybercrimes Act the Commission aligned itself with proposals contained in an earlier version thereof to repeal sections 27A and 30B(1)(b) of the Films and Publications Act.<sup>319</sup> Subsequently the proposal to repeal these sections of the Films and Publications Act has been omitted from the final version of the Cybercrimes Act. In turn the Films and Publications Amendment Act seeks to amend section 27A by substituting the term “Internet Service Provider” with “internet access provider” in order to oblige access providers to take certain steps to prevent access to child pornography, to report the presence thereof and to preserve evidence in this regard.<sup>320</sup> This mirrors the content of the Bill which preceded this Act. In the discussion paper the Commission proposed repealing section 27A and in its place enacting clause 54A(2) in the Sexual Offences Act which places similar obligations on electronic communications service providers with the addition of allowing the South African Police Service reasonable time to investigate the matter before access is restricted. As outlined in the discussion paper<sup>321</sup> data retention and preservation provisions have increasingly become a point of discussion in the sphere of child protection online. These provisions help ensure that digital evidence is available to law enforcement when needed for the investigation and prosecution of illicit online activity.

4.84 The Department of Communications and Digital Technology submits that in respect of the Commission’s proposed repeal of section 27A, that section 27A(1)(a) which speaks to the registration of Internet service providers<sup>322</sup> with the Board should remain. The Commission acknowledges the need for this. The Department of Communications and Digital Technology, however, concedes that an amendment may be needed to the remainder of the section by submitting that the proposed clause 54A(2) will be considered in the next Films and Publications Amendment Bill. The Commission has considered the submissions received on the proposed repeal of section 27A and the enactment of clause 54A(2) in the Sexual Offences Act. The Commission believes that it is necessary to place an obligation on electronic communication service providers and financial institutions in the Sexual Offences Act as this aligns with the aim of consolidating all matters relating to the criminalisation of

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<sup>319</sup> Section 27A deals with registration and other obligations of internet service providers and section 30B(1)(b) deals with presumptions and proof in respect of access or attempted access to child pornography on a distributed network.

<sup>320</sup> Section 28 of the Films and Publications Amendment Act.

<sup>321</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.64.

<sup>322</sup> Amended to read internet access providers in the Films and Publications Amendment Act.

sexual offences in one Act. Based on the comment received, the explanation above and the discussion below, the Commission recommends the repeal of section 27A(1)(b) of the Films and Publications Act and not the whole of section 27A.

## **6 Insertion of clause 54A and amendment of section 54 of the Sexual Offences Act**

4.85 For ease of reference and for the sake of context a discussion on the whole of the proposed clause 54A, as opposed to only focusing on clause 54A(2), will follow.

4.86 A number of respondents support the inclusion of clause 54A which legislates for a reporting obligation in respect of the crimes committed under the proposed clauses 19A, B and C.<sup>323</sup> Although Esselaar Attorneys confirms its support of measures to combat child sexual abuse material and to deal with “sexual predators” it submits that the proposed clause 54A will further erode the attorney-client privilege and may inadvertently criminalise members of society who are acting in the best interests of the child. It submits that:

it would appear that it would now be impossible for the public to consult with attorneys about CSAM as the new section 54A would essentially result in the attorney having two choices: 1) Either report the offence and breach attorney-client privilege, or 2) Do not report the offence (i.e. maintain attorney-client privilege) and face being convicted in terms of section 54A.

4.87 The Commission does not agree with Esselaar Attorneys that this will be the case. The legislative obligation on persons and Internet Service Providers to report knowledge or suspicion of child sexual abuse material was effected by the Films and Publications Amendment Act 18 of 2004 and has been in place ever since. There are, in addition, a number of reporting obligations contained in other pieces of legislation, including the current section 54 of the Sexual Offences Act, and this has not had an impact on attorney-client privilege.

4.88 Workshop attendees and respondents flagged a few matters relating to the proposed wording of clause 54A for attention. It was pointed out that as a failure to report would be a criminal offence, the use of the word “immediately” in clause 54A(1) may be too

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<sup>323</sup> Group 1 Gauteng Workshop; Anonymous Gauteng Workshop; MJ Makgwatha, DPP PTA; Delaine Naidoo, Child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Carol-Ann Cromhout, First Distribution/Kaspersky; Adv P Smith, NPA; Adv Vuyo Ketelo, NPA; Adv Vuyokazi Xalisa, NPA; Brendan Botha, Break-Free; Group 4 Gauteng Workshop; Commission for Gender Equality; and South African Police Service.

prescriptive.<sup>324</sup> Cause for Justice and Google comments that it would be unreasonable to expect an immediate report, which will inevitably require time to obtain succinct details. The Refugee Legal and Advocacy Centre supports this comment and advocates for reporting within a reasonable time frame to allow for circumstances where such immediate reporting is not practical. Group 1 of the Gauteng Workshop, however, noted that there may be on-going harm and that with reporting, time is of the essence and should not be delayed. The Commission has considered the comment received and is of the view that the term “without undue delay” should rather be used as it would mean that the urgency of reporting is emphasised yet is not as prescriptive as the word “immediately”. It would further avoid an interpretational challenge. For this reason the Commission expresses its preference to use this wording in the draft Bill and suggests that the department considers this recommendation in future amendments to the Sexual Offences Act.

4.89 In its submission, Google makes reference to the obligation it is under in terms of the law in the United States to report suspected child sexual abuse material to the National Center for Missing and Exploited Children (NCMEC). It explains that it creates a report called a CyberTip which it sends to NCMEC’s CyperTipline and that it removes and “hashes” the content to enable detection of matching content across platforms. It further explains that where a CyberTip report implicates a user outside of the United States, NCMEC must refer the matter to the appropriate law enforcement agency. Google suggests that South Africa could set up a dedicated NCMEC virtual private network to allow the appropriate law enforcement agency to be the central point of access for the investigation. This would mean that any South Africa-based reports would be directly routed to South Africa through the VPN to be investigated by the relevant authority and implies that a direct obligation to report to the South African Police Service is not preferred. Bearing in mind that the Cybercrimes Act incorporates a reporting obligation on electronic communications service provider directly to the South African Police Service and in view of existing Memoranda of Understanding (MOU’s) between the South African Police Service, Interpol, international law enforcement and developments in this regard,<sup>325</sup> the Commission is of the view that a direct reporting obligation should be retained and included in section 54 of the Sexual Offences Act thereby also averting circuitous reporting and possible delays in response.

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<sup>324</sup> Anonymous Gauteng Workshop; Capt Banks, SAPS: SECI Unit; Tara Harris, Monash; and Cause for Justice.

<sup>325</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.47.

4.90 The need to provide for enquiries on a suspicion and anonymous complaints in respect of the commission of sexual offences was also raised. Advocate T Buitendag of the National Prosecuting Authority comments that provision needs to be made for situations where a police official receives a report but where a written statement is not taken. A suggestion was made that provision should be made for a written statement or some other proof that a report was made. However, this comment is covered by the comment made by Advocate P Smith of Sexual Offences and Community Affairs Unit in the National Protection Act and Brigadier Pienaar that report statements are covered in the South African Police Service National Instructions.

4.91 After consideration of the comments received, the Commission is of the view that it is not necessary to provide for an additional reporting obligation in clause 54A and that an amendment to section 54 of the Sexual Offences Act will suffice.<sup>326</sup> As indicated above, as it is necessary to have an obligation on electronic communication service providers and financial institutions due to their access to additional information such as records that the ordinary person does not have it would be necessary to include the content of clause 54A(2) in section 54. Amending section 54 would have the added advantage that the obligation to report extends to all sexual offences in the Act.<sup>327</sup>

4.92 The Commission has, however, noted that section 54 distinguishes between having knowledge of a sexual offence against a child and knowledge, reasonable belief or suspicion of a sexual offence against a person with a mental disability. It is therefore easier to report an offence against a person with a mental disability than against a child. The Commission agrees with Cause for Justice that it is unclear why this distinction is made. After consideration, which included engaging with the Department of Justice and Constitutional Development,<sup>328</sup> the Commission recommends that subsection (1) and (2) of section 54 should be collapsed into one subsection and that the qualifier of “knowledge, reasonable belief or suspicion” should apply in respect of sexual offences against children, people with mental disabilities; anyone unable to report a sexual offence committed against them and offences involving child sexual abuse material. This amendment would also address the shortcoming that subsection 54(2)(c) is not mirrored in the current subsection (1). It is apt to point out that the Department of Justice and Constitutional Development has proposed an

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<sup>326</sup> The submission made by Cause for Justice is instructive in this regard.

<sup>327</sup> Cause for Justice.

<sup>328</sup> Email correspondence with Mr Henk du Preez, Legislative Development, Department of Justice and Constitutional Development as reflected in the combined working document of the Advisory Committee dated 30, 31 October and 7 November 2019.

amendment to section 54 in its Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16 – 2020] which is currently before Parliament.<sup>329</sup> The recommendation entails collapsing subsection (1) and (2) as it relates to a child and a person with a mental disability into one subsection, thereby making the reporting duty the same for children and persons who are mentally disabled.<sup>330</sup> The latest version of this Bill seeks to remove reference to a child or a person who is mentally disabled by substituting these terms with “persons who are vulnerable” and defining a person who is vulnerable in order to extend the reach of the reporting obligation. While the extension is welcomed, the view is held that it may in its specificity exclude certain persons from its reach. The Commission proposes that this reporting obligation be extended to a broader category of victims of sexual offences to include persons otherwise unable to report or sexual offences involving child sexual abuse material and duties connected therewith.

4.93 The Commission is mindful that the Cybercrimes Act also seeks to amend section 54 of the Sexual Offences. This proposed amendment, however, leaves the existing subsections (1) and (2) intact. It seeks to insert subsection (3) which places a reporting obligation on a person having knowledge of or reason to suspect that an offence relating to child pornography<sup>331</sup> “has been or is being or will probably be committed” and subsection (4) which places a reporting obligation on an ECSP “that is aware or becomes aware” that its service or network is used or involved in the commission of such offences. Whereas the reporting obligation on a person in subsection (3) is “as soon as possible”, that of the electronic communication service provider in subsection (4) is “immediately”.

4.94 Although the need for a reporting obligation on electronic communication service provider and financial institutions was endorsed by a number of respondents,<sup>332</sup> representatives from the Banking Association of South Africa (BASA) and the South African Banking Risk Information Centre (SABRIC)<sup>333</sup> and the Financial Intelligence Centre (FIC),<sup>334</sup>

<sup>329</sup> Parliamentary Monitoring Group Criminal Law (Sexual Offences) Amendment Act A/B; Domestic Violence A/B & Criminal and Related Matters A/B: Department briefing with Deputy Minister 1 September 2020 available at <https://pmg.org.za/committee-meeting/30990/> Accessed on 12 November 2020.

<sup>330</sup> Parliamentary Monitoring Group Department briefing.

<sup>331</sup> As inserted by clause 19A of the Bill.

<sup>332</sup> Cause for Justice; Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; Gloria de Gee, Umgeni Community Empowerment Centre; Mrs Corrine Sandenberg, STOP Trafficking of People; Craig Kiggen; and Jeanette Williams.

<sup>333</sup> Meeting held at the Office of the SA Law Reform Commission on 22 August 2019

<sup>334</sup> Follow up meeting held with the advisory committee on 17 September 2019.

share the concern that clause 54A(2) would place an obligation on financial institutions to police or monitor all financial transactions to detect crime and particularly to determine if a financial transaction relates to child sexual abuse material and that the systems in place would not enable them to do so.<sup>335</sup>

4.95 Media Monitoring Africa shares a similar concern that the phrasing of the recommendation gives the impression that a duty to monitor will be placed on electronic communication service providers and financial institutions. In its view this creates a risk of violating the right to privacy, as well as running contrary to the purport of section 78 of the ECTA, which provides that there is no general obligation on a service provider to monitor the data which it transmits or stores, or to actively seek facts or circumstances indicating an unlawful activity. It is further of the view that as various communications platforms make use of end-to-end encryption, there would not be a practicable way to give effect to this. It suggests that this recommendation be reviewed. This matter is dealt with above in paragraph 4.79.

4.96 The Films and Publications Act already makes it a crime to facilitate child sexual abuse material and if a person becomes aware of it, it should be reported.<sup>336</sup> The Commission is further of the view that this provision does not place an obligation on financial institutions to police or monitor transactions, but would only command a response when the financial institution has knowledge or reasonable suspicion that a financial transaction is related to child sexual abuse material. The identical interpretation of the expression “knowledge” in the Prevention and Combating of Trafficking in Persons Act, 2013 and the Financial Intelligence Centre Act, 2017 is instructive.<sup>337</sup> In both Acts the interpretation reads as follows:

- “(1) For purposes of this Act, a person is regarded as having knowledge of a fact if —
- (a) that person has actual knowledge of the fact; or
  - (b) the court is satisfied that —
    - (i) the person believes that there is a reasonable possibility of the existence of the fact; and
    - (ii) the person has failed to obtain information to confirm the existence of that fact,
 and “knows” or “knowing” must be construed accordingly.
- (2) For purposes of this Act, a person ought reasonably to have known or suspected a fact if the conclusions that he or she sought to have reached are

<sup>335</sup> Meeting held at the Office of the SA Law Reform Commission on 22 August 2019 and at the Office of the FIC on 17 September 2019.

<sup>336</sup> Section 24B(3) of the FPA.

<sup>337</sup> Section 2 of the TIP Act and section 1 of the FIC Act.

those which would have been reached by a reasonably diligent and vigilant person having both —

- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
- (b) the general knowledge, skill, training and experience that he or she in fact has.”

4.97 A number of respondents support including the words “having knowledge of”.<sup>338</sup> An alternative suggestion is to use the words “knows or ought reasonably to have known” as is done in section 2 of the Trafficking in Persons Act and then to define these terms.<sup>339</sup> The Commission finds merit in the suggestion to use the words “knows or ought reasonably to have known” instead of “knowledge” as this would provide clarity and broader protection to this vulnerable group of people. For the sake of clarity it further supports defining these words in a manner similar to the Trafficking in Persons and Financial Intelligence Centre Acts. In order to ease concerns in this regard it is recommended that an interpretation clause of this nature be included in the Sexual Offences Act.

4.98 This obligation should not be interpreted to mean that suspicious transactions should not still be reported to the Financial Intelligence Centre for investigation. The Commission further encourages collaboration between the South African Banking Risk Intelligence Centre (SABRIC) and the South African Police Service: Family Violence, Child Protection and Sexual Offences Serial and Electronic Crimes Investigation Unit with a view to exploring ways of harnessing the internal flagging system used by banks to identify financial transactions linked to child sexual abuse material. It would seem that the existing Memoranda of Understanding between the police and the Financial Intelligence Centre do not specifically address sexual crimes. The pathway between the South African Police Service, the South African Banking Risk Intelligence Centre, the Banking Association of South Africa and the Financial Intelligence Centre should optimally form part of the inter-sectoral approach provided for in sections 62 – 66 of the Sexual Offences Act. For the sake of clarity the Commission recommends that the terms “financial institution” and Electronic Communications Service Provider should also be defined. It is also deemed necessary to define the Internet. The proposed definitions inserted in section 1 of the Sexual Offences Act read as follows:

<p>(b) by the insertion of the following definition of “electronic communications</p>
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<sup>338</sup> Delaine Naidoo, Child Welfare SA: Gauteng; and Dr Lynette Roux, Clinical Psychologist.

<sup>339</sup> Anonymous.

service provider” and the related interpretational definitions of “electronic communications network” and “electronic communications service”:

““electronic communications network” means an electronic communications network as defined in section 1 of the Electronic Communications Act, 2005, and includes a computer system;

“electronic communications service” means any service which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services as defined in section 1 of the Electronic Communications Act, 2005;” and

““electronic communications service provider” means—

(a) any person who provides an electronic communications service to the public, sections of the public, the State, or the subscribers to such service, under and in accordance with an electronic communications service licence issued to that person in terms of the Electronic Communications Act, 2005, or who is deemed to be licenced or exempted from being licenced as such in terms of that Act; and

(b) a person who has lawful authority to control the operation or use of a private electronic communications network used primarily for providing electronic communications services for the owner’s own use and which is exempted from being licensed in terms of the Electronic Communications Act, 2005;”

(c) by the insertion of the following definition of “financial institution”:

““financial institution” means a ‘financial institution’ as defined in section 1 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017);”

(d) by the insertion of the following definition of “Internet”:

““Internet” means “Internet” as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

4.99 A few respondents have drawn the Commission’s attention to the possible unintended and adverse consequences of criminalising the failure to report.<sup>340</sup> Media

<sup>340</sup> Media Monitoring Africa; Professor Ann Skelton, UNESCO Chair: Education Law in Africa.

Monitoring Africa comments that these are complex issues. It specifically draws attention to situations where family members dealing with children who have contravened the law are involved. It further suggests that exemptions for consensual sharing of self-generated child sexual abuse material should be considered; and that provision should be made for rehabilitative and restorative measures, taking into account the vulnerability and lack of maturity of children.

4.100 Professor Skelton endorses the recognition of normative behaviour such as consensual sexting between adolescents and cautions against placing an obligation on parents to report such behaviour under pain of sanction. In light of this and other comment<sup>341</sup> pertaining to the re-framing of section 54 and the framing of the proposed insertion of sub-clause 56(9) in the Sexual Offences Act, to provide for consensual self-generated child sexual abuse material in certain circumstances, the Commission has decided to remove this proposal and to provide for a stand-alone provision. The reframing of what constitutes consensual self-generated child sexual abuse material and the non-criminalisation thereof in the proposed clause 19D is dealt with in chapter three above. In those instances where criminal liability is excluded, as provided for in the newly recommended clause 19D providing for normative sexual behaviour, non-reporting by the relevant parent might, depending on the circumstances, be justifiable and therefore not unlawful. The recommended amendment to section 54 of the Sexual Offences Act reads as follows:

**Amendment of section 54 of Act 32 of 2007**

Section 54 of the Principal Act is hereby amended —

(a) by the substitution for the heading of section 54 of the following heading:

“Obligation to report commission of sexual offences against children or persons who are mentally disabled or otherwise unable to report or offences involving child sexual abuse material and duties connected therewith”; and

(b) by the substitution for section 54 of the following section:

**54.** (1) A person who —

(a) has knowledge, or has the reasonable belief or suspicion that a sexual offence has been or is being committed

<sup>341</sup> Various workshop participants and the SAPS.

- (i) against a child;
- (ii) against a person who is mentally disabled;
- (iii) against a person who for whatever reason is not able to report the commission of the offence; or
- (iv) that involves child sexual abuse material  
must without undue delay report such knowledge, reasonable belief or suspicion to a designated police official;
- (b) 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 imprisonment.
- (2) An electronic communications service provider or financial institution that—
  - (a) knows or ought reasonably to know that its electronic communications system or facilities are being used to facilitate the commission of any sexual offence as contemplated in subsection(1) must—
    - (i) without delay report the offence to a police official;
    - (ii) preserve any information which may be of assistance to a police official investigating the offence;
    - (iii) comply with any written request by a police official relating to the investigation and prosecution of such offence;
    - (iv) take all reasonable steps to prevent access to the child sexual abuse material by any person, unless instructed by a commissioned police officer in writing within two days of having reported the offence not to take such steps;
    - (v) disclose the fact of having reported or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is, or must be made, other than in accordance with any legislative provisions or for purposes of legal proceedings or in terms of a court order;
  - (b) fails to comply with any of the obligations contained in subsection (2)(a) is guilty of an offence.
- (3) A person, electronic communications service provider or institution referred to in subsections (1) and (2)—
  - (a) must provide reasons for that knowledge, reasonable belief or

suspicion to a police official; and  
 (b) who makes the report in good faith, is not liable to civil or criminal proceedings by reason of making such report.

The Commission proposed insertion of a definition of 'police official' in the Sexual Offences Act to provide clarity as to whom a report should be made to, was welcomed.<sup>342</sup> The insertion in section 1 of the Sexual Offences Act provides as follows:

(e) \_\_\_\_\_ by the insertion of the following definition of "police official":  
"police official" means a member of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No.68 of 1995);"

## **7 Repeal of section 30B(1)(b) of the Films and Publications Act**

4.101 The Commission provisionally recommended the deletion of section 30B(1)(b) of the Films and Publications Act. This recommendation sought to give effect to the aim of the draft Bill which seeks to comprehensively criminalise child pornography in the Sexual Offences Act and to consolidate the criminal law specifically applicable to crimes related to the sexual abuse of children in the Sexual Offences Act. Section 30B of the Films and Publications Act collectively deals with presumptions and proof, with section 30B(1)(b) creating the presumption that access or attempted access to child pornography is by the registered subscriber or user of a distributed network. The Minister of Social Development: Western Cape supports the repeal of this subsection, in so far as the contents thereof are captured in the Sexual Offences Act. In its comment the Department of Communications and Digital Technology and Film and Publication Board express the view that this subsection should be left in the Films and Publications Act. They point out that the aim of this subsection is to impose an obligation and to ensure accountability on the registered subscriber or the user to safeguard access provided or granted to them. In light of the Department of Communications and Digital Technology intention to retain child sexual abuse material offences in the Films and Publications Act, as reflected in the Films and Publications Amendment Act, the recommendation to retain this subsection is understood. However, in

<sup>342</sup> MJ Makgwatha, DPP PTA; M Porogo Commission for Gender Equality; Elmarie, Touch of Hope; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Liesl Stander, Cause for Justice; Ms Sonkosi Lorrinda, NPA (SOCA); Ms Vatiswa Jodwana-Blayi NPA (SOCA); Adv Vuyokazi Xalisa, NPA; and Brendan Botha, Break-Free.

light of the proposed consolidation of these offences in the Sexual Offences Act the need to retain this subsection in the Films and Publications Act is unclear.

4.102 The Department of Communications and Digital Technology points out that the issue of reverse onus will arise in respect of this presumption where there is no evidence to show that the access was not gained by the registered subscriber or user. But that this would only apply where there is no evidence to the contrary which raises reasonable doubt. The constitutionality of reverse onus provisions has increasingly come under scrutiny.<sup>343</sup> The crux of the question is whether the reverse onus provision is consistent with the constitutionally entrenched right to a fair trial and, in particular, section 35(3)(h) of the Constitution which guarantees the right “to be presumed innocent, to remain silent, and not to testify during the proceedings.”<sup>344</sup> The Constitutional Court has pointed out that there is no formulaic answer generically applicable to all reverse onus provisions and that each deserves consideration.<sup>345</sup> Further, that cases exist “where practicalities and common sense dictate that, bearing in mind the reduced risk of error involved, it would be disproportionately onerous for the state to be obliged to discharge its normal burden in order to secure a conviction.”<sup>346</sup> Although aimed at alleviating the evidential burden on prosecutors, due to the contestation around reverse onus provisions the Commission does not recommend placing a similar provision in the Sexual Offences Act. In the context of consolidating child sexual abuse material offences in the Sexual Offences Act, the Commission confirms its recommendation to delete this subsection and for the Department of Communications and Digital Technology to re-evaluate its stance in this regard. As suggested by an anonymous respondent, an option to locate and narrow responsibility may be to prescribe that every computer and mobile or other device capable of accessing pornography or child sexual abuse material must have a password. Though probably a useful suggestion, a general legislative obligation would be overbroad in its reach and onerous in implementation and is therefore not supported.

