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**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
PROJECT 107: SEXUAL OFFENCES: PORNOGRAPHY AND CHILDREN**

On 16 March 2019 the Commission approved the publication of its discussion paper on sexual offences (pornography and children) for comment. As part of the overarching investigation into the review of all sexual offences, this discussion paper seeks to review the legislative framework that currently applies to children in respect of exposure to pornography and child sexual abuse material (the Commission's preferred term for child pornography) within the larger framework of all statutory and common law sexual offences.

Five main topics are discussed in this paper, namely:

- Access to or exposure of a child to pornography;
- Creation and distribution of child sexual abuse material;
- Consensual self-child sexual abuse material (sexting);
- Grooming of a child and other sexual contact crimes associated with or facilitated by pornography or child sexual abuse material; and
- Investigation, procedure & sentencing.

The Commission invites comment on the discussion paper and the draft Bill which accompanies it. Comment may also be made on related issues of concern which have not been raised in the discussion paper. The closing date for comment is 30 July 2019.

ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, CENTURION

DATE: 8 April 2019

A copy of the summary of the discussion paper and the draft Bill is attached. The contact person for enquiries in respect of the media statement is Ms D Clark: email dclark@justice.gov.za. The discussion paper is freely available on <http://salawreform.justice.gov.za>

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EXECUTIVE SUMMARY

1. As part of the overarching investigation into the review of all sexual offences, this discussion paper seeks to review the legislative framework that currently applies to children in respect of pornography and child sexual abuse material 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 preliminary 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 pornography (described as child sexual abuse material in this discussion paper). This material may be illegal or may only be legal for adults.

3. For the purpose of this paper, five areas of concern have been identified:

- Access to or exposure of a child to pornography;
- Creation and distribution of child sexual abuse material;
- Explicit self-images 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 discussion paper aims to identify 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 reflects the submissions made to the Commission in response to its issue paper, discusses identified gaps and makes preliminary legislative and non-legislative recommendations. Its purpose is to serve as a basis for in-depth deliberation on the law reform needed to protect children and to test

public opinion on the solutions identified by the Commission. It also discusses concerns relating to implementation. This approach aligns with the expanded mandate of the South African Law Reform Commission's (Commission) 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 discussion paper 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 discussion paper contains provisional legislative and non-legislative recommendations (some in the form of options). The Commission requests comment on the discussion paper, particularly the provisional recommendations made in it and the draft Bill which accompanies it.

6. Following the discussion paper, the Commission will publish a report containing the Commission's final recommendations and proposal for law reform by way of draft legislation, if necessary. The report will take the public response to and input gleaned from public and expert workshops on the discussion paper into account in arriving at its

final recommendations. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration.

7. In summary, in addition to the proposed amendments to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA) and the Films and Publications Act 65 of 1996 (FPA) contained in the proposed draft Bill the Commission provisionally recommends, and seeks comment on, the following:

7.1. 'Child pornography' or 'child sexual abuse material'

The Commission provisionally recommends that the term 'child pornography' be substituted with the term 'child sexual abuse material' in the SOA 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 discussion paper.

7.2 Revision of the SOA 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 SOA 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 FPA and the substitution thereof by reference to the proposed definition of 'child sexual abuse material' in the SOA.

7.3. Child sexual abuse material and related offences to continue to be criminalised in both the FPA and SOA or rather in a single statute, the SOA

The Commission provisionally recommends that all offences relating to child sexual

abuse material and children's exposure to pornography be criminalised in the SOA. This means that all pertinent offences in the FPA are to be deleted and re-enacted (with the necessary changes) in the SOA.

7.4. Alignment of the definitions of 'child sexual abuse material' and 'pornography'

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

7.5. Providing for all technologies

The Commission is mindful that all existing and newly created offences in the SOA 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 not to draft legislative proposals in such a way that the crimes are technology dependent or specific.

7.6. Protecting children from exposure to pornography and child sexual abuse material

The Commission provisionally 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. The Commission endorses the continued criminalisation of child sexual abuse material and its classification as illegal. Consequently the provisional recommendation is to ensure that all devices (new and second hand) 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 will serve to protect both the child and the provider, though regulations will be required to provide for effective

implementation.

