

# A critical analysis of legislation pertaining to the sexual abuse of children

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Knowledge of legislation pertaining to sexual abuse is imperative for health care professionals working with the child who has been sexually abused. This article will provide a critical analysis of those aspects of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, relevant to the health care professional. The shortcomings of the Act and the practical implication of these for healthcare professionals will be highlighted. Focus is also placed on the relevant sections of the Childcare Act, 38 of 2005 and how these sections complement the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

## INTRODUCTION

The phenomenon of sexual abuse is one that helping professions are faced with on an increasing basis. In order to address this phenomenon effectively in practice – whether in assessment, evaluation, intervention planning or therapy – it is of the utmost importance that professionals are aware of current legislation pertaining to sexual abuse of children and the practical implication of legislation. When professionals are without knowledge of relevant legislation pertaining to cases of alleged sexual abuse, intervention is often planned without taking relevant legal aspects into account, with the result that interventions fail to meet legal requirements and prerequisites.

Health care professionals often have various misconceptions and different opinions regarding what constitutes sexual abuse. Due to these misconceptions and differences in opinion, health care professionals either neglect to report cases of alleged sexual abuse and/or are unsure when they are legally required to report such a matter to authorities. The information in this article is therefore intended to provide health care professionals with a comprehensive yet critical analysis of current definitions of sexual abuse and the correlation between these definitions and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (further on “the Act”). A clear

outline of the roles and responsibilities of health care professional arising from the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 as well as the new Childcare Act (38/2005) is also critically analysed in terms of those aspects relevant to the professional working with the child who has been sexually abused.

## THE AIM AND OBJECTIVES OF THE ARTICLE

The aim of this article is to provide a literature analysis with regard to current legislation pertaining to the sexual abuse of children. To achieve the aim of this article, the following objectives are set:

- To critically evaluate current definitions of sexual abuse from a legal perspective, thereby providing health care professionals with a clear outline of what constitutes sexual abuse in legal terms;
- To critical evaluate the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 with specific reference to aspects relevant to the helping professional, thereby providing professionals in the field with a clear understanding of the practical implication of legislation when working with a child who has been sexually abused; and
- To critically evaluate the relevant articles in

the Child Care Act (38/2005) pertaining to the sexual abuse of children, highlighting the roles and responsibilities of the professional working in the field of sexual abuse.

### **DEFINING SEXUAL ABUSE WITHIN CURRENT LEGISLATION**

Until the recent commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, behaviour that was previously described as sexual offences against children, was mainly dealt with by the common law. The definition of sexual abuse of children was further limited to terms in the common law such as *rape*, *indecent assault* and/or *incest* (Minnie 2009:526).

In the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, however, sexual offence against children is defined in much clearer and broader terms, while the various underlying dynamics of sexual abuse, such as grooming of a child, is for the first time addressed by legislation pertaining to the sexual abuse of children. Although the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 is a welcome addition to legislation aimed at protecting children, the authors are of the opinion that there are still a variety of weaknesses in the Act that needs to be addressed. In the section to follow, the relevant content of the Act and those aspects relevant to the health care professional working with children who have been sexually abused will be critically analysed.

#### **Defining sexual abuse in the framework of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**

Child sexual abuse encompasses a wide spectrum of acts and there are often disagreement between professionals about both when and whether certain sexual acts are abusive. From a legal point of view, sexual abuse is defined by the Act as any person who engages a child (*a person under the age of 18*) in a sexual act, with or without the consent of the child. A *sexual act* is defined as an act of sexual penetration or an act of sexual violation. *Sexual penetration* is seen as any sexual form of penetration to any extent whatsoever by the genital organ, any body part and/or object by one person into or beyond the genital organs, anus or mouth of another person (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32/2007).

*Sexual violation* includes any act which causes:

- direct or indirect contact between the genital organs, anus or breasts of one person and any part of the body of another person, including any object resembling or presenting the genital organs or anus of a person or animal;
- the mouth of one person and the genital organs, anus, breasts or mouth of another person;
- any other part of the body of another person that could cause sexual arousal or stimulation;
- masturbation of one person by another person; or
- insertion of any object resembling or representing the genital organs of a person or animal into or beyond the mouth of another person (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32/2007).