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<sup>343</sup> *S v Manamela and others* Constitutional Court of South Africa Case No CCT 25/1999; 2000 (1) SACR 414 (CC); *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC).

<sup>344</sup> *S v Manamela and others* Constitutional Court of South Africa (4).

<sup>345</sup> *S v Manamela and others* Constitutional Court of South Africa (1)

<sup>346</sup> *S v Manamela and others* Constitutional Court of South Africa (29).

## **8 Note on pending legislation and related matters**

4.103 It is notable that the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16 – 2020] substitutes the designation “child” and “persons who are mentally disabled” with an umbrella term “persons who are vulnerable” and defines the same in Chapter 6 of the Sexual Offences Act. This is therefore only in respect of the employment restriction applicable where a person’s name is to be placed on the National Register for Sex Offenders. The broadening of protection to a wider category of vulnerable people is not applied to the whole Sexual Offences Act. The reason for this is unclear. The Commission wishes to flag the term “persons who are mentally disabled” as restrictive and excluding of persons who are equally or even more vulnerable from receiving the protection they deserve. Persons with physical disabilities who possess the requisite mental capacity but are unable to communicate non-consent may be just as vulnerable. The terminology used to describe and define what disability is, is fluid and deserving of revision. The Commission is of the view that it may be advisable for the Department of Justice and Constitutional Development to give attention to the terminology used and the manner in which reference is made to this vulnerable group. A possibility would be to change and expand the term “persons with mental disabilities” to rather refer to all persons with disabilities unable to report or to consent or to indicate non-consent. The Commission is mindful that strictly speaking a recommendation of this nature falls outside of the mandate of this investigation. For the sake of inclusivity the Commission recommends that the heading of section 54 be amended to include an obligation to report the commission of sexual offences against children or persons who are otherwise unable to report, or of offences involving child sexual abuse material. This proposal is coupled with the proposed amendment of the ninth bullet of the long title to reflect the extension of the duty to report.

4.104 On a matter of procedure the Commission wishes to record its concern for the safety of certain children where a report of a sexual offence has been made. The Commission has been informed by an expert advisory committee member that in a number of instances where a report of a sexual offence against a child, including that of child sexual abuse material, has been made the child may not necessarily be referred to social services for a safety assessment and may be left with the alleged abuser. The child may in turn be punished or pressurised, leading to the case being withdrawn. Similarly children are returned to alleged offenders without an assessment as to their safety where there is insufficient evidence for either a prosecution or a conviction.

## 9 Primary prevention: non legislative recommendations

4.105 The Commission reflects that although South Africa has good law on paper it is facing challenges with the implementation of the law. The inability to adequately implement the law is further complicated by the widespread recognition of the important role that technology plays not only in the commission of sexual offences against children but in the detection and reporting of such offences. The Commission recognises that since the publication of the discussion paper the Film and Publication Board has published revised regulations aimed at facilitating implementation of the Films and Publications Act.<sup>347</sup> The Commission welcomes the Film and Publication Board's consideration of the recommendations made in the discussion paper in respect of the regulations. It is trite that primary prevention holds more benefits for society than secondary intervention. Not only is it not a viable solution to use prosecution of offenders as a remedy to the pandemic of online violence against children, but it is not viable to rely on providing intervention or support after the fact. For the child, there is limited access to basic necessities such as safety, food, hygiene and medical care or physical and psychological care, with a real risk of suicide.<sup>348</sup> COVID-19 has had an adverse effect on access to support services, either due to the logistical barriers brought about by lockdown measures preventing service providers from being able to reach abused children or due to the lack of staff needed to service the influx of abuse cases.<sup>349</sup>

4.106 The Commission reiterates that it views an acknowledgement that child sexual abuse and exploitation is a public health problem as part of the solution.<sup>350</sup> This approach would recognise that the exploitation of children to create this material is underpinned by a combination of individual, relationship, community and societal factors—all of which need to be addressed to effectively prevent child sexual abuse and exploitation. The prevalence of poverty, unemployment and inequality in South Africa, and possibly globally post COVID lockdown, are also contributory socio-economic factors that should be recognised as factors that impact on the added vulnerability of children and the non-reporting of offences involving child sexual abuse material. This approach would further recognise that child sexual abuse

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<sup>347</sup> Draft Films and Publications Amendment Regulations, 2020 Government Gazette, 3 July 2020 No 43495.

<sup>348</sup> Lieutenant General Mothiba, Acting National Commissioner SAPS Keynote speaker 2017 Conference 'New Trans-Disciplinary Horizons in the Criminal Justice System' hosted by the University of Johannesburg Faculty of Law and Department of Strategic Communication and UNISA College of Law 6 & 7 September 2017.

<sup>349</sup> World Vision COVID-19 Aftershocks 2020 12.

<sup>350</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.257.

and exploitation is not a problem that can, or should, be addressed only through the criminal justice system or after an offence has been committed.

4.107 The Commission endorses the use of training, monitoring and evaluation of the application of the law as a starting point.<sup>351</sup> Capacity building on all of these levels is a crucial foundation.<sup>352</sup> A key building block would be evidence-based policies and initiatives to interrupt and create barriers to supply and demand for this material, including the cessation of affiliated hyper-sexualised treatment and portrayal of children and individuals and businesses profiting in this manner.

4.108 The Commission confirms the need for the following non-legislative interventions:

- Therapy or counselling for children exposed to child sexual abuse material - including children in conflict with the law - who have become affected by or addicted to pornography. Optional counselling is considered to be and may be a useful tool in arresting the cycle of abuse.<sup>353</sup> Treatment or assistance should remain optional so as to recognise the autonomy of the child. Dr Roux<sup>354</sup> highlights the need for children to receive psychotherapy or counselling as soon as possible. She submits that they should not have to wait until they have testified which is sometimes 18 months to 2 years after the event or the disclosure of the abuse. She explains that some prosecutors and presiding officers forbid counselling and support, claiming that therapy will contaminate the evidence. In her view, not allowing a child and family to receive support is damaging and possibly abusive in itself. The child suffers psychologically for years unnecessarily. The Commission holds the view that an order preventing therapy is probably contrary to the constitutional imperative of the child's best interest to be of paramount importance. Therapy might even assist the child to be a better witness and, if necessary, the relevant professional body/bodies should provide guidelines on therapeutic interventions that will not serve to contaminate the child's evidence. The Commission encourages therapy to be provided as soon as possible where so required and justified.
- Group 4 of the Nelspruit Workshop submit that sign language interpreters should be made available by departments for deaf and speech disabled victims.<sup>355</sup>

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<sup>351</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.255.

<sup>352</sup> SALRC Sexual Offences Discussion Paper (2019) par 4.255.

<sup>353</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.162.

<sup>354</sup> Dr Lynette Roux, Clinical Psychologist.

<sup>355</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Siphon Mkhonza, NPA (Group 4 Nelspruit).

- Online safety initiatives and advisories in all official languages and accommodating of different levels of literacy and or disability, to provide substantive protection to children.
- Effective awareness and education on ICT and social media by the Department of Basic Education and content providers offering child-oriented services. The view is held that awareness raising initiatives should make use of varied platforms, including television, print media; all advertising i.e. billboards.<sup>356</sup> The Gauteng Expert Workshop suggests using platforms such as Dischem in store video messaging. The Commission believes that it is critical to use various platforms as some of the most vulnerable children may not have access to messaging from school or online.<sup>357</sup>
- Establishing close working partnerships between the applicable law enforcement authorities and the Information and Communications Technology (ICT) industry and internet and wireless application service providers by way of a memorandum of understanding.<sup>358</sup> An alliance between legal regulation and self-regulation includes placing obligations on internet intermediaries to:
  - take steps to prevent the use of their services for the hosting or distribution of pornography to children;
  - report knowledge, and even “good-reason suspicion” to the police, of the commission of any offence related to the exposure of children to pornography, sexual abuse and exploitation of children, including grooming; and
  - provide such support and information as the police may require for the effective investigation of any reported information related to a child’s access or exposure to pornography.

4.109 The Commission commends Google and MTN for the initiatives they have embarked on as part of their business models to ensure that children’s rights are respected and supported. The mechanism’s they document in their submissions to the Commission seek to prevent harm and actively safeguard children’s interests.<sup>359</sup> The Commission agrees with the comment made by a number of respondents that:

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<sup>356</sup> Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation).

<sup>357</sup> World Vision COVID-19 Aftershocks 2020 12.

<sup>358</sup> SALRC Sexual Offences Discussion Paper (2019) par 2.171.

<sup>359</sup> UNICEF Children’s Rights and Business Principles 3. General Assembly Human Rights Council Thirty-first session *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Agenda Item 3 Rights of the child: information and communications technologies and child sexual exploitation 23 March 2016.

parental protection facilities should be law across all service providers and more importantly should be enforced. Our country ranks in the top countries worldwide for pornography access, through mobile devices. If Vodacom<sup>360</sup> and MTN can manage this, so can others.<sup>361</sup>

4.110 It further believes that more companies should embrace the commitment displayed in the submission received from Google i.e.:

As a company, Google is deeply committed to protecting children on the Internet and providing all of our users with a safe experience because protecting children is a responsibility we all share, and our business depends on people being online -- and we need it to be a safe space.

4.111 A recommendation is made that the Department of Basic Education should have a conversation with schools and learners about this legislation to make learners aware of the serious repercussions of child sexual abuse material.<sup>362</sup> However, Lungile Masuku<sup>363</sup> points out that the Department of Basic Education will first have to equip schools to do so and that training should be linked to Continuous Professional Development points. The Department of Social Development supports the introduction of preventative and aftercare programs whereby educational awareness programs are integrated into all sectors i.e. health facilities, schools, clinics and communities.<sup>364</sup> World Vision notes that schools in particular can be an essential lifeline and protective environment for girls and boys.<sup>365</sup> Teachers are often the first point of contact when it comes to disclosure of abuse. Further that, safety and awareness

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A/HRC/31/L.9/Rev.1 [3].

<sup>360</sup> Although a submission was not received from Vodacom, it is noteworthy that Vodacom's support of Childline South Africa by ensuring that calls to the NGO's toll-free crisis telephone counseling are free for its customers and routing the calls to multiple Childline locations is identified and acknowledged in the ECPAT International (2019) Landscape of Sexual Exploitation of Children in South Africa. Bangkok: ECPAT International and The Economist Intelligence Unit (2019) Out of the Shadows: Shining light on the response to child sexual abuse and exploitation.

<sup>361</sup> Cause for Justice; Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; and Crystal Clear Ministries International.

<sup>362</sup> Alida van der Mescht, JellyBeanz; and Lorise Diamond, Commission for Gender Equality.

<sup>363</sup> Lungile Masuku, FAMSA PMB; endorsed by Sibusio Biyela, Office of the Premier, KZN.

<sup>364</sup> This aligns with the recommendations contained in the CRC Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 10 September 2019. Nationally it aligns with the Department of Social Development's National Child Care and Protection Policy (2019) 20.

<sup>365</sup> World Vision COVID-19 Aftershocks 2020 12.

programs should be introduced from foundation level in educational programs.<sup>366</sup> However, a number of respondents flag their concern on what they consider to be graphic material being introduced in the school curriculum.<sup>367</sup> Dr Malek<sup>368</sup> submits that national awareness should include awareness of Internet dangers for parents with regard to their children,<sup>369</sup> and that parental support should be given at various critical points in time, i.e. during pregnancy, early childhood, pre-school, and school-age. Further that, the Department of Health should do more with parents and to be resourced accordingly. Dr Malek specifically flags the need for mental health<sup>370</sup> to be strengthened at District Health Centre level, community and health care level, and also for staff. She submits that schools should provide mandatory parent information sessions at primary school level about the dangers of the Internet and parental responsibility and where to get help and skills. This should include adverse childhood events awareness, (implement the tool widely) strengthen health services and social services and schools to do prevention aspects. She is supportive of more social workers in pre-schools.

4.112 The Commission supports Dr Malek's proposal that a National Directive should be developed for the Department of Education, Department of Health, Department of Social Development and Department of Basic Education which includes:

- the Department of Health and Department of Social Development providing counselling services to parents of children exposed to child sexual abuse material;
- the Department of Health investing in parent preparedness sessions starting during antenatal care and certain routine child health care visits and through Community Health Worker antenatal and postnatal support groups and home visits;
- the Department of Basic Education implementing mandatory parent awareness, offering self-esteem building opportunities for learners;
- Department of Social Development to provide supervision and mentoring for social workers to be routine and part of Key Result Areas; and
- all frontline service departs (Department of Health, Department of Basic Education and Department of Social Development) to address burnout through providing more staff and providing mental health and counselling for all staff.

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<sup>366</sup> Supported by Dr Elmarie Malek, Cape Town.

<sup>367</sup> Pamela Andre, Mom.

<sup>368</sup> Dr Elmarie Malek, Cape Town.

<sup>369</sup> Endorsed by Rianette, Leibowitz, Gauteng Expert Workshop; Cape Town Workshop.

<sup>370</sup> The need for mental health assessment and support is endorsed by World Vision 14.

## CHAPTER 5: GROOMING OF A CHILD AND OTHER SEXUAL CRIMES ASSOCIATED WITH OR WHICH ARE FACILITATED BY PORNOGRAPHY

### A Introduction and background

5.1 The Sexual Offences Act currently criminalises different aspects of the crime of grooming a child in terms of sections 18 to 20. Section 18 of the Sexual Offences Act criminalises two distinct categories of offences pertinent to grooming. Firstly behaviour constituting promoting the sexual grooming of a child and secondly the actual behaviour of sexual grooming of a child. In addition to section 18, section 19 criminalises exposing a child to child sexual abuse material and pornography and section 20 criminalises amongst others the use of a child to create, make or produce child sexual abuse material.<sup>371</sup> Sexual grooming of a child may occur in person (in “real” time) or online, over a plethora of online social media and gaming platforms. As explained in the discussion paper the same techniques of seduction and manipulation are used to entice and entrap a child online and offline.<sup>372</sup> A child may be exposed to pornography or child sexual abuse material as part of the grooming process or may be groomed to provide explicit sexual material created by the child of him or herself. Due to the calculated exploitation involved in this behaviour the Sexual Offences Act extends protection to all children under the age of 18 irrespective of the fact that certain children can unreservedly consent to sexual acts from the age of 16. The behaviour of the groomer negates the ostensible consent of the child thereby removing any culpability on the part of the child.<sup>373</sup>

5.2 In this chapter the Commission confirms its recommendation to amend section 18 of the Sexual Offences Act only insofar as there is a need to substitute the term “child pornography” with “child sexual abuse material”.<sup>374</sup> It further confirms its stance not to recommend a separate offence to criminalise the participation of parents in the grooming process as the offence is applicable irrespective of affiliation. After careful consideration the

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<sup>371</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.15.

<sup>372</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.4.

<sup>373</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.17.

<sup>374</sup> The all-encompassing nature of section 18 of the Sexual Offences Act is acknowledged in the ECPAT International The Landscape of Sexual Exploitation (2019).

Commission is of the view that there is no need to amend section 56 of the Sexual Offences Act to provide undercover police officials to intercept child sexual exploiters as entrapment of this nature is already possible and justifiable in terms of section 252 of the Criminal Procedure Act.

5.3 The exposure of children to pornography and child sexual abuse material without the intention to groom is dealt with above in chapters 2, 3 and 4.

## **B Summary of proposals contained in the discussion paper**

5.4 In the discussion paper the Commission found that the manner in which grooming is addressed in sections 18 to 20 of the Sexual Offences Act meets the five key criteria listed by the International Centre for Missing & Exploited Children's (ICMEC) model legislation for online grooming for sexual purposes i.e. it provides for a specific crime addressing online grooming, the offence defines grooming, the offence includes grooming with and without the intent of meeting the child, and the showing of pornography or child sexual abuse material to the child.<sup>375</sup> South Africa is only one of a handful of countries that meets these criteria. It further found that the national policy framework in the Sexual Offences Act providing a uniform and co-ordinated approach by the state and institutions dealing with matters relating to sexual offences meet the International Centre for Missing & Exploited Children's (ICMEC) standard.<sup>376</sup> It discussed and provisionally recommended, with the exception of the need for a consequential amendment of the term "child sexual abuse material" for the term "child pornography" the retention of section 18 of the Sexual Offences Act which criminalises grooming.<sup>377</sup>

5.5 In spite of the Sexual Offences Act not expressly punishing parents or legal guardians who participate in the grooming of a child in their care the Commission provisionally did not support a standalone offence to criminalise the participation of parents in the grooming process. The Commission concluded that if their actions meet the elements of the section 18 crime they may be prosecuted accordingly and any participation by parents

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<sup>375</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.15.

<sup>376</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.32.

<sup>377</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.23.

or guardians would be viewed as aggravation when it came to sentencing.<sup>378</sup> The Commission, however, included a standalone crime involving parents or guardians as an option for consideration. The proposal read as follows:

**Parent or guardian procuring sexual acts**

Any parent, guardian or adult ('A') in a position of authority over a child ('B') who facilitates access to B or procures another person ('C') to obtain access to B in whatever manner for the purposes of a sexual act, including the exposure of the child to child sexual abuse material or to pornography or for the creation or viewing by B or C of child sexual abuse material is guilty of the crime of procurement by a parent or guardian of a child for sexual acts.

5.6 The Commission concluded that based on the understanding that the behaviour engaged in by child exploiters to groom a child necessitates a leading and active role on the part of the child exploiter, this would arguably make any defence of entrapment hard to prove. The Commission found merit in equipping police officials with the relevant tools to act proactively to intercept groomers before harm or further harm is done.<sup>379</sup> In order to assist the police in their investigations and to act preventively or at least to interrupt the grooming process before a child is sexually abused, either through a physical meeting or solely online, the Commission recommended that section 56 of the Sexual Offences Act be amended to provide a defence for undercover police officials acting as a child to intercept child sexual exploiters without compromising a child.

## C Evaluation and recommendations

5.7 Group 3 of the Cape Town Workshop questioned whether the possession of articles intended to facilitate the commission of a sexual act with a child should be regulated. The Commission is of the view that as such an object could be used by children engaged in legal and consensual sexual acts it will flag this comment, but not make a recommendation in this regard. While reconsidering the reach of the section, the Commission questioned whether the words "publication or film" in section 18(1)(b) may be too limiting. It recommends the revision of this sub-section to read "film, publication, game or other material" and to effect the same change to section 18(1)(c)(iii) and 18(2)(a)(iii). The Commission further considered

<sup>378</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.18.

<sup>379</sup> SALRC Sexual Offences Discussion Paper (2019) par 5.22.

whether section 18 addresses online grooming “in the presence of” a person and whether remote grooming by way of Skype, for example, would be included. The Commission is of the view that for the sake of clarity the words “whether physical or remote” should be included in this sub-section 18(2)(b) where applicable.

5.8 As no comment was received on the need for a stand-alone offence criminalising grooming by parents, and the Commissions’ view that this behaviour would not only already be criminalised by section 18 but would serve as in aggravation of sentence, it was decided not to pursue this as an option.

5.9 A number of workshop attendees expressed support for the inclusion of sub-clause 56(10) aimed at providing law enforcement with a tool to prevent or at least interrupting the grooming process before a “real” child is sexually abused either through a physical meeting or solely online.<sup>380</sup> The view was held that the proposed amendment might have the effect that children would not have to be sexually abused before a conviction is secured. Group 3 of the Nelspruit Workshop questioned whether the reach of this sub-clause should be extended to include entrapment by someone acting in the child’s interest, such as the mother of the child. The Commission is of the view that authorising entrapment by third parties outside of law enforcement, aside from the lack of evidence collecting equipment and know-how, could lead to unintended consequences, and is not supported.

5.10 A number of respondents submitted that the manner in which the sub-clause was worded and particularly sub-clause 56(10)(b) was worded was confusing and obscured the meaning of the provision.<sup>381</sup> The Commission agrees with this viewpoint and after re-consideration the Commission is of the view that this confusion may have arisen from attempting to clarify that which is already catered for in law. For this reason it would seem that this sub-clause would not be necessary. Entrapment is a recognised investigative tool and already provided for in section 252A of the Criminal Procedure Act. Although our legal system does not provide for a defence of entrapment, evidence may be excluded if the entrapment is found to have been unfair or if the administration of justice will be brought into

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<sup>380</sup> Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Adv Vuyokazi Xalisa, NPA; Brendan Botha, Break-Free; Commission for Gender Equality.

<sup>381</sup> Sonnika Gillespie; Lindi Barrett; Mrs SR Cazalet; Mrs Lesley Gaye Watson; Rev Cindy Erasmus; Kerry Janse van Rensburg, Project Exodus; Henriette Dippenaar; Susan Jansen van Rensburg; Karel Willems; iMeMovement; Gloria de Gee Founder (Umgeni Community Empowerment Centre); Mrs Corrine Sandenberg STOP Trafficking of People; Craig Kiggen; Jeanette Williams; Graham Haddad; Hope Risen Foundation; Mrs Rashieda Naidoo; Crystal Clear Ministries International; and Cause for Justice.

disrepute should the evidence be allowed. Conversely, it will be allowed if justified. Relevant considerations and prescripts are provided for in section 252A including the obtaining of the prior authorisation of the Director of Public Prosecutions in certain circumstances. Private entrapment need not comply with these prescripts. The proposed sub-clause provides a non-defence and not an investigative tool. In the event of entrapment involving an offence that requires a child to be the victim or object of the offence and where a police official makes use of methods whereby a fictitious child is depicted, the accused may be convicted of an attempt to commit the offence since the victim or object is in fact not a child i.e. does not exist and the offence is in fact impossible to commit, although, in the mind of the accused based on what he or she thought was the factual position, it was possible. The Commission has concluded that the only reason for retaining this sub-clause would be to elevate the crime from a mere attempt to commit the crime to the commission of the completed crime. The Commission believes that as the child sexual exploiter would be committing the offence of attempting to groom a child, it would not be necessary to go to such lengths for a conviction of a completed crime. The Commission, however, wishes to draw attention to the need for the South African Police Service to develop a specific Standard Operating Procedure to respond to child sexual abuse material within the scope of the broader Standard Operating Procedure provided for all sexual offences. This matter is addressed further by the recommendation made in Schedule 1 of Chapter 6 and particularly item 13.