7.7. Consensual self-generated child sexual abuse material by and of certain children

The Commission is mindful of the need to differentiate between creating or 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. The Commission is of the view that very limited decriminalisation should be provided for, as proposed in clause 56(9), but that, given the very nuanced scenarios that come into play, the provisions of the Child Justice Act 75 of 2008 will sufficiently cater for those instances where a diversion, rather than a full prosecution, would be the preferred manner to deal with the child in conflict with the law.

7.8. Live performances involving child sexual abuse material

The Commission provisionally recommends that all aspects of live performances involving child sexual abuse material, including the attendance or viewing thereof and the procurement of children to participate therein should 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. However the provisional recommendation is that the acts of attending, viewing or procuring are to be specifically included as part of a standalone offence criminalising the recruiting, coercion or deception of a child to participate in a live performance involving child sexual abuse material; or to provide child sexual abuse material.

7.9 Obligation to report commission of offences

The Commission provisionally 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 SOA. 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.

7.10. 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 and 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 SOA:

- a no-defence clause regards age or entity in the event of under-cover police operations, in clause 56(10);
- an evidentiary clause to aid courts in the determination of the age of the child in or depicted in the child sexual abuse material, in clause 59A;
- a sentencing clause for clause 19C- offences, previously criminalised in the FPA, and for a range of ancillary 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, in clause 56A;
- a clause on the management of child sexual abuse material and pornography, in clause 61A. In terms of this recommendation court officials and the police may not reproduce any such material without a reproduction order granted by a court and must take all reasonable steps to prevent access to this material; and
- for court-orders regarding the seizure, forfeiture, disposal or destruction of evidence relating to child sexual abuse material or pornography, in clause 61B.

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

Although the law currently regulating child sexual abuse material has been lauded internationally and meets the five criteria listed by the International Centre for Missing and Exploited Children (ICMEC) for model legislation, specific areas have been

highlighted by the United Nations Convention on the Rights of the Child Committee (UNCRC Committee) for attention and some problems have been identified with implementation. South Africa has been enjoined by the UNCRC Committee to take specific measures to prevent and tackle online CSEA. These measures include the adoption of a national response for preventing and addressing online child sexual exploitation and abuse (CSEA), in close collaboration with relevant industry and organizations.

The Commission recommends that a multi-disciplinary approach should be followed and that directives and national instructions or standing operating procedures should either be developed or updated with a specific focus on the policing and prosecution of case relating to child sexual abuse material. The Commission recommends the inclusion of the Department of Education in the Inter-sectoral Committee for the Management of Sexual Offence Matters as provided for in the SOA. 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 training for first responders and follow-up investigation and management of cases involving child sexual abuse material. Although section 66 of the SOA provides for training (including social context training) and it forms part of the NPA training curriculum it would seem that this aspect needs renewed attention.
- 3 A multi-disciplinary committee must provide for uniformity of data obtained from SAPS and the NPA Sexual Offences and Community Affairs (SOCA). The Commission recommends that record keeping should be standardized and that statistics should be segregated i.e. data on different crimes, according to the section and 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 the police and prosecutors 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. The Commission recommends that the roleplayers themselves should develop programmes focusing specifically on support/debriefing of members dealing with sexual offences and for members dealing with victims and child sexual abuse material.

The Commission further recommends that SAPS 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.

7.12 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 of the FPA and in its place recommends the enactment of clause 54A(2) which places similar obligations on electronic communication service providers with the addition of allowing SAPS 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.

7.13. Miscellaneous matters

As some of the proposed amendments to existing legislative provisions applicable to children in the SOA 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 (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT
AMENDMENT BILL
(MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES)

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.

B I L L

To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by inserting offences relating to child sexual abuse material; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts, as follows:—

1. Amendment of Act 65 of 1996

(a) The amendment of section 1 of the Films and Publications Act, 1996 by the substitution for the definition of ‘child pornography’ of the following definition:

‘child pornography’ means ‘child pornography’ as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).¹

(b) The amendment of section 1 of the Films and Publications Act, 1996 by the substitution for paragraph (b) of the definition of ‘publication’:

‘(b) any writing or typescript [**which has in any manner been duplicated**];’

(c) The deletion of sections 24B, 27A² and 30B(1)(b) of the Films and Publications

¹ The FPA Amendment Bill has adopted this definition (see clause (1)(b) of the Bill). However as there are two conflicting amendments it is not clear which is the preferred option.
² The Commission is cognisant of the development of a number of Bills (including the Cybercrimes

Act, 1996.