The terms *sexual penetration* and *sexual violation* provide a legal definition of what is often referred to in literature as *contact sexual abuse*. In sexual abuse literature, contact sexual abuse is described as sexually abusive behaviour where there is direct or indirect contact between the body of the child and that of the perpetrator(s) (Durbin 1998:16; Faller 2003:21-22; Labuschagne 1998:9; Potgieter 2000:19; Stop it Now 2008).

When defining sexual abuse, it is important to realise that sexual abuse is not limited to contact sexual behaviour, as described in the legal terms of sexual penetration and/or sexual violation. Much of sexual abusive behaviours as described in literature may be described as non-contact sexual abuse. Non-contact sexual abuse is viewed as sexually abusive behaviour where there is no direct contact between the child's body and that of the alleged perpetrator, and it thus involves other forms of sexual abusive behaviour in which actual physical contact is excluded (Durbin 1998:16; Faller 2003:21-22; Labuschagne 1998:9; Potgieter 2000:19; Stop it Now 2008).

Although the Act does make reference to behaviours that literature would describe as non-contact sexual abuse, it does not treat these non-contact sexual behaviours as sexual abuse. A person who commits these acts is guilty of the offence of compelling or causing a child to witness pornography, a sexual offence, a sexual act or self-masturbation (Criminal Law (Sexual

Offences and Related Matters) Amendment Act, 32 of 2007 (3) (19a,b,c.); (21,1, 2, & 3)).

### **A critical analysis of the definition of sexual abuse as described in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**

The previous section provided a broad outline of the legal definition of sexual abuse and the extent to which the Act covers aspects of both contact sexual abuse and non-contact sexual abuse, as found in literature. Although the Act makes reference to behaviour that constitutes non-contact sexual behaviour, these behaviours that constitute an offence are limited to a select few.

As pointed out above, the Act (in article 19, 21 and 22) refers to behaviour that is described by literature as non-contact sexual abuse. The behaviour described in the Act is, however, limited to the following:

- a) exposure of a child to pornography;
- b) exposure of a child to a sexual offence;
- c) exposure of a child to adult sexual activity;
- d) exposure of a child to self-masturbation; and
- e) exposure of a child to the genital organs, anus or breasts of a person.

Although the inclusion of these behaviours in the Act as an offence is positive, the exclusion of other non-contact behaviours described in literature, such as sexual comments to a child, fetishism and voyeurism, can be seen as a shortcoming in the Act.

In practice it has been experienced that there is often a link between non-contact sexual behaviour and the sexual grooming of the child. It is important, though, that health care professionals note that the Act makes no reference to any connection between non-contact sexual behaviour or offences and the sexual grooming of the child. In practice, the onus would therefore rest on the forensic investigator to prove that the motive underlying these offences (Art 19, 20, 21) was the sexual grooming of the child. Regardless of the fact that the Act fails to highlight the connection between non-contact sexual behaviour and grooming, it is important that professionals understand the dynamics of non-contact sexual abuse as possibly forming part of the process of sexual abuse. In practice, the authors have experienced that non-contact sexual abuse often forms part of the grooming process of a child leading up to sexual violation

and/or later sexual penetration of the child. It should, however, also be noted that a progression in behaviour is not always found (Faller 2003:23; Spies 2006:45).

The authors are of the opinion that in cases where non-contact sexual abuse, as described by the Act, is indeed found to be present at the time of the sexual abuse of the child and/or preceding the sexual abuse of the child, these non-contact behaviours should inherently constitute the sexual grooming of a child.

### **Defining grooming within the framework of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007)**

A critical analysis of the definition of sexual abuse and other behaviour that is seen as a sexual offence in the Act, revealed that the Act does not make a clear link between non-contact sexual behaviours and the sexual grooming of a child. Yet, as pointed out above, the grooming of a child forms an inherent part of most incidents of sexual abuse of a child. It is therefore important that professionals working in the field of sexual abuse have a clear understanding of what grooming entails, both from a legal and a psycho-social perspective.

In general terms, grooming has been defined as “*to prepare or train for a particular purpose or activity*” (OED:395). In the framework of sexual abuse, the “*grooming*” of a child would therefore refer to preparing and/or training a child for the purpose of sexual abuse or sexual activities with the child.

