THE GROOMING PROCESS
AND THE
DEFENCE OF CONSENT
IN
CHILD SEXUAL ABUSE CASES

by

DEON MINNIE

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SUPERVISOR: DR. D. ERASMUS
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DEDICATION

This work is dedicated to all of us who have been, or are being, sexually abused as children. This is part of my journey towards recovery. It is a long and winding road littered with obstacles, some more difficult to navigate than others. The memory of what has happened will always remain. It is a haunting shadow from the past, but through our experiences we are tempered, shaped and empowered, we gain empathy and we have a better understanding of the plight of others in similar situations. No matter how some of our experiences may impact on our daily lives, most of us carry on, regardless. We are survivors, not victims. With the help of significant persons in our lives we are able to overcome these hurdles.

It is impossible to forget, yet part of the journey is to forgive, difficult as it may be. Anger, hatred and sadness are some of the obstacles we encounter on the road to recovery. So are self-doubt, low self-esteem and feelings of intense guilt. We often think that we let it happen to ourselves. Daily we face a whirlpool of emotions and we have to learn to live with these. It is not always easy, but in our quests for healing and understanding we have to travel this road. As is evident from research, it is not a road “less traveled”. There are people like us in every community and every society. In fact, we are everywhere: the sexually abused children of this world. Understanding and accepting that it was not our fault and that we are not to blame is probably the biggest obstacle to overcome. It is easy to ascribe guilt to ourselves. It is much easier than trying to understand the motives of those who did this to us.

My wish is that this work will help to create an understanding of the grooming process to which many of us have been, or are being, subjected and which ultimately contributed to our sexual abuse. Perhaps then we will be able to understand and acknowledge that we are not to blame. What happened was not our fault.
ACKNOWLEDGMENTS

This dissertation may be a small contribution to understanding some aspects of child sexual abuse, but for me it has been a giant leap, not only in faith, but also in terms of growth in my personal life. This would not have been possible without the assistance, support and advice of a number of people. This paper is the result of their continued faith in me, for which I am extremely grateful. They have all contributed towards my personal growth and the realisation of my ambitions and dreams.

I dedicate this to my parents and family who have, throughout my life, been so supportive of my quest to prove and better myself, not only academically, but also on a personal level. Without your continