

Disrupting Harm

Evidence from 13 countries on the context, threats, and children's perspectives of online child sexual exploitation and abuse.

Legal Analysis of OCSEA related Provisions in South Africa

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This report is a summary of preliminary data collected for this research project. The perspectives contained herein represent the individuals interviewed and surveyed. Support from the Global Partnership to End Violence against Children does not constitute endorsement.

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International, Regional and National Commitments and Legislation on Sexual Exploitation of Children

Status of ratification of relevant international and regional instruments, reporting to human rights bodies and engagement with the special procedures of the Human Rights Council		
International Instruments		Date of ratification/accession
Convention on the Rights of the Child - 1989		16 June 1995
Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography - 2000		30 June 2003
Optional Protocol on a Communication Procedure - 2011		Not signed, not ratified
ILO Convention on the Worst Forms of Child Labour - 1999 (No. 182)		07 June 2000
UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and children – 2000 (supplementing the UN Convention against Transnational Organised Crime)		20 February 2004
Regional Instruments		Date of ratification/accession
African Charter on the Rights and Welfare of Children (African Union, 1990)		7 January 2000
Convention on Cyber Security and Personal Data Protection (African Union, 2014)		Neither signed, nor ratified
Convention on Cybercrime – Budapest Convention (Council of Europe, 2001)		Signed on 23 November 2001, not yet ratified
Human Rights Bodies	Date of latest submitted report	Comments
Committee on the Rights of the Child (OPSC review)	26 November 2014	

General Issues Related to Children's Rights

The Constitution of South Africa guarantees to every child, *inter alia*, the right to be protected from maltreatment, neglect, abuse or degradation.¹ The term 'child' has been defined by the Constitution as a person under the age of 18 years.² Similarly, the Children's Act,³ the Prevention and Combating of Trafficking in Person's Act (PACOTIP)⁴, the Basic Conditions of Employment Act⁵ and the Criminal Law Amendment (Sexual Offences and Related Matters) (SORMA)⁶ define a child as a person under the age of 18 years. Hence, the definition of a child is **consistent across the national legislation**. However, SORMA creates an exception.

The **age of sexual consent** in South Africa is 16 years for both boys and girls.⁷ According to SORMA, "A person ('A') who commits an act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years 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, unless A, at the time of the alleged commission of such an act, was— (a) 12 years of age or older but under the age of 16 years; or (b) either 16 or 17 years of age and the age difference between A and B was not more than two years."⁸ Therefore, the law recognises a **close-in-age exception**. Notwithstanding, a child engaging in consensual sexual intercourse with another child can be prosecuted for the offence of statutory rape if they were aged either 16 or 17 at the time the alleged offence was committed and the age difference between the two children was more than two years.⁹ However, the Director of Public Prosecution must provide a written authorisation for the initiation of prosecution against a child.¹⁰ Furthermore, a child below the age of 12 years is incapable of giving consent for any sexual act.¹¹

The **legal working age** is 15 years for boys and girls.¹² A child cannot be employed for work that is inappropriate for their age or poses a risk to their well-being, health, education, or development.¹³ For

¹ Republic of South Africa. (1996). [Constitution of the Republic of South Africa Act No. 108 of 1996](#), Section 28(1)(d).

² Republic of South Africa. (1996). [Constitution of the Republic of South Africa Act No. 108 of 1996](#), Section 28(3).

³ Republic of South Africa. (2005). [Children's Act No. 38 of 2005 \(as amended in 2010\)](#), Section 1(1).

⁴ Republic of South Africa. (2013). [Prevention and Combating of Trafficking in Persons Act 7, 2013](#), Section 1.

⁵ Republic of South Africa. (1997). [Basic Conditions of Employment Act No. 75 of 1997, Section 1](#).

⁶ [Republic of South Africa. \(2007\). Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 1(1).

⁷ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007 \(as amended in 2015\)](#), Section 15.

⁸ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007 \(as amended in 2015\)](#), Section 15.

⁹ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007 \(as amended in 2015\)](#), Section 15.

¹⁰ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 15(2)(a).

¹¹ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 57(1).

¹² Republic of South Africa. (1997). [Basic Conditions of Employment Act No. 75 of 1997](#), Section 43.

¹³ Republic of South Africa. (1997). [Basic Conditions of Employment Act No. 75 of 1997](#), Section 43(2).

children between 15-18 years of age, the Minister of Labour, upon advice of the Employment Conditions Commission, can make further regulations to prohibit or place conditions on their employment.¹⁴

The **minimum age of criminal responsibility** is 10 years of age.¹⁵ However, children between the age of 10-14 years are presumed to also lack the capacity to commit crimes,¹⁶ unless the prosecution proves their criminal capacity.¹⁷

The **legal age of marriage** is 15 for girls and 18 for boys.¹⁸ An exception can be granted by the Minister of Home Affairs or public service officer authorised by the Minister.¹⁹ This provision is discriminatory as it sets different ages for boys and girls.

Online Child Sexual Exploitation and Abuse

In South Africa, the legal framework regarding OCSEA is fragmented. It comprises multiple pieces of legislation, common law definitions of criminal offences and civil law remedies. Moreover, the current legal framework is not comprehensive as far as OCSEA offences are concerned. While some offences, like those related to child sexual abuse material, are specifically covered in the various acts, newer forms of OCSEA offences are yet to find direct mention. The most important laws that cover OCSEA are SORMA and the Film and Publications Act of 1996.

SORMA gives a clear and comprehensive **definition of child sexual abuse material**.²⁰ The definition covers images, descriptions and presentations of a child engaged in sexually explicit acts.²¹ In addition, the definition covers real as well as simulated persons, thereby providing for **virtual child sexual abuse material** and also materials that depict a person appearing to be a **minor engaged in sexually explicit conduct**.²² It covers not only visual material, but **audio** and **written material** as reflected by the use of the words ‘description’ and ‘presentation’.²³ Therefore, it can be affirmed that the definition of child sexual abuse material under SORMA is **in line with the international standards** as enshrined in the OPSC.

¹⁴ Republic of South Africa. (1997). [Basic Conditions of Employment Act No. 75 of 1997](#), Section 44(1).

¹⁵ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 7(1).

¹⁶ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 7(2).

¹⁷ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 7(2).

¹⁸ Republic of South Africa. (1992). [Marriage Act No. 25 of 1961 \(as amended in 1992\)](#), Section 26(1).

¹⁹ Republic of South Africa. (1992). [Marriage Act No. 25 of 1961 \(as amended in 1992\)](#), Section 26(1), Section 26(1).

²⁰ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 1(1).

²¹ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 1(1).

²² Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 1(1).

²³ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 1(1).

SORMA criminalises the exposure or display of child sexual abuse material to both adults and children.²⁴ Further, it criminalises using children for or benefiting from child sexual abuse material.²⁵ A person who uses children for the purpose of creating, **making or producing** child sexual abuse material or assisting in any of these activities and any person who gains financially from the commission of these acts shall be guilty of this offence.²⁶

Although acts like distributing, disseminating, importing, exporting, offering, selling or possessing child sexual abuse material are not explicitly criminalised by SORMA, these acts should fall within the ambit of the offence of benefiting from child sexual abuse material.

SORMA does not criminalise **mere possession of child sexual abuse material** without the intention of gaining financially from such possession. In addition, **knowingly obtaining access to child sexual abuse material** has not been criminalised. SORMA fails to acknowledge the fact that each image containing child sexual abuse material in any form represents a crime-scene.²⁷ By collecting such images, a person promotes the production of child sexual abuse material and perpetuates the sexual exploitation and abuse of children.²⁸

In a discussion paper, the South African Law Reform Commission provisionally recommended that the definition of “child pornography” should be substituted with a new definition and that this definition should be used to interpret what is understood as child sexual abuse material in SORMA and related legislations.²⁹ This definition is more comprehensive than the current one under SORMA and more in line with the OPSC.³⁰ Once the Law Commission’s paper is finalised, their findings and recommendations will

²⁴ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Sections 10 and 19.

²⁵ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 20.

²⁶ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 20(1).

²⁷ Free State High Court. (2014). AS Botha v. the State (unreported) cited in [William Alexander Beale v. State, \[2019\] ZAWCHC 47](#).

²⁸ High Court of Gauteng. (2016). DPP North Gauteng v. Gerhardus Joahannes Alberts (unreported) cited in [William Alexander Beale v. State, \[2019\] ZAWCHC 47](#).

²⁹ South Africa Law Reform Commission. (2019). [Project 107 – Sexual Offences: Pornography and children – Discussion paper 149](#), P. 189.

³⁰ South Africa Law Reform Commission. (2019). [Project 107 – Sexual Offences: Pornography and children – Discussion paper 149](#), P. 211: “child sexual abuse material means any live display, image or sequence of images, however create or portrayed, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such live display, image, sequence of images, description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such live display, image, sequence of images, or description or presentation of such person – (a) engaged in an act that constitutes a sexual offence; (b) engaged in an act of sexual penetration; (c) engaged in an act of sexual violation; (d) engaged in an act of self-masturbation; (e) displaying the genital organs of such person in a state of arousal or stimulation; (f) unduly displaying the genital organs, anus or breasts of such person; (g) displaying any form of stimulation of a sexual nature of the female breasts; (h) engaged in sexually suggestive or lewd acts; (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature; (j) engaged

act as the starting point for drafting and debating amendments. Their recommendations may eventually be adopted in whole or may be amended during the legislative debate process.

Apart from SORMA, the Film and Publications Act (FPA) of 1996, as amended in 2019, also criminalises certain acts associated with child sexual abuse material. It is noteworthy that the scope of criminal conduct related to child sexual abuse material under FPA is much wider than SORMA. The 2019 Amendment to FPA added a new object to the Act which is to “criminalise the possession, production and distribution of child pornography”.³¹ The amended FPA contains elaborate provisions on child sexual abuse material. It criminalises any person who unlawfully possesses child sexual abuse material; creates, produces or assists in the creation or production of child sexual abuse material; or imports, procures, obtains or accesses child sexual abuse material or knowingly assists in any of these activities; or knowingly distributes or makes available, exports, broadcasts or in any way assists in these acts, any film, game or publication containing child sexual abuse material or which advocates, advertises, encourages or promotes child sexual abuse material.³² Unlike SORMA, the FPA criminalises mere possession of and knowingly obtaining access to child sexual abuse material. Furthermore, it expressly criminalises the **distribution** of child sexual abuse material.

Besides, the Children’s Act criminalises “commercial sexual exploitation of children”, including use of children in sexual activities like “pornography” for financial gain or reward.³³ The Act prohibits persons from using, **procuring, employing**, or offering a child to participate in the creation of pornographic material.³⁴

Currently, the national legislation does not criminalise **knowingly attending pornographic performances involving children**.

in conduct, or activity characteristically associated with sexual intercourse; or (k) showing or describing such person –(i) participating in, or assisting or facilitating another person to participate in; or (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or (l) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18, that could be used to advocate, advertise or promote a child for sexual purpose or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons”.

³¹ Republic of South Africa. (2019). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 2(d).

³² Republic of South Africa. (2019). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

³³ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 1(1) read with 141(1)(b).

³⁴ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 1(1) read with 141(1)(b).

SORMA has also introduced a new crime into the South African corpus juris³⁵ by comprehensively defining the offence of sexual **grooming** of children.³⁶ The definition covers two types of adult misconduct as observed by a South African Court in *Ravi Chetty v. State*.³⁷ Firstly, it includes conduct with the intention to “encourage or persuade” a child to perform a sexual act; and, secondly, conduct with the intention to “diminish or reduce any resistance or unwillingness” on the part of the child to engage in a sexual act. The court observed, “manipulation of a child’s sexual psyche by an adult for his or her own amusement or sexual diversion is harmful conduct which may have far reaching consequences for the child, even if the adult has no intention of ultimately performing any overt sexual act with the child”.³⁸ This interpretation broadens the scope of the protection provided against the offence of sexual grooming provided under SORMA.

Presently, the laws in South Africa do not cover relatively newer categories of OCSEA offences like **live streaming** of child sexual abuse. However, the soon to be adopted Cybercrimes Bill 2017 will solve these

³⁵ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 18.

³⁶ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 18: **Sexual grooming of children:** (1) A person ('A') who(a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child ('B'); (b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by 'B'; (c) supplies, exposes or displays to a third person ('C')(i) an article which is intended to be used in the performance of a sexual act; (ii) child pornography or pornography; or (iii) a publication or film, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or (d) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B, is guilty of the offence of promoting the sexual grooming of a child. (2) A person ('A') who(a) supplies, exposes or displays to a child complainant ('B')(i) an article which is intended to be used in the performance of a sexual act; (ii) child pornography or pornography; or (iii) a publication or film, with the intention to encourage, enable, instruct or persuade B to perform a sexual act; (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to(i) perform a sexual act with A or a third person ('C'); (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching; (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation; (iv) be exposed to child pornography or pornography; (v) be used for pornographic purposes as contemplated in section 20 (1); or (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B; (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B; (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B(i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or (ii) during such meeting or communication or any subsequent meeting or communication to(aa) commit a sexual act with A; (bb) discuss, explain or describe the commission of a sexual act; or (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person; or (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B, is guilty of the offence of sexual grooming of a child’.

³⁷ High Court of South Africa (Kwazulu-Natal Division). (2015). [Ravi Chetty v. State \[2015\], ZAKZPHC 41, P.23.](#)

³⁸ High Court of South Africa (Kwazulu-Natal Division). (2015). [Ravi Chetty v. State \[2015\], ZAKZPHC 41, P.23.](#)

gaps.³⁹ The Bill will introduce many crucial amendments in SORMA to make it more comprehensive as far as OCSEA offences are concerned. It will impose stricter penalties on Internet Service Providers (ISPs), holding them responsible for child sexual abuse material being circulated or hosted through their services. Apart from live streaming of OCSEA, it will also cover offences like **unwanted sexting**, bullying of a child through **online sexual harassment** and **online sexual extortion**.⁴⁰ Currently, these offences are not criminalised explicitly in South Africa.

Regarding the inclusion of online live streaming of OCSEA, the South Africa Law Reform Commission argued in its discussion paper that the inclusion of the word ‘portrayed’ in the suggested definition of child sexual abuse material under SORMA would cover the real-time portrayal via webcam or live-streaming of sexual abuse and exploitation.⁴¹ With reference to sexual extortion, the Commission suggested inserting a clause into Section 20 to include the act of coercion as “the targeting and commoditisation of a child, or the visual depiction of that child, by technological means, using sexual images and/or videos depicting that child through coercion or extortion for the purposes of sexual gain (for example for new child sexual exploitation material or a sexual encounter), financial gain or other personal gain (such as psychological gain, e.g. popularity or malicious satisfaction)”.⁴²

The Electronic Communications and Transactions Act (ECT) covers computer-related extortion, fraud and forgery.⁴³ Nevertheless, these provisions do not explicitly refer to OCSEA.

SORMA criminalises the **attempt** to commit any of the sexual offences mentioned in the Act, including therefore the offences associated with child sexual abuse material as mentioned above. Indeed, the Act criminalises attempt, conspiracy, incitement or inducing another person to commit a sexual offence in terms of this Act.⁴⁴

The abovementioned provisions apply to **all children below 18** and to both **boys** and **girls** with no distinction.

A person guilty of creating or making child sexual abuse material cannot claim the defence of **ignorance of the age** of the person depicted in the child sexual abuse material unless he took all reasonable steps to

³⁹ Republic of South Africa. (2017). [The Cybercrimes Bill of 2017](#), P. 51-60.

⁴⁰ Mzekandaba, S. (2018). [Cyber Crimes Bill inches closer to becoming law](#).

⁴¹ South Africa Law Reform Commission. (2019). [Project 107 – Sexual Offences: Pornography and children – Discussion paper 149, P. xix and 211](#).

⁴² South Africa Law Reform Commission. (2019). [Project 107 – Sexual Offences: Pornography and children – Discussion paper 149, P. 262](#).

⁴³ Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Section 87.

⁴⁴ Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Section 55.

ascertain the age of that person and took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.⁴⁵

In terms of the legal duties of **Internet Service Providers (ISPs)**, the FPA obligates ISPs to take all reasonable steps to ensure that their services are not being used for hosting or distribution of child sexual abuse material.⁴⁶ In case they gain knowledge about the same, it is their duty to prevent access to child sexual abuse material and provide information about the offender to the South African Police Service.⁴⁷

Furthermore, the FPA imposes certain obligations on persons who provide child-oriented services,⁴⁸ whether on the Internet or through mobile cellular telephone. It is the duty of such persons, *inter alia*, to moderate such services and take reasonable steps to prevent the use of such services for commission of offences against children.⁴⁹ Further, such service providers have the duty to inform the South African Police Service regarding suspicious behaviour.⁵⁰ If such persons fail to comply with these provisions, they are liable to be punished either with a fine or imprisonment or both.⁵¹

Besides, under the ECT Act, service providers, which means “any person providing information system services”,⁵² do not have any general obligation to monitor the data transmitted or stored; or actively seek facts or circumstances indicating an unlawful activity.⁵³ However, the Minister of Communications may, subject to Section 14 of the Constitution, prescribe procedures for service providers to inform the competent public authorities of alleged illegal activities undertaken or information provided by the recipients of their service; and to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service.⁵⁴ In addition, these provisions do not affect: (a) any obligation founded on an agreement; (b) the obligation of a service provider acting as such under a licensing or other regulatory regime established by or under any law; (c) any obligation imposed by law or

⁴⁵ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007 \(as amended\)](#), Section 56(6).

⁴⁶ Republic of South Africa. (2019). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

⁴⁷ Republic of South Africa. (2019). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

⁴⁸ Republic of South Africa. (2019). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24C(1)(a): “child-oriented service” means a contact service and includes a content service which is specifically targeted at children

⁴⁹ Republic of South Africa. (2019). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24C(2)(a).

⁵⁰ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24C(2)(d).

⁵¹ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24C(3).

⁵² Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Section 70.

⁵³ Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Section 78(1).

⁵⁴ Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Section 78(2).

by a court to remove, block or deny access to any data message; (d) any right to limitation of liability based on the common law or the Constitution. The Act also provides for the establishment of a Cyber Inspectorate, with power to inspect, search, and seize content.⁵⁵ However, it is unclear if any implementing regulations were promulgated, inspectors appointed and offences prosecuted at the time of writing.

The South African legislation does not impose any explicit duty on **cybercafé owners** to report and prevent cases of OCSEA. However, in accordance with the provisions of the FPA, they may be required to register themselves with the Film and Publications Board as distributors or exhibitors of films or games.⁵⁶ Further, the Act requires them to “submit for examination and classification any film or game that has not been classified, exempted or approved in terms of this Act or the Publications Act, 1974”.⁵⁷ The Board shall refer the submitted film or game to a classification committee for examination and classification.⁵⁸ The classification committee shall classify the film or game as “refused classification” if it contains child sexual abuse material⁵⁹ and refer it further to the South African Police Service for investigation and prosecution.⁶⁰

Extraterritoriality and Extradition

In South Africa, extraterritoriality has been established by law, within the parameters of Article 4 of the OPSC. Under SORMA, if a citizen or ordinary resident of South Africa commits abroad an act which constitutes an offence under the Act, or if a citizen or permanent resident of South Africa is victim of an act committed abroad which constitutes an offence under the Act, South African courts have the jurisdiction if the offender is found on the country’s territory.⁶¹ Hence, SORMA establishes **active** as well as **passive extraterritorial jurisdiction**. The offender would be prosecuted even if the act does not constitute an offence in the place of commission. The principle of **double criminality** which states, ‘a person may be extradited only when his/her actions constitute an offense in both the requesting and requested states’⁶², does not apply in South Africa. The law does not provide for **universal extraterritorial jurisdiction**.

⁵⁵ Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Chapter 12.

⁵⁶ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 3 of 2009\)](#), Section 18(1)(a); Association for Progressive Communications: Comninos, Alex. (2012). [Intermediary Liability in South Africa](#), P. 6.

⁵⁷ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 3 of 2009\)](#), Section 18(1)(b).

⁵⁸ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 3 of 2009\)](#), Section 18(2).

⁵⁹ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 3 of 2009\)](#), Section 18(3)(a).

⁶⁰ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 3 of 2009\)](#), Section 18(5).

⁶¹ Republic of South Africa. (2002). [Electronic and Communications and Transactions Act No. 25 of 2002](#), Section 61.

⁶² USLegal. (u.d.) [Dual-Criminality Principle](#).

The Children's Act also provides for extraterritoriality but only for offences relating to child trafficking.⁶³

In terms of **extradition**, since the Extradition Act which provides for the extradition of fugitives accused or convicted of an “**extraditable offence**” – defined as those punishable by deprivation of liberty of six months or more – it can be argued that OCSEA offences would qualify as extraditable offences.⁶⁴ The Extradition Act specifies the necessity of the offence to be committed within the jurisdiction of a foreign State, which is party to an extradition agreement with South Africa.⁶⁵ In case the foreign State did not agree to an extradition agreement, only the President can consent in writing to the extradition of any person accused or convicted of an offence.⁶⁶ In *Carolissen v. DPP*, the magistrate allowed the accused to be extradited to the USA to face the trial in the Federal Court in the State of Maine on charges relating to the production and dissemination of child sexual abuse material.⁶⁷ This is also in line with Article 5.2 of the OPSC, which sets forth that “if a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Protocol as a legal basis for extradition in respect of such offences”.⁶⁸

Other OCSEA-Related Provisions

The FPA imposes **penalties** for offences relating to child sexual abuse material. The offences are punishable with a fine or imprisonment, or both. Depending on the gravity of the offence, the maximum term of imprisonment is 15 years.⁶⁹ For offences relating to the creation and production of child sexual abuse material, the court may impose a sentence under Section 276 of the Criminal Procedure Act of 1977, in cases where the penalty has not been prescribed.⁷⁰

In respect of offences under SORMA, if a person is charged in the High Court, the maximum sentence that can be imposed is life imprisonment and if charged in a Regional Court, the maximum sentence is 15 years imprisonment.⁷¹ In *Kleinhans v. S*, the court explained how the intention of sentencing in case of child sexual abuse offences is retributive and preventive.⁷² In this case, the appellant was a 74-year old

⁶³ Republic of South Africa. (2005). [Children's Act No. 38 of 2005 \(as amended in 2010\)](#), Section 7(2), [Section 291](#).

⁶⁴ Republic of South Africa. (1962). [Extradition Act No. 67 of 1962 \(as amended in 2004\)](#), Section 1.

⁶⁵ Republic of South Africa. (1962). [Extradition Act No. 67 of 1962 \(as amended in 2004\)](#), Section 3(1).

⁶⁶ Republic of South Africa. (1962). [Extradition Act No. 67 of 1962 \(as amended in 2004\)](#), Section 3(2).

⁶⁷ High Court of South Africa (Western Cape Division). (2016). *Carolissen v. DPP*, 2016 (2) SACR 171, cited in [William Alexander Beale v. State, \[2019\] ZAWCHC 47](#), P 9.

⁶⁸ United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 5.2.

⁶⁹ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B(4)-(8).

⁷⁰ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B(4).

⁷¹ High Court of South Africa (Western Cape Division). (2019). [William Alexander Beale v. State, \[2019\] ZAWCHC 47](#), P 11.

⁷² High Court of South Africa (Western Cape Division). (2019). [Johannes Adolph Kleinhans v. the State, \[2014\] ZAWCHC 68, P. 24](#).

businessman who had been convicted of various contraventions of SORMA, including the manufacture of child sexual abuse material, sexual grooming and sexual assault. His counsel appealed to the court to allow him to undergo treatment in a correctional supervision programme for child sexual offenders instead of serving time in a prison. However, the court refused. While there were mitigating factors such as his age and illness, he was a child sexual offender of a predatory and systematic nature. Hence, considering the gravity of the offence, the court sentenced him to undergo four years' imprisonment with a further four years' imprisonment conditionally suspended.⁷³

Apart from the aforementioned penalties, the FPA allows **seizure** of any film or game that does not comply with the requirements of the Act.⁷⁴

In addition, the FPA criminalises all forms of **promoting** or **advertising** child sexual abuse material.⁷⁵

Currently, the national legislation does not impose any liabilities on **legal entities** for committing OCSEA offences. Notwithstanding, under the Children's Act, juristic persons may be held liable for certain offences relating to trafficking, including trafficking of children for use in the creation of child sexual abuse material.⁷⁶

Chapter VI of SORMA exclusively deals with the provisions relating to a **national register for sex offenders**. It provides for the establishment of a national register for sex offenders containing the details of persons convicted of any sexual offence against a child or are alleged to have committed a sexual offence against a child.⁷⁷ It also provides for the designation of a person as the Registrar of the Register by the Minister with due regard to his or her experience, conscientiousness and integrity.⁷⁸ The objective of the Register is to protect children against sexual offenders by establishing and maintaining records of such offenders, informing employers and other relevant authorities dealing with fostering, kinship care-giving, temporary safe care-giving, adoption or curatorship about whether a particular applicant has a record in such a register or not.⁷⁹ The Register must include personal information such as name, address and also particulars of conviction such as date and place of conviction and sentence imposed.⁸⁰ The Act also

⁷³ High Court of South Africa (Western Cape Division). (2019). [Johannes Adolph Kleinhans v. the State, \[2014\] ZAWCHC 68, P. 24.](#)

⁷⁴ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 15A(f).

⁷⁵ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

⁷⁶ Republic of South Africa. (2005). [Children's Act No. 38 of 2005 \(as amended in 2010\)](#), Section 285.

⁷⁷ [Republic of South Africa. \(2007\). Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 42(1).

⁷⁸ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 42(2)-(3).

⁷⁹ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 43.

⁸⁰ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 49.

prohibits the **disclosure of information**, thereby safeguarding the **confidentiality** of information in the register. It penalises disclosure of information by the Registrar, person(s) who assist him/her or any other person who has acquired information in exercise of his/her powers, duties and functions, except to give effect to the provisions of this Chapter; or when required by a court to do so.⁸¹

Recidivism has been treated seriously by the FPA.⁸² For instance, if the offence of making child sexual abuse material available through import, export or other means is committed for the first time, the offender is subjected to a fine or up to 10 years' imprisonment or both. If the same offence is committed more than once, the accused is punished with a fine or up to 15 years' imprisonment or both.⁸³ Similar rules exist in case of other child sexual abuse material-related offences under the Act.⁸⁴

Pursuant to the provisions of SORMA, convicted sex offenders are prohibited from holding **positions involving or facilitating contact with children**.⁸⁵

In terms of **retention and preservation** of digital evidence, the FPA makes it the duty of ISPs to take all reasonable steps to retain such **evidence** for purposes of investigation and prosecution by the relevant authorities.⁸⁶ If ISPs fail to comply with these provisions, they are held liable and are punished either with a fine or imprisonment or both.⁸⁷

Access to Justice and Remedies

National complaint mechanisms and reporting

The Children's Act imposes mandatory duties on **professionals** such as nurses, social workers, etc., who come into contact with a child victim of trafficking.⁸⁸ As mentioned previously, trafficking under the Children's Act includes trafficking of a child for use in "pornography".⁸⁹ Therefore, this duty exists specifically for trafficking related child sexual abuse material offences and not all OCSEA offences in general.

⁸¹ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 52.

⁸² Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

⁸³ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B(4).

⁸⁴ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B(5)-(6).

⁸⁵ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), 41.

⁸⁶ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

⁸⁷ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B.

⁸⁸ Republic of South Africa. (2005). [Children's Act No. 38 of 2005 \(as amended in 2010\)](#), Section 288.

⁸⁹ Republic of South Africa. (2005). [Children's Act No. 38 of 2005 \(as amended in 2010\)](#), Section 288.

Nevertheless, reporting a sexual offence committed against a child is **mandatory** in South Africa for all persons. SORMA criminalises anyone who knew that a sexual offence has been committed against a child and does not report it immediately to a police official.⁹⁰ But if such a person is a child, they cannot be convicted.⁹¹ A similar reporting obligation exists under FPA.⁹²

The FPA obligates child-oriented service providers to establish a **reporting mechanism** which enables children to report suspicious behaviour by any person in a chat-room to the service or access provider.⁹³ It also allows any person to complain to the Film and Publication Board about prohibited content including child sexual abuse material relating to online services “offered by any person, including commercial online distributors and non-commercial online distributors”.⁹⁴ If the Board finds merit in the complaint, it can issue a take-down notice against the person offering such services.⁹⁵ The Board can compel the ISPs to provide the Board or South African Police Services with information relating to the identity of the publisher of the prohibited content.⁹⁶ The Act does not provide for **protection mechanisms** for those who make such complaints.

The FPA also penalises failure to report knowledge of child sexual abuse material to the police.⁹⁷ In addition, it sets an obligation for Internet service and mobile cellular telephones providers as well as any operators who provide child-oriented services, such as chat-rooms, to moderate their services and act in case of any offence committed against a child, share safety messages and provide a mechanism for children to report any suspicious behaviour, and to transfer this report to the police.⁹⁸ The Children’s Act makes it the duty of ISPs to report to the South African Police any site that is engaged in advertising, publishing, printing, broadcasting or distributing information that facilitates trafficking of children.⁹⁹

⁹⁰ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 54(1).

⁹¹ Republic of South Africa. (2007). [Criminal Law Amendment \(Sexual Offences and Related Matters\) Act No. 32 of 2007](#), Section 56(5).

⁹² Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24B(2).

⁹³ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24C(2)(c).

⁹⁴ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 18E(1).

⁹⁵ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 18E(2).

⁹⁶ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 18E(3).

⁹⁷ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24.

⁹⁸ Republic of South Africa. (1996). [The Film and Publication Act No. 65 of 1996 \(as amended by Amendment Act No. 11 of 2019\)](#), Section 24C.

⁹⁹ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 285.

In terms of **statutory limitations**, all OCSEA offences carry a limitation period of 20 years except the offence of using a child for child sexual abuse material purposes under Section 20(1) of SORMA, which does not carry any limitation period and hence, can be prosecuted at any time.¹⁰⁰

The abovementioned provisions apply equally to both **boys** and **girls**.

Child-sensitive justice

In terms of child-sensitive justice, the Children’s Act protects child victims of crimes by closing or limiting attendance in court proceedings, and also by prohibiting the publication of information that may reveal the **identity** of child victims or witnesses.¹⁰¹ Further, the Act states that Children’s Court hearings must be held in a room which is furnished and designed in a manner aimed at putting children at ease.

The South African Constitution provides that every child has the **right to have a legal practitioner** assigned to them by the state, “and at state expense, in civil proceedings affecting the child if substantial injustice would otherwise result”.¹⁰² Similarly, the Children’s Act states, “every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within jurisdiction of that court”.¹⁰³

Similarly, the Criminal Procedure Act includes provisions to **protect** child witnesses and child complainants in criminal proceedings. It allows the court to exclude members of the public to protect the interest of a child complainant or witness at the request of their parent or guardian.¹⁰⁴ The Act allows child witnesses to submit evidence through intermediaries.¹⁰⁵ It states that, “whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary”.¹⁰⁶ Furthermore, if a court appoints an intermediary, it may direct that the child witness shall give their evidence at any place which puts them at ease and enables the court and any other relevant person ‘to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony’.¹⁰⁷

The South African Constitutional Court in DPP v. Minister of Justice and Constitutional Development acknowledged that a child suffers undue stress and suffering when they are subjected to intensive and

¹⁰⁰ Republic of South Africa. (1977). [Criminal Procedure Act No. 51 of 1977 \(as amended in 2013\)](#), Section 18.

¹⁰¹ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005\(as amended in 2010\)](#), Section 74.

¹⁰² Republic of South Africa. (1996). [The Constitution of South Africa \(as amended in 2012\)](#), Section 28.

¹⁰³ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005\(as amended in 2010\)](#), Section 14.

¹⁰⁴ Republic of South Africa. (1977). [Criminal Procedure Act No. 51 of 1977 \(as amended in 2013\)](#), Section 153(3).

¹⁰⁵ Republic of South Africa. (1977). [Criminal Procedure Act No. 51 of 1977 \(as amended in 2013\)](#), Section 170A.

¹⁰⁶ Republic of South Africa. (1977). [Criminal Procedure Act No. 51 of 1977 \(as amended in 2013\)](#), Section 170A.