2. Amendment of the long title of Act 32 of 2007

(a) The amendment of the long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by the substitution for the term 'child pornography' by the term 'child sexual abuse material' wherever it appears;

(b) The amendment of the long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by the substitution 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, including offences relating to sexual exploitation or grooming, **[exposure to or display of pornography and the creation of child sexual abuse material] to provide for the further protection of children by providing comprehensively for all offences relating to child sexual abuse material as well as the exposure of children to inappropriate adult sexual content**, 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.

3. Amendment of the Index of Act 32 of 2007

(a) The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading to Part 3 of Chapter 2 of the following heading: "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";

Bill and the FPA Amendment Bill) aiming to regulate the interaction between ISPs and government. As these Bills are yet to be enacted the Commission would be remiss to point out that sections 27A and 30B(1)(b) need to be repealed.

(ii) the substitution for item 10 for the following item:

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

(b) The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading to Part 2 of Chapter 3 of the following heading:

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

(ii) the substitution for item 19 for the following item:

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

(iii) 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';

(iv) the substitution for item 20 for the following item:

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

(c) The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading of Chapter 4 of the following heading:

'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 persons who are mentally disabled for pornographic purposes or benefiting therefrom';

(ii) 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 person who are mentally disabled';

(d) The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading to Part 1 of Chapter 7 of the following heading: 'Miscellaneous offences: Obligation to report commission of sexual offences against children or persons who are mentally disabled or offences involving child sexual abuse material and attempt, conspiracy, incitement or inducing another person to commit sexual offence';

4. Amendment of Act 32 of 2007

(a) The amendment of section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by the

(i) substitution for the definition of 'child pornography' of the following definition: "child **[pornography]** sexual abuse material" means any live display,³ image or sequence of images,⁴ however created⁵ or portrayed,⁶ or any description or presentation of a person, real or simulated, who is, or who is⁷ 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 stimulate erotic or aesthetic feelings or not, including any such live display, image, sequence of images, or description or presentation⁸ of such person –

- (a) engaged in an act that constitutes a sexual offence;⁹
- (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;¹⁰

3 A shortcoming reflected in the EU Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. This is included in the Cybercrimes Bill amendment to section 20 of the SOA as a standalone offence.

4 FPI note that it is not clear that video footage is included.

5 The use of the word 'created' could be problematic. If encryption technology is used of streaming then the material is never 'created' in a format that can be accessed because it is not necessarily downloaded or saved anywhere. This question should be asked in conjunction with the insertion of section 19C which expressly includes reference to 'accessing' and 'viewing'.

6 To cover the 'real time' portrayal via webcam or live-streaming as there is no record of it thereafter, it is not 'created'.

7 The Cybercrimes Bill inserts the word 'realistically' but the Commission is of the view that the word 'is' refers to real. An option would be to incorporate the word 'virtual' which is not in the OPSC. It is unclear whether comics (anime) would be covered under the word 'is' as well.

8 Insertion as in the Cybercrimes Bill for consistency.

9 The definition of 'sexual conduct' in the FPA includes bestiality but as this is a sexual offence in the SOA it is not necessary to include reference to it in the definition.

10 SAPS request that the words 'or breasts' be included. The words are only included in the

- (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 sexual 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,¹¹ 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, that could be used to advocate, advertise or promote a child for sexual purposes¹² or 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’;

(ii) 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);

(iii) 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 or presentation of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature whether such image, live display, image, sequence of images description or presentation is intended to stimulate erotic feelings or not [that is intended to stimulate erotic feelings], including any such image 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 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;

definition of ‘child sexual abuse material’ and not ‘pornography’ and are kept gender neutral on purpose. The Commission has made this proposal with the understanding that a defence is provided for in section 56(8) in the interest of a legitimate cultural practice for the exposure or display of the female breasts in terms of section 9 and 22.

11 This could already include ‘erotic’ posing. Is it necessary to specify it?

12 Gap highlighted by Mr Chetty and by ICMEC e.g. advertising where to find a website. This phrase is included in the Cybercrimes Bill as part of clause 19A(6) where it is incorporated as an offence.

- (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 sexual 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;'

(b) Chapter 2 is hereby amended by—

- (i) the substitution for the heading to Part 3 of Chapter 2 of the following heading:

"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, or engaging sexual services of persons 18 years or older";'

- (ii) the substitution for the heading of section 10 of the following heading:

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

(c) Chapter 2 is hereby amended by—

- (i) the substitution for the heading to Part 2 of Chapter 3 of the following heading:

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

- (ii) 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,with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or'

(iii) the substitution for section 19 of the following section:

‘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.’.

