Sexual Offences and the Internet: Are we ready to face 2010?

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1 INTRODUCTION

With the Internet fast taking over our lives it is no surprise that the human race is exploring its capabilities to commit crimes. Although various crimes such as Internet fraud, hacking, cracking and alike are common crimes within the IT environment, certain offences seem unreal to be committed electronically. These crimes include inter alia rape, sexual assault, molestation etc. With South Africa nearing the 2010 soccer world cup tournament, it is commonly predictable that foreign visitors will engage in sexual activities during their stay. Some of these activities will be criminal in nature, and, as we are fast becoming an Internet driven society, it is common thought that these activities will be done electronically or partially electronically. The purpose of this article is to dissect common sexual offences within the South African context to determine if they can be committed electronically and if so, whether or not such electronic actions are punishable under the South African law.

2 COMMON LAW

Firstly one has to look at the elements of a crime to determine whether or not certain actions are punishable. In order for actions to be punishable as crimes it should contain the following elements:

a) Legality: The action which the court wants to punish must be an accepted or existing criminal offence. The court cannot punish actions which it feels should morally be prohibited or punished.

b) Action: Once it has been established that certain actions are punishable it must further be established whether or not X has committed such an action. An action can be committed by an omissio or commissio. The action must also be done out of X's free will, in other words X must have control over his actions.

c) The actions must comply with the definition of the said crime: Every crime has its own definition of how, where and when the crime can be committed. Elements of specific crimes such as murder, assault, and sexual assault will be discussed below.

d) Unlawfulness: In certain cases some action, although it complies with all the elements of the said crime, will not be punishable due to certain defences available to X.

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1 Snyman Strafreg 4de uitgawe 28; Joubert Lawsa vol 6 22; Burchell and Milton Principles of Criminal law 1991 71.
2 Snyman 28.
3 Ibid.
4 Ibid; Burchell 71.
5 Ibid; Joubert 24.
6 Snyman 28.
7 Snyman 29.
8 Ibid; Joubert 36-37
e) Fault: It has to be determined whether or not X can be legally reproachable for his action. This is a two-tier test. Firstly it has to be determined whether or not X had the mental capacity to realise the wrongfulness of his actions and furthermore that he continued to act in spite of the realisation. Secondly X should have acted intentionally or negligently. If X’s actions were neither intentionally nor negligent, ie innocent, he can not be convicted of the said crime.10

2.1 Rape

Rape is committed when a man has intentional and unlawful sexual intercourse with a woman without her consent.11 Considering the definition of rape a few aspects thereof needs further discussion. Firstly sexual intercourse according to Snyman means that the male’s sexual organ must penetrate that of the female victim.12 The severity of penetration is irrelevant.13 From this element, it is clear that the perpetrator, who makes use of the Internet to engage in virtual sexual intercourse14 with the victim, cannot be convicted of common law rape, because no actual contact exists.15 The element that the perpetrator can only be a man falls outside of this study and will not be discussed.16 “Without consent” means that rape is absent when the victim willingly and consciously expressly or tacitly consented to have sexual intercourse with the perpetrator.17 If the element of actual penetration is negated one could possibly argue that sexual conversations in a chat room without the victim's consent can be construed as some kind of sexual offence, even rape. Since the presence of the parties in a chat room or webcam communication is completely voluntary it will be difficult for any prosecutor to prove the absence of consent. When the alleged victim feels uncomfortable with the conversation or visual contact with the other communicant, she or he can merely log off and end the connection.18 Since common law rape can only be done with the physical contact between two human beings, this crime cannot be committed virtually using cyberspace.

2.2 Indecent assault

Indecent assault is the unlawful and intentional assault of another person with the intention to commit an indecent action.19 One of the key elements of this crime is that an action is required by which the perpetrator must at least have some physical contact with the victim's

9 Ibid 30. These defences are inter alia: Self-defence, necessity, consent etc.  
10 Ibid 31. For a more in depth discussion on these elements consult Snyman 36-249; Joubert 87-89  
12 Snyman 459; Joubert 257; Hunt 405.  
13 Snyman 459.  
14 Where X and Y communicates via webcam, each at their own pc, and X have online intercourse with Y; or where X suggests via email or in a chat room how he is raping Y.  
15 Also see the discussion below on the sexual offences bill.  
16 See van Zyl Manlike verkragting: Steeds ‘n jurielse onmoontlikheid  
17 Snyman 461.  
18 See discussion below on stalking.  
19 Snyman 453; Joubert 255; Rv Abrahams 1918 CPD 590 as discussed in Milton Cases and Materials on Criminal law 1997 572.
This key element immediately excludes sexual gestures via a chat room or webcam as indecent assault. There are furthermore two problematic views on what exactly is meant with *indecent* assault. Firstly it is contended that the action itself must, objectively viewed, indecent in nature. The second view is that the perpetrator must have had the intention to commit an act of an indecent nature irrespective of whether or not the action is indecent. According to Snyman the second viewpoint is preferred to allow for instances where the private parts of another is accidentally touched in passing by without the intention to commit an indecent act. It is therefore clear that no actual contact with the victim’s private parts is needed as long as the perpetrator merely has the intention to commit an indecent act. The question arises whether or not any physical contact is indeed needed and whether or not it is possible to indecently assault another with mere threats or proposals? Can the perpetrator who suggests indecent assault via a chat room or make suggestive movements via webcam be convicted of indecent assault? If one however keep in mind that the primary requirement for assault is some kind of physical contact with the victim’s body, any proposal or suggestive actions can merely be attempt to commit indecent assault and not indecent assault itself.

3 LEGISLATION

3.1 Keeping a brothel

In terms of section 2 of the Sexual offences Act any person who keeps a brothel is guilty of an offence. Will keeping an Internet brothel be an offence for purposes of section 2? Firstly the definition of a brothel includes “any house or place kept for purposes of section 2? For persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose.” A house includes “a dwelling-house, building, room, out-house, shed or tent or any part thereof.” For purposes of place any “field, enclosure, space, vehicle or boat or any part thereof” will suffice. There is no indication in the act itself that a patron to this brothel must be physically present to make use of the services before such house or place can be seen as a brothel. It therefore seems possible to be guilty of keeping a brothel if lewd or indecent acts are committed at the said house or place and where patrons visit same online. Thus where these actions are done verbally or visually via webcam the mere fact that these indecent actions can take place will constitute an offence in terms of section 2. It was contended in *Jordan* that section 2 is unconstitutional in that it prohibits a person’s right to engage freely in economic activities and to pursue a livelihood. Spoelstra J was however of

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20 Snyman 454.
21 Author’s accent.
25 Act 23 of 1957; Joubert 478.
26 *S v Jordan and others* 2002 (1) SA 797 (T) 800.
the opinion that when a third person organises prostitution and benefits or profits there from, it can no longer be a private affair between a man and a woman or persons for that matter. Evidence brought before the court showed that the general public would be offended if they are confronted with prostitutes, pimps and brothels on every street corner. Spoelestra thus concluded that in light of section 36 of the Constitution keeping a brothel remains a criminal offence in order to protect the "moral serenity, dignity and tranquillity." In light of this decision one can also contend that the keeping of an Internet brothel should be prohibited just as the real brothel is prohibited. Although various computer programs are available to Internet users to warn them about such lewd and indecent websites, many of these programs are insufficient or intended for the rich and famous. Legally these unsuspecting, mainly under aged, Internet users should be protected against coming across an Internet brothel. As from the above arguments it is clear that keeping Internet brothels can be an offence in terms of section 2, charging and convicting the operators thereof can however be an uncanny task. A further question is whether or not virtual brothels will also constitute an offence within section 2? Again the definition of brothel in section 1 gives no indication that any physical action must take place in the house or place for it to be a brothel, but the mere lewdness or indecency thereof will suffice to constitute such. It can therefore be contended that even the keeping of a virtual brothel, as long as it is kept in a house or place as defined in section 1, will constitute a criminal offence.

3.2 Prostitution and exhibition

Being the oldest profession in the world, men have tried various methods to deal in and with prostitution. Possibly the safest form of prostitution is cyber sex which is sometimes even committed at work. Will online prostitution or exhibition be a criminal offence within the sexual offences act? In terms of section 19 any person who-

“(a) entices, solicits, or importunes in any public place for immoral purposes or
(b) wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access,

shall be guilty of an offence”

A person who displays his or her body in any sexual or otherwise immoral manner in public will thus be guilty of an offence. The words “door or window….public street or place...” clearly refers to an actual place where the public can physically walk pass and view the display. It would therefore be difficult to include Internet displays hereunder. If one however interpret the words “or any place to which the public have access” such place need not physically be visited by the public as long as the public has access to it. Therefore, if a person exhibits himself or herself by means of photographs or webcam or video clips on the Internet via email or a chat room it constitutes an offence within section 19. The

32 Ibid 801.
33 Ibid.
34 Act 106 of 1996.
35 2002 (1) SA 801, 2001(2)SACR 594.
36 Brothels where no actual prostitute is displayed or used but where animated prostituted or figurines are used to please patrons.
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The constitutionality of this section can be attacked in the light that where two or more consenting adults display their bodies to each other electronically could be seen as freedom of their sexual expression which is entrenched in the constitution. However, as Spoelstra confirmed in Jordan, the public needs to be protected and the public does not want to view indecency on every street corner. It is therefore imperative that these consensual actions must take place privately and it should not be readily available to the public i.e. a private chat in a chat room as appose to a public chat. Since section 19 only to refer to a person who exhibits himself or herself, a person who create virtual characters or figurines that are displayed in a sexual nature will not be guilty of this offence. Section 20 of the Act deals with prostitution:

“(1) Any person who-
   (a) Knowingly lives wholly or in part on the earnings of prostitution; or
   (aA) has unlawful vernal intercourse, or commits an act of indecency, with any other person for reward; or
   (b) in public commits any act of indecency with another person; or
   (c) in public or in private in any way assists in bringing about, or receives consideration for, the commission by any person of any act of indecency with another person,
   shall be guilty of an offence.”

There has been various contentions against section 20(1)(aA) in that it discriminates against woman who act as prostitutes. This section however, does not only address female prostitutes but also male prostitutes and is therefore gender neutral and not discriminatory.

Section (aA) is strictly speaking only directed at the prostitute and not the client. If this strict approach is followed only the person who receives the reward for indecent acts commits a crime and not the person who gives the reward. Such a strict approach can be discriminating. Ngcobo J is however of the opinion that the intention of the sexual offences act, especially section 20 was to address both the prostitute and the customer. This opinion is preferred as there is no reference in subsection (aA) to the word “receives” but only to a person who has sexual intercourse or commits indecent acts “for” remuneration. Ngcobo J correctly stated that a person who commits these acts for remuneration can just as well refer to both the prostitute and the customer. According to Ngcobo J the section was not aimed at any specific person but it was aimed to outlaw commercial sex and any person who takes part in commercial sex should be punished. The Judges’ opinion is however based that the customer commits a crime in terms of common law and the Riotous Assemblies Act, which,

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37 2002 (1) SA 801.
38 Such a person could however commit an offence in terms of the Films and Publications Act.
39 2002 (1) SA 801, S v Jordan and others (Sex workers education and advocacy task force and others as Amici Curiae) 2002 SACR 499 (CC), 2001(2) SACR 595, Burchell and Milton
40 Ibid.
41 Ibid, See also S v H 1988 (3) SA 545 (A) where council submitted “any person” excludes the prostitute, S v H 1986 (4) SA 1995.
42 See especially O’Regan J and Sachs J’s decision on 520 that they are of the opinion that s20 only criminalises acts by prostitutes and not that of the customer.
43 2002 SACR 499 (CC) 509.
44 Also see Kumleben J at 1988 (3) SA 553.
46 Act 17 of 1956.
in my opinion, is not needed since subsection (aA) is clear enough to include both customer and prostitute. The other reasons for section 20’s unconstitutionality rests upon it infringing on the rights of the prostitute to economic freedom and privacy. All of these arguments were rejected by the Constitutional Court in Jordan in that firstly: Prostitutes are still allowed to make money but the law has to keep up the good morals and prohibit commercial sex, and secondly: Prostitutes are not prohibited from having sex in private, but they are only prohibited from luring the public to have sex for reward. It is thus the public display and luring to promote commercial sex that must be prohibited and not the private actions. It therefore stands that Spoelstra J’s decision to decriminalise prostitution cannot be upheld. The majority decision however was that section 20(1)(aA) is inconsistent with the then Interim Constitution and thus invalid.

Since no indication exist as to where these indecent actions must take place for it to constitute an offence, one can argue that online-sex, webcam sex and telephone sex for reward are all criminal offences. These sites are created to promote commercial sexual activities although they do not physically take place. It is difficult to determine whether or not an open and democratic society would condemn prostitution as such but will tolerate online sexual activities for reward. Socially most indecent and illicit sexual activities are condemned and promoters thereof are usually outcasts of the community. However, where these sites are privately available and these prostitutes do not lure the public into their webs, one could argue that these actions take place privately and that the law has no interest therein. Furthermore, since these prostitutes have no physical contact with the customers, can it still be seen as prostitution or a mere form of business? If this online prostitution cannot be regarded as actual prostitution wouldn’t these actions be protected under the sections 16(c); 18 and 22 of the Constitution?

But when considering the fact that innocent Internet users can come across explicit prostitution sites, one can hardly differentiate between actual and electronic prostitution. It is also interesting to note that Selebi is of the opinion that prostitution and drinking in public should be legalised for the 2010 world cup as not to scare off tourists. However, legalising prostitution should be done with strong regulations as to continuously protect the public against moral decay. From Selebi’s arguments it rather seems that the legislator finds it too difficult to combat prostitution and online prostitution but legalising it seems to be the easier option to dispose of this ever growing problem. Police nowadays only arrest prostitutes in the course of combating other crimes.

3.3 The films and Publications act

The films and publications act was promulgated to rate all films distributed in South Africa and to regulate and prohibit certain films from being published. Chapter 7 of the act

47 2002 (2) SACR 499 (CC) 511, 524.
48 Ibid 512-513.
49 Ibid 514.
50 Act 200 of 1993.
51 Director of SAPD
53 2001(2) SACR 593-596.
54 Sex taxis and red-light district? www.mg.co.za visited 16/05/2007.
55 Act 65 of 1996.
deals specifically with criminal offences within the act relating to distribution and publication of certain films. Section 25 provides that:

“Any person who knowingly-
(a) distributes or advertises for distribution a publication classified as XX in terms of a decision of the Board which has been published in the Gazette;
(b) distributes a publication classified as X18 in terms of such a decision so published;
(c) distributes any publication in conflict with any condition imposed on such a publication in terms of section 17;
(d) publishes any publication without having printed in such publication his or her name and the prescribed particulars of his or her business address, shall be guilty of an offence.”

The films and publications board will review and assess all publications and then rate them according to their contents. These XX films referred to in section 25 are described as a publication that contains:

“….a visual presentation, simulated or real of-
(a) child pornography.
(b) explicit violent sexual conduct;
(c) bestiality, incest or rape;
(d) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or
(e) the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm;…”

Films rated as X18 contain:

“…a visual presentation, simulated or real, of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals;
(2) it describes predominantly and explicitly any or all of the acts mentioned in Schedule 1 or item (1).”

In order to properly assess these publications and why publishing them can be a criminal offence one has to look at the meaning of “publication” for purposes of this act. 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;

Schedule 1 item 1 act 65 of 1999. Also see Schedule 6, De Reuck v Director of Public Prosecutions, Witwatersrand local division and Others 2004 (1) SA 406 (CC) 419.
Schedule 2 items 1 and 2 act 65 of 1999. Also see Schedule 7, 2004 (1) SA 406 (CC) 419.
(e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or 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;"58

From the above definitions it is clear that any form of availability of pictures or films or alike on the Internet but also cellular phones can be regarded as a publication for purposes of the act. If these publications contain material that would reasonably have caused it to be XX or X18 rated, such a publication would constitute a criminal offence. Typical offenders will be creators of pornographic movies and or cartoons who distribute them via the Internet.59 The question however is whether pictures of a pornographic nature that were sent on a private request in a chat room would constitute an offence? Furthermore, whether or not online webcam communications of a pornographic nature for reward, which takes place in private, can be a punishable offence? No exemption is granted in the act for distribution of these films privately such as in a private chat, mms or e-mail. The words “distributed network”60 might give an indication that private publications are excluded from the ambit of the act. Distribute is defined as “in relation to a film or publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire…”61 The ordinary meaning is: “a distribution or being distributed; specifically, (a) apportionment by law (of funds, property, etc.), (b) the process by which commodities get to final consumers, including storing, selling, shipping, and advertising, (c) frequency of occurrence or extent of existence.”62 From these definitions it is clear that some kind of commercial aspect is involved in distribution. Therefore, where two or more people communicate with each other in private via webcam and XX rated or X18 rated material are sent to each other only, it can hardly be regarded as distribution and therefore not criminal in nature. The moment that the public will have access to these films, or live webcam conversations, it will no longer be private and will definitely constitute an offence in terms of section 25. The question however is when an ordinary website is used to invite prospective clients to enter into private chats with online prostitutes and XX rated or X18 rated material get exchanged whether these actions are then private or public and furthermore whether or not these actions are criminal? In my view this kind of distribution is in contravention of section 25 although it might be a private contribution. The fact is that the public will have access to it when they log on and request same. Where it happens to be two individuals who happened to meet on the Internet and both consent to having webcam conversations and both display their bodies in private it cannot contravene section 25. The same applies to persons who meet in public and then decide to display their bodies to each other privately in a room. It is therefore my opinion that distribution relates to the parties intention to have

58  Section 1 act 65 of 1999.
59  This article exclusively deals with electronic publications. Other forms of publication will not be discussed.
60  Section 1 act 65 of 1999.
61  Section 1 act 65 of 1996.
62  www.wikipedia.org visited 17/01/07
some kind of commercial gain for example where pictures are sent to engage in prostitution or pictures are sent via e-mail or mms for consideration or to invite the receiver to enter into a regular service. Where these pictures are then distributed in private with no commercial gain but for the parties' sole private pleasure such distribution should not be criminal.

Most of the Internet sexual activities are not only available to adults but children are more and more exposed to these elements by doing ordinary searches, chatting online and conducting online pleasures such as playing games. The Internet Watch Foundation\(^{63}\) is an online support-site where people from member countries can lodge complaints against websites containing child pornography or websites that promotes child pornography. According to this foundation there are more than 5 million images of child pornography floating the Internet.\(^{64}\) According to UNICEF, a organisation for children and abuse against children,\(^{65}\) child pornography and sex with children are all morally unacceptable and should be prohibited worldwide. UNICEF also estimates that 90% of all paedophile activities involve the Internet.\(^{66}\) Because the Internet is an identity free environment most paedophiles enjoy the anonymous contact with other like-minded people. In the virtual world they are not alone as appose to the real world where they find themselves as outcasts of the community. Paedophiles often pose themselves as other youngsters in chat rooms and gain the confidence of their victims after which they lure them into a web of pornography, sex and lies. For this reason and more the Films and Publications act also deals with child pornography. Section 27 deals with the possession of certain films and publications:

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\text{“27 Possession of certain publications and films prohibited} \\
\text{(1) (a) Any person shall be guilty of an offence if he or she-} \\
\text{(i) is in possession of;} \\
\text{(ii) creates or produces or in any way contributes to, or assists in, the} \\
\text{creation or production of;} \\
\text{(iii) imports or in any way takes steps to procure, obtain or access; or} \\
\text{(iv) knowingly exports, broadcasts or in any way distributes or causes to} \\
\text{be exported, broadcast or distributed,} \\
\text{a film or publication which contains child pornography or which} \\
\text{advocates, advertises or promotes child pornography or the sexual} \\
\text{exploitation of children.} \\
\text{(b) Paragraph (a) does not apply to a person who is in possession of a} \\
\text{film or publication containing child pornography if such possession is} \\
\text{necessary for the performance of any function in terms of this Act.} \\
\text{(3) Any person who has under her or his control any material referred} \\
\text{to in Schedule 1, 2, 6 or 7 and who fails to take all reasonable steps to} \\
\text{prevent access to such materials by a person under the age of 18 years} \\
\text{shall be guilty of an offence.”}
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In certain instances the law has to interfere even in the most private sort of conduct to protect the good morals of the society and or the wellbeing of others. The rights of children and their wellbeing in a society are of utmost importance. Children need to be protected