5.11 The recommended amendment to section 18 of the Sexual Offences Act reads as follows:

**Amendment of section 18 of Act 32 of 2007**

Section 18 of the principal Act is hereby amended —

(a) by the substitution for subsection 18(1)(b) of the following subsection:

“(b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication, [or] film, game or other material that promotes or is intended to be used in the commission of a sexual act with or by “B”,” and

(b) by the substitution for subsection 18(1)(c) of the following subsection:

“(c) supplies, exposes or displays to a third person (‘C’) –

(i) an article which is intended to be used in the performance of a

sexual act;

(ii) child **[pornography]** sexual abuse material or pornography; or

(iii) a publication, **[or]** film, game or other material,

with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or”; and

(c) the substitution for subsection 18(2) of the following subsection:

“(2) A person ('A') who —

(a) supplies, exposes or displays to a child complainant ('B') —

(i) an article which is intended to be used in the performance of a sexual act;

(ii) child sexual abuse material **[pornography]** or pornography; or

(iii) a publication, **[or]** film, game or other material,

with the intention to encourage, enable, instruct, or persuade B to perform a sexual act;

(b) commits any act with or in the presence, whether physical or remote, of B or who describes the commission of any act to or in the presence, whether physical or remote, of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to —

(i) perform a sexual act with A or a third person ('C');

(ii) perform an act of self-masturbation in the presence, whether physical or remote, of A or C or while A or C is watching;

(iii) be in the presence, whether physical or remote, of or watch A or C while A or C performs a sexual act or an act of self-masturbation;

(iv) be exposed to child sexual abuse material **[pornography]** or pornography;

(v) be used for **[pornographic]** purposes of creating child sexual abuse material as contemplated in section 20(1); or

(vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;

(c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;

(d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B -

(i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or

(ii) during such meeting or communication or any subsequent meeting or communication to –

(aa) commit a sexual act with A;

(bb) discuss, explain or describe the commission of a sexual act; or

(cc) provide A, by means of any form of communication including electronic communication, with **[any image, publication, depiction, description or sequence of] child [pornography] sexual abuse material** of B himself or herself or any other person; or

(e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B,

is guilty of the offence of sexual grooming of a child.”;

## CHAPTER 6: INVESTIGATION, PROCEDURAL MATTERS AND SENTENCING

### A Introduction and background

6.1 On face value the current law, in the form of the Films and Publications Act and the Sexual Offences Act, meet the substantive and procedural law criteria contained in the International Centre for Missing and Exploited Children (ICMEC) model law. Furthermore, the Films and Publications Act Amendment Act and the Cybercrimes Act both seek to improve the current law. The discussion paper, however, highlighted the shortcoming that there is no assurance that a victim of a sexual offence broadly, or a victim who has been exposed to child sexual abuse material or pornography or abused to create child sexual abuse material specifically, will be dealt with in terms of acceptable procedures or be protected from secondary or further harm within the criminal justice system.<sup>382</sup> For this reason the discussion paper made provisional recommendations on aspects of investigation, procedure and sentencing.

6.2 This chapter recommends the harnessing of a fully coordinated and integrated framework by the state to deliver services which are prompt, sensitive, effective and dependable and designed to prevent secondary trauma. It recommends the reconfiguration of the inter-sectoral committee for the management of sexual offence matters and the restructuring of the content of directives and instructions to be issued in order to comprehensively address child sexual abuse material. These recommendations on the amendment of clauses relating to the issuing of national instructions and directives on key departments in the Sexual Offences Act align with the national strategy for making South Africa safe for children. This approach further aligns with the expanded mandate of the umbrella project on sexual offences i.e. to encourage action by the appropriate government structures and to galvanise communities to participate in the prevention and management against sexual violence.<sup>383</sup>

6.3 This chapter also provides for a sentencing framework and the issuing of ancillary orders aimed at extending protection to children following the release of sexual exploiters

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<sup>382</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.43.

<sup>383</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.1.

from prison. It further makes provision that a court may take judicial cognisance of the age of a child in order to avoid unnecessary delays in such matters; regulates safe custody and access to child sexual abuse material and forfeiture and disposal of child sexual abuse material.

## **B Summary of proposals contained in the discussion paper**

6.4 The Commission concluded that the effective management by the criminal justice system of children and offences relating to pornography and sexual abuse material can only occur through a fully coordinated and integrated framework to deliver services which are prompt, sensitive, effective and dependable and designed to prevent secondary trauma.<sup>384</sup> The proposed multi-disciplinary approach, including a gap analysis and review of existing Directives, National Instructions or Standing Operating Procedures drew particular attention to the need for all role-players to develop suitability or psychometric screening programmes, training for first responders, follow-up investigation and management of cases, and provide uniformity of data obtained from the South African Police Service and the National Prosecuting Authority by way of standardised record keeping and segregated statistics.<sup>385</sup> Part of the effective management of service delivery is capacitating and taking care of those delivering the service. For this reason the Commission endorsed the need for the assessment for and provision of psycho-social counselling as an integral element of working in this field for all role-players.<sup>386</sup>

6.5 The Commission recognised that section 62 to 65 of the Sexual Offences Act lays the foundation for the national strategy against all sexual offences.<sup>387</sup> With the increased focus on the prevention of child exposure to pornography and child sexual abuse material associated offences the Commission flagged the need to include the Department of Education in the Inter-sectoral Committee for the Management of Sexual Offence Matters with a corresponding obligation to issue directives for all educators and relevant persons dealing with sexual offence cases within its jurisdiction.<sup>388</sup> It further proposed the inclusion of

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<sup>384</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.44.

<sup>385</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.78.

<sup>386</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.78.

<sup>387</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.74.

<sup>388</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.87.

the Director-General of Justice and Constitutional Development in the Inter-sectoral Committee and for directives to be issued in respect of the management of sexual offence cases, including the manner in which court records are dealt with, disposed of or destroyed.<sup>389</sup> The Commission recommended the need for the Director-General of Social Development as part of the Inter-sectoral Committee to issue directives relevant to the Sexual Offences Act.<sup>390</sup> The Commission invited comment on whether the National Commissioner of Correctional Services should be included in the Inter-sectoral Committee and whether he should be required to issue directives relevant to the Sexual Offences Act.

6.6 The Commission noted that the proposed consolidation of all offences relating to pornography and children in the Sexual Offences Act would ensure that the national policy framework established in terms of the Sexual Offences Act would find application.<sup>391</sup> The Commission noted that the consolidation would have the added benefit that prescription would not be applicable to any of these crimes.<sup>392</sup>

6.7 The discussion paper identified and examined relevant stages of the investigation and prosecution of crimes relating to children and pornography and child sexual abuse material. It flagged the need for a reactive and proactive response by all role-players. It recommended the fast tracking of the Victim Identification Data Base by the South African Police Service linked to Interpol's International Child Sexual Exploitation Image Database so that the primary focus of any investigation would be the identification and location of the child in the material.<sup>393</sup> It, however, cautioned that the initial and subsequent contact with the child should be approached with circumspection and with the realisation that the child and parents or caregivers may not have been aware that the material has been discovered; distributed wider than intended or even have been aware that the material had been made. The Commission suggested that the process to be followed could be included in non-legislative directives.<sup>394</sup>

6.8 The Commission raised the concern that intimate, graphic and identifying information, including the identity of the child, relating to the offence is found in numerous

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<sup>389</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.89.

<sup>390</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.91.

<sup>391</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.44.

<sup>392</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.72.

<sup>393</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.47.

<sup>394</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.47.

records that form part of the criminal justice process i.e. charge sheet, court records, plea agreements. Some of these records form part of the public record and others may only be made available to court officials but is done without restriction or warning as to content or how this evidence should be disposed of.<sup>395</sup> The Commission concluded that it would provide greater protection to children to provide legislatively for the handling of child sexual abuse material and the children depicted therein.<sup>396</sup> It proposed the insertion of clause 61A to regulate the management of child sexual abuse material and pornography. This clause contains a prohibition against the reproduction of such material and for the restriction of access to the same.<sup>397</sup> The Commission specifically endorsed the National Director of Public Prosecutions (NDPP) Prosecution Directives which provides that the defence should not be provided with copies of child sexual abuse material and that such dockets should at all times be kept at the official workplace and stored in a secure locked location.<sup>398</sup> It further suggested that the procedures around viewing of such evidence by the defence should be formalised. The Commission supported a move towards simplification of the prosecution process by allowing for multiple incident counts. This would remove the need to draft separate counts for each device found and allow for the consolidation of various images in a single charge.<sup>399</sup>

6.9 The Commission provisionally recommended the repeal of section 27A of the Films and Publications Act which places an obligation on internet service providers to take all reasonable steps to prevent the hosting or distribution of child sexual abuse material through its services and contains obligations on reporting, restriction of access and preservation of evidence for purposes of investigation and prosecution. And in its stead the Commission provisionally recommended the enactment of clause 54A(2) which places similar obligations on electronic communications service providers with the addition of allowing the police reasonable time to investigate the matter before access is restricted.<sup>400</sup> The discussion and evaluation of this proposal is contained in chapter 4 of this report.

6.10 The Commission expressed the view that as child sexual abuse material should be considered evidence of a sexual offence the prosecutor has a duty to apply to court for the

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<sup>395</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.51 – 6.52.

<sup>396</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.54.

<sup>397</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.55.

<sup>398</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.61.

<sup>399</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.62.

<sup>400</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.64.

material not to be viewed in open court. This should be the case even if the child does not testify.<sup>401</sup>

6.11 In order to avoid unnecessary delays the Commission provisionally recommended the enactment of clause 59A to allow a court to take judicial cognisance of the fact that a child is under the age of 18. It further recommended that where the age of the child is disputed that an affidavit or certificate issued in terms of section 212(4) of the Criminal Procedure Act which provides for a fact to be established by any examination or process requiring any skill in *inter alia* biology or anatomy or human behavioural sciences, would suffice.<sup>402</sup>

6.12 The discussion paper tabled some of the salient challenges facing law enforcement in respect of forfeiture and disposal of child sexual abuse material. The Commission proposed that in the event of:

- No arrest or trial – the evidence should be forfeited but should only be destroyed after the statute of limitations for filing a case has passed as an arrest may still be a possibility. For crimes for which the statute of limitations does not apply an appropriate order should be sought for destruction unless a pressing reason exists not too;
- No conviction and a decision by the National Prosecuting Authority not to appeal – an order should be sought to forfeit and destroy the child sexual abuse material; or
- A conviction – the evidence should only be destroyed after the final date to file an appeal has passed (if appeals are not filed) or after the appeal process has been exhausted.

6.13 The Commission provisionally recommended the enactment of clause 61B to provide for orders to seize, forfeit, dispose of and destroy child sexual abuse material. For the purposes of starting a discussion on sentencing provisions the Commission provisionally inserted clauses relevant to sentencing and ancillary orders into section 56A of the Sexual Offences Act.<sup>403</sup> The proposed ancillary orders were based on the example provided in the United Kingdom of Sexual Harm Prevention Orders which seeks to provide an appropriate balance between the need to safeguard the public from further internet based offending and

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<sup>401</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.65.

<sup>402</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.67.

<sup>403</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.117.

the interests of released offenders to engage in modern life.<sup>404</sup> Key principles underpinning the crafting of ancillary orders include that any restriction on internet usage must be necessary and proportionate, should be tailored to the facts of each case and should allow some flexibility in the drafting of terms.<sup>405</sup> It further commented that when it comes to sentencing (with the exception of self-generated child sexual abuse material) there should be no difference between the person who views child sexual abuse material and the person who creates or distributes it.<sup>406</sup>

## **C Evaluation and recommendations**

6.14 The evaluation of the comment received and the Commission's recommendations will follow the numeric sequence of the clauses in the draft Bill contained in the discussion paper.

### **1 Sentencing and ancillary orders**

6.15 A number of respondents indicated their support of the sentencing and ancillary orders in the proposed amendment to section 56A of the Sexual offences Act in respect of any person who is convicted of an offence relating to creating, distributing, making available, transmitting and selling of child sexual abuse material.<sup>407</sup>

6.16 With regards to sub-clause 56A(3), which dealt with sentencing, the Civilian Secretariat of Police submits that clarity is needed as to whether the proposed sentence of 15 years is a minimum or maximum sentence. Group 3 of the Nelspruit workshop supports the imposition of a minimum sentence of imprisonment and that presiding officers should be educated on the harm perpetrated by these crimes. The view was also expressed that while the inclusion of sub-clause (3) is viewed as a progressive and reformative step as it aims to ensure uniformity and consistency when it comes to the imposition of sentence, it is limiting in the sense that it does not take into account the difference in merits when it comes to the

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<sup>404</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.98.

<sup>405</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.100; 6.114.

<sup>406</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.93.

<sup>407</sup> Tara Harris, Monash; Adv T Buitendag, NPA; Adv P Smith, NPA; Ms Vatiswa Jodwana-Blayi NPA (SOCA); L Jekwa, NPA; Adv Vuyokazi Xalisa, NPA; Brendan Botha, Break-Free; National Commissioner of the South African Police Service; Cause for Justice; and the Commission for Gender Equality.

imposition of sentence.<sup>408</sup> In order to give context to this submission reference was made to a number of pertinent cases and judgements in which the number of offences committed, the nature of the material and the circumstances in which the abuse occurred were considered in arriving at an appropriate sentence.

6.17 Advocate Buitendag submits that a court should firstly take the quantity of material into account as an aggravating factor. She explains that if this is not catered for then, in theory, it would mean that a person found guilty of one count would receive the same sentence of 15 years imprisonment as another person found guilty of 100 counts. She illustrates the effect of not considering the quantity of the material referring the Commission to the *Beale*<sup>409</sup> and *Alberts*<sup>410</sup> cases where both sexual exploiters received identical sentences of 10 years' imprisonment for the possession of child pornography, although *Alberts* was charged with 481 counts, and *Beale* was charged with 18644 counts. She secondly submits that the type or nature of the material should also play a role. She explains that in the case of *S v AR*,<sup>411</sup> in spite of being convicted of abusing the children in the material and creating, possessing, and manufacturing the child sexual abuse material, AR was sentenced to an effective term of "only" eight years imprisonment. She further submits that the content of the child sexual abuse material should also play a role in sentencing i.e. whether it is an image of a baby who in all likelihood will die as a result of the brutality of penetrative sexual abuse or a child in an erotic pose. Advocate Buitendag submits that a third consideration should be the financial benefit sought or obtained by the sexual exploiter. Advocate Nkosi proposes that aggravating circumstances be included expressly in the Sexual Offences Act.

6.18 A further concern raised was that although a child sexual exploiter may be sentenced to 15 years imprisonment, he or she may be considered for parole after serving a part of the sentence. The Commission is mindful that the sentence may be commuted even sooner if the sexual exploiter is placed under correctional supervision or parole as provided for in the Correctional Services Act or released in terms of a commutation of sentence. Advocate Buitendag submits that this is particularly dangerous for children, and stands in stark contrast with convictions elsewhere where sentences are structured in such a way that child

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<sup>408</sup> Advocate Buitendag (submission in private capacity).

<sup>409</sup> William Alexander Beale v S 2019 (2) SACR 19 (WCC).

<sup>410</sup> Director of Public Prosecutions, Pretoria v Alberts 2016 (2) SACR 419 (GP).

<sup>411</sup> S v AR 2017 (2) SACR 402 (WCC).

sexual exploiters are incarcerated for long terms or not released from prison.<sup>412</sup> Advocate Buitendag suggests that this clause be reframed to provide for the grading of sentences based on whether it was a first, second or third conviction for an offence of this nature i.e. a fine or 15, 20 or 25 years or both such fine and imprisonment. Further that, in the presence of aggravating circumstances, the maximum term of imprisonment that any court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years. She lists aggravating factors as including:

- “(i) the quantity of child sexual abuse material that forms the basis of the conviction;
- (ii) the nature of the material concerned;
- (iii) whether the material was manufactured by the accused;
- (iii) whether the material was distributed by the accused; and
- (iv) the purpose for which the material was possessed i.e. financial gain.”

She proposes that alternatively the Criminal Law Amendment Act 105 of 1997, Schedule 2 Part II, could be amended to include the offences listed in the proposed clause 19(C)(1) – (6) of the Sexual Offences Act.

6.19 The Commission is opposed to staggered sentencing as a conviction is not indicative of whether the child sexual exploiter has offended for the first time or not or indicative of the gravity of the offence(s) for which a conviction has been obtained. The “first” time offender may invariably but unfortunately have been offending for a period of time before being arrested, charged and convicted for the first time for an offence of this nature. The Commission further questions the effect of lengthy sentences on child sexual exploiters. In a group setting focussed on offences against children they will be placed around people with similar pre-dispositions thereby normalising their behaviour. This may make them more likely to re-offend. Dr van Niekerk is of the view that the consequence of long term sentences is that an offenders’ whole social structure disappears. Placing such an offender in prison, particularly where sex offenders are grouped together and the complexities of prison life may

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<sup>412</sup> Adv Buitendag refers to an article by Iyavar Chetty, Director of Canadian based Kids Internet Safety Alliance (KINSA) “The Trivialisation of Child Pornography Crimes by South African Courts” – 27 December 2018, South African courts’ sentences stands in chilling contrast to those in the USA:

“Patricia Ayers was sentenced to 1,590 years in prison after pleading guilty to 53 counts of producing child pornography. Her husband, Matthew Ayers also pleaded guilty to 25 counts of producing child pornography and was sentenced to 750 years in prison. Both received the maximum penalties for each count. (Couple Sentenced to More Than 1,000 Years After Child Pornography Production, Florence, USA, Katelyn Murphy, 24 October 2014). (Remember also the report by Korea Times, Seoul, South Korea, a few years ago that an Arizona man who received a 200-year prison sentence for possessing 20 pornographic images of children failed to persuade the Supreme Court to have his sentence reduced!)”

make the person more likely to re-offend. Another consideration is that the jurisdiction of a Regional Court is limited to 15 years unless the Minimum Sentencing Act finds application. An option could be shorter terms of imprisonment coupled with long supervision and ancillary measures. The Commission finds merit in including the proposed and additional aggravating circumstances which should be considered by court during sentencing in section 56A.

6.20 The Civilian Secretariat of Police submits that courts should be given guidance as to the amount of the fine which they may impose. Some respondents are of the view that an option of a fine for natural persons should be removed,<sup>413</sup> and that a separate clause for juristic persons should be enacted.<sup>414</sup> Bertha Bresler of Stop Trafficking of People suggests that fines should only be available in exceptional circumstances and then only for a specific sub-set of child sexual exploiters. Advocate Buitendag, however, argues that where there has been financial benefit the sexual exploiter should be sentenced to direct imprisonment **and** a fine and not be sentenced in the alternative. She explains that although proceeds of crime may be seized and forfeited to the State through the National Prosecuting Authority's Asset Forfeiture Unit, prosecutors do not always alert the Asset Forfeiture Unit to matters like these, and the accused gets to keep the proceeds of his or her criminal activities.<sup>415</sup>

6.21 The Commission has considered removing the option of a fine for natural persons. Furthermore, clause 19(2)(C) includes a number of different offences demonstrating a need for a different approach. The Commission believes that more discretion should be given to the courts in terms of sentencing options. This may result in a fine being imposed in certain circumstances. However, in spite of judicial discretion serious crimes should not be dealt with by handing down a light sentence and a fine. The default approach may be to provide for direct imprisonment unless there are special or compelling circumstances where the presiding officer could consider a fine as an option. The Commission has, however, decided to provide that a fine would not be an option for natural person as it is the best approach in respect of lenient sentencing. The Commission believes that due to the immediate and long term negative consequences of these crimes, a fine should not be an option for an offender independently of imprisonment. The option of a fine would therefore only be applicable for juristic persons as imprisonment does not serve the same purpose. The proposed sub-

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<sup>413</sup> Sarah Buffkins, NPA; Group 4, Cape Town Workshop; Group 3, Nelspruit workshop; Carli van Wyk, Cause for Justice; Juanita Wright, The Salvation Army; Nomfundo Lilyrose Mtobi, NPA; and Commission for Gender Equality.

<sup>414</sup> Group 3, Nelspruit workshop.

<sup>415</sup> PB Nkosi, NPA.

clause has been amended accordingly. Consequently the Asset Forfeiture Unit would need to be notified of a conviction and the need to seize relevant assets.

6.22 In respect of ancillary orders the Civilian Secretariat of Police questions whether the ancillary orders regarding no or qualified access to the Internet would be implementable where a child sexual exploiter has been given a fine and is not in custody. The practical monitoring of a child sexual exploiter's use of the Internet is also questioned by others.<sup>416</sup> Cause for Justice submits that research summaries prepared by The National Center on Sexual Exploitation ("NCOSE") and Dr John Foubert shows – amongst other things – that pornography (even non-violent types of pornography) triggers persons who have certain risk factors to physically act out pornographic fantasies on non-consenting real flesh and blood victims. Cause for Justice further submits that based on scientific evidence it is sensible to deny such persons access to triggers such as Internet pornography. It, however, would extend the application of ancillary orders to all sexual exploiters within this group, i.e. persons displaying risk factors to be triggered by pornography into acting out by way of sexually coercive acts on non-consenting victims. Some respondents are of the view that ancillary orders should be made applicable to all sexual offenders for all sexual offences including violent pornography and cyber-bullying.<sup>417</sup> The Commission agrees that ancillary orders should be applicable to all sexual offences for the purposes of protecting children.

6.23 A number of respondents placed emphasis on the obligation which rests on a court in terms of section 50(3) of the Sexual Offences Act to notify the employer of an offender of a conviction for a sexual offence against a child.<sup>418</sup> Advocate Buffkins proposes that the procedure of notification should be included in the Directives for the National Prosecuting Authority.<sup>419</sup> The Western Cape Education Department submits that where the court has made an ancillary order that a child sexual exploiter may not visit, frequent or reside in close proximity to any school, premises or place frequented by a child, that the court should order that the Department of Education be notified thereof.<sup>420</sup> Alida van der Mescht of JellyBeanz emphasises the need to screen all educators (anyone with access to children) to ascertain if they have committed any offences against children. The Commission takes note of the recommendation to apply a wider interpretation to the term "employer" in section 50(3) of the

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<sup>416</sup> Civilian Secretariat of Police; Adv T Buitendag, NPA; and Group 3 Gauteng.

<sup>417</sup> Group 3 Polokwane Workshop.

<sup>418</sup> Carli van Wyk, Cause for Justice; Nomfundo Lilyrose Mtobi, NPA; Sarah Buffkins, NPA; Group 4 of the Cape Town; and Cause for Justice.

<sup>419</sup> Group 4 of the Cape Town

<sup>420</sup> R Kemp, Western Cape Education Department.

Sexual Offences Act i.e. notifying the Department of Education as opposed to the de facto employer which may be a particular school or learning centre. For purposes of this part of the Sexual Offences Act the term “employer” is defined.

6.24 The Commission has considered and supports comments indicating a need for sanctions to be attached to non-compliance of an ancillary order.<sup>421</sup> A provision to this effect has been included.

6.25 The Commission considered providing that the court should include the payment of damages when handing down its judgement. The Commission is cognisant that compensation may be claimed through the application of section 300 of the Criminal Procedure Act as provided for in section 154(6) of the same Act which makes it applicable to sexual offence matters, but is also aware that the amount of damages sought in terms of this section may be limited and that the damages only relate to monetary and psychological loss. The court may, however, as part of its judgement instruct the offender to contribute towards the services required by the victim as a result of the offences committed against him or her. The Commission finds merit in including such a provision. The Commission is of the view that the enforcement, functions and duties of such an ancillary order should be performed by the Department of Correctional Services. Access to the child should be restricted and where not possible, limited, during and post sentencing. The Commission is mindful that the ban against employment with children made by the National Register of Sexual Offenders may not prevent an offender from moving back home where children may reside and that adequate measures should be put in place to protect them. The Commission recommends that the name of a convicted offender should be ordered by the court to be placed on Part B of the Child Protection Register when the court makes its order to place the name of the offender on the National Register of Sexual Offenders.

6.26 The Commission recognises that sexual abuse against children and the documenting thereof as child sexual abuse material are in effect facets of the same crime and often cannot be neatly compartmentalised. While the Commission is mindful that its mandate relates to the specific arena of pornography and children, it has recommended that the application of ancillary orders be extended to all sexual offences against children. The aim is to provide children with protection from offenders with a known tendency towards offending against children.

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<sup>421</sup> Nomfundo Lilyrose Mtobi, NPA; Group 3 of the Polokwane workshop; and Advocate Mtobi.

6.27 The proposed amendment to section 56A reads as follows:

**Amendment of section 56A of Act 32 of 2007**

Section 56A of the principal Act is hereby amended by the insertion of the following subsections —

“(3) A person convicted of any offence in terms of section 19C is liable upon conviction to a sentence of 15 years’ imprisonment and in the event of a legal person, to a fine.

(4) If a person is convicted of an offence under section 19C, the court that imposes the sentence must consider, but is not limited to consider, the following factors which may serve in aggravation of sentence—

(a) the quantity of child sexual abuse material that forms the basis of the conviction;

(b) the nature of the material concerned, including the level of violence used, or depicted, the age of the child used or depicted, the extent of explicitness of the material and the degree of invasiveness of any deed perpetrated or depicted to be perpetrated on a child;

(c) the degree to which the accused contributed towards or participated in the commission of the offence;

(d) the purpose for which the offence was committed; and

(e) the relationship between the accused and the child involved including the existence of any expectation of trust or whether the accused acted in a position of authority or of taking care of the child.

(5) In addition to any sentence imposed and any order regards placement of the name of a person convicted of a sexual offence against a child including an offence involving child sexual abuse material on the National Register for Sex Offenders as provided for in section 50 and on the Child Protection Register as provided for in the Children’s Act, 2005 (Act No. 38 of 2005) the court, subject to a pre-sentence report by a probation officer in consultation with a community corrections official, and for such period as may be determined by the court, whether of immediate effect, whilst serving a sentence or after the serving of the sentence imposed or as conditions of a suspended or partially suspended sentence, may make any order that will serve to protect a child or children in general including any or all of the following orders —

- (a) that the convicted person may not visit, frequent, or reside in close proximity to any school, premises or places frequented by children;
- (b) that the convicted person may not access the Internet, or may have such qualified access as may be determined by the court;
- (c) that the convicted person may not have access to any device that is able to provide access to the Internet, or that the accused may have such qualified access to such device as may be determined by the court;
- (d) that the convicted person may not employ any child;
- (e) that the convicted person may only be in the presence of any specified child, or in the presence of any child or children in general, when accompanied by another adult person;
- (f) that the convicted person must submit to supervision and monitoring by a community correction official who may apply any technique to limit access to the Internet, including social media platforms, for purposes of preventing access to children and/or child sexual abuse material;
- (g) that the convicted person must accede to any reasonable request by a community correction official for purposes of monitoring compliance with any order made;
- (h) that the convicted person must undergo such therapeutic interventions as the court may determine appropriate; and
- (i) that the convicted person must pay the cost of any therapeutic treatment needed by a child complainant in respect of the offence for which he or she has been convicted, and that such monies must be paid to the clerk of the court for disbursement to the service provider.
- (6) The order referred to in subsection (5) must be accompanied by an order detailing the monitoring of the accused by the community correction official.
- (7) Where the convicted person fails to comply with any of the orders imposed in terms of subsection (5) and where such order was not made a condition of a suspended sentence, the accused shall be guilty of an offence and liable to a fine or to imprisonment for a period of two years or both such fine and imprisonment.”.

## 2 Judicial notice of age of child depicted in child sexual abuse material

6.28 A number of respondents welcomed the proposal for a clause providing for judicial notice that the child in the child sexual abuse material is, or is depicted as being, under the age of 18 years of age.<sup>422</sup> The Commission for Gender Equality submits that undue delays in prosecution of crimes would be avoided if a medical certificate or affidavit could be admitted as proof of age. In its view it would improve access to justice.<sup>423</sup> The Commission agrees with the submission made by the Commission for Gender Equality that the words “of the fact” should be deleted. Furthermore, that while section 337 of the Criminal Procedure Act already provides for age estimation of a person and sections 13 to 16 of the Child Justice Act for age estimation as well as determination, a specific provision is required to provide for a finding of age in child sexual abuse material. In this regard the Commission is mindful that section 56(6) of the Sexual Offences Act clearly provides that a person accused of using a child for or benefiting from child sexual abuse material, as provided for in section 20(1), is not able to use the defence that the child was depicted as being older than 18 years of age or that an adult was depicted as a child. The only exception allowed is where the accused took all reasonable steps to ascertain the age of the person where depicted as being over the age of 18.<sup>424</sup> A consequential change is proposed to section 56(6) in respect of the use of the term “child pornography” as follows:

### Amendment of section 56 of Act 32 of 2007

Section 56 of the principal Act is hereby amended by the substitution of subsection (6) of the following subsection —

“(6) It is not a valid defense to a charge under section 20(1), in respect of a visual representation that —

(a) the accused person believed that a person shown in the representation that is alleged to constitute child **[pornography]** sexual abuse material, was or was

<sup>422</sup> This clause will be extremely helpful – Group 3 Cape Town Workshop; Group 3 Gauteng workshop; M Porogo Commission for Gender Equality; Adv T Buitendag, NPA; Adv P Smith, NPA; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Tara Harris, Monash; Captain Ndubane, SAPS; Brendan Botha, Break-Free; JE Kraftt, NPA; and Michelle Nel, NPA/SOCA.

<sup>423</sup> Supported by Captain Ndubane, SAPS.

<sup>424</sup> Section 56(6)(a) of the Sexual Offences Act.

depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and

(b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.”

6.29 The Commission is of the view that, a strict approach to estimating age is not required (as would be the position generally in criminal law and where the age is an element of the offence), since proof of actual age is not required but rather the depiction of the person in the child sexual abuse material to be under the age of 18. In addition, the Commission is of the view that such proposal will serve to strengthen the court’s powers, facilitates its response and prevent unnecessary delays. The proposed clause reads as follows:

#### **Insertion of section 59A of Act 32 of 2007**

The following section is hereby inserted after section 59 in the principal Act:

#### **“59A Evidence of age of child depicted in child sexual abuse material**

(1) In criminal proceedings involving child sexual abuse material, the court may take judicial notice that the person in the child sexual abuse material is, or is depicted as being, under the age of 18.

(2) Subject to section (1), where it is disputed that the person in the child sexual abuse material is, or is depicted as being, under the age of 18, an affidavit or certificate issued pursuant to section 212(4)(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), will serve as *prima facie* proof of such age and the provisions of section 212(12) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) will find application with the necessary changes required.”.

### **3 Management of Child Sexual Abuse Material and Pornography**

6.30 A number of workshop attendees and respondents support the introduction of clause 61A to manage access to and reproduction of child sexual abuse material.<sup>425</sup> The

<sup>425</sup> Group 3 Gauteng Workshop; - Group 3 Nelspruit workshop; Delaine Naidoo, child Welfare SA:

Commission for Gender Equality expresses support for the clause as it reflects an attempt to manage the chain of custody and curb any possible abuse or corruption that might incur. However, others are of the view that it is an operational matter which should be dealt with in directives for the South African Police Service and the National Prosecuting Authority.<sup>426</sup> The view was submitted that the South African Police Service should compile a directive to prevent free access, for example a locked cupboard.<sup>427</sup> The Commission for Gender Equality points out that the directives of the National Prosecuting Authority already make provision for the safe keeping of child sexual abuse material. It contends that the same provisions should be reflected in the South African Police Service Standing Orders and National Instructions. The Commission is mindful of the argument that making unauthorised access or reproduction of the material a criminal offence may stifle investigations and prosecutions. The Commission is however of the view that it should be a criminal offence and not an administrative contravention. Safe custody of the material is in the best interest of all children and is contraband.

6.31 The view was proffered that the management of child sexual abuse material and pornography within the criminal justice system should not only be focussed on the child sexual abuse material or pornography itself. It should include the curtailment of access to or the reproduction of the content of the relevant case docket; electronic storage of contents of the case docket; and victim statements as the descriptions contained in these documents may amount to written child sexual abuse material.<sup>428</sup> The Commission is of the view that although the various methods of access to child sexual abuse material and the form in which it may be documented are not expressly stipulated i.e. victim statements, notes made the attorney of what the child said etc. it would constitute child sexual abuse material and be subjected to restriction of access. The Commission flags the need to keep plea agreements and related documentation in safe custody and is of the view that it would be more appropriate to regulate this in the directives.

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Gauteng; Dr Lynette Roux, Clinical Psychologist; Adv Vuyo Ketelo, NPA; Mafusi Lekeda, NPA/SOCA; Ms Sonkosi Lorrinda, NPA (SOCA); Ms Vatiswa Jodwana-Blayi NPA (SOCA); L Jekwa, NPA; Brendan Botha, Break-Free; Lorise Diamond, Commission for Gender Equality; Cape Town Workshop; Commission for Gender Equality.

<sup>426</sup> Job Masina; Adv T Buitendag, NPA; Sarah Buffkins, NPA; Ramutle Sikue, Child Health, National Department of Health; Nomfundo Lilyrose Mtobi, NPA; Group 3 Gauteng Workshop; Adv Vuyo Ketelo, NPA; Adv P Smith, NPA; Bertha Bresler, Stop Trafficking of People; R Kemp, Western Cape Education Department; Nomfundo Lilyrose Mtobi, NPA; Juanita Wright, and the Salvation Army.

<sup>427</sup> R Kemp, Western Cape Education Department.

<sup>428</sup> Bloemfontein workshop.

6.32 Advocate Jekwa suggests that the clause should be more specific i.e. not refer generally to all court officials who have access to the material, but only court officials assigned to the case.<sup>429</sup> The Commission for Gender Equality agrees and submits that although possession of the material should be closely monitored and guarded and access should be restricted, clause 61A should differentiate further between access by the South African Police Service, court officials (Department of Justice and Constitutional Development staff) and officials of court (prosecutors and defence attorneys). It contends that there should be a clear differentiation and procedure set out in terms of the responsibility which each organisation or institution bears. It explains by way of example that the South African Police Service is the custodian of all dockets. When the defence needs access to a docket there is a specific application that should be brought for access. The Commission is of the view that the words “police and court officials having access to . . .” are wide enough to cover the range of persons who may have access to the material and who are obligated to comply with clause 61A. Accused who represent themselves are, however, problematic as they would need a copy of the statement.

6.33 Workshop attendees at the Cape Town workshop submit that no copies of child sexual abuse material should be given to the defence and that no details of the offence should be attached to the charge sheet. All evidence should be sealed as reflected in the National Prosecuting Authority Directives and be implemented as practice.

6.34 Bertha Bresler of Stop Trafficking of People submits that the safe keeping of the material should be regulated in a directive for each government department.<sup>430</sup> A need was identified to provide for training in general to all role-players and particularly to “first responders” i.e. those who first respond to reports of child sexual abuse material or children exposed to pornography on how to manage the evidence in order to prevent unauthorised access thereto.<sup>431</sup> Other views include incorporating the safe keeping of child sexual abuse material in section 66(3A) of the Sexual Offences Act which relates to directives for the Department of Health,<sup>432</sup> and that the Department of Basic Education should be included in the inter-sectoral committee and obliged to issue directives relating to the management of

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<sup>429</sup> Adv L Jekwa, NPA.

<sup>430</sup> Endorsed by Carli van Wyk, Cause for Justice; and Sarah Buffkins, NPA.

<sup>431</sup> Alida van der Mescht, JellyBeanz.

<sup>432</sup> Ramutle Sikue, Child Health, National Department of Health; Nomfundo Lilyrose Mtobi, NPA; Juanita Wright, The Salvation Army.

sexual offences and particularly the management of child sexual abuse material in accordance with the Sexual Offences Act.<sup>433</sup>

6.35 A number of respondents are of the view that regulating access and safe-keeping to child sexual abuse material through sector directives for all role-players may provide sufficient protection.<sup>434</sup> If prima facie evidence of child sexual abuse is found then reproduction orders should be excluded and as is done with firearms, the evidence is not brought to court.<sup>435</sup> Group 4 of the Cape Town Workshop submits that members of the South African Police Service attached to Family Violence, Child Protection and Sexual Offence's Investigations (FCS), who are responsible for the investigation of serial and electronic crime (child sexual abuse material) should be tasked with handing in forensic analysis reports in court as prima facie evidence of the images instead of the images themselves. Cause for Justice agrees that a forensic report should be compiled of the evidence and not to make use of the images as evidence. It is also submitted that processes should be stipulated in the National Instructions of the South African Police Service and that the sensitivity of the matter must be taken into consideration.<sup>436</sup> Alternatively, Michelle Nel of the Sexual Offences and Community Affairs Unit in the National Prosecuting Authority suggests that it could be ordered that the material must remain with the investigating officer for safe-keeping after it is handed up as evidence and not attached to the J15.

6.36 While the Commission understands on the one hand, the motivation for proposing that forensic analysis reports be handed in as prima facie evidence instead of each of the images themselves, it is mindful that having the images in court serves the purpose of determining of the gravity of the offence for purposes of imposing an appropriate sentence. On the other hand it is understood that currently, in practice, the investigating officer views and investigates all the material. This means that the material is downloaded as a mirror image and the investigating officer views and investigates the content and submits a statement to the court. The investigating officer is tasked with explaining the severity of the images in aggravation of sentence. The Commission is therefore of the view that provision should be made for a report to serve in the place of child sexual abuse evidentiary material thereby eliminating further viewing and distribution of the material but that will also ensure that nothing will prevent the presentation of the evidentiary material if deemed necessary.

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<sup>433</sup> Group 3 Gauteng Workshop; and Ramutle Sikue, Child Health, National Department of Health.

<sup>434</sup> Sarah Buffkins, NPA; and Group 4 Cape Town Workshop.

<sup>435</sup> Group 4, Cape Town Workshop.

<sup>436</sup> Carli van Wyk, Cause for Justice; Group 4, Cape Town Workshop.

6.37 The recommended clause on the management of child sexual abuse material and pornography reads as follows:

The following section is hereby inserted after section 61 in the principal Act:

**“61A Management of Child Sexual Abuse Material and Pornography**

(1) Police and court officials having child sexual abuse material or pornography, including any devices in or upon which child sexual abuse material is or might be stored, in their custody —

- (a) must take all reasonable steps to prevent access thereto by anyone not having a right of access; and
- (b) may not reproduce any such material except for purposes of evidence in criminal proceedings.

(2) Where the Judge or judicial officer presiding at criminal proceedings in which child sexual abuse material will serve as an exhibit or as evidentiary material, is informed by the prosecutor that a report has been prepared which explains in sufficient detail the child sexual abuse material and that, if presented in evidence, it could serve to dispense with the need to present the child sexual abuse material in evidence —

- (a) the court must enquire from the legal representative of the accused if he or she consents to the report being presented in evidence in lieu of the child sexual abuse material. Where the accused consents, the police official who compiled the report must be called to give oral evidence regarding the contents of the report; and
- (b) the court may of its own motion and must, where so requested by any of the parties, call for the child sexual abuse material to be presented in evidence at any stage of the proceedings.

(3) The Judge or judicial officer presiding at criminal proceedings in which child sexual abuse material, including any devices in or upon which child sexual abuse material is stored, serves as an exhibit or evidentiary material must issue directives for purposes of ensuring the safe-keeping thereof pending the conclusion of the proceedings.”

## 4 Orders to seize, forfeit, dispose and destroy child sexual abuse material

6.38 A number of workshop attendees and respondents agree with the proposed insertion of clause 61B in the Sexual Offences Act to provide, to the extent necessary, for a court order to seize, forfeit, dispose and destroy all child sexual abuse material and the devices on which it is stored.<sup>437</sup> Advocate Buffkins of the National Prosecuting Authority, however, disagrees.<sup>438</sup> She submits that disposal and destruction orders should be made by the Director of Public Prosecutions as he or she is mandated to make the final decision regarding prosecution.<sup>439</sup> This would include forfeiture of the material and devices to the state and a decision to either wipe the material or to dispose of it in a particular manner.<sup>440</sup>

6.39 Advocate Kraftt of the National Prosecuting Authority further submits that the procedure for seizure, disposal and destruction to be followed by the South African Police Service should be contained in the National Instructions.<sup>441</sup> It is further submitted that specialised software is necessary for proper investigation and that the Police Service needs proper resources.<sup>442</sup> Captain Ndubane of the South African Police Service suggests that the timeframe in which the disposal or destruction and proof thereof needs to be provided and should be included.<sup>443</sup> However, a few respondents pointed out that the clause does not stipulate who bears the responsibility of the disposal or destruction of the material or devices.<sup>444</sup> The Cape Town workshop participants suggest that the evidence and devices should be forfeited to the state and that the National Instructions should stipulate that it is the responsibility of the police.<sup>445</sup> Group 3 of the Gauteng workshop suggest that standing operational procedures should be issued for the National Prosecuting Authority and the South African Police service to facilitate destruction and disposal.<sup>446</sup> The Western Cape

<sup>437</sup> Group 3 Gauteng Workshop; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Adv Vuyo Ketelo, NPA; Ms Vatiswa Jodwana-Blayi NPA (SOCA); L Jekwa, NPA; Adv Dorcas Shabangu, NPA (SOCA); Brendan Botha, Break-Free

<sup>438</sup> Sarah Buffkins, NPA; endorsed by Dr Lynette Roux, Clinical Psychologist.

<sup>439</sup> Sarah Buffkins, NPA; and Nomfundo Lilyrose Mtobi, NPA.

<sup>440</sup> Sarah Buffkins, NPA.

<sup>441</sup> Sarah Buffkins, NPA

<sup>442</sup> JE Kraftt, NPA; and Sarah Buffkins, NPA.

<sup>443</sup> Endorsed by Adv Dorcas Shabangu, NPA (SOCA); Adv PB Nkosi, NPA; and Group 3 Nelspruit workshop.

<sup>444</sup> Juanita Wright, The Salvation Army; Advocate Nomfundo and Lilyrose Mtobi, NPA.

<sup>445</sup> Group 4, Cape Town Workshop.

<sup>446</sup> Endorsed by Juanita Wright, and the Salvation Army.

Education Department submits that the procedure should be clarified in national multi-disciplinary instructions.<sup>447</sup> Further that, an integrated course should be developed for all role-players with a view to empowering first responders.<sup>448</sup>

6.40 A number of respondents question what is to happen in the case of an appeal<sup>449</sup> and prescription.<sup>450</sup> Advocate Nel questions what is to happen where a case is not enrolled and she may wish to prosecute later. Group 4 of the Gauteng workshop further questions the consequences of destroying data where another case appears at a later stage with the same data as before and is needed for purposes of that case. Participants at the Cape Town workshop further question what measures would be in place to accommodate files that go missing, necessitating reconstruction of the docket and whether reproduction of electronic evidence to provide for use on the docket and court file should be allowed. They refer to cases where images are contained on flash drives and whether the prohibition on reproduction would find application in these circumstances. They submit that not all courts are equipped with audio visual equipment and this may lead to practical implications.<sup>451</sup> The Commission for Gender Equality submits that while it comprehends the purpose of the proposed clause, it should be instituted with great care as it may give rise to civil claims and may defeat the ends of justice. It submits that in instances where cases are withdrawn, and an application is brought by the prosecution to confiscate or dispose of such material, the case may not be instituted again even if there is later sufficient cause or evidence to do so, due to the disposal of the material. It further submits that this section also poses a danger in terms of record keeping as evidence that formed part of the prosecution will be destroyed should a convicted accused wish to take the matter on appeal. It believes that the disposal and destruction of evidence of child sexual abuse material and the devices it is stored on should be dealt with in a circumspect manner.

6.41 JellyBeanz suggests that the police should be obliged to “write a report on ALL the findings and then destroy the evidence”.<sup>452</sup> Cause for Justice submits that by requiring the

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<sup>447</sup> R Kemp, Western Cape Education Department.

<sup>448</sup> R Kemp, Western Cape Education Department.

<sup>449</sup> Group 3 Gauteng; Sarah Buffkins, NPA; Group 4 Gauteng Workshop; and the Commission for Gender Equality.

<sup>450</sup> Sarah Buffkins, NPA; and the Cape Town Workshop.

<sup>451</sup> Cape Town Workshop.

<sup>452</sup> Alida van der Mescht, JellyBeanz endorsed by Advocate Sarah Buffkins, NPA; and Bertha Bresler, Stop Trafficking of People.

making of a forensic report the evidence can be destroyed.<sup>453</sup> The manner and extent of the disposal or destruction of the material or device should be stipulated. For example, specifying that content should be wiped and the mechanism to be destroyed.<sup>454</sup> Bertha Bresler submits that the report should describe what percentage of images or videos are child sexual abuse material and the decision by the Director of Public Prosecutions on whether or not to prosecute. Brendan Botha of Break Free submits that consideration could be given to the storing of confiscated or seized items until an order is issued. Being mindful of space he suggests that the items should not be stored but the data on them.

6.42 Based on the expert advice of its advisory committee of experts the Commission recommends that devices on which child sexual abuse material are stored (data storage mediums, CDs etc.) should be destroyed. It has been advised that deleting, formatting or wiping the memory of the device will not prevent recovery thereof. Due to the nature of the material contained therein the item is forfeited to the State in terms of section 35 of the Criminal Procedure Act.

6.43 The Commission considered the submissions received and agrees that a careful approach is required. The proposed clause has therefore been amended, with further recommendations made regarding administrative processes in the section 66 amendment provisions and the schedules proposed. The recommended clause relating to an order to seize, forfeit, dispose of or destroy child sexual abuse material and pornography and the devices in which it is contained has therefore been amended and reads as follows:

**“61B Orders to keep secure, remove, disable access to, dispose of and destroy child sexual abuse material**

(1) Upon the conclusion of the criminal proceedings, whether the accused is convicted or acquitted of any offence in terms of this Act that involves child sexual abuse material, the Judge or presiding magistrate, after having provided the prosecutor and accused an opportunity to address the court, —

(a) must make an order regards the management of the court record by the Clerk of the court, if the order is made by a magistrate, or by the Registrar of the

<sup>453</sup> Endorsed by Bertha Bresler, Stop Trafficking of People.

<sup>454</sup> Carli van Wyk, Cause for Justice.

High Court if the order is made by a Judge.

- (b) must make an order regards the management of any such child sexual abuse material or devices that served as evidence in the proceedings pending appeal and or review proceedings, including the manner of disposal and destruction thereof upon finalisation or abandonment of appeal or review proceedings.
- (c) may, upon application by the prosecutor, make an order that the police official charged with the investigation must destroy any part of, or all child sexual abuse material or any device upon which material is stored that had not been used as evidence in the proceedings and to provide the court with an affidavit to this effect, which affidavit shall be part of the court record.
- (d) must, where so justified by the evidence, direct the police official charged with the investigation to take the required steps for purposes of having any such material hosted by electronic communications service providers removed and access thereto disabled.”

## **5 Multi-sectoral management of child sexual abuse material and the exposure of children to pornography**

6.44 The recommendation by the Commission in its Report on Sexual Offences<sup>455</sup> for the establishment of a national strategy for multi-disciplinary intervention relating to sexual offences was legislated for in sections 62 to 65 of the Sexual Offences Act which provides for a national policy framework. In terms of section 62 the Ministries of Justice and Correctional Services; Police; Social Development and Health and the National Director of Public Prosecutions are enjoined to adopt a national policy framework, relating to all matters dealt with in the Sexual Offences Act, to –

- (a) ensure a uniform and co-ordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences;
- (b) guide the implementation, enforcement and administration of this Act; and
- (c) enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources.<sup>456</sup>

<sup>455</sup> SALRC Sexual Offences Report (2002) par 9.2.1 at p300.

<sup>456</sup> Section 62(1)(a) – (c).

6.45 Section 63 of the Sexual Offences Act establishes an Inter-sectoral Committee for the Management of Sexual Offence Matters. The proposals made in the discussion paper to include the Director-General: Department of Basic Education in the Inter-sectoral Committee in Section 63(2)<sup>457</sup> and as one of the departments to be consulted in the development of National Instructions and Directives in subsections 66(1);<sup>458</sup> 66(2);<sup>459</sup> and 66(3)<sup>460</sup> aimed at the management of sexual offences by the National Commissioner of the South African Police Service; the National Director of Public Prosecutions and the Director-General: Health was widely welcomed. Cause for Justice voiced the opinion of all workshop attendees and respondents in its submission endorsing a national unified strategy involving close co-operation and collaboration between government, industry and organisations, and all other role-players, is vital.<sup>461</sup>

6.46 The proposed corresponding obligation placed on the Director-General of Basic Education in clause 66(3B)<sup>462</sup> to issue directives for all educators and relevant persons

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<sup>457</sup> Proposal supported by Ms Vatiswa Jodwana-Blayi NPA (SOCA); Adv Vuyokazi Xalisa, NPA; Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Dories B Sithole-Nkosi, SAPS; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Instructions – Christa du Plessis; Magda Marais; Tracy Keen-Horak; Siphon Mkhonza, NPA; Group 3 Gauteng; National Commissioner of the South African Police Service; Adv Robbertse, Department of Justice and Constitutional Development; Commission for Gender Equality; and Cause for Justice.

<sup>458</sup> Proposal supported by Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Mlondolozzi Vava, CGE; Instructions – Christa du Plessis; Magda Marais; Tracy Keen-Horak; Siphon Mkhonza, NPA; Commission for Gender Equality; Cause for Justice; and Adv Robbertse, Department of Justice and Constitutional Development.

<sup>459</sup> Proposal supported by Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Mlondolozzi Vava, CGE; – Christa du Plessis; Magda Marais; Tracy Keen-Horak; Siphon Mkhonza, NPA; Commission for Gender Equality; Cause for Justice; and Adv Robbertse, Department of Justice and Constitutional Development.

<sup>460</sup> Proposal supported by Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Mlondolozzi Vava, CGE; Christa du Plessis; Magda Marais; Tracy Keen-Horak; Siphon Mkhonza, NPA; Commission for Gender Equality; Cause for Justice; and Adv Robbertse, Department of Justice and Constitutional Development.

<sup>461</sup> This approach is supported in the Department of Social Development's National Child Care and Protection Policy (2019).

<sup>462</sup> Proposal supported by Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Commission for Gender Equality; Cause for Justice; and Major General Linda, South African Police Service.

dealing with sexual offence cases within its jurisdiction;<sup>463</sup> in clause 66(1)(a)<sup>464</sup> for the Director-General of Justice and Constitutional Development to issue directives in respect of the management of sexual offence cases, including the manner in which court records are dealt with, disposed of or destroyed;<sup>465</sup> and in clause 66(3A)<sup>466</sup> for the Director-General of Social Development as part of the Inter-sectoral Committee to issue directives relevant to the Sexual Offences Act<sup>467</sup> also found resounding support.<sup>468</sup>

6.47 Delaine Naidoo<sup>469</sup> suggests that in order to avoid repetition of the names of the departments referred to in sections 62 to 66 and particular in section 66 that the “Inter-sectoral Committee” could be defined and that thereafter reference would only need to be made to it. Dr Lynette Roux suggests that reference be made to all departments and not only those who are part of the Inter-sectoral Committee. The Commission is of the view that while the repetition of the names of the departments presented in the Committee seems repetitive in the subsections in section 66, the proximity of the names and the sequence and manner in which this is done is not identical. Each member must “in consultation” with the applicable Ministry and “after consultation” with the remaining members of the Committee issue instructions or directives as the case may be. For this reason the Commission does not support substituting the cluster of names in the subsections with the term “Inter-sectoral Committee”.

6.48 In order to provide an overview of the framework presented below a summary of the approach followed in reviewing sections 62 to 66 of the Sexual Offences Act follows. Scrutiny of the content of the subsections contained in section 66 revealed that there is

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<sup>463</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.87.

<sup>464</sup> Proposal supported by Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; Slie Thwala, DoJ&CD; Mlondolozzi Vava, CGE; Commission for Gender Equality; Cause for Justice; and Major General Linda, South African Police Service.

<sup>465</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.89.

<sup>466</sup> Proposal supported by Group 1 Gauteng Workshop; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Magda Marais, NPA; Brendan Botha, Break-Free; Mlondolozzi Vava, CGE; Commission for Gender Equality; Cause for Justice; and Major General Linda, South African Police Service.

<sup>467</sup> SALRC Sexual Offences Discussion Paper (2019) par 6.91.

<sup>468</sup> The need for embracing a developmental child care and protection approach is emphasized in the Department of Social Development’s National Child Care and Protection Policy (2019) 20.

<sup>469</sup> Delaine Naidoo, Child Welfare SA: Gauteng, endorsed by Dr Lynette Roux, Clinical Psychologist.

significant repetition in terms of the areas identified for officials who are tasked with matters related to sexual offences within the context of the mandate of the identified departments. The manner in which the identified areas are captured has also been identified as hard to engage with. The Commission has considered and deliberated on all submissions made in respect of the framing of these subsections. It has heeded the recommendation that uniform areas such as multi-sectoral training, screening and preventative programmes should be clustered together in section 65 and that section 66 needs to be streamlined to avoid unnecessary repetition.<sup>470</sup>

6.49 The Commission presents a Bill attached to this report which contains the legislative recommendations made in this report. The Bill contains two options in respect of the review of section 66. The first and the Commission's preferred option is to streamline the subsections of section 66 by retaining only the introductory obligations placed on the relevant Inter-sectoral committee members and delinking the open list of all matters which are reasonably necessary or expedient to dealing with sexual offence matters in dedicated schedules attached to the Bill. The second option amends the relevant subsection in section 66 by augmenting the list in the particular subsection. This makes the structure of section 66 even more cumbersome than what it is. It is anticipated that if the preferred option contained in the first option of the Bill is followed that the inclusion of dedicated schedules in the Sexual Offences Act for each member of the augmented Inter-sectoral committee will bring about a dedicated revision of all existing instructions and directives by committee members and provide structure for the development of new directives for new members.

6.50 This revision of the National Policy Framework aligns with the recommendation contained in the most recent general comment by the UN Committee on the Rights of the Child<sup>471</sup> in which states parties:

are called upon to take legislative and administrative measures to protect children from violence in the digital environment, including the regular review, updating and enforcement of robust legislative, regulatory and institutional frameworks that protect children from recognized and emerging risks of all forms of violence in the digital environment.

And that:

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<sup>470</sup> This recommendation is supported by the recommendations contained in the ECPAT International The Landscape of Sexual Exploitation (2019).

<sup>471</sup> United Nations Convention on the Rights of the Child General comment No.25(2021) on children's rights in relation to the digital environment 2 March 2021 par 82.

States parties should implement safety and protective measures in accordance with children's evolving capacities.<sup>472</sup>

**(a) Substitution of subsection 63(2) of the Sexual Offences Act: expansion of the Inter-sectoral committee**

6.51 The National Commissioner of the South African Police Service welcomed the proposal that the Department of Basic Education be included as one of the role-players in educating children on sex education. The National Commissioner is of the view that some children might find it easier to ask about sex education questions from their teachers than asking their parents. It is further of the view that it is imperative that teachers be equipped to deal with matters of this nature, as some parents may find it difficult to speak about sex to their children and also to warn and protect children about the dangers of child sexual abuse material.

6.52 Respondents submitted that the Department of Communications and Digital Technologies should be included in the Inter-sectoral Committee and that corresponding obligations should be placed on it to issue directives in respect of child sexual abuse material.<sup>473</sup> Advocate Xalisa suggested that the directives should extend to the South African Broadcasting Corporation (SABC) and other media companies.<sup>474</sup> Respondents also suggested that in addition to the inclusion of the Department of Communications and Digital Technologies (which oversees the Film and Publication Board), the Department of Higher Education and Training should be included to cater for early school leavers who find themselves, while under the age of 18, attending Further Education and Training (FET) and similar facilities.<sup>475</sup> While no submissions were received in reply to the question whether the Department of Correctional Services should be obliged to issue directives in terms of the Sexual Offences Act, the Commission is of the view that the Department of Correctional Services may have a considerable role to play for purposes of the proposed prescribed pre-sentence report and the proposed monitoring of any order made subsequent to conviction, sentencing and release.

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<sup>472</sup> United Nations Convention on the Rights of the Child General comment No.25(2021) on children's rights in relation to the digital environment 2 March 2021 par 82.

<sup>473</sup> Kerry Oosthuizen, Commission for Gender Equality; and Adv Vuyokazi Xalisa, NPA.

<sup>474</sup> Adv Vuyokazi Xalisa, NPA.

<sup>475</sup> Brendan Botha, Break-Free; Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; Slie Thwala, DoJ&CD; Mlondolozzi Vava, CGE; Delaine Naidoo, child Welfare SA: Gauteng; Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; and Mlondolozzi Vava, Commission for Gender Equality.

6.53 The Department of Correctional Services may also have a role relating to child sexual abuse material matters regarding parole processes, including where victims may or are called to make submissions to the parole board. Furthermore, matters relating to sexual offences including child sexual abuse material stand to be managed within correctional facilities. Anecdotal reports of accessing and dissemination of child sexual abuse material from within correctional facilities would need to be dealt with if it occurs. Contraband, including mobile devices is routinely confiscated in correctional facilities around the world.<sup>476</sup> South Africa is unfortunately no different.<sup>477</sup> The Commission is of the view that an obligation should be placed on the National Commissioner of Correctional Services to issue directives on its obligations in respect of sexual offence matters.

6.54 The recommended amendment to section 63(2) of the Sexual Offences Act reads as follows:

Section 63(2) is substituted by the following subsection:

- “(2) The Committee must **[shall]** consist of —
- (a) the Director-General: Justice and Constitutional Development, who will **[shall]** be the chairperson of the Committee;
  - (b) the National Commissioner of the South African Police Service;
  - (c) the National Commissioner of Correctional Services;
  - (d) the Director-General: Social Development;
  - (e) the Director-General: Health; **[and]**
  - (f) the National Director of Public Prosecutions[.] ;
  - (g) the Director-General: Department of Basic Education;
  - (h) the Director-General: Department of Higher Education and Training;  
and

<sup>476</sup> The Namibian Broadcasting Corporation recently reported that “the Namibia Correctional Service confiscated contraband including 38 mobile phones, 19 parcels of drugs including dagga, Mandrax and cocaine and 44 cases of tobacco”. Namibian Broadcasting Corporation “Correctional Services confiscates cellphones and drugs” 13 April 2021 available at <https://nbc.na/news/correctional-services-confiscate-cellphones-and-drugs.44843> Accessed on 20 April 2021.

<sup>477</sup> Madhomu B “Stash of illegal items confiscated in raids at Goodwood prison” Cape Town etc 30 March 2021 available at <https://www.capetownetc.com/news/stash-of-illegal-items-confiscated-in-raids-at-goodwood-prison/> Accessed on 20 April 2021. It was reported that “some of the items seized were 12 cellphones with SIM cards, various sharp objects, cash, dagga, tip and mandrax”.

(j) the Director-General: Department of Communications and Digital Technologies.”;

**(b) Insertion of subparagraph 65(1)(e) of the Sexual Offences Act: screening policies and debriefing programmes**

6.55 A number of respondents agreed with the addition of subparagraph 65(1)(e) that screening policies and debriefing programs should be provided by the state.<sup>478</sup> Advocate Marais<sup>479</sup> submits that more support resources, screening policies and feedback are necessary. She further submits that the Department of Health and the Department of Social Development should allocate role responsibility in the provision of assessments of mentally impaired victims.

6.56 Ramutle Sikue of Child Health: National Department of Health submits that a clearance certificate in respect of the National Register for Sex Offenders should be issued for all officials/employees providing screening and debriefing to children. Further that, there should be uniform guidelines across all departments, including the Department of Transport and the Department of Tourism in respect of children and that they should be trained in sign language.<sup>480</sup>

6.57 Group 4 of the Nelspruit workshop submit that:

- All organs of state to ensure that clearance certificates are applied for persons dealing with SO or CSAM matters;
- Copy of clearance certificate to be place on a personnel file;
- Directives to include what measures / steps to be taken against Departments not adhering to the Directives / Standing order/ Instructions.<sup>481</sup>

6.58 Cause for Justice points out that although reference is made to the United Nations Convention on the Rights of the Child Committee’s (“UNCRC Committee”) directive to South Africa to take specific measures to prevent and tackle online commercial sexual exploitation

<sup>478</sup> Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist (very important); Nicola Arend; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Ramutle Sikue, Child Health, National Department of Health; and Brendan Botha, Break-Free.

<sup>479</sup> Magda Marais, NPA.

<sup>480</sup> Delaine Naidoo, child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Nicola Arend; and Group 4 Gauteng Workshop.

<sup>481</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Siphon Mkhonza, NPA (Group 4 Nelspruit).

and abuse, the focus in the directives contained in the proposals are only on aftercare and do not touch on equally necessary preventative measures. It therefore recommends the inclusion of measures in relation to a wider societal response to prevent exposure to child sexual abuse material and/or pornography (and other preventative measures).<sup>482</sup>

6.59 After due consideration the Commission is of the view that a generic obligation on the state to provide multi-sectoral training, screening policies, prevention programmes, debriefing, and guidance on the securing of child sexual abuse material to all employees who manage, are exposed to, or investigate cases involving sexual offences should be consolidated in clause 65(1)(e). The Commission is mindful that a number of the additions go broader than child sexual abuse material. For example, prevention programmes include child sexual abuse material but in context relate to all sexual offences. The recommended insertion provides as follows:

Section 65 of the principal Act is hereby amended by —

(a) the insertion after subparagraph (d) of subsection (1) of the following subparagraph:

“(e) ensuring the different organs of state provide for —

(i) appropriate and relevant training, including intra- and intersectoral training, on how to respond to and manage allegations and convictions of sexual offences as part of its curricula, in-service and continuous training;

(ii) appropriate screening policies;

(iii) prevention programmes relating to sexual offences;

(iv) debriefing programmes including a focussed child sexual abuse material debriefing programme;

(v) the manner in which any child sexual abuse material is kept secured to prevent unauthorised access, possession, reproduction and distribution, or loss or damage thereof; and

(vi) the manner in which inter-sectoral consultations to enhance the investigation, management and safety of the victim and family should take place

for all employees who may manage, be exposed to or investigate cases involving

<sup>482</sup>

Cause for Justice.

<u>sexual offences.”;</u>
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**(c) Insertion of subparagraph 66(1)(a)(vii) of the Sexual Offences Act: South African Police Service National Instructions - investigation**

6.60 A number of respondents agree to the insertion of subparagraph 66(1)(a)(vii).<sup>483</sup> The involvement of other role-players in respect of victim protection (victim support) was emphasised.<sup>484</sup> Including the Department of Basic Education and the Department of Communications and Digital Technology in this regard was particularly seen as a positive step.<sup>485</sup> Workshop attendees and respondents alike submit that adequate resources are necessary for the police to implement the National Instructions dealing with child sexual abuse material specifically and sexual offences against children broadly<sup>486</sup> and that resources should be allocated to specific departments that deal with reports related to child sexual abuse material.<sup>487</sup>

6.61 Some respondents are of the view that timeframes should be included<sup>488</sup> and that the police should act immediately.<sup>489</sup> The view was expressed that the instructions should include Key Performance Areas for the South African Police Service.<sup>490</sup>

6.62 Dr Lynette Roux submits that it should be emphasised that the role of the police is not to decide whether or not to investigate. Cause for Justice submits that the procedures dealing with child sexual abuse material need to be specific.<sup>491</sup> However, the National Commissioner of the South African Police Service points out that the wording “the manner in which these offences are to be investigated including the manner of search and seizure and

<sup>483</sup> Delaine Naidoo, Child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; and Mlondolozzi Vava, Commission for Gender Equality.

<sup>484</sup> Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; and Slie Thwala, DoJ&CD.

<sup>485</sup> Sarah Buffkins, NPA; and Kerry Oosthuizen, Commission for Gender Equality.

<sup>486</sup> Bertha Bresler, Stop Trafficking of People; Nomfundo Lilyrose Mtobi, NPA; and Sarah Buffkins, NPA.

<sup>487</sup> Sarah Buffkins, NPA.

<sup>488</sup> Delaine Naidoo, Child Welfare SA: Gauteng; Group 4 Gauteng Workshop; Dr Lynette Roux, Clinical Psychologist; and Nicola Arend.

<sup>489</sup> MJ Makgwatha, DPP PTA.

<sup>490</sup> Mlondolozzi Vava, Commission for Gender Equality.

<sup>491</sup> Carli van Wyk, Cause for Justice.

undercover operations” speaks to investigation methods. It is submitted that the disclosure of investigative techniques and procedures in the public domain will seriously jeopardise the effectiveness of investigations of this nature and may be used by perpetrators to conceal their offences. This will certainly not be in the interest of victims and will undermine effective investigations. The Commission has reworded the phrase to allow for the development of standard operating procedures which are not available to the public. It, however, emphasises that the National Instruction, which addresses sexual offences and the National Instruction on exhibits should be revisited and amended to include procedures specifically focusing on the policing of the crimes relating to child sexual abuse material. The National Instruction on debriefing must also be revisited to focus on members exposed to child sexual abuse material and sexual offences in the course of performing their duties.

6.63 The Commission is mindful of the tabling of the Judicial Matters Amendment Bill 2 July 2018 which seeks to amend section 66 of the Sexual Offences Act to stipulate the manner in which police officials must deal with child pornography, in order to ensure the confidentiality of, and disposal of such material; and the manner in which prosecutors and other officials in the national prosecuting authority must deal with child pornography, in order to ensure the confidentiality of, and disposal of such material. As this Bill has not been promoted in Parliament yet, clauses to this effect have been included in the proposed draft Bill.

6.64 Bertha Bresler of Stop Trafficking of People reflects that the workload of police officials dealing with these matters is immense. The importance of personal and confidential debriefing of all personnel dealing with (and/or exposed to) and or responsible for the investigations of sexual offences and child sexual abuse material was highlighted.<sup>492</sup> The Commission supports the view that personal professional debriefing should be done at least twice a year (but not limited to that if needed).<sup>493</sup>

6.65 Some respondents are of the view that the items addressed in this subparagraph should be presented as a list as the collection thereof in one paragraph is convoluted.<sup>494</sup> The Commission agrees and has expanded the proposal into a list.

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<sup>492</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Sipho Mkhonza, NPA (Group 4 Nelspruit).

<sup>493</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Sipho Mkhonza, NPA (Group 4 Nelspruit).

<sup>494</sup> Nomfundo Lilyrose Mtobi, NPA; Sibusiso Biyela, Office of the Premier, KZN; Mlondolozu Vava, Commission for Gender Equality; Slie Thwala, DoJ&CD; and Lungile Masuku, FAMSA PMB.

6.66 The Commission endorses the recommendation by ECPAT that South Africa becomes a member of the Victim Identification Data Base.<sup>495</sup> The Commission further recommends that section 66(1)(a) of the Sexual Offences Act be amended to include the Departments of Basic Education, Higher Education and Training, and Communications and Digital Technologies and that it should be accompanied by the proposed Schedules 1 to the Sexual Offences Act. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 1, reads as follows:

Section 66 of the principal Act is hereby amended —

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

**Option 1**

“(a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Police and after consultation with the Minister, the National Director of Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health [and], Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, issue and publish in the *Gazette* national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including those listed in Schedule 1 of the Act **[the following:**

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;**
- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an**

<sup>495</sup> Launch of ECPAT Briefing Paper on Sexual Exploitation of Children in South Africa, 29 October 2019.

- (iii) investigation in respect of a sexual offence may be discontinued; the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality;
- (vi) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results; and
- (vii) the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).;]

**“Schedule 1**

**SOUTH AFRICAN POLICE SERVICE**

**(Section 66(1)(a))**

1. The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials.
2. The manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible
3. The manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued.
4. The manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).
5. The manner in which police officials must act to give effect to aspects

covered in Chapter 5 – Services to victims of sexual offences and compulsory HIV testing of alleged sex offenders—

- (a) The circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (b) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- (c) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality; and
- (d) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results.