(iv) the insertion after section 19 of the following items:

‘19A. Enticement to view or making child sexual abuse material or pornography accessible to children

- (1) A person (‘A’) who unlawfully and intentionally advertises, provides access to or distributes to a child (‘B’), or entices B to view any of the items or categories listed in section 19 through any means, with or without the consent of B, is guilty of the offence of enticing a child to view child sexual abuse material or pornography.
- (2) A person (‘A’), including a manufacturer or distributor of any technology or device or electronic communications service provider –
 - (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 or pornography, is guilty of the offence of making child sexual abuse material or pornography accessible to a child;
 - (b) who uninstalls the default setting blocking access to child sexual abuse material is guilty of the offence of making child sexual abuse material accessible;

- (c) who uninstalls the default setting blocking access to pornography without valid identification proving that the requester is a user over the age of 18, is guilty of the offence of making pornography accessible to a child;
 - (d) who, when uninstalling the default setting blocking access to pornography fails to keep a register as prescribed is guilty of an offence;
 - (e) who fails to take reasonable steps to ensure that any of the items or categories listed in section 19 through any means is not made accessible, exposed or displayed to a child ('B'), is guilty of the offence of negligently making accessible, exposing or displaying child sexual abuse material or pornography to a child.
- (3) The Minister must make regulations pertaining to the register provided for in subclause 2(d) and pertaining to the minimum requirements on the steps to be taken as required in subclause 2(e).

19B. Misleading techniques on the internet

- (1) Whoever 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 child 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 child to child sexual abuse material or pornography.
- (2) For purposes of this section the term
 - (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 .

19C. Offences relating to child sexual abuse material

- (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 downloads, possesses, accesses or 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 distributes, makes available, transmits, offers for sale, sells, offers to procure or procures child sexual abuse material, or allows child sexual abuse material to be distributed, made available, transmitted, offered for sale, sold, offered to procure or procured, is guilty of the offence of making child sexual abuse material available.

- (4) A person who unlawfully and intentionally arranges, attends or participates in a live performance involving child sexual abuse material is guilty of the offence of arranging, attending or participating in a live performance involving child sexual abuse material.
- (5) 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.
- (6) A person who unlawfully and intentionally processes or facilitates a financial transaction that will facilitate a contravention of subsections (1) to (5) is guilty of an offence.'

(v) the substitution of section 20 for the following section:

'(1) A person ("A") who unlawfully and intentionally uses a child complainant ("B"), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person ("C") or not –

- (a) for purposes of creating, making or producing;
- (b) by creating, making or producing; or
- (c) in any manner assisting to create, make or produce,

[any image, publication, depiction, description or sequence in any manner whatsoever of] child [pornography] sexual abuse material, is guilty of the offence of using 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.

(3) A person ('A') who unlawfully and intentionally recruits, coerces or deceives 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) being used as described in subsection(1); or
- (b) participating in a live performance involving child sexual abuse material is guilty of the offence of recruiting a child for child sexual abuse material.

(4) A person ('A') who unlawfully and intentionally coerces or deceives a child ('B') through whatever means to provide child sexual abuse material of him or herself in any manner whatsoever is guilty of the offence of coercing or deceiving a child to provide child sexual abuse material .'

(vi) the insertion after section 54 of the following item:

'54A. Obligation to report commission of offences under sections 19A, B and C

(1) Any person who, having knowledge of the commission of any offence referred to in section 19A, B and C, or having reason to suspect that such

offence has been or is being committed and unlawfully and intentionally fails to-

- a) Immediately report such knowledge or suspicion to a police official; or
- b) furnish, at the written request of a police official, all particulars of such knowledge or suspicion,

is guilty of an offence.

- (2) An electronic communications service provider or financial institution that is aware or becomes aware that its electronic communications system or facilities have or are being used or are involved in the commission of any offence involving child sexual abuse material referred to in sections 19A, B or C and fails to-

- a) immediately report the offence to a police official;
- b) preserve any information which may be of assistance to a police official investigating the offence;
- c) comply with all lawful written requests by a police official relating to the investigation and prosecution of such offence;
- d) take all reasonable steps to prevent access to the child sexual abuse material by any person, unless otherwise instructed by a police official in writing not to take such steps;

is guilty of an offence.