\(^{63}\) www.ispa.org.za/iweek/2003/presentations/ichetty.doc. visited 17/01/07
\(^{64}\) www.iwf.org.uk visited 29/01/07, www.beeld.com visited 08/02/07.
\(^{65}\) www.unicef.org visited on 29/01/07.
\(^{66}\) Ibid.
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against moral decay and early exposure to sexual pleasures, drug abuse and alike. Even if the child is not present when these pictures are shared, he or she will be violated every time when such picture is displayed or shared. Therefore even if children are only depicted in pornography and viewed in private, such actions should be punishable. As clearly indicated in section 27 any form of child pornography is a crime, whether in the making, distribution or the mere possession thereof. Child pornography is defined as:

“any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years-
(i) engaged in sexual conduct;
(ii) participating in, or assisting another person to participate in, sexual conduct; or
(iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.’

From the definition and section 27 it is clear that electronic transmission, storage, possession, creation or simulation of any sexual conduct where a minor is involved will constitute an offence. There is no indication in section 27 on the age of the perpetrator. Considering the fact that many youngsters from age 15 engage in sexual activities one could argue that where two consenting “children” of age 17 who make a film of their sexual behaviour for their own pleasure can be guilty of an offence. Should the law condemn these actions done in private by two individuals? Since both individuals are minors in all aspects of the law they cannot legally consent to the actions. What if they are married to each other? Will they still be regarded as children for purposes of section 27 although they have full contractual capacity? The sexual offences act is also silent on this matter. UNICEF defines a child as a person under the age of 18 or who has otherwise not passed the stage of puberty. Are persons under the age of 18 who are married to each other children in the eyes of UNICEF purely because they have not passed the puberty stage? Common sense would prevail to assume that a married 17 year old cannot be regarded as a child and pornographic films made by such “child” for his or her own private pleasure will not be an offence. The moment however that these films are distributed to the public it must be a punishable offence.

A further question that arises is what can or should Internet service providers do to prevent child pornography from floating their systems and can failure to act against child pornography be a punishable offence in the hands of the ISP? Section 27A was introduced to address some of these issues:

“ 27A Registration and other obligations of Internet service providers
(1) Every Internet service provider shall-
(a) register with the Board in the manner prescribed by regulations

68 Supra.
69 www.unicef.org/magic/media/documents/beyond_all_tolerance.pdf visited on 29/01/07.
70 ISP
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made under this Act; and
(b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.

(2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall-
(a) take all reasonable steps to prevent access to the child pornography by any person;
(b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and
(c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.

(3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.

(4) Any person who fails to comply with the provisions of this section shall be guilty of an offence.”

Section 27A is clear on the ISP’s responsibility towards child pornography. Considering the masses of information stored on servers and the speed at which this information is transferred, uploaded and deleted it is highly impossible for an ISP to monitor the contents of their user’s data. In some of the cases handled by UNICEF and IWF it was found that dealers in child pornography are electronic and Internet experts that hide their material in encoded data such as computer games or even official documentation. Therefore section 27A correctly commands an ISP to take “reasonable steps” to prevent the trafficking of child pornography. In the absence of case law it is uncertain as to what extend “reasonable” should be interpreted. Common delictual principles should be applied to determine whether or not such an ISP took reasonable steps. Furthermore, services from an ISP can be obtained anonymously. Some ISP’s do not require the user to supply any personal information or when it is required, no authentication takes place.71 Can it be considered negligent enough to warrant a punishable offence in terms of section 27A? The Electronic Communications and Transactions act 72 contains limitations on the liability of service providers. Most ISPs allow their users to upload information and store same on their servers. These services are called hosting. Section 75 of the ECT act limits the liability in the case of hosting if:

“(1) A service provider that provides a service that consists of the storage of data provided by a recipient of the service, is not liable for damages arising from data stored at the request of the recipient of the service, as long as the service provider-
(a) does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of a third party; or

71 See for example www.msn.com; www.yahoo.com; www.hotmail.com
72 25 of 2002.
Section 75 of the ECT act is somewhat in conflict with section 27A of the Films and Publications act. Although section 75 of the ECT act is aimed at the civil liability of an ISP subsection (3) gives an indication that it can also restrict the criminal liability of an ISP. Both acts allow for some leverage as to the liability. In both cases in my view, the ISP can only be liable in the case of intent or gross negligence. Where the service provider fails to remove the information from its server after receipt of the take-down notice in terms of section 77 of the ECT act it can obviously be liable in terms of the ECT act or the Films and Publications act. Section 78 of the ECT acts states that there is no general obligation on any service provider to:

