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Sexual Offences in South Africa

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT OF 2007 (Act 32 of 2007) – An overview

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On the 16th of December 2007, certain section of the Criminal Law (Sexual Offences and related matters) Amendment Act, 2007 (hereafter referred to as "the Act"), save for Chapter 5 and Chapter 6 therein, came effect. Chapter 5 came into effect on 21 March 2008 and Chapter 6 shall come into effect on 16 June 2008. Check the Government Gazette for other new legislation.

Below is an overview of the Act. Seeing that I am dealing with sexual offences, I have decided not to provide a graphic explanation of the offences as it might be a bit disturbing. I have therefore limited myself to what the Act defines the offences to be and leave the rest to the reader.

The Act is to amongst other things, comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences in South Africa, and to deal with all legal aspects of or relating to sexual offences in a single statute, by—

Repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender;
repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent;
creating new statutory offences relating to certain compelled acts of penetration or violation;
eliminating the differentiation drawn between the age of consent for different consensual sexual acts and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years;
creating a duty to report sexual offences committed with or against children or persons who are mentally disabled;

providing the South African Police Service with new investigative tools when investigating sexual offences or other offences involving the HIV status of the perpetrator;

providing certain services to certain victims of sexual offences, amongst other things, to minimise or, as far as possible, eliminate secondary traumatisation, including affording a victim of certain sexual offences the right to require that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances; and

establishing and regulating a National Register for Sex Offenders.

Section 2 of the Act deals with its objects. According to this section, the objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.

The Act further deals with various sexual offences which are found in its Chapter 2.

Interesting note is the offence of Rape. According to the Act, any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.

With regard to what is meant by sexual penetration, the Act defines it as follows:

"sexual penetration" includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.

Chapter 2 further deals with various other sexual offences which are:

Compelled rape;

Sexual Assault;

Compelled Sexual Assault;

Compelled self – sexual Assault: Where a person ("A") who unlawfully and intentionally compels a complainant ("B"), without the consent of B, to—

- (a) engage in—

- (i) masturbation;
- (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or
- (iii) sexually suggestive or lewd acts, with B himself or herself;

(b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or

(c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus.

Compelling or causing persons 18 years or older to witness a sexual offences, sexual acts or self-masturbation;

Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ("flashing");

Exposure or display of or causing exposure or display of child pornography to persons 18 years or older;

Engaging sexual services of persons 18 years or older;

Incest;

Bestiality; and

Sexual act with corpse

Chapter 3 of the Act deals with sexual offences against children. According to section 15 of Chapter 3, a person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child. This was referred to as "statutory rape" in the past. The definition of sexual penetration is provided above.

According to the definition section of the Act, a child here refers to a person 12 years or older but under the age of 16 years.

Section 16 deals with Acts of consensual sexual violation with certain children (statutory sexual assault). Here we again refer to children 12 years or older but under the age of 16 years. According to this section, a person ("A") who commits an act of sexual violation with a child ("B") is, despite the consent of B to the commission of such an act, is guilty of the offence of having committed an act of consensual sexual violation with a child.

The Act defines sexual violation as follows:

"sexual violation" includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbbj) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in

the case of a female, her breasts, or an animal; or

(iii) mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration.

However, with regard to a defence when charged in terms of section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.

Therefore, according to my interpretation, kissing of children who are between 12 years or older, but under the age of 16 years old and the age difference between them is more than two years at the time of the kissing, is a criminal offence.

Chapter 3 of the Act further deals with the following offences:

Sexual exploitation of children;

Sexual grooming of children;

Exposure or display of or causing exposure or display of child pornography or pornography to children;

Using children for or benefiting from child pornography;

Compelling or causing children to witness sexual offences, sexual acts or self-masturbation; and

Exposure or display of or causing exposure or display of genital organs, anus or female breasts to children ("flashing").

The rest of the Act deals with the following:

Chapter 4: Sexual offences against persons who are mentally disabled;

Chapter 5: Services for victims of sexual offences and compulsory HIV Testing for Alleged Sex Offenders.

Chapter 6: National Register for Sexual Offenders. This section shall come into effect on 16 June 2008; and
Chapter 7: General Provision.

On the whole, the Act is a very much needed piece of legislation in South Africa. Seeing that the Act is still new, it would be interesting to see how the court interprets its provisions.

Kind regards,

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