In the Act, two new offences have been created in section 18, namely promoting the sexual grooming of children and the sexual grooming of children (Minnie 2009:555). Sexual grooming of a child is described in the legal framework as the use of an article, pornography, publication or film with the intention to facilitate the commission of a sexual act with or by a child. Sexual grooming of children in the legal framework is also seen as any act committed by a person with the intention to encourage, persuade, facilitate and/or diminish or reduce any resistance or unwillingness of a child, in order to ultimately engage the child in a sexual act (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32/2007). In light of the above description in the Act, the authors are of the opinion that grooming can therefore be seen as the premeditation of the eventual sexual abuse of a child.

The inclusion of the offence of sexual grooming of a child in the Act begins to acknowledge the important role grooming plays in the sexual abuse of children (Minnie 2009:545), but the authors are of the opinion that the Act does not take into account the full impact that grooming has on the child. The limitations of the Act with regard to grooming will be highlighted in the next paragraph.

### **A critical analysis of the definition of grooming as described in the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007)**

According to the authors, the term *grooming* can be used to describe the perpetrator's actions during the preparatory stage of sexual abuse. Although the inclusion of sexual grooming in current legislation is a huge step in the right direction, current definitions of grooming fail to connect non-contact sexual behaviours (*the offence of compelling or causing a child to witness pornography, a sexual offence, sexual act or self-masturbation*) with the possible grooming of a child. The authors are of the opinion that where these non-contact sexual behaviours were present prior to and/or during the sexual abuse of the child, the Act should make include provision that these behaviours inherently be seen as constituting the sexual grooming of a child. Because the Act fails to do this, it is the responsibility of health care professions to illustrate to the court the progression in behaviour, in cases where it exists, and to highlight how in certain cases the presence of non-contact sexual behaviour can constitute the sexual grooming of the child.

Another shortcoming in the Act pertaining to the sexual grooming of a child relates to the question of premeditation. The Act does not clearly state whether the sexual grooming of a child is seen as premeditation leading to the eventual sexual violation and/or penetration of the child. Yet, where the sexual grooming of a child has been present prior to the eventual sexual violation and/or penetration of a child, it should be seen as premeditation. The very essence of the definition of grooming, both in psycho-social and legal terms, suggests the presence of premeditation. As grooming is not described by the Act as indicative of premeditation, the question that arises is whether the sexual grooming of a child is considered by the court as aggravating circumstances when a person is found guilty of sexual violation and/or penetration of a child.

According to Minnie (2009:555), the Act is limited in the scope of behaviours that are regarded as grooming, and various behaviours which have been recognised by practitioners and academics as grooming, are not included in the provisions of section 18 (2) of the Act. The grooming process of the child is furthermore not limited to the sexual grooming of the child, as referred to in a legal definition, but also includes the emotional grooming, or establishing of an emotionally rewarding relationship with the child. Although this is a difficult aspect to address in the legal framework, legislation fails to consider that offenders may groom a child not only sexually but also emotionally. In some cases, grooming is an even more extensive process which is not limited to the sexual and emotional grooming of the child but which also includes the grooming of the child's parents and even the broader community. Grooming of the child's parents or primary caretakers and the broader community is often done with the intention to diminish or reduce the parents' or the community's resistance, in an effort to ultimately engage the child in a sexual act (Hollely & Minnie 2008:2; McAlinden 2006:339; Minnie 2009:556).

Although the Act makes provision for the sexual grooming of a child as a sexual offence, it includes various stipulations that apparently disregard the effect of grooming on a victim. An example of this is the age of consent, which is 18, except where consensual sexual acts are described. Where consensual sexual acts are described, the age of consent is between 12 and 16. Children under the age of 12 are thus deemed by the Act as being incapable of consenting to any act of sexual penetration and/or sexual violation (Minnie 2009:545).

The Act determines that where a child over the age of 12 consents to a sexual act, the perpetrator of such an act will be guilty of a consensual sexual act. This is interpreted as a less serious offence and therefore a lesser sentence will be applicable. The question that arises, then, is whether only children under the age of 12 are susceptible to grooming, bearing in mind that if a child of 12 years or older has been exposed to an emotional and sexual grooming process, that child's ability to give consent to a sexual act would surely be affected. Health care professionals need to take note that where a child has been exposed to sexual grooming, regardless of their age, it is the responsibility of that professional to highlight the impact of the grooming process on

the child's ability to give consent to the court.

As pointed out above, the Act places much emphasis on the age of consent. A further question that therefore arises is whether age alone plays a role in determining whether or not a child can give consent to a sexual act. Factors that influence the ability of a child to give consent will be discussed more in-depth in the section to follow.

### **The issue of consent as covered by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007**

Section 1(2) of the Act defines the term *consent* as follows: "*consent means voluntary or uncoerced agreement*". The issue of consent is further addressed by the Act by excluding children under the age of 12 from being able to give consent to an act of sexual violation and/or sexual penetration, in that section (1)(3)(d) includes children under the age of 12 in the group who is considered to be incapable of appreciating the nature of a sexual act (Minnie 2009:545).

The Act further determines that the sexual exploiting of children (section 17) and the exposure of a child to pornography (section 19) constitute offences, regardless of whether or not a child has consented to these acts. Minnie (2009:544) points out that the practical implication of this is that a person charged with any of these offences will not be able to raise consent as a valid defence.

However, the Act does not allow the same provisions where a child is compelled or in some way caused to witness sexual offences, sexual acts or self-masturbation of the perpetrator while the child is observing. Hence, a valid defence in these cases could rest on the fact that a child consented to witnessing these acts. It is therefore necessary to take a more critical look at the issue of consent.

### **Critical analysis of the issue of consent**

In the authors' opinion, the definition in the Act of a mentally disabled person provides good guidelines for when a person is able to provide consent – unfortunately, in the Act these defining factors only apply to cases where mentally disabled people are involved. In the Act, the ability of a child to give consent is determined solely by the age of the child, while other factors that play a role in the child's ability to consent, are not taken into account. Factors like the child's level of

maturation, the impact and role of grooming and the difference in power and status between the offender and the child, for example, are not taken into account by the Act.

It is important that health care professionals dealing with cases of alleged sexual abuse have knowledge of and insight into the dynamics of abuse, so that they may understand that age alone cannot determine ability to give consent. In a case of sexually abusive behaviour where there is a difference in status between the perpetrator and the child, the question that immediately arises is whether a child is able to give informed consent for an action of which he/she has inferior knowledge to a person who is older, wiser, bigger and in an authority position over him/her (Delany 2005:3; Spies 2006:44).

Zabow and Kaliski (2006:371) highlight four elements that are considered as central to a person's ability to give consent. These elements include:

- competence;
- voluntariness;
- full disclosure of information; and
- the possibility to withdraw consent.

Competence of decision-making requires an assessment of the person's understanding and capacity to make decisions regarding the situation at hand (Zabow & Kaliski 2006:371). According to the authors, the child's capability to understand what he/she is consenting to is undermined not just by age but also by the grooming process as well as the fact that the perpetrator does not fully disclose all information as to what the sexual abuse entails. Zabow and Kaliski (2006:373) explain that consent goes hand in hand with the disclosure of information: "*No-one can make a reasonable decision without being provided with all the relevant information about the procedure or process to which he or she will be consenting to.*"

Therefore, situations where children give consent, agree to cooperate, or even willingly and actively participate, are still abusive. Although this aspect is covered by the Act in as far as it acknowledges that certain sexual acts are considered as an offence (sections 17 & 19), regardless of whether the child did give consent, very few of these behaviours are unconstrained by the issue of consent. For example, it is unclear why exposing a child to pornography is treated as an offence, regardless of whether the child gave consent; while in acts

such as exposing a child to sexual offences, sexual acts or self-masturbation, consent is accepted as a viable defence. The Act is not consistent in this respect, because a child, who is regarded as unable to consent to being exposed to pornography, should also be deemed unable to consent to witness sexual acts.

It is the opinion of the authors that health care professionals working in the field of sexual abuse should be knowledgeable not only about the legal parameters defining consent but also about those factors that have an influence on a child's ability to give consent. As indicated in the above discussion, the legal parameters defining consent are limited; but regardless of whether a child has given consent to a sexual act or not, it is important to note the professional's obligation to report sexual acts with a child to authorities.

**Provisions in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 in terms of the obligations to report commissions of sexual offences against children**

Within the general provisions of the Act, sections 54 (1)(2), reference is made to the obligation of any person to report knowledge that a sexual offence has been committed against a child. The failure to report such knowledge is treated as an offence that can lead to either imprisonment or a fine. In terms of the reporting of knowledge, suspicion or reasonable belief that a sexual offence has been committed against a mentally disabled person, section 54(2)(c) further determines that if a person reports such suspicions and/or reasonable belief in good faith, that person shall not be liable in terms of any civil or criminal proceedings for making such a report.

In section 54, however, a clear distinction is made between section 54(1) pertaining to children and section 54(2) pertaining to a person who is mentally disabled. With regard to section 54(1), referring to children, the Act limits the obligation of reporting to *knowledge* that a sexual offence has been committed. Section 54(2), pertaining to a mentally disabled person, makes provision for not only the reporting of knowledge but also the obligation to report any reasonable belief and/or suspicion that a sexual offence has been committed. A clear distinction is also made in terms of the civil or criminal liability of reporting information pertaining to sexual abuse in the case of a child, as opposed to a person with

mental disabilities. The question that arises is why this clear distinction is made between children and persons with mental disabilities.

**A critical analysis of the obligations stipulated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 to report commissions of sexual offences against children**

A distinct differentiation is made in the Act between a child and a person with mental disability, specifically in terms of the general provisions of the Act on the obligation to report sexual offences against children and in terms of civil and criminal liability when someone fails to report these matters. In the sections to follow, each of these aspects will be critically analysed.

The Act clearly states that in the case of children, professionals and members of the public are only obligated to report *knowledge* of sexual abuse. Yet, in the case of a person with mental disabilities, the Act specifies that *knowledge, suspicions and/or reasonable belief* that a mentally disabled person is being sexually abused, should be reported to authorities (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007). Often, professionals and/or members of the public only have a suspicion or a reasonable belief that a child is being sexually abused, although no concrete knowledge exists. Yet, within the general guidelines of the Act, neither professionals nor members of the public are in these cases obliged to report the matter.

By differentiating between a child and a mentally disabled person in terms of the public's obligation to report suspicions or a reasonable belief that a child is being abused, the dynamics of sexual abuse such as grooming and the child's ability to give consent are disregarded. Although it is acknowledged that there is a difference between a child and a mentally disabled person, the definition of a mentally disabled person in the Act should surely also apply to children when the dynamics of sexual abuse are taken into account.

In chapter one of the Act, a mentally disabled person is defined as "*a person affected by any mental disability, including any disorder or disability of the mind to the extent that he or she at the time of the alleged commission of the offence in question was:*

- a) able to appreciate the nature and reasonably foreseeable consequences of such an act,

- but unable to act in accordance with that appreciation;
- b) unable to resist the commission of any such act; or
  - c) unable to communicate his or her unwillingness to participate in any such act”.

In view of the above definition of a mentally disabled person, the authors are of the opinion that children – due to their age and cognitive capabilities – are often also incapable to appreciate the nature and foreseeable consequences of a sexual act. The Act indirectly addresses the child’s inability to consent to a sexual act, by stating that children under the age of 12 are incapable of understanding the nature of sexual activities and are therefore incapable of consenting to any act of sexual violation and/or penetration (Minnie 2009:545). Yet, despite this recognition, children are still being placed in a disadvantaged position because the public is not obliged to report suspicions of a child being sexually abused.

The protection that the Act provides against civil or criminal liability of a person who in good faith reports suspicions of and/or reasonable belief of sexual abuse is, again, limited to cases involving persons with a mental disability. In the experience of the authors in private practice, however, people are often hesitant to report suspicions of sexual abuse, as they fear civil proceedings against them by the alleged perpetrator. This concern is now being addressed by the Act in terms of the mentally disabled person and the Act will hopefully provide the public with the necessary assurance that they cannot be held liable for acting in what they believe is the best interest of a mentally disabled person. However, this protection remains limited to cases where the victim is mentally disabled – the Act does not provide the assurance that people reporting suspicions and/or knowledge of sexual abuse of a child cannot be held liable in terms of civil or criminal proceedings. It therefore needs to be established why this clear distinction is made between children and people with mental disabilities.