¹⁰⁷ Republic of South Africa. (1977). [Criminal Procedure Act No. 51 of 1977 \(as amended in 2013\)](#), Section 170A.

aggressive interrogation in an open court in the process of the accused.¹⁰⁸ In the words of the Court, “these experiences are often as traumatic and as damaging to the emotional and psychological wellbeing of the child complainant as the original abusive act or may even expose the child to further trauma, possibly as severe as the trauma caused by the crime itself”.¹⁰⁹ In order to prevent the child victim from facing the perpetrator, South African courts have remote witness rooms linked to the courtroom via CCTV or video link.¹¹⁰ It can be based on the court’s initiative or the prosecutor’s application.¹¹¹

The Witness Protection Act, which is aimed at protecting all witnesses that are intimidated or threatened because of their cooperation with law enforcement may be applicable to child victims of OCSEA offences.¹¹²

Furthermore, the Children’s Act entitles child victims of trafficking, including child sexual abuse material-related trafficking, to receive temporary safe care.¹¹³

Additionally, court preparation programs are available for vulnerable victims, including child victims.¹¹⁴ The State-run program, *Ke Bona Lesedi*, acts in conjunction with the National Prosecuting Authority.¹¹⁵ Other programs are available through NGOs, such as ChildLine,¹¹⁶ the Teddy Bear Clinic,¹¹⁷ and the Child Witness Institute.¹¹⁸

Access to recovery and reintegration

With regard to child victims’ **right to recovery and rehabilitation**, the Children’s Act of 2005 states that the provincial department of social development or designated child protection organisation which has conducted an investigation of a child victim of abuse or in need of care and protection must take measures to assist the child, including rehabilitation and family reconstruction and rehabilitation.¹¹⁹ With regard to child victims and child witnesses, in *S v. Mokoena*, it was emphasised that the state should create positive conditions for recovery to take place and diligently seek to avoid conduct by its agencies that has the effect of placing children in peril.¹²⁰

¹⁰⁸ Constitutional Court of South Africa. (2009). [Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development, 2009 2 SACR 130 \(CC\)](#), P. 57.

¹⁰⁹ Constitutional Court of South Africa. (2009). [Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development, 2009 2 SACR 130 \(CC\)](#), P. 57.

¹¹⁰ Universiteit Leiden. (2018). [Leveraging technology to enhance access to justice for children in Africa](#).

¹¹¹ Republic of South Africa. (1977). [Criminal Procedure Act No. 51 of 1977 \(as amended in 2013\)](#), Section 158.

¹¹² Republic of South Africa. (1998). [Witness Protection Act No. 112 of 1998 \(as amended in 2007\)](#), Section 7.

¹¹³ Republic of South Africa. (2005). [Children’s Act No. 38 of 2005 \(as amended in 2010\)](#), Section 289(1)(b).

¹¹⁴ National Prosecuting Authority of South Africa. (2019). [Annual Report 2018/19](#), P. 66.

¹¹⁵ National Prosecuting Authority of South Africa. (2019). [Annual Report 2018/19](#), P. 66.

¹¹⁶ Childline South Africa. (n.d.). [How we help? Training](#).

¹¹⁷ Teddy Bear Clinic Foundation. (n.d.). [What we do](#).

¹¹⁸ Child Witness Institute. (n.d.). [Our work](#).

¹¹⁹ Republic of South Africa. (1998). [Witness Protection Act No. 112 of 1998 \(as amended in 2007\)](#), Section 110.

¹²⁰ High Court of South Africa (Transvaal Division). (2008). [S v. Mokoena, ZAGPHC 148](#), P. 21.

The national legislation does not provide for any **specific programmes** for support and reintegration of child victims of OCSEA.

Access to compensation

In terms of provisions related to **compensation** for child victims of sexual exploitation, these are limited to victims of trafficking.

The PACOTIP provides that victims of trafficking are entitled to appropriate compensation from a convicted trafficker at the discretion of a court or at the request of the complainant or a prosecutor.¹²¹ The compensation may be paid for a number of reasons according to the Act including for loss of property; physical, psychological or another injury; being infected with a life-threatening disease; loss of income or support and any expenses incurred.¹²² The Act also provides that a civil action may also be instituted by the victim to recover any amounts not covered by the order for compensation.¹²³

Child victims of OCSEA do not have the possibility of seeking compensation in **civil** or **criminal proceedings** from convicted perpetrators. It is surprising that SORMA, which exclusively deals with sexual offences including those against children, does not include any provisions regarding compensation.

Moreover, there are no **country managed funds** from which these children can seek compensation. The creation of a statutory compensation fund for victims of crime has been suggested as one way to streamline the process of ensuring victims get compensation.¹²⁴

¹²¹ Republic of South Africa. (2013). [Prevention and Combating of Trafficking in Persons Act No. 7 of 2013](#), Section 29(1)(a).

¹²² Republic of South Africa. (2013). [Prevention and Combating of Trafficking in Persons Act No. 7 of 2013](#), Section 29(1)(a).

¹²³ Republic of South Africa. (2013). [Prevention and Combating of Trafficking in Persons Act No. 7 of 2013](#), Section 29(2).

¹²⁴ Wessels, A.B. (2018). [Developing the South African Law of Delict: The Creation of a Statutory Compensation Fund for Crime Victims. Thesis \(LL.D.\), Stellenbosch University](#), Chapter 4, P. 189.