- (3) A person referred to in subsections (1) and (2)—

(a) must provide reasons for that knowledge 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.'

- (vii) the amendment of section 56, by the addition of the following subsections:

'(9) A child ('A') may not be convicted of an offence and the prosecutor must refer A to the probation officer who must deal with A in accordance with the provisions of section 9 of the Child Justice Act, 75 of 2008, with the necessary changes, in the following circumstances –

- (a) A may not be convicted of an offence in terms of sections 19C(1) or 19C(2) if A is the child in the child sexual abuse material;
- (b) A may not be convicted of an offence in terms of section 19 if A is the child in the child sexual abuse material,¹³ and the exposure or display is made to a child B, who is 12 years or older and not more than 2 years younger than A, who consented to the exposure or display;
- (c) A may not be convicted of an offence in terms of sections 19, 19C(1), 19C(2) or 20(1) if the child sexual abuse material is of another child with or without A, where the other child depicted consented to the creation of the child sexual abuse material and the exposure or display is only to the

13 The Commission would like to flag these clauses as it is concerned that children may, despite the element of consent, display or expose another child to material in which the child is self-harming or of the child engaging in harmful conduct such as sado-masochism or criminal conduct such as bestiality. The child consenting to receive child sexual abuse material may not fully understand what he or she will be exposed to.

other child, and the other child is 12 years or older and not more than 2 years younger than A.

(d) A may not be convicted of an offence in terms of section 10 if A is also the child in the image and the exposure or display is made to an adult person B.

(10) It is not a valid defence to a charge under section 18 –

(a) that the accused person ('A') believed that the person with whom A agreed or made an arrangement was a police official or a person acting under the written direction of a police official; or

(b) that if the person with whom the accused agreed or made an arrangement was a police official or a person acting under the written direction of a police official, the person referred to did not exist.'

(viii) the amendment of section 56A, by the addition of the following subclauses:

'(3) A person convicted of any offence in terms of section 19C is liable upon conviction to a fine or 15 years' imprisonment;

(4) In addition to any sentence imposed on the accused for an offence in terms of section 19C or an order that the name of the accused be placed on the National Register for Sex Offenders, punishment may include any order that the court, subject to a pre-sentence report by a probation officer, may deem appropriate to protect children from a sexual offence being committed against them, to be complied with for such period as may be determined by the court, including any or all of the following orders-

(a) that the accused shall not visit, frequent, or reside in close proximity to any school, premises or places frequented by children;

(b) that the accused shall not access the internet, or that the accused shall have such qualified access as may be determined by the court;

(c) that the accused shall 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 accused shall not employ any child;

(e) that the accused 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 accused shall submit to supervision and monitoring by a probation officer who may apply any technique to limit access to the internet for purposes of preventing access to children and/or child sexual abuse material;

(g) that the accused shall accede to any reasonable request by a probation officer for purposes of monitoring compliance with any order made; and

(h) that the accused shall undergo such therapeutic interventions as the court may determine appropriate.'

- (ix) the insertion after section 59 of the following clause:

'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 cognisance of the fact that the child in the child sexual abuse material is, or is depicted as being, under the age of 18.

(2) Where it is disputed that the child 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, 51 of 1977, shall serve as prima facie proof of such fact and the provisions of section 212 (12) shall find application.'

- (x) the insertion after section 61 of the following clauses:

'61A Management of Child Sexual Abuse Material and Pornography

(1) Police and court officials having access to images or sequences of images, descriptions, or portrayals of child sexual abuse material or pornography may not reproduce any such material without a court having made a reproduction order.¹⁴

(2) Police and court officials having access to images or sequences of images, descriptions, or portrayals of child sexual abuse material or pornography, shall take all reasonable steps to prevent access thereto by anyone not having a right of access.

(3) A reproduction order referred to in subsection (1) shall only be made in the presence of substantial and compelling circumstances and shall be accompanied by directives regarding the manner in which the material is to be managed including the period for which it may be held and the date upon which it shall be returned to the investigating officer.