(a) monitor the data which it transmits or stores; or
(b) actively seek facts or circumstances indicating an unlawful activity.\(^{73}\)

Section 78 of the ECT act is in clear conflict with section 27A of the films and publications act. While section 27A actively requires an ISP to take reasonable steps to prevent access to child pornography section 78 requires no such actual commitment from an ISP. Which is to follow then? Chapter XI of the ECT act was aimed at the civil liability of an ISP and one can argue that although it is in conflict with the Films and Publications act, the latter will prevail in establishing the criminal liability of an ISP. Prosecutors should just make sure that the case against the ISP is based in terms of the Films and Publications act and not the ECT act. The legislator usually never intends to create conflicting acts unless the latest act expressly amends or replaces the older act.\(^{74}\) In the case of conflict between two equally based acts exists, rules of interpretation shows that an interpretation should be given to allow for the co-existence of the acts.\(^{75}\) In the event that no such interpretation can be given, the latest act will take preferance above the older act.\(^{76}\) It is therefore in my view that

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\(^{73}\) Section 78 act 25 of 2002.
\(^{74}\) Botha Wetsuitleg: ‘n Inleiding vir Studente 3de uitgawe 67; Kent v Railways and harbors 1946 AD 405.
\(^{75}\) Wendywood Development (Pty) Ltd v Rieger 1971 3 SA 28 (A); Shozi v Minister of Justice, kwazulu 1992 2 SA 338 (N)
\(^{76}\) New Modderfontein Gold Minong Cov Transvaal Provincial Administration 1919 AD 367; S v Majavu 1994 (4) SA 268 (CK); Fundstrust (Pty) Ltd (In liquidation) v Van Deventer 1997 (1) SA 710 (A).
these two acts can co-exist if one is of the opinion that chapter of the ECT act only focuses on civil liability and has no bearing over criminal liability.

4. JURISDICTION

Another problem that South Africa will be facing in combating online sexual offences will be the jurisdiction to prosecute offenders. Since the Internet is a borderless terrain it would be difficult to pin point where and when the offender committed the crime. With offences where physical contact is needed such as in the case of rape and sexual assault, the perpetrator can generally only be convicted if the crime was committed on South African soil. As stated above, these crimes can, in terms of common law, not be committed electronically or online even if such actions are virtually possible. Therefore the Internet poses no threat as such to prosecute these offenders. However, sexual crimes where no physical contact is needed such as keeping a brothel, prostitution and contravention of the films and publications act, can be committed online but can a South African citizen be culpable for his actions of keeping a virtual brothel only visited by foreigners on a foreign server? Can a South African prostitute be convicted of prostitution if she renders her services online (with pre-recorded video files) that were uploaded on a foreign server and accessed throughout the world? Can the South African who creates child pornography while on vacation in the UK be guilty of contravention of the films and publications act if these pictures were uploaded on a foreign server but maintained in South Africa by the said perpetrator? Can a South African prostitute be convicted of prostitution if she renders her services online (with pre-recorded video files) that were uploaded on a foreign server but maintained in South Africa by the said perpetrator? Can a South African who creates child pornography while on vacation in the UK be guilty of contravention of the films and publications act if these pictures were uploaded on a foreign server but maintained in South Africa by the said perpetrator? Section 30A of the Films and Publications act provides for extra-territorial jurisdiction in that any citizen or permanent resident to South Africa who commits an act outside of the Republic which would have constituted an offence in terms of the act shall be guilty of such an offence as if it was committed within the republic. This however does not allow for prosecutions to take place against persons who commit the crimes outside of the republic and who are non-residents and where only the effect of the crime is felt in South Africa. For example where X, an American citizen, creates online child pornography and such porn is accessible from South Africa by any person who willingly or unwillingly comes across X's website, such an offender cannot be convicted in South Africa. Where the crime was committed by a foreigner within the Republic any court within the republic will have jurisdiction over the matter. Section 90 of the ECT act provides for jurisdiction over criminal matters contained in the act. A court within South Africa will have jurisdiction if the crime was committed in the Republic, where the crime was prepared in the Republic or the result was felt within the Republic; or if the crime was committed by a South African citizen or permanent resident; or if the crime was committed on board a ship or plane to or from the Republic. Section 90 however only deals with crimes that can be committed in terms of the ECT act which relates to hacking, extortion and other Internet crimes and it fails to address sexual crimes. This means that where the effect of a crime committed in terms of the films and publications act is felt in South Africa no conviction can take place under the ECT act or any other act unless the crime was physically committed in South Africa.