6. The manner in which police officials must act in reports of alleged cases involving child sexual abuse material and pornography:

- (a) The expediency with which police officials are to react to the reporting of these cases;
- (b) the manner in which these offences are to be investigated including the steps to be taken to have any child in the child sexual abuse material identified and traced;
- (c) the manner in which the child victim is to be provided protection, whether identified or not;
- (d) the manner of search for and seizure of evidence;
- (e) the manner in which the child sexual abuse material or pornography should be kept in safe custody, stored and or disposed of; and
- (f) the manner in which effect will be given to court orders relating to the evidence.

7. The development and implementation of a standard operating procedure to determine the manner in which:

- (a) Undercover operations relating to sexual offences including those sexual offences involving child sexual abuse material must be conducted;

- (b) the circumstances, expediency and the manner in which an electronic communications service provider is to be instructed not to take steps to prevent access to the child sexual abuse material by any person, the steps to be taken and the reasonable period within which this is to occur; and
- (c) the service provider is to be instructed to take steps to prevent access after a request not to do so.

## **Option 2**

“(a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Police and after consultation with the Minister, the National Director of Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health [and], Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, issue and publish in the *Gazette* national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;
- (ii) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;
- (iii) the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- (iv) the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- (v) the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to

- ensure confidentiality;
- (vi) the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results;**[and]**
- (vii) the manner in which police officials must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)**[.]**;
- (viii) The manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible
- (ix) The manner in which police officials must act in reports of alleged cases involving child sexual abuse material and pornography:
- (aa) The expediency with which police officials are to react to the reporting of these cases;
- (bb) The manner in which these offences are to be investigated including the steps to be taken to have any child in the child sexual abuse material identified and traced;
- (cc) The manner in which the child victim is to be provided protection, whether identified or not;
- (dd) The manner of search for and seizure of evidence;
- (ee) The manner in which the child sexual abuse material or pornography should be kept in safe custody, stored and or disposed of; and
- (ff) The manner in which effect will be given to court orders relating to the evidence.
- (x) The development and implementation of a standard operating procedure to determine the manner in which:
- (aa) Undercover operations relating to sexual offences including those sexual offences involving child sexual abuse material must be conducted;
- (bb) The circumstances, expediency and the manner in which an electronic communications service provider is to be instructed not to take steps to prevent access to the child sexual abuse material by any person, the steps to be taken and the reasonable period within which this is to occur; and

(cc) The service provider is to be instructed to take steps to prevent access after a request not to do so.”

**(d) Insertion of subparagraph 66(2)(a)(x) of the Sexual Offences Act:  
National Director of Public Prosecutions: Directives – referral to a  
probation officer and diversion**

6.67 A number of workshop attendees and respondents agree to the formulation of this subparagraph.<sup>496</sup> Some respondents, however, indicate that they do not agree with the formulation<sup>497</sup> and that it should be broken down into bullet form or into a list for easier reading and interpretation.<sup>498</sup> The need for a timeline for finalising the case was also emphasised.<sup>499</sup>

6.68 It was submitted that experienced prosecutors<sup>500</sup> should deal with these matters and that the manner in which it is dealt with should be expedient.<sup>501</sup> Bertha Bresler of Stop Trafficking of People reiterates that the workload of prosecutors is immense and that the forensic report should be used to present the evidence with the actual material only being viewed in exceptional circumstances. It was submitted that debriefing should also be available to prosecutors and all personnel dealing with or exposed to these matters.<sup>502</sup> Furthermore, that this debriefing (internal or external) should be compulsory, be done at least twice a year (more if necessary), and that attendance should be confirmed by a service provider.<sup>503</sup>

6.69 It was further submitted that the prosecutor dealing with the matter should apply for an order detailing the safe custody of the child sexual abuse material pending the finalisation

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<sup>496</sup> Delaine Naidoo, Child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; and Brendan Botha, Break-Free.

<sup>497</sup> Mlondolozzi Vava, Commission for Gender Equality; and Dr Lynette Roux, Clinical Psychologist.

<sup>498</sup> Slie Thwala, DoJ&CD; and Lungile Masuku, FAMSA PMB.

<sup>499</sup> Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; and Mlondolozzi Vava, Commission for Gender Equality.

<sup>500</sup> Sibusiso Biyela, Office of the Premier, KZN.

<sup>501</sup> Slie Thwala, DoJ&CD.

<sup>502</sup> Magda Marais, NPA.

<sup>503</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Sipho Mkhonza, NPA (Group 4 Nelspruit).

of the matter in court and that the prosecutor is to apply for an order regarding the final disposal of the child sexual abuse material after finalisation of matter.<sup>504</sup>

6.70 A proposal was made to include the criteria for diversion in respect of self-generated child sexual abuse material i.e. it should be referred to a probation officer in terms of section 9 of the Child Justice Act when it is shown to other children by the child or is material of other children.<sup>505</sup> The Commission consequently included the following item in the list for prosecutors so as to accommodate the comment received from Professor Skelton:

the criteria, including factors relating to power and age differentials, to be used in exercising the discretion whether to refer the child to the probation officer, in respect of section 19D.

6.71 The Commission recommends that section 66(2)(a) of the Sexual Offences Act be amended to include the Departments of Basic Education, Higher Education and Training, and Communications and Digital Technologies and that it should be accompanied by the proposed Schedule 2 to the Sexual Offences Act. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 2, reads as follows:

Section 66 of the principal Act is hereby amended —

(b) the substitution in subsection (2) for paragraph (a), by the following paragraph:

**Option 1**

“(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health [and], Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies, issue and publish in the *Gazette* directives regarding all matters which are reasonably

<sup>504</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Sipho Mkhonza, NPA (Group 4 Nelspruit).

<sup>505</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Sipho Mkhonza, NPA (Group 4 Nelspruit).

necessary or expedient to be provided for and which must be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including those listed in Schedule 2 of the Act [the following:

- (i) **The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;**
- (ii) **the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;**
- (iii) **the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provide for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;**
- (iv) **the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;**
- (v) **the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family;**

- (vi) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16(2), dealing with consensual sexual violation with a child with the view to ensuring uniformity;
- (vii) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 38(1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity;
- (viii) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant; and
- (ix) . . .
- (x) the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).];

## Schedule 2

### THE NATIONAL DIRECTORATE OF PUBLIC PROSECUTIONS

#### (Section 66(2)(a))

1. The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped.
2. The manner in which protection is provided to the victim, whether identified or not, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.
3. The manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible,

including:

- (a) The criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;
  - (b) the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provide for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;
  - (c) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
  - (d) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family.
4. The criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16(2), dealing with consensual sexual violation with a child with the view to ensuring uniformity.
  5. The criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute

a prosecution contemplated in section 38(1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity.

6. The information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the victim and relevant others.
7. The manner in which aspects relating to cases involving child sexual abuse material must be dealt with, including:
  - (a) The circumstances in which ancillary orders provided for in s56A(5) are to be sought and the steps to be taken for purposes of securing the required report.
  - (b) the criteria, including factors relating to power and age differentials, to be considered in respect of section 19D.
  - (c) the manner in which sexual offence cases involving child sexual abuse material must be dealt with, kept in custody, stored and/or disposed of when:
    - (i) A case docket is received from a member of the South African Police Service for consideration for prosecution;
    - (ii) a case is serving before court during the trial;
    - (iii) a case is concluded in court;
    - (iv) when a request for access to the material is received from the defence.
8. The criteria to be used and circumstances in which the diversion of a child accused of a sexual offence involving child sexual abuse material or pornography should be considered and the appropriate conditions of diversion.

## **Option 2**

“(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health [and], Social Development, Basic Education, Higher Education and Training and

Communications and Digital Technologies, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

- (i) The manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
- (ii) the criteria to be used and circumstances in which the prosecution must apply to court for an order that witnesses and, in particular, child complainants below the age of 16 years give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977, if the court does not make an order on its own initiative in terms of subsection (2)(a) of that section or an application in terms of subsection (2)(b) of that section is not made;
- (iii) the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provide for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;
- (iv) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
- (v) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family;

- (vi) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 16(2), dealing with consensual sexual violation with a child with the view to ensuring uniformity;
- (vii) the criteria to be used, circumstances and manner in which Directors of Public Prosecutions should authorise and institute a prosecution contemplated in section 38(1), dealing with the ascertainment of the HIV status of an alleged offender or disclosure of the results of any HIV tests, with the view to ensuring uniformity;
- (viii) the information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant; **[and]**
- (ix) . . .
- (x) the manner in which prosecutors must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (xi) the manner in which protection is provided to the victim, whether identified or not, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.
- (xii) the manner in which respectful and supportive services are provided to the victim; the rights of the victim to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible;
- (xiii). the manner in which aspects relating to cases involving child sexual abuse material must be dealt with, including:
  - (aa) The circumstances in which ancillary orders provided for in section 56A(5) are to be sought and the steps to be taken for purposes of securing the required report.
  - (bb) the criteria, including factors relating to power and age differentials, to be considered in respect of section 19D.
  - (cc) the manner in which sexual offence cases involving

child sexual abuse material must be dealt with, kept in custody, stored and/or disposed of when:

(aaa) A case docket is received from a member of the South African Police Service for consideration for prosecution;

(bbb) a case is serving before court during the trial;

(ccc) a case is concluded in court; or

(ddd) when a request for access to the material is received from the defence; and

(xiv). the criteria to be used and circumstances in which the diversion of a child accused of a sexual offence involving child sexual abuse material or pornography should be considered and the appropriate conditions of diversion.”;

**(e) Insertion of subparagraph 66(3)(a)(vi) of the Sexual Offences Act:  
Department of Health – determination of age**

6.72 A number of workshop attendees and respondents supported the inclusion of this subparagraph and the assistance with determining age.<sup>506</sup> The view was held that the Department of Health should determine the need for and provide psychological support services where needed.<sup>507</sup> Delaine Naidoo<sup>508</sup> submits that the Department of Social Development and Department of Health should jointly ensure immediate therapeutic services. In turn, it was submitted that debriefing should also be available to all personnel dealing with or exposed to these matters.<sup>509</sup> Furthermore, that this debriefing (internal or external) should be compulsory; be done at least twice a year (more if necessary); and that attendance should be confirmed by a service provider.<sup>510</sup>

6.73 Alida van der Mescht of JellyBeanz comments that training should be provided on how to appropriately deal with child victims of sexual abuse. In order to provide uniformity

<sup>506</sup> Ms Vatiswa Jodwana-Blayi NPA (SOCA); Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Mlondolozzi Vava, CGE; Christa du Plessis; Magda Marais; Tracy Keen-Horak; Sipho Mkhonza, NPA; and Nomfundo Lilyrose Mtobi, NPA.

<sup>507</sup> Lungile Masuku, FAMSA PMB; Slie Thwala, DoJ&CD; and Mlondolozzi Vava, CGE.

<sup>508</sup> Child Welfare SA: Gauteng.

<sup>509</sup> Magda Marais, NPA.

<sup>510</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Sipho Mkhonza, NPA (Group 4 Nelspruit).

the Commission recommends the inclusion of the manner in which a suspected sexual offence including child sexual abuse material must be reported to a member of the South African Police Service – this includes the disclosure by the child that child sexual abuse material has been made during a medical examination. Currently this is not recorded on the J88.

6.74 The Commission further recommends the inclusion of the manner in which the child sexual abuse material must be secured to prevent unauthorised access, loss or damage to provide for a seamless chain of custody. The latter provision is to address images created by a medical practitioner and the need for these files to be kept private and confidential. However, as some case records of social workers and psychologists may also contain graphic records relating to a sexual offence it is decided that a generic provision will also be included in section 65(1)(e). This will exclude cases where there is no alleged abuse. For example, a mother sending an image of a rash to a doctor for diagnosis or a doctor taking an image that is not abuse related.

6.75 The Commission recommends that section 66(3)(a) of the Sexual Offences Act be amended to include the Departments of Basic Education, Higher Education and Training, and Communications and Digital Technologies and that it should be accompanied by the proposed Schedule 3 to the Sexual Offences Act. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 3, reads as follows:

Section 66 of the principal Act is hereby amended —

(c) the substitution in subsection (3) for paragraph (a), by the following paragraph:

**Option 1**

“(a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with National Director of Public Prosecutions, the Directors-General: Justice and Constitutional Development **[and]**, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all medical

practitioners and any other relevant persons when dealing with sexual offences cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others, to those listed in Schedule 3 of the Act. [—

- (i) the administering of Post Exposure Prophylaxis;**
- (ii) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;**
- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality;**
- (iv) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment;**
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided; and**
- (vi) the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)].”;**

### **Schedule 3**

#### **THE DEPARTMENT OF HEALTH**

(Section 66(3)(a))

1. The manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to an official employed at a public health establishment or when a sexual offence is suspected or detected by such official during a medical assessment, examination or intervention.
2. The manner in which respectful and supportive services are provided to the victim of a sexual offence including the manner in which their rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety in as far as is possible.
3. The manner in which health care professionals must act to give effect to aspects covered in Chapter 5 – Services to victims of sexual

offences and compulsory HIV testing of alleged sex offenders:

- (a) Matters relating to the administering of Post Exposure Prophylaxis;
  - (b) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;
  - (c) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality.
4. The manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).
5. The manner in which any child sexual abuse material must be secured to prevent unauthorised access, loss or damage
6. The manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided, including:
- (a) The forensic medical examination of victims and alleged offenders;
  - (b) the determination of age where the child sexual abuse material involves unidentified victims or depictions;
  - (c) the manner in which any evidence, including child sexual abuse material, must be secured to prevent unauthorized access, loss or damage.”;

**Option 2**

“(a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with National Director of Public Prosecutions, the Directors-General: Justice and Constitutional Development [and], Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all medical practitioners and any other relevant persons when dealing with sexual

offences cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others, to —

- (i) the administering of Post Exposure Prophylaxis;
- (ii) the manner in which court orders for compulsory HIV testing contemplated in section 33 must be executed in order to ensure the security, integrity and reliability of the testing processes and test results;
- (iii) the manner in which the HIV test results contemplated in section 37 must be dealt with in order to ensure confidentiality;
- (iv) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment;
- (v) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided; **[and]**
- (vi) the manner in which medical practitioners and any other relevant persons must carry out their responsibilities and duties in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (vii) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to an official employed at a public health establishment or when a sexual offence is suspected or detected by such official during a medical assessment, examination or intervention.
- (viii) the manner in which respectful and supportive services are provided to the victim of a sexual offence including the manner in which their rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety in as far as is possible.
- (ix) the manner in which any child sexual abuse material must be secured to prevent unauthorised access, loss or damage
- (x) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided, including:
  - (aa) The forensic medical examination of victims and alleged offenders;
  - (bb) the determination of age where the child sexual abuse material involves unidentified victims or depictions;

(cc) the manner in which any evidence, including child sexual abuse material, must be secured to prevent unauthorized access, loss or damage.”:

**(f) Insertion of subparagraph 66(3A) of the Sexual Offences Act: Department of Social Development**

6.76 A number of respondents support the inclusion of the corresponding obligations on the Department of Social Development.<sup>511</sup> The view was held that the role of the Department of Social Development is to assist victims of crime.<sup>512</sup> However, it was also submitted that as trauma is very complex the department should also support the children of victims and their families and witnesses.<sup>513</sup> A further suggestion was for the department to compile an education or awareness book for parents to assist with the trauma the child is going through.<sup>514</sup>

6.77 It was submitted that officials providing support to victims of child sexual abuse should be in possession of police clearance certificates.<sup>515</sup> The Commission for Gender Equality comments that these directives should stipulate the manner in which the matter and the material should be reported to the South African Police Service.<sup>516</sup>

6.78 The Commission recommends that section 66(3A) of the Sexual Offences Act be amended to include the Departments of Basic Education, Higher Education and Training, and Communications and Digital Technologies and that it should be accompanied by the proposed Schedule 4 to the Sexual Offences Act. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 4, reads as follows:

<sup>511</sup> Group 1 Gauteng Workshop; Carol-Ann Cromhout, First Distribution/Kaspersky; Yonika Murigan, Kaspersky; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Magda Marais, NPA; Brendan Botha, Break-Free; and Mlondolozzi Vava, CGE.

<sup>512</sup> MJ Makgwatha, DPP PTA; Group 3 Polokwane Workshop; and Carol-Ann Cromhout, First Distribution/Kaspersky.

<sup>513</sup> Yonika Murigan, Kaspersky; Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; Slie Thwala, DoJ&CD; Group 1 Gauteng Workshop; and Christel Long, Crystal Clear Ministries International & CESESA (Coalition to End Sexual Exploitation).

<sup>514</sup> Carol-Ann Cromhout, First Distribution/Kaspersky; and Yonika Murigan, Kaspersky.

<sup>515</sup> Ramutle Sikue, Child Health, National Department of Health.

<sup>516</sup> Mlondolozzi Vava, CGE.

(d) the substitution for subsection (3A) of the following subsection:

**Option 1**

“(3A) The Director-General Social Development must, in consultation with the Minister of Social Development and after consultation with the Directors-General: Justice and Constitutional Development, Health, Basic Education, Higher Education and Training, and Communications and Digital Technologies, National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, **[issue]** develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to those listed in Schedule 4 of the Act **[the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)]**.”;

**Schedule 4**

**THE DIRECTOR-GENERAL SOCIAL DEVELOPMENT**

(Section 66(3A))

1. The manner and the expediency with which social workers are to respond to the disclosure or reporting of an alleged sexual offence;
2. The manner in which respectful and supportive services are provided to the victim; the rights of child victims to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety and well-being in as far as is possible.
3. The manner in which the child victim of a sexual offence including child sexual abuse material should be protected and referred for other services if necessary including the circumstances when the offender, rather than the victim, should be removed from the communal residence;

4. The manner in which assistance in the investigation and prosecution of sexual offences, including matters relating to child sexual abuse material must be provided, including:
  - (a) The procedures that must be followed in the reporting of the sexual offence to a member of the South African Police Service;
  - (b) the procedures relating to the safe keeping of the evidence of the alleged sexual offence, including child sexual abuse material to prevent unauthorised access, loss or damage before handing it over to a member of the South African Police Service;
5. The manner in which therapy may be provided to a child victim that is required to testify in court proceedings.
6. The manner in which probation officers are to deal with children referred in terms of section 19D and any other child in conflict with the law for having committed a sexual offence or that involves child sexual abuse material; how such children are to be assessed; and the investigations required for purposes of the appropriate interventions to be recommended or for purposes of determining appropriate conditions of diversion.
7. The manner in which to conduct investigations and compile a report when so required for purposes of assisting courts in making any ancillary order as provided for in section 56A(5).
8. The responsibilities and duties of officials in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b).

## Option 2

“(3A) The Director-General Social Development must, in consultation with the Minister of Social Development and after consultation with the Directors-General: Justice and Constitutional Development, Health, Basic Education, Higher Education and Training, and Communications and Digital Technologies, National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, **[issue]** develop and publish in the *Gazette* directives regarding all

matters which are reasonably necessary or expedient to be provided for and which are to be followed by all relevant persons who exercise any power or perform any duty in terms of this Act relating to social services, when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to —

- (a) the responsibilities and duties of these persons in relation to sexual offences courts designated in terms of section 55A and any regulations made in terms of section 67(b)[.];
- (b) the manner and the expediency with which social workers are to respond to the disclosure or reporting of an alleged sexual offence;
- (c) the manner in which respectful and supportive services are provided to the victim; the rights of child victims to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure their safety and well-being in as far as is possible;
- (d) the manner in which the child victim of a sexual offence including child sexual abuse material should be protected and referred for other services if necessary including the circumstances when the offender, rather than the victim, should be removed from the communal residence;
- (e) the manner in which assistance in the investigation and prosecution of sexual offences, including matters relating to child sexual abuse material must be provided, including:
  - (i) The procedures that must be followed in the reporting of the sexual offence to a member of the South African Police Service;
  - (ii) the procedures relating to the safe keeping of the evidence of the alleged sexual offence, including child sexual abuse material to prevent unauthorised access, loss or damage before handing it over to a member of the South African Police Service;
- (f) the manner in which therapy may be provided to a child victim that is required to testify in court proceedings;
- (g) the manner in which probation officers are to deal with children

referred in terms of section 19D and any other child in conflict with the law for having committed a sexual offence or that involves child sexual abuse material; how such children are to be assessed; and the investigations required for purposes of the appropriate interventions to be recommended or for purposes of determining appropriate conditions of diversion; and

(h) the manner in which to conduct investigations and compile a report when so required for purposes of assisting courts in making any ancillary order as provided for in section 56A(5);”;

**(g) Insertion of subparagraph 66(3B) and (3C) of the Sexual Offences Act: Department of Basic Education and the Department of Higher Education and Training**

6.79 The proposal to include the Department of Basic Education in the Inter-sectoral Committee on sexual offences and the application of commensurate obligations on the department were widely supported.<sup>517</sup> The Commission for Gender Equality, however, submit that the Committee should also include the Department of Higher Education and Training.<sup>518</sup> The Civilian Secretariat for Police, however, submits that these measures should rather be provided for in regulations as opposed to directives. It argues that directives do not have the same legal standing as regulations.<sup>519</sup>

6.80 Media Monitoring Africa recommends that support mechanisms should be established to ensure that persons are able to lodge complaints, and seek the necessary support, when dealing with child sexual abuse material. It suggests that formalised relationships should be established with entities such as Child Line, which are appropriately equipped and trained to deal with such matters. Furthermore, that public officials should be trained on the prohibition, prevention and combating of child sexual abuse material, as

<sup>517</sup> Proposal supported by Ms Vatiswa Jodwana-Blayi NPA (SOCA); Adv Vuyokazi Xalisa, NPA; Kerry Oosthuizen, Commission for Gender Equality; Magda Marais, NPA; Dories B Sithole-Nkosi, SAPS; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Christa du Plessis; Magda Marais; Tracy Keen-Horak; Sipho Mkhonza, NPA; Group 3 Gauteng; National Commissioner of the South African Police Service; Commission for Gender Equality; and Cause for Justice.

<sup>518</sup> Mlondolozzi Vava, Commission for Gender Equality.