**Other shortcomings in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 that have relevance for the health care professional working in the field of sexual abuse**

Other shortcomings in the Act that is relevant for the professional working with children, who

have been sexually abused, include a lack of clearer definitions of certain terminology in the Act. The first term that is not clearly defined, relates to the obligation to report *knowledge* of sexual abuse. Above, it was explained that members of the public as well as professionals are under a legal obligation to report knowledge of sexual abuse of a child. Yet, it is not clear what constitutes knowledge of sexual abuse. The Act provides no definition or guidelines to the public or the professional about when information can be considered as knowledge of sexual abuse. In general terms, knowledge is defined as “*The sum of what is known. An awareness gained by experience of a fact or situation*” (OED:500). In the authors’ opinion, knowledge of sexual abuse would include a verbal disclosure made by a child to another person and/or professional as well as a positive medical exam that confirm sexual abuse. Unfortunately, verbal disclosures as well as positive medical exams are often not present in cases of sexual abuse, and this leaves many children vulnerable to further abuse. It is therefore of the utmost importance that a clearer guideline is set for health care practitioners in terms of when a case should be reported to the authorities.

The second term in the Act that is not clearly defined relates to when a person is deemed to be a perpetrator. The Act refers to a perpetrator as “*a person who commits certain acts deemed as an offence within the act*”, but no clear definition is provided of the terminology “person” in terms of age and/or other defining factors. The only reference to age is made under the general provision of the Act, where it is described that where both the accused parties who are consenting to sexual violation, are children, the age difference between them may not exceed two years.

Where both the perpetrator and the child are minor children, factors such as the motivation and/or intent of the alleged perpetrator should be taken into account when a child is considered as a perpetrator. In the experience of the authors, young children who have been sexually abused often involve other children (with or without a two year age difference) in sexual acts that can be considered abusive, although in such cases it is often not the intent of the “*perpetrator*” to abuse. Rather, an abused child’s repeating of sexual abusive acts with others is intended to make sense of the own abusive experience, and/or an attempt to gain a sense of control over a situation in

which the abused child had no power and control (Potgieter 2000:22; Ryan 2000:43;). The motivation and/or intent of the perpetrator as a factor for determining whether an act should be considered as abusive or not, poses various difficulties. The first and possibly the most difficult aspect in this regard are proving the motive of a perpetrator. Nonetheless, the authors are of the opinion that intent should be considered, especially where acts of sexual violation among children are concerned. Clearer guidelines in the Act about when sexual violation among children should be regarded as a criminal offence could provide professionals with the necessary guidelines to determine when these incidents should be reported criminally.

Minnie (2009:543) concludes that the objectives of the Act are to enact all matters relating to sexual offences in a single statute, to criminalise all forms of sexual abuse or sexual exploitation and to expand or extend statutory sexual offences. The new Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, is a vast improvement on the common law offences and previous Sexual Offence Act, 23 of 1957, and it succeeds in its attempt to address all matters relating to sexual offences in a single statute. Nevertheless, there are still areas in the Act that fail to address the specific vulnerabilities of children in the sexual sphere.

Complementary to the Act are the sections of the new Children's Act, 38 of 2005, pertaining to sexual offences against children. The sections of the new Children's Act, 38 of 2005, pertaining to sexual abuse and complementary to Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, will be discussed in the section to follow.

### **CRITICAL ANALYSIS OF THE SECTIONS IN THE CHILDREN'S ACT, 38 OF 2005, THAT COMPLEMENT THE SEXUAL CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT, 32 OF 2007**

The object of the Children's Act, 38 of 2005, is to give effect to certain rights of children and to set out principles relating to the care and protection of children. The Children's Act, if implemented correctly, will provide children in South Africa with the legal framework that will safeguard them against violation of their human rights and that will promote their overall well-being and safety (Kassan & Mahery 2009:185).

In the Children's Act, the provisions pertaining to the reporting of sexual abuse of children may be regarded as complementary to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007. As pointed out above, one of the weaknesses of the latter Act is that the compulsory reporting of a sexual offence against children is limited to the reporting of *knowledge* of sexual abuse. Section 42(1) of the Children's Act, 38 of 2005, and section 110(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, are complementary to these provisions in the latter Act and determine that certain individuals are obliged to report the sexual abuse of a child.

In these sections of the Children's Act, 38 of 2005, as well as the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, there is an obligation on a person (both professionals and members of the general public) who:

- a) On reasonable grounds conclude that a child has been sexually abused (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (110)(1)); and/or
- b) Deals with a child in circumstances that gives rise to the suspicion that a child is being abused (Children's Act, 38 of 2005), to report such conclusions and/or suspicions.

According to Kassan and Mahery (2009:222), in order for a person to conclude that a child has been sexually abused, reasonable grounds would include more than mere suspicion, but rather several factors must be present that justify the conclusion of possible abuse. The Children's Act, 38 of 2005, therefore provides the necessary provisions to enable professions and others to report suspicions of sexual abuse, although the Children's Act is not very clear on what the factors justifying these suspicions would be. The authors are, however, of the opinion that a constellation of factors – such as behaviour symptoms, including sexualised behaviour, a child playing out age-inappropriate sexual knowledge, as well as tentative disclosures of abuse and possible hearsay evidence by a third party – when seen together, could justly be considered as suspicions of possible abuse that should be reported.

### **CONCLUSIONS AND RECOMMENDATIONS**

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

represents a huge step in the right direction in terms of protecting children against sexual abuse and enabling the judicial system to effectively prosecute sexual offenders. There are, however, several shortcomings in the Act that need to be addressed. These shortcomings are summarised below:

- A clearer and broader definition is necessary of non-contact sexual behaviours that form part of sexual abuse.
- Non-contact sexual behaviours need to be clearly linked to grooming and in the event where these behaviours formed a part of the abusive experience, the presence of these acts should constitute grooming.
- The elements defining a mentally disabled person in the Act, with regard to their inability to give consent, should also apply to children in cases of sexual abuse, by taking into account the effect of grooming and the dynamics of sexual abuse.
- The issue of consent, as covered by the Act in terms of what a child under the legal age can consent to, should be broadened to include not only the exposure of a child to pornography but also the exposure of a child to sexual offences, sexual acts or self-masturbation by the perpetrator while the child is observing.
- The same obligation that rests upon any person to report suspicions of abuse of a mentally disabled person should also apply with regard to suspicions of abuse of a child. This implies that anyone who reports suspicions of abuse of a child in good faith must be protected by the Act against civil or criminal liability.
- Clearer guidelines in the Act about when sexual violation among children is considered as a criminal offence could provide professionals with the necessary guidelines in terms of when these incidents should be reported criminally.

The critical analysis of various aspects of

legislation pertaining to sexual abuse made it clear that the professional working in the field of sexual abuse is tasked with a very big responsibility. In light of the shortcomings of legislation, the authors would like to highlight the following responsibilities of professionals in the field:

- It is the responsibility of health care professionals to equip themselves with extensive knowledge, not only pertaining to the relevant legislation in case of alleged sexual abuse, but also pertaining to the dynamics of abuse.
- Health care professionals have a responsibility to educate the courts on how the presence of non-contact sexual behaviour can in certain cases constitute the sexual grooming of the child, as well as on the possible impact of grooming on a child.
- It is the opinion of the authors that health care professionals working in the field of sexual abuse should be knowledgeable not only about the legal parameters defining consent but also about those factors that have an influence on a child's ability to give consent.
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, as well as the Children's Act, 38 of 2005, place a legal obligation on professionals and members of the public to report knowledge of sexual abuse, as well as a reasonable belief and/or suspicions of sexual abuse, where such a belief or suspicion is based on a constellation of various factors.

Health care professionals should not only be knowledgeable about legislation relevant to sexual abuse, but should also be aware of the shortcomings in legislation, so that they can take the responsibility to act in the best interest of the child – either by promptly reporting matters of alleged sexual abuse or by speaking on behalf of children, educating the court and others where legislation falls short.

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