77 Certain exceptions are contained in the Police Act 7 of 1958 as amended. They are not discussed as they fall outside of the scope of this research.
78 Section 30A(a) act 34 of 1999.
79 Section 30A(c) act 34 of 1999.
80 Section 90 act 25 of 2002.
5. **LAW REFORM: SEXUAL OFFENCES BILL**

The purpose of the sexual offences bill is *inter alia* to develop the South African rape laws and other sexual offences to be gender neutral. This discussion will focus on some of the crimes created or amended by the bill that has a bearing on the possibility of online sexual offences. With regards to rape, the bill creates a gender neutral definition of the common law crime but physical contact in the form of some kind of penetration is still needed before this crime is committed.\(^{32}\) In terms of section 6 of the bill a person who compels, causes or induces another person to commit an indecent act on him or her or any third person or the victim himself would be guilty of an offence. This will only be possible in circumstances where the victim would not have committed such an act under normal circumstances. A person guilty of this offence can get a maximum conviction of a fine and imprisonment for not more than 5 years. This crime can be committed without the perpetrator and victim needing to be in each other’s physical presence. Therefore where the perpetrator induces the victim via webcam or messaging to commit an indecent act with himself or a third party it could constitute a punishable offence. Mutual consent and the absence of force or coercive circumstances\(^{83}\) will exclude all criminal aspects of the actions. Section 10 of the bill criminalises any action of a person who manufactures or distributes an article that promotes sexual offences with children. A person who displays any article to a child that is used for sexual intercourse or to promote or encourage the child to commit sexual acts will be guilty of an offence punishable with a fine and/or a maximum of six years imprisonment. There is no indication in section 10 that the actions should be physically committed. Therefore, even if the article is shown via email or webcam or mms\(^{84}\) with the intention to entice the child to commit an indecent or sexual act, such a person sending the picture of such an article will be guilty of an offence. Section 11 deals with child prostitution and provides for:

"11. (1) A person who, in relation to a child, for financial or other reward, favour or compensation to such child or to any other person, intentionally—

(a) commits an indecent act or an act which causes penetration with such child;
(b) invites, persuades or induces such child to allow him or her or any other person to commit an indecent act or an act which causes penetration with such child;
(c) makes available, offers or engages such child for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;
(d) supplies, recruits, transports, transfers, harbours or receives such child, within or across the borders of the Republic, for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;
(e) allows or knowingly permits the commission of indecent acts or acts which cause penetration by any person with such child while being a primary care-giver defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992), parent or guardian of that child;
(f) owns, leases, rents, manages, occupies or has control of any movable or

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82 Section 2(1) of the Bill.
83 Section 2 (3) of the bill. It includes any use of force or abuse of authority.
84 Multimedia message service.
immovable property used for purposes of the commission of indecent acts or acts which cause penetration with such child by any person;

(g) detains such child, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of indecent acts or acts which cause penetration with such child by any person; or
(h) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts which cause penetration with such child by any person, is, in addition to any other offence of which he or she may be convicted, guilty of the offence of being involved in child prostitution and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

(2) A person who intentionally receives financial or other reward, favour or compensation from the commission of indecent acts or acts of sexual penetration with a child by another person is guilty of the offence of benefiting from child prostitution and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

(3) A person who intentionally lives wholly or in part on rewards, favours or compensation for the commission of indecent acts or acts of sexual penetration with a child by another person is guilty of the offence of living from the earnings of child prostitution and is liable upon conviction to a fine or to imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

(4) A person, including a juristic person, who—
(a) makes or organises any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; or
(b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child, is guilty of the offence of promoting child sex tours and is liable upon conviction to a fine or imprisonment for a period not exceeding 20 years.

(5) A person may not be convicted of an offence in terms of subsections (2) and (3) if that person is—
(a) a child; and
(b) not a person contemplated in subsection (1).”

Section 11(1)(a) clearly indicates that penetration is a requirement and can therefore not be committed online. Although subsection (b) also requires a physical element of penetration the initial acts of persuasion can be done electronically. Thus where the persuasion is done electronically and the act is later physically committed the persuader can be guilty of an offence. The primary actions in subsections (c), (d) and (e) can also be done electronically and the perpetrator can be convicted if the final penetration will take place physically. There is however no indication in the bill that actual penetration must take place but only that the actions must cause penetration. In my view actual penetration should not be a requirement, nor should the possibility of penetration be a requirement. Mere indecent acts or the possibility of those actions with children should be heinous enough to be punishable. Subsection (f) relates to child prostitution which can also be committed electronically and in my view no physical contact is needed but the mere possibility thereof should suffice to constitute an offence. Although subsection (g) requires a physical element of control over the
child one could make out an argument that the perpetrator can control a child via webcam to force the child to commit indecent acts in front of the camera. The mere abuse of power should be enough to satisfy the requirement of control and physical control should not be a requirement. Subsection (h) relates to any person who promotes indecent acts with children and can include a smorgasbord of activities which can all be committed online such as the distribution of child pornography, advertising of child sex facilities or prostitution. Online communications with paedophiles to arrange meetings with children or to encourage them to commit indecent acts with children etc should all be punishable under this subsection. Although the bill clearly simplifies the definitions of sexual offences and the appropriate penalties thereof, it still lacks a clear indication on the exact requirements for each offence. It furthermore does not take into account that most of the offences can be committed online or without physical contact, and it is up to the interpretation of the court to incorporate online and non physical actions within the ambit of the definitions. This will create the same situation as the current where uncertainty exists as to the interpretation of these crimes. In order to incorporate the possibility of these crimes being committed online without relying on the courts’ interpretations, the bill needs some changes. If the words “cause penetration” is described as any action that would under any circumstances lead to penetration but no actual penetration or physical contact is needed, it will immediately create the possibility of online sexual offences. Hopefully the legislator will amend the bill before promulgation as to incorporate the possibility of these crimes being committed online.