(4) Any person who fails to comply with the provisions of subclauses (1) or (2) or the directives of a reproduction order shall be guilty of an offence and liable upon conviction to a fine or 2 years' imprisonment or to both such fine and imprisonment'; and

'61B Orders to seize, forfeit, dispose and destroy

(1) The court that convicts or acquits a person of any offence in terms of this Act that involves child sexual abuse material must order the seizure of all such material and any device that may allow access to child sexual abuse material if not yet seized, and the confiscation and forfeiture of all such material or devices

¹⁴ Commission is concerned that this proviso may hamper the effective investigation and prosecution of offences involving child sexual abuse material.

and, to the extent necessary, the future handling, seizure, forfeiture, disposal and or destruction thereof.

(2) Where, following an investigation for any offence in terms of this Act that involves child sexual abuse material, no prosecution is instituted a court may, upon application by a prosecutor, order the confiscation, forfeiture, disposal and destruction of all such material and of any device that may allow access to child sexual abuse material’.

(xi) the substitution of subsection 63(2), by the following subsection:

‘(2) The Committee shall consist of –
(a) the Director-General: Justice and Constitutional Development, who 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[.] and
(g) the Director-General: Department of Basic Education.’

(xii) the insertion after subparagraph 65(1)(d) of the following subparagraph:

‘(e) ensuring the different organs of state provide for, where relevant, appropriate screening policies and debriefing programs.’

(xiii) the substitution of subparagraph 66(1)(a), by the following subparagraph:

‘(a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Safety and Security 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 and Basic Education, 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: . . .’

(xiv) the insertion after subparagraph 66(1)(a)(vi), by the following subparagraph:

‘(vii) the manner in which and the expediency with which police officials are to react to the reporting of sexual offences involving child sexual abuse material; the circumstances under which 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 manner in which these offences are to be investigated including the manner of search and seizure and undercover operations; the steps to be taken to have any child in the child sexual abuse material identified and

the manner in which the victim is to be provided protection, whether identified or not; the steps to be taken to protect the child sexual abuse material from unauthorised access including final disposal thereof.'

- (xv) the substitution of subparagraph 66(2)(a), by the following subparagraph:
- '(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of Safety and Security and Correctional Services and the Directors-General: Health [and], Social Development and Basic Education, 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: . . .'
- (xvi) the insertion after subparagraph 66(2)(a)(ix), by the following subparagraph:
- '(x) the manner in which sexual offences involving child sexual abuse material should be dealt with, the manner in which the victim is to be provided protection, whether identified or not; the steps to be taken to protect the child sexual abuse material from unauthorised access including final disposal thereof; the manner in which a child is to be referred to a probation officer in terms of section 56(9); 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.'
- (xvii) the substitution of subparagraph 66(3)(a), by the following subparagraph:
- '(a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with the Directors-General: Justice and Constitutional Development [and], Social Development and Basic Education 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, including the following: . . .'
- (xviii) the insertion after subparagraph 66(3)(a)(v), by the following subparagraph:
- '(vi) the manner in which assistance in the investigation and prosecution of sexual offences involving child sexual abuse material must be provided, including the determination of age where the material involves unidentified victims or depictions.'

(xiv) the insertion after subparagraph 66(3), by the following subparagraphs:

'(3)(A) The Director-General Basic Education must, in consultation with the Inter-sectoral Committee 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 offences, with particular reference, among others to –

- (i) equipping educators and learners with knowledge on preventative measures;
- (ii) the manner in which reports of sexual offences should be dealt with in general;
- (iii) the manner and time limit within which sexual offences are to be reported to the SAPS;
- (iv) the manner the child victim should be protected and referred for other services if necessary;
- (v) the manner in which the child in conflict with the law should be dealt with;
- (vi) the manner in which assistance in the investigation and prosecution of sexual offences generally must be provided; and
- (vii) the manner in which child sexual abuse material must be dealt with.';

'(3)(B) The Director-General Justice and Constitutional Development must, in consultation with the Inter-sectoral Committee 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 offences, with particular reference, among others to –

- (i) the manner 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 dealt with including any copying and distribution thereof at all courts; and
- (ii) 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 disposed of and destroyed.';

'(3)(C) The Director-General Social Development must, in consultation with the Inter-sectoral Committee 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 offences, with particular reference, among others to –

- (i) the manner in which probation officers are to deal with children referred in terms of section 56(9) and any other child in conflict with the law for having committed a sexual offence involving child sexual abuse material;
- (ii) the manner in which they are to be assessed; and
- (iii) the interventions to be recommended for purposes of determining appropriate conditions of diversion.'