<sup>519</sup> Endorsed by Sarah Buffkins, NPA.

contemplated in the Sexual Offences Act. It suggests that this training should include social context training.<sup>520</sup>

6.81 It was pointed out that instructions would be needed on how to deal with educators who are not employees.<sup>521</sup> The view was held that parallel processes cause secondary victimisation and should be avoided.<sup>522</sup>

6.82 The Commission for Gender Equality submits that a reporting mechanism or procedure should be developed for parents or guardians in respect of child victims or offenders; and that the directives should include the protocol around access to the Internet and blocking of harmful sites on school owned devices.<sup>523</sup> The Commission for Gender Equality further submits that paragraph (i) which provides for “equipping, continuous training and standardized assessment” should be replaced.<sup>524</sup> The Commission has reconsidered this paragraph and substituted it with the following: “facilitate and ensure continuous training of educators and learners on preventative measures”.<sup>525</sup>

6.83 Some of the respondents are of the opinion that employee relations should be providing directives on how to proceed when an educator is involved.<sup>526</sup> Employee Relations is key on when it is an educator that is involved. Group 3 of the Nelspruit workshop comment that the Unions should be involved in developing the directives so as to prevent the hindering or obstructing of the implementation thereof.

6.84 As was done for the other departments it was submitted that debriefing should also be available to all personnel dealing with or exposed to these matters.<sup>527</sup> Furthermore, that this debriefing (internal or external) should be compulsory, be done at least twice a year (more if necessary), and that attendance should be confirmed by a service provider.<sup>528</sup>

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<sup>520</sup> Endorsed by Group 4 of the Nelspruit workshop.

<sup>521</sup> Nomfundo Lilyrose Mtobi, NPA.

<sup>522</sup> Nomfundo Lilyrose Mtobi, NPA.

<sup>523</sup> Kerry Oosthuizen, Commission for Gender Equality

<sup>524</sup> Endorsed by Group 4 of the Nelspruit workshop.

<sup>525</sup> Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; Slie Thwala, DoJ&CD; Mlondolozzi Vava, CGE

<sup>526</sup> Bertha Bresler, Stop Trafficking of People; Nomfundo Lilyrose Mtobi, NPA

<sup>527</sup> Magda Marais, NPA

<sup>528</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; Siphon Mkhonza, NPA (Group 4 Nelspruit)

6.85 Group 4 of the Nelspruit workshop further flag the following areas that need incorporation:

- (i) National standardised code of conduct in dealing with reports of Sexual offences.
- (ii) Immediate reporting of a sexual offence to a police officer.
- (iii) The manner in which a child should be protected.
- (iv) The Department of Social Development to be contacted if applicable (if the perpetrator is a family member).
- (v) Victim to be referred to a service provider to provide psychological support and or therapeutic services (if available at School).
- (vii) Service provider must provide support to contain and empower the victim not to discuss the facts of the matter.
- (viii) The matter must be dealt with, with the necessary sensitivity and confidentiality to protect the dignity of the child.
- (ix) Preventative measures to be taken to prevent any bullying and, or further traumatising of child, by any person.
- (x) National standardised code of conduct in dealing with a child in conflict with the law
- (xi) Provide the police with a sworn or affirmed affidavit and to give evidence in court if called to do so.
- (xii) Child sexual abuse material to be handed to the South African Police Service.
- (xiii) All child sexual abuse material to be handed to the South African Police Service without distributing such material; or having shown to any other person; or described to any other person.

6.86 The Commission welcomes the issuing of the schedule to the Employment of Educators Act, 1998<sup>529</sup> which requires that before a person is appointed or re-appointed to work with children they amongst other requirements need to be vetted against the National Child Protection Register of the Children's Act and must have a clearance certificate indicating that their names do not appear on the National Register for Sex Offenders as provided for in the Sexual Offences Act. Furthermore, that if a person's name appears on these registers they may not be employed until such time as their names are removed from the registers. They are also prohibited from employment as an educator for an indefinite period where they have committed an act of sexual assault on a learner, student or other employee or have a sexual relationship with a learner of the school. The Commission finds

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<sup>529</sup> Schedule to the Employment of Educators Act, 1998 on the prevention of re-employment of former educators discharged or deemed discharged for misconduct or deemed resigned Government Gazette No 44433 9 April 2021.

anecdotal reports of private schools not reporting sexual offences until a “formal” investigation is opened as problematic. This provides alleged sexual exploiters with a loophole, whereby they resign and no further action is taken by the school. Schools need to report promptly as it is child protective and may prevent alleged sexual exploiters from moving from school to school being employed by unsuspecting schools and continuing to prey on children. The Commission has also identified the need for guidelines on how to deal with teachers who are not employees and other people in service of a school. For example contractors, volunteers or interns. The Commission is further of the view that instances of learners committing sexual offences outside of the school environment need to be addressed so as to protect learners in the school environment.

6.87 The Commission recommends that clause 66(3)(B) of the Sexual Offences Act be inserted to cater for directives by the Department of Basic Education and that it should be accompanied by the proposed Schedule 5 to the Sexual Offences Act. The insertion to cater for directives by the Department of Higher Education in clause 66(3)(C) is coupled with the proposed Schedule 6. The recommended amendments reflected as two options, the first option of which is coupled to Schedules 5 and 6, read as follows:

(e) the insertion after subsection (3A) of the following subsections:

**Option 1**

“(3B) The Director-General Basic Education must, in consultation with the Minister of Basic Education and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Higher Education and Training and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions, and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to those listed in Schedule 5 of the Act.;

**Schedule 5**

**THE DIRECTOR-GENERAL BASIC EDUCATION**

(Section 66(3B))

1. Facilitate and ensure continuous training of educators and learners on preventative measures.
2. The manner the child victim should be protected and referred for other services if necessary, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the safety of the victim in as far as is possible.
3. The manner and expediency with which educators are to respond to a learner or educator reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service.
4. The manner and expediency with which educators are to respond to allegations of sexual abuse by an educator, contractor, employee, intern, volunteer or learner.
5. The manner in which a child alleged to have committed a sexual offence or in conflict with the law in respect of a sexual offence must be dealt with.
6. The manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided.
7. The manner in which evidence of the alleged sexual abuse, child sexual abuse material, pornography or any other evidence is to be kept secure before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage.
8. The manner in which learners are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.

**Option 2**

“(3B) The Director-General Basic Education must, in consultation

with the Minister of Basic Education and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Higher Education and Training and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions, and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to -

- (a) facilitate and ensure continuous training of educators and learners on preventative measures;
- (b) the manner the child victim should be protected and referred for other services if necessary, including the manner in which the victim's rights to equality, privacy, respect and dignity are to be realized and the steps to be taken to ensure the safety of the victim in as far as is possible;
- (c) the manner and expediency with which educators are to respond to a learner or educator reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service;
- (d) the manner and expediency with which educators are to respond to allegations of sexual abuse by an educator, contractor, employee, intern, volunteer or learner;
- (e) the manner in which a child alleged to have committed a sexual offence or in conflict with the law in respect of a sexual offence must be dealt with;
- (f) the manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided;
- (g) the manner in which evidence of the alleged sexual abuse, child sexual abuse material or any other evidence is to be kept secure before handing it over to a member of the South African

Police Service, to prevent unauthorised access, loss or damage; and

- (h) the manner in which learners are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.;

### **Option 1**

(3C) The Director-General Higher Education and Training must, in consultation with the Minister of Higher Education and Training and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to those listed in Schedule 6 of the Act.;

### **Schedule 6**

#### **THE DIRECTOR-GENERAL HIGHER EDUCATION AND TRAINING**

(Section 66(3C))

1. Facilitate and ensure continuous training of educators, lecturers or tutors and students on preventative and reactive measures.
2. The manner the child victim should be protected and referred for other services if necessary, including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.

3. The manner and expediency with which lecturers or staff at tertiary institutions are to respond to a student, lecturer or staff reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service.
4. The manner and expediency with which lecturers or staff are to respond to allegations of sexual abuse against a lecturer, staff, contractor, employee, intern, volunteer or student, including reporting the alleged sexual offence to the department and a member of the South African Police Service.
5. The manner in which the child in conflict with the law should be dealt with.
6. The manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided.
7. The manner in which evidence of the alleged sexual abuse, child sexual abuse material, pornography or any other evidence is to be kept secure before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage.
8. The manner in which students are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.

### **Option 2**

(3C) The Director-General Higher Education and Training must, in consultation with the Minister of Higher Education and Training and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, and the Department of Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any

other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to -

- (a) facilitate and ensure continuous training of educators and students on preventative and reactive measures;
- (b) the manner the child victim should be protected and referred for other services if necessary; including the manner in which the victim's rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the safety of the victim in as far as is possible;
- (c) the manner and expediency with which lecturers or staff at tertiary institutions are to respond to a student, lecturer or staff reporting an alleged sexual offence, including reporting the alleged sexual offence to the department and a member of the South African Police Service;
- (d) the manner and expediency with which lecturers or staff are to respond to allegations of sexual abuse against a lecturer, staff, contractor, employee, intern, volunteer or student, including reporting the alleged sexual offence to the department and a member of the South African Police Service;
- (e) the manner in which the child in conflict with the law should be dealt with;
- (f) the manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided;
- (g) the manner in which evidence of the alleged sexual abuse, child sexual abuse material, pornography or any other evidence is to be kept secure before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage; and
- (h) the manner in which students are to be educated on responsible internet usage, available protective measures and the risks of accessing inappropriate sexual content including that of creating and distributing self-generated content.;

**(h) Insertion of subparagraph 66(3)(D) of the Sexual Offences Act:  
Department of Justice and Constitutional Development**

6.88 A number of workshop attendees and respondents agree with the inclusion of subparagraph 66(3D).<sup>530</sup> However, a number of questions were asked in respect of the proposed insertions. For example, what would happen if evidence is destroyed and there is an appeal which may occur many years later as these sexual offences do not prescribe?<sup>531</sup> Group 4 of the Nelspruit workshop question how long should the material be kept for and by whom and where.<sup>532</sup>

6.89 The following areas were also highlighted, namely the need:

- (i) to communicate the duty to report a sexual offence even though the sexual incident has been resolved between the parties;<sup>533</sup>
- (ii) for tailor-made or specialised diversion programmes;<sup>534</sup>
- (iii) forfeiture of devices to the state even when they have been returned to factory settings (wiped) by the police;<sup>535</sup>
- (iv) for the court to make an order regarding the safekeeping of relevant exhibits including child sexual abuse material by the designated person pending the finalisation of the matter;
- (v) for keeping charge sheets containing child sexual abuse material in a lockable cabinet pending the finalisation of the matter; and
- (vi) for the court to make an order in respect of the disposal of the child sexual abuse material after the finalisation of the matter.

6.90 The National Commissioner of the South African Police Service submits that the Minister of Justice and Correctional Services must promulgate regulations pertaining to the establishment of a register to be kept by manufacturers or distributors of technology, device

<sup>530</sup> Delaine Naidoo, Child Welfare SA: Gauteng; Dr Lynette Roux, Clinical Psychologist; Ms Vatiswa Jodwana-Blayi NPA (SOCA); Magda Marais, NPA; Ramutle Sikue, Child Health, National Department of Health; Brendan Botha, Break-Free; Lungile Masuku, FAMSA PMB; Sibusiso Biyela, Office of the Premier, KZN; Slie Thwala, DoJ&CD; and Mlondolozzi Vava, CGE.

<sup>531</sup> MJ Makgwatha, DPP PTA; Elmarie, Touch of Hope; Delaine Naidoo, child Welfare SA: Gauteng; and Dr Lynette Roux, Clinical Psychologist.

<sup>532</sup> Christa du Plessis; Magda Marais; Tracy Keen-Horak; and Siphon Mkhonza, NPA (Group 4 Nelspruit).

<sup>533</sup> Nomfundo Lilyrose Mtobi, NPA.

<sup>534</sup> Alida van der Mescht, JellyBeanz; and Nomfundo Lilyrose Mtobi, NPA.

<sup>535</sup> Sarah Buffkins, NPA.

or electronic and communications service providers. It is an offence not to keep such a register. The National Commissioner states that clarity is needed as to who will monitor the compliance by the manufacturers and distributors and whether the register will be accessible for purposes of investigation.

6.91 Media Monitoring Africa recommend that the South African Judicial Education Institute should develop and implement training courses, including social context training courses, for judicial officers presiding over cases regarding child sexual abuse material, as contemplated in the Sexual Offences Act.

6.92 The Commission has noted that the workshops held on the discussion paper held a clear educational value and provided people with information they may not otherwise have had. It was evident in some engagements how little some people knew about the existing legislation and processes. The Commission suggests that the Department of Justice and Constitutional Development, in collaboration with other government departments, should explore ways of disseminating the content of the legislative proposals contained in this report when they are enacted and the non-legislative proposals as a matter of priority with a view to prevention. The Commission further suggests that relevant departments should consider multi-disciplinary training.<sup>536</sup> The benefits of this would be three-fold. Firstly and most importantly, it would provide clear role-definition, secondly it would provide a clear pathway of service, and thirdly it could be cost saving.

6.93 The Commission recommends that section 66(3D) of the Sexual Offences Act be inserted to cater for directives by the Department of Justice and Constitutional Development and that it should be accompanied by the proposed Schedule 7 to the Sexual Offences Act. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 7, reads as follows:

**Option 1**

(3D) The Director-General Justice and Constitutional Development must, in consultation with the Minister and after consultation the Directors-General: Health, Social Development, Basic Education, Higher Education and Training,

<sup>536</sup> This approach is endorsed in the ECPAT International The Landscape of Sexual Exploitation (2019).

and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to those listed in Schedule 7 of the Act.:

### **Schedule 7**

#### **THE DIRECTOR-GENERAL JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

(Section 66(3D))

1. The manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and child sexual abuse material or pornography, must be dealt with including any copying and distribution thereof at all courts.
2. The manner in which victims are supported and protected within the court environment.
3. The manner in which victims are prepared for testifying in court.
4. The manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be kept in custody, stored and disposed of or destroyed.
5. The manner in which an order contemplated in section 50(2)(a) (dealing with an order of a court to include the accused's name in the Register) must be forwarded to and received by the Registrar of the National Register for Sex Offenders so as to ensure the relevant data is captured.

#### **Option 2**

(3D) The Director-General Justice and Constitutional Development must, in consultation with the Minister and after consultation the Directors-General: Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public

Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to —

- (a) the manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and child sexual abuse material or pornography, must be dealt with including any copying and distribution thereof at all courts;
- (b) the manner in which victims are supported and protected within the court environment;
- (c) the manner in which victims are prepared for testifying in court;
- (d) the manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be kept in custody, stored and disposed of or destroyed; and
- (e) the manner in which an order contemplated in section 50(2)(a) (dealing with an order of a court to include the accused's name in the Register) must be forwarded to and received by the Registrar of the National Register for Sex Offenders so as to ensure the relevant data is captured.;

**(i) Insertion of subparagraph 66(3E) of the Sexual Offences Act:  
Department of Communications and Digital Technologies**

6.94 In accordance with the submissions received the Commission recommends that section 66(3E) of the Sexual Offences Act be inserted to provide for directives by the Department of Communications and Digital Technologies under which the Film and Publication Board resorts and that it should be accompanied by the proposed Schedule 8 to the Sexual Offences Act. The Commission acknowledges the existence of a memorandum of understanding between the Film and Publication Board and the South African Police Service with regard to child sexual abuse material; and that the role of the Film and

Publication Board is to classify the material, not to do age verification in respect of child sexual abuse material i.e. to ascertain the age of a child in child sexual abuse material. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 8, reads as follows:

**Option 1**

(3)(E) The Director-General: Department of Communications and Digital Technologies must, in consultation with the Minister of Communications and Digital Technologies and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education and Higher Education and Training, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to those listed in Schedule 8 of the Act.;

**Schedule 8**

**DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES**

(Section 66 (3E))

1. The manner in which to raise public awareness and to educate the general public in the responsible use of the Internet, including available protective measures to prevent the inadvertent accessing of sexual material or any access to child sexual abuse material.
2. The manner in which to collaborate with relevant roleplayers providing or involved in electronic communications services for purposes of ensuring optimal protection to children from accessing child sexual abuse material or pornography, inclusive of minimum requirements that industry is to comply with and the monitoring of such measures.
3. With reference to the classification of publications, films and games, including any other material to be regulated and classified by the Film

and Publication Board-

- (a) the manner and the expediency with which an offence involving child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service;
- (b) the manner in which any child sexual abuse material or other material that constitutes a sexual offence, is to be kept secured to prevent loss or damage or unauthorised access, until handing it over to a member of the South African Police Service, including the manner in which further distribution and access of such material is to be prevented and restricted;
- (c) when exercising a discretion not to refuse classification, the manner in which to protect a child victim, irrespective whether the child is identified or identifiable, inclusive of excision and blurring techniques and, irrespective the fact of classification, the manner and expediency with which the child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service.

**Option 2**

(3)(E) The Director-General: Department of Communications and Digital Technologies must, in consultation with the Minister of Communications and Digital Technologies and after consultation with the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education and Higher Education and Training, the National Director of Public Prosecutions and the National Commissioners of the South African Police Service and Correctional Services, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to –

- (a) the manner in which to raise public awareness and to educate the general public in the responsible use of the Internet, including available protective measures to prevent the inadvertent accessing of sexual material or any access to child sexual abuse material;
- (b) the manner in which to collaborate with relevant roleplayers providing or involved in electronic communications services for purposes of ensuring optimal protection to children from accessing child sexual abuse material or pornography, inclusive of minimum requirements that industry is to comply with and the monitoring of such measures;  
and
- (c) with reference to the classification of publications, films and games, including any other material to be regulated and classified by the Film and Publication Board-

  - (i) the manner and the expediency with which an offence involving child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service;
  - (ii) the manner in which any child sexual abuse material or other material that constitutes a sexual offence, is to be kept secured to prevent loss or damage or unauthorised access, until handing it over to a member of the South African Police Service, including the manner in which further distribution and access of such material is to be prevented and restricted;
  - (iii) when exercising a discretion not to refuse classification, the manner in which to protect a child victim, irrespective whether the child is identified or identifiable, inclusive of excision and blurring techniques and, irrespective the fact of classification, the manner and expediency with which the child sexual abuse material or other material that constitutes a sexual offence must be reported to a member of the South African Police Service.;

**(j) Insertion of subparagraph 66(3F) of the Sexual Offences Act:  
Department of Correctional Services**

6.95 The Commission is of the view that the inclusion of this part should be limited and linked to the Department of Correctional Services role, specifically in relation to the reporting and management of child sexual abuse material in its jurisdictional space. The view is held that parole board members should receive training on these matters and should at best include an expert dealing with rehabilitation to assist them with this process.

6.96 The Commission recommends that section 66(3F) of the Sexual Offences Act be inserted to cater for directives by the Department of Correctional Services and that it should be accompanied by the proposed Schedule 9 to the Sexual Offences Act. The recommended amendment reflected as two options, the first option of which is coupled to Schedule 9, reads as follows:

**Option 1**

(3)(F) The National Commissioner of Correctional Services must, in consultation with the Minister and after consultation with the the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, with particular reference, among others to those listed in Schedule 9 of the Act.;

**Schedule 9**

**DEPARTMENT OF CORRECTIONAL SERVICES**

**(Section 66 (3F))**

1. The manner in which sexual offence cases, including cases relating to child sexual abuse material, should be dealt with when detected or reported within the correctional services context.
2. The manner in which the victim within the correctional services facility

is to be provided protection including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible.

3. The manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided.
4. The manner in which the child sexual abuse material or any other evidence is kept secured before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage.
5. The development and implementation of assessment tools and therapeutic programmes for persons convicted of sexual offences who are in the care of or monitored or provided with services by the department.
6. The manner in which to ensure that Parole Boards receive appropriate recommendations relating to the parole, supervision and necessary community therapeutic services for persons convicted of sexual offences.
7. The manner in which to assist the probation officer for purposes of recommending appropriate ancillary orders as provided for in section 56A(5) including on the manner of monitoring thereof when so required.

## **Option 2**

(3)(F) The National Commissioner of Correctional Services must, in consultation with the Minister and after consultation with the the Directors-General: Justice and Constitutional Development, Health, Social Development, Basic Education, Higher Education and Training, and Communications and Digital Technologies, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing

on complainants of such offences, with particular reference, among others to

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- (a) the manner in which sexual offence cases, including cases relating to child sexual abuse material, should be dealt with when detected or reported within the correctional services context;
- (b) the manner in which the victim within the correctional services facility is to be provided protection including the manner in which the victim`s rights to equality, privacy, respect and dignity are to be realised and the steps to be taken to ensure the victim`s safety in as far as is possible;
- (c) the manner in which assistance in the police investigation and prosecution of sexual offences generally must be provided;
- (d) the manner in which the child sexual abuse material or any other evidence is kept secured before handing it over to a member of the South African Police Service, to prevent unauthorised access, loss or damage;
- (e) the development and implementation of assessment tools and therapeutic programmes for persons convicted of sexual offences who are in the care of or monitored or provided with services by the department;
- (f) the manner in which to ensure that Parole Boards receive appropriate recommendations relating to the parole, supervision and necessary community therapeutic services for persons convicted of sexual offences; and
- (g) the manner in which to assist the probation officer for purposes of recommending appropriate ancillary orders as provided for in section 56A(5) including on the manner of monitoring thereof when so required.”;

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The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

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The Criminal Procedure Act 51 of 1977

The Electronic Communications and Transactions Act 25 of 2002

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The Prevention and Combatting of Trafficking in Persons Act 7 of 2013

The Protection from Harassment Act 17 of 2011

The Protection of Personal Information Act 4 of 2013

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## **LIST OF CODES**

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Code of Conduct for Subscription Broadcasting Service Licensees

Interactive Advertising Bureau of South Africa Code of Conduct available at <http://iabsa.net/about-iab/code-of-conduct/>

Internet Service Provider Association Code of Conduct (ISPA Code) available at <http://ispa.org.za/code-of-conduct/>

Mobile UK Codes of Practice available at <http://www.mobileuk.org/codes-of-practice.html>  
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*Paroline v. United States* 134 S.Ct.1710 (2014) [Case No. 12-8561] Link to full judgment at [http://www.supremecourt.gov/opinions/13pdf/12-8561\\_7758.pdf](http://www.supremecourt.gov/opinions/13pdf/12-8561_7758.pdf)

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## **INTERNATIONAL DOCUMENTS, CONVENTIONS AND TREATIES**

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The Convention on Cybercrime

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The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No. 201. United Nations Treaty Office available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=201> (last accessed 23 March 2015)

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The Protocol to the Agreement for the Suppression of the Circulation of Obscene Publications 1949 United Nations Treaties. League of Nations Treaty Series, vol.27, p214 available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VIII-3&chapter=8&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VIII-3&chapter=8&lang=en)

The United Nations Convention on the Rights of the Child (1989)

# ANNEXURE A: LIST OF RESPONDENTS

## LIST OF RESPONDENTS TO ISSUE PAPER 30

1. Alexander Robynne, Centurion Vineyard Christian Fellowship
2. Anderson Peter Rev United Congregational church of Southern Africa.
3. Africa Christian Action (Taryn Hodgson)
4. Barter Paul
5. Basson Antoinette, Dr, UNISA Youth Research Unit, Bureau of Market Research
6. Bester Marcelle, FAMSA Highveld Ridge
7. Blacklaws John R
8. Bonoko, Lesibana Silas, SAPS
9. Boshoff Lorna
10. Botha Charmaine, CMR Komatipoort
11. Bremner Jonathan
12. Bremner Lyn
13. Carstens Jack, David & Jonathan Foundation
14. Cause for Justice
15. Child Welfare South Africa (CWSA) (Julie Todd)
16. Chiliza Mr Cebo
17. Chikane Monica (Social Auxillary Worker FAMSA)
18. Claasen Louie, UNISA
19. Clifford Pastor Colin
20. Crystal Clear Ministries International (Christel Long)
21. Cyber Crime Unit (Mr. L.S.Bonoko)
22. Department of Communications (Khayaletu Rutsha)
23. Dutlow Judy
24. Eckard Memory
25. Essop Jameel
26. Family Policy Institute (Errol Naidoo)
27. Fisher Sonja, Ladies Arise
28. Francis Kashiefa, Child Welfare SA, NC
29. Gengan Desiree
30. Giela
31. Gongoma, Lilian, Lerato House
32. Goosen Deon

33. Google (Fortune Mgwili-Sibanda)
34. Gounder Capt K V(SAPS Project Leader: Operation Spiderweb)
35. Hardwick Marc
36. Haslam Lyndy
37. Hendry Gavin, Centurion Vineyard Christian Fellowship
38. Hochfelden, Mrs C.
39. Human Clive
40. Jackson Russell
41. Jesson Dawn
42. Kimberley Workshop participant (anonymous)
43. Kostlin Nicola
44. Khoury Mark, Virtue Net
45. Lopes Arthur
46. Leppan Monique
47. Linders, Petronella, Department of Telecommunications and Postal Services (DTPS)
48. Maggio Santy (Zimbabwe)
49. Makua, Sheryl, Tshwane Leadership Foundation
50. Masalesa, Dineo
51. Matabane, Lizzy, DTPS
52. Matjokana Mapule Dorothy
53. McLean Cathy, Child Welfare Tshwane
54. Media Monitoring Africa (William Bird)
55. Mhlanga Miranda
56. Mienie Rina
57. Ministry of Social Development, Western Cape (Adv Albert Fritz)
58. Minnaar Pastor Debbie, Church Alive
59. Minnie Wean
60. M-Net and Multichoice
61. Mokone Kgobi
62. Molin Tracie Blank, Africa Textiles
63. Mooney Filo
64. Mortlock Caren, NPA
65. Moses John, Grace Community Church
66. Mthethwa Phumzile
67. Muthambi Ronald
68. Narain Martha
69. National Association of Broadcasters (NAB)

70. National Prosecuting Authority (Adv Pierre Smith)
71. Nel Benita, Dr, Childline
72. Nkatha, N
73. Nkobane, Deborah, Child Welfare
74. Noluvu M Sekelwa
75. Ntakalle, Petronella, Tshwane Leadership Foundation
76. Nzomane Nomagugu
77. Orlan Ngwenya
78. Parent Infant and Child Health and Wellness (PICH) (Chairperson Dr Elmarie Malek)
79. Philander Sidhartha
80. Ria
81. Riba Evidence N
82. Rutsha K, Department of Communications (Durban)
83. Scheckle Natale, Loreto Convent
84. Schnaid Barbara
85. Schultz, Charlotte, Snail Attorneys
86. Schultz Rob
87. Seitz Ulanda
88. Seymour Lyn Westville KZN
89. Shamien, National Training Manager, Child Welfare South Africa
90. Shelley, Zoë Life
91. Sikhakhane Cindy, CLSA
92. Smith Adv E, DDPP, FS
93. Snyders Daine
94. South African Police Service (Acting National Commissioer: Lt Gen Phahlane)
95. Stephenson Dr Robin
96. Steynberg Vernon B
97. Swanepoel Renee, Loreto Convent School
98. Thabane Amalinelah
99. The Green Hearts
100. Theron Deon
101. Tshisphonga Innocent, Tshwane Leadership Foundation, Inkululeko Community Centre
102. Tolken N
103. Van Deventer Riki
104. Van Heerden Sandra and Chris
105. Vilakazi Amanda LSSA

106. Wain, Lauren, Netclean
107. Women and Men Against Child Abuse (WMACA)
108. Zabow Prof T
109. Zietsman Ria
110. Zulu Goodness, UNISA Youth Research Unit, Bureau of Market Research

## **LIST OF RESPONDENTS TO DISCUSSION PAPER 149**

1. Anonymous
2. Badenhorst, Casper H
3. Basson Carli
4. Barrett Lindi
5. Be In Touch, Farina Kate
6. Break-Free, Botha Brendan
7. Broad David
8. Buitendag Tania (Adv)
9. Burgoyne Madelain
10. Camp Coleen
11. Catholic Parliamentary Liaison Office
12. Cause for Justice
13. Cazalet Mrs SR
14. Civilian Secretariat of Police
15. Commission for Gender Equality, Marissa van Niekerk, Director: Legal Services
16. Crystal Clear Ministries International, Long Christel Executive Director
17. Cubitt Ondine
18. De Bruyn Willem
19. Department of Communications
- 20.. Dial a Nerd, Thornton Aaron
21. Dippenaar Henriette
22. Doctors for Life International
23. Dodgen Lorna
24. Dzeli Terance
25. Erasmus Rev Cindy
26. Esselaar Attorneys (per Paul Esselaar)
27. Esterhuyse Susan
28. Farley Jillian

29. Fisher Marianna
30. Ferreira Mariet
31. Film and Publications Board
32. Google, Fortune Mgwili-Sibanda:Lead: Government Affairs and Public Policy, SSA
33. Haddad Graham
34. Hargreaves Pamela
35. Internet Service Providers Association (ISPA)
36. Jacquet, Etrecia, concerned great grandmother
37. Jansen Van Rensburg Susan
38. Janse Van Vuuren Rebecca
39. Jerling Renata
40. KeeptheDream196, Batty Louise
41. Kiggen, Craig
42. Kiggen, Michelle
43. Lamprecht Retia
44. Lanae D
45. Law Society of South Africa – E-Law Committee
46. Lentjies Martha
47. Luthuli, Mpumelelo
48. Mapasa Tumi
49. Mapeklula NL Zihle
50. Masekoameng Alpheus
51. Masondo Fred
52. Mbambo Sifundo
53. Media Monitoring Africa
54. Ministry of Social Development, Western Cape (Minister S.G. Fernandez)
55. Mosupye Caroline Lydia
56. Motaung William
57. MTN (Moses Mashisane General Manager: Regulatory Affairs)
58. Muthien Bernedette, Board Member: South African Broadcasting Corporation (SABC)
59. Naidoo (Mrs) Rashieda
60. Netsweeper, Khoury Mark
61. Potgieter Ruan
62. Project Dignity Foundation, Restiau Catherine
63. Project Exodus, Janse Van Rensburg Kerry
64. Research ICT Africa (RIA) and the Association for Progressive Communications (APC)

65. Robertson Colleen
66. SABRIC member banks
67. Skhosana Bokang
68. South African Police Service
69. Speirs, CM
70. STOP Trafficking of People, Sandenberg Mrs Corinne
71. Surmon Mark
72. Surgeon Mark
73. The Compassion Centre, Gillespie Sonnika
74. The Hope Foundation, Chetty Vanessa
75. The Refugee Legal and Advocacy Centre
76. Van Rensburg Debbie
77. Van der Vyver Liezl
78. Van Wyk Jackie
79. Varnicker Cariston
80. Venter Lilly
81. Watson (Mrs) Lesley
82. Werth Carol
83. Willems Karel
84. Williams Jeanette
85. Wireless Access Providers' Association of South Africa
86. Wireless Application Service Providers' Association (WASPA)

## ANNEXURE B: WORKSHOPS

### GAUTENG WORKSHOP (ALL STAKEHOLDERS) 12 JUNE 2019 (CENTURION)

	NAME	ORGANISATION/ DESIGNATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Dr Joan Van Niekerk	Advisory Committee Chairperson
3	Dominic Cull	Advisory Committee member
4	Brig Anneke Pienaar (ret)	Advisory Committee member
5	Dellene Clark (Adv)	Researcher
	Mpolokeng Ledwaba	Administrative support
	Nelisiwe Moledi	Administrative support
	<b>DELEGATES</b>	
6	Nicola Arend	MSc Forensic Psychology
7	Capt. Veronica Banks	SAPS FCS
8	Adv. Tania Buitendag	NPA-SOCA
9	Carol Cromhout	First Distribution
10	Octavia Ephraim	The Octavia Ephraim Foundation
11	Tara Harris	Monash University
12	Ms NLH Hlatshaneni	Dept. of Basic Education
13	Adv V Ketelo	NPA SOCA UNIT
14	T Lage	Hope Risen
15	Major General Linda	SAPS: Head FCS
16	Christel Long	Christal Clear Ministries International
17	Ms ET Machika	Dept. of Basic Education
18	Isabel Magaya	Centre for child Law- University of Pretoria
19	Phumeza Matshaya	SAPS
20	Mokgaetji J Makgwatha	DPP: Pretoria
21	Christopher Mamathuntsha	Film and Publication oard, Appeals Tribunal
22	J N Martinson	Child Welfare SA North West
23	Adv Job Masina	NPA
24	Thandeka Masondo	Chief Cornerstone Foundation
25	Brigadier Earl Mills	SAPS FCS
26	Prof N Mollema	UNISA Faculty of Law
27	Yonika Murugan	Kaspersky
28	Delaine Naidoo	Child Welfare SA Gauteng
29	Nondumiso Ngqulunga	Dept. of Women
30	Dr Kiru Pillay	DTPS
31	Molebogeng Porogo	Commission for Gender Equality
32	Michael Power	Facebook obo Emilar Ghandi
33	Elmarie Pretorius	Touch of Hope Search & Rescue
34	Tania Prinsloo	SALRC

35	Dr Lynette Roux	Clinical Psychologist
36	Khayaletu Rutsha	Dept. of Communications
37	Lt Col Segotta	SAPS
38	Motshabi Setlhako-Maliehe	DOJ&CD N W Regional Office
39	R Sibey	Love Justice
40	Adv P Smith	NPA SOCA UNIT
41	Elizabeth Steenkamp	The Teddy Bear Foundation
42	Jennie Hoff	PACSEN
43	Mark Khoury	Netsweeper

**GAUTENG WORKSHOP (ICT/ INDUSTRY STAKEHOLDERS) 13 JUNE 2019  
(CENTURION)**

	<b>NAME</b>	<b>ORGANISATION/ DESIGNATION</b>
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Dr Joan Van Niekerk	Advisory Committee Chairperson
3	Dominic Cull	Advisory Committee member
4	Brig Anneke Pienaar (ret)	Advisory Committee member
5	Dellene Clark (Adv)	Researcher
	Mpolokeng Ledwaba	Administrative support
	Nelisiwe Moledi	Administrative support
	<b>DELEGATES</b>	
6	Ilanka Badenhorst	WASPA
7	Carol Cromhout	First Distribution
8	Cheryl Dinkelmann	MTN
9	Henk Du Preez	DOJ&CD
10	Mr Pandelis Gregoriou	FPB
11	Yolanda Hannig	MSF
12	Jennie Hoff	PACSEN
13	Rakesh Ishwardeen	MTN
14	George Kalu	Media Monitoring Africa
15	Joe M. Kgamede	Rain
16	Mark Khoury	Netsweeper
17	Anton Kotze	ISPA
18	Cecilia Lamola	MSF
19	Rianette Leibowitz	SaveTNet
20	Christopher Mamathuntsha	FPB Appeal Tribunal
21	Jerry Maseko	WASPA
22	Abongile Mashele	CEO Film and Publication Board
23	Collin Mashile	Dept. of Communications
24	Yolanda Mlonzi	Google
25	Murendeni Muridili	FPB
26	Yonika Murugan	Kaspersky
27	Danny Myburgh	Cyanre
28	Nicole Naidoo	SABRIC

29	Norman Nhliziyo	Rain
30	Phakamile K	Media Monitoring Africa
31	Themba Phiri	Cell C (Executive Head)
32	Sarel Robbertse	DOJ&CD
33	Andrew Sebapu	FPB
34	Thandi Smith	Media Monitoring Africa
35	Fortune Sibanda	Google
36	Nicky Tindall	Rain
37	Nicolette van den Heever	Cell C
38	Tish Pillay	WASPA

**WESTERN CAPE WORKSHOP 19 JUNE 2019  
(CAPE TOWN)**

	<b>NAME</b>	<b>ORGANISATION</b>
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Dr Joan Van Niekerk	Advisory Committee Chairperson
3	Dominic Cull	Advisory Committee member
4	Brig Anneke Pienaar (ret)	Advisory Committee member
5	Dellene Clark (Adv)	Researcher
6	Gift Sambo	Administrative support
	<b>DELEGATES</b>	
7	Pamela Andre	Concerned citizen
8	L Africa	NPA SOCA UNIT
9	Jade Aspeling	William Booth Attorneys
10	Nicole Bartels	Stop Trafficking of People
11	Aniela Batschari	Shukumisa Coalition
12	Bertha Bresler	Stop Trafficking of People
13	Saarah Buffkins	NPA
14	Lorise Diamond	Commission for Gender Equality
15	Paul Esselaar	Esselaar Attorneys
16	Muhammed Saleem Firfirey	William Booth Attorneys
17	Graham Haddad	
18	Isabella Hamilton	Commission for Gender Equality
19	Brigadier S Harri	SAPS (FCS)
20	Clive Human	S.T.O.P
21	Rochshana Kemp	WC Education Department
22	Elma Kloppers	Department of Social Development
23	Farheen Mahmood	William Booth Attorneys
24	Elmarie Malik	Department of Health
25	Khensani Motileni	Legal Resources Centre
26	Nomfundo Lilly Mtobi	Department of Justice
27	Paul Modise	Commission for Gender Equality
28	Errol Naidoo	Family Policy Institute
29	Sixolile Ngcobo	Commission for Gender Equality

30	Simvile Nonkula	Department of Communications
31	Nicolette Ras	Department of Social Development
32	Rachel Sloth-Nielson	Miller du Toit Cloete
33	Liesl Stander	Cause for Justice
34	G Titus	NPA SOCA UNIT
35	Taryn Ulster	Family Policy Institute
36	Alida van der Mescht	JellyBeanz
37	Carli van Wyk	Cause for Justice
38	Zia Wasserman	Sonke Gender Justice
39	Clara Williams	Dept.of the Premier WC Government
40	Juanita Wright	Salvation army

**EASTERN CAPE WORKSHOP 25 JUNE 2019  
(MTHATHA)**

	NAME	ORGANISATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Brig Anneke Pienaar (ret)	Advisory Committee member
3	Dominic Cull	Advisory Committee member
4	Dellene Clark (Adv)	Researcher
5	Gift Sambo	Administrative support
	<b>DELEGATES</b>	
6	Philisiwe Buthelezi	Sinawe TCC Mthatha
7	N.F. Dyonase	Sinawe TCC Mthatha
8	Ntombodumo Genu	Sinawe TCC Mthatha
9	L Jekwa	NPA SOCA UNIT
10	V Jodwana-Blayi	NPA SOCA UNIT
11	Sonkosi Lorrinda	NPA-SOCA
12	DWO Theo Mafani	SAPS
13	Nonkululeko Mcimbi	Childline SA
14	Yonela Yolanda Mgojo	Childline SA
15	Nthabiseng Moleka	Commission for Gender Equality
16	Noluvo Msekelwa	NPA SOCA UNIT
17	Vuyiseka Mtendeshe	Sinawe TCC Mthatha
18	Malalange Nangavo	MRH-PN
19	Sergeant Busisiwe Ncula	SAPS
20	Dr Nomonde Ndyalvan	Sinawe TCC Mthatha
21	Bolekwa Nokeke	Sinawe TCC Mthatha
22	Ondela Ntloko	Sinawe TCC Mthatha
23	Kerry Anne Oosthuizen	Commission for Gender Equality
24	Sergeant Sonwabile Sokapase	SAPS FCS UNIT MTHATHA
25	Nosicelo Somyalo	Sinawe TCC Mthatha
26	Adv Vuyokazi Xalisa	NPA
27	Zolani Ximbi	Sinawe TCC Mthatha

28	Luyolo Yoyo	Sinawe TCC Mthatha
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**FREE STATE WORKSHOP 27 JUNE 2019  
(BLOEMFONTEIN)**

	NAME	ORGANISATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Brig Anneke Pienaar (ret)	Advisory Committee member
3	Dominic Cull	Advisory Committee member
4	Dellene Clark (Adv)	Researcher
5	Chantelle Krebs	Administrative support
	<b>DELEGATES</b>	
6	Samantha Britz	Commission for Gender Equality Bloemfontein
7	Cynthia du Toit	Child Welfare Bfn and Childline Fs
8	Sgt Chrisna Van Klieltigh	SAPS Galeshewe FCS
9	Jacoba Elizabeth Krafft	NPA
10	Nono Lesie-Shale	NPA
11	P Maarman	NPA SOCA UNIT
12	Mafusi Paulinah Maphepha-Lekeda	NPA (SOCA Unit)
13	Michele Nel	NPA
14	Lt Colonel Marli Strydom	SAPS Galeshewe FCS
15	Khopolo Thebe	The Angels Brigade

**LIMPOPO WORKSHOP 2 JULY 2019  
(POLOKWANE)**

	NAME	ORGANISATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Dr Joan Van Niekerk	Advisory Committee Chairperson
3	Dominic Cull	Advisory Committee member
4	Brig Anneke Pienaar (ret)	Advisory Committee member
5	Dellene Clark (Adv)	Researcher
6	Mpolokeng Ledwaba	Administrative support
	<b>DELEGATES</b>	
7	Louise Batty	KeeptheDream196

8	Ruth Chauke	Ndlovu Medical Trust
9	Nobesuthu Javu	Ekuphumuleni-Thy Rest Restoration Home
10	Morongwa Magongoa	Ndlovu Medical Trust
11	MA Masekoameng	DOJ&CD
12	Richard Masindi	NPA
13	Buyi Mathenjwa	Ndlovu Medical Trust
14	Dennis Matotoka	Commission for Gender Equality
15	Corinne Sandenbergh	STOP
16	Jakkie Wessels	

**MPUMALANGA WORKSHOP 4 JULY 2019  
(MBOMBELA)**

	NAME	ORGANISATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Dr Joan Van Niekerk	Advisory Committee Chairperson
3	Dominic Cull	Advisory Committee member
4	Brig Anneke Pienaar (ret)	Advisory Committee member
5	Dellene Clark	Researcher
6	Edith Louw	Administrative support
	<b>DELEGATES</b>	
7	Dlamini TV	Hendrina TCC
8	Christa Du Plessis	NPA SOCA UNIT
9	T Keen-Horak	NPA SOCA UNIT
10	Z Khoza	NPA SOCA UNIT
11	Nonhlanhla Madalane	Project Dignity Foundation
12	Brigadier MB Magagula	SAPS
13	Thandi Maluka	Positive Women's Network
14	Nonhlanhla Maphala	The Salvation Army
15	Magda Marais	NPA
16	Nokutwari Mashego	Positive Women's Network
17	Asanda Mdala	Childline
18	G Mdwandwe	NPA SOCA UNIT
19	Miranda Mhlanga	DoJ&CD
20	M Mkhathshwa	NICRO
21	S Mkhonza	NPA SOCA UNIT
22	Emeldah Mokoena	CLMPU
23	Filo Mooney	Childline MP
24	C Mthembu	Hendrina CYCC
25	R Mukwangwari	Khulisa

26	Tsakani Ndlovu	CLMPU
27	Captain CJ Ndubane	SAPS
28	Benita Nel	Childline Mpumalanga
29	Linneth Nkosi	Hendrina TCC
30	PB Nkosi	NPS:Secunda Soc
31	Sakhile Nkosi	DoJ&CD
32	Evidence Piettersen	DoJ&CD
33	Catherine Restiau	Project Dignity Foundation
34	Adv Dorcas Shabangu	NPA (SOCA UNIT)
35	Ramutle Sikue	Child Health
36	Capt Sithole-Nkosi	SAPS
37	Nhandora Songeziwe	The Salvation Army
38	Noluvuyo Violet Tembeni-Nondze	NPA

**KWAZULU NATAL WORKSHOP 11 JULY 2019  
(PIETERMARITZBURG)**

	<b>NAME</b>	<b>ORGANISATION</b>
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Dr Joan Van Niekerk	Advisory Committee Chairperson
3	Dominic Cull	Advisory Committee member
4	Brig Anneke Pienaar (ret)	Advisory Committee member
5	Dellene Clark (Adv)	Researcher
6	Vusi Mavuso	Administrative support
	<b>DELEGATES</b>	
7	Shireen Anthony	Msunduzi Municipality
8	Ayanda Baepi	Banking Association of South Africa
9	Sibusiso Biyela	KZN Premiers'Office
10	Brendan Botha	Break-Free
11	Vanessa Chetty	The Hope Foundation
12	Dawn Coleman Malinga	NPA
13	Conrad Cooper	Project Exodus, Anthem Church
14	Joanne Downs	Concerned citizen
15	Samkelisiwe Hlongwane	NPA (SOCA UNIT)
16	Kerry Janse van Rensburg	Project Exodus, Anthem Church
17	Michelle Kiggen	Kiggen
18	Alex Khanyile	Pinetown Magistrate Court
19	Lloyd Lotz	SAHRC
20	Nqobile Malinga	NPA Pinetown
21	Frederick Masondo	Church
22	Lungile Masuku	FAMSA PMB
23	Val Melis	NPA
24	D Seocharan	NBCC Manufacturing Industry

25	Julie Todd	PMB Child Family Welfare Society
26	Slie Thwala	DoJ&CD
27	Mlondolozzi Vava	Commission for Gender Equality

**STAKEHOLDER MEETING 22 AUGUST 2019  
(BASA & SABRIC)**

	NAME	ORGANISATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Brig Anneke Pienaar (ret)	Advisory Committee member
3	Dellene Clark (Adv)	Researcher
	<b>STAKEHOLDER</b>	
4	Ayanda Baepi	Banking Association of South Africa
5	Nicole Naidoo	SABRIC
6	Susan Potgieter	SABRIC

**STAKEHOLDER MEETING 22 AUGUST 2019  
(LEGISLATIVE DEVELOPMENT DoJ&CD)**

	NAME	ORGANISATION
	<b>SA Law Reform Commission</b>	
1	Adv Retha Meintjes SC	Advisory Committee Project Leader
2	Brig Anneke Pienaar (ret)	Advisory Committee member
3	Dellene Clark (Adv)	Researcher
	<b>STAKEHOLDER</b>	
4	Adv Sarel Robbertse	DoJ&CD