On Jurisdictional matters the bill addresses a few matters inter alia extra-territorial jurisdiction. A South African citizen or permanent resident who commits an action outside of the Republic which actions would have constituted an offence if it was committed within the Republic, can be found guilty of such an offence and duly punished. Where the person has however been found guilty or acquitted in the country where the acts were committed the person cannot be trialled in South Africa. The bill furthermore provides that any court will have jurisdiction over such matter if the Director of Public Prosecutions in writing consented to it. This will allow for cross-border convictions in cases where these crimes were committed online and where the effect was felt abroad or within the Republic. Subsection (1) in its current form only relates to South African citizens and permanent residence to South Africa and excludes those perpetrators who commit the crime online and where the effect of the crime is felt within the Republic. The legislator should also allow for the conviction of foreign perpetrators who commit these crimes online but where the effect is felt in South Africa.

6 CONCLUSION

As societies change and moral values change with it one constantly need to re-evaluate the morality laws of a country to keep up with modern changes and to prevent moral decay without interfering in a citizen’s personal lives or privacy. Certain actions relating to sexual behaviour have proved to be unacceptable even if it is done in private and with consent. These actions include inter alia sexual intercourse with children. From the above research it is clear that some sexually unaccepted behaviour are not only committed with physical
contact but it can also be committed by using electronic devices such as computers, pagers and cellular phones. For this reason common law crimes such as rape and other statutory crimes such as statutory rape, indecent assault etc has become outdated in that the current requirements fail to address these crimes being committed electronically. As indicated above most of these crimes require a physical element before it can be committed. However, it should be noted that the physical aspect of these crimes are not the only aspects that causes the victim to suffer. A child can be sexually molested by a person chatting with that child in a chat room without physically being touched. The child will suffer the same sense of exploitation than that child who was physically touched. The same applies for a person who was induced to commit a sexual act on him or herself without being in the physical presence of the perpetrator who forced that victim to do same. Although the sexual offences bill simplifies the South African rape and sexual offences laws it still fails to address the possibility of the crimes being committed online. All of the crimes created or simplified or extended by the bill should furthermore contain a clause to enable the prosecution of perpetrators who commit the said action electronically. As indicated above it is proposed that the words “that cause penetration” should be deleted as it gives the indication that actual penetration must take place or that penetration is possible. In order for penetration to be possible a physical presence is needed which immediately rules out online actions. The words “that cause penetration” can be replaced with “that could possibly lead to penetration under any possible circumstance” and thus create the impression that penetration is no longer a physical requirement and it will furthermore exclude the criminalisation of online flirting between consenting adults. It should be borne in mind that legislation should not be overprotective of moral rights as to impose on the privacy of a country’s legal subjects. The legislator should however be very cautious as not to be oversensitive towards protecting the moral rights of a society and in the process criminalising what used to be socially acceptable and innocent actions. The legislator’s task is surely a difficult one especially to prevent future crimes and loopholes because technology will develop to simplify the perpetrator’s effort to commit sexual offences. Hopefully the sexual offences bill will be amended as suggested in this article to ensure that online perpetrators can not commit these crimes without being prosecuted. As for prostitution: Legalisation should be considered to regulate the industry and to prevent over protective of moral rights of a society. Once it will be regulated there will be no difference between actual prostitution and online prostitution. All prostitutes should be registered with a prostitution council which will look after the social, mental and medical wellbeing of prostitutes and which will furthermore police areas of concern to prosecute prostitutes and brothels that fail to comply with the regulations. Regulations that can be imposed can include that prostitutes may not lure clients off the street but that the business should be conducted from a proper premises that must be painted in specific colours as to identify such businesses. It should furthermore secure that no person under the age of eighteen is allowed inside the premises. Online brothels and prostitutions sites must have a homepage which is free from any pornographic pictures and or words and it must contain a proper warning of the contents of the site. Before a person can enter the site the person has to register to gain access. The registration process should enable the site to verify the age of the proposed user as to prohibit any person under the age of 18 to enter the site. The same regulations should apply to websites containing and or selling pornography. It should however be noted that the rights of children should still be protected in that child prostitution and pornography cannot and should not be legalised or regulated at all. Persons dealing with child prostitution and child pornography should still be punished. Hopefully the legislator will be able to ensure the protection of moral rights without infringing on the rights to privacy but
also be able to protect victims against online sexual unacceptable behaviour as discussed in the article. With regards to pornography and access their to by children, parents or guardians should install filters on their computers, regularly monitor their child's Internet use\(^{89}\), get acquainted with Internet language\(^{90}\), filters, chat rooms etc. When a parent or anyone stumbles across pornography and child pornography that person can, but actually should alert authorities.\(^{91}\)

\(^{89}\)“Keep your child safe from Internet Predators”

\(^{90}\)Ibid.

\(^{91}\)Contact the SAPD or Films and Publications Board at 0800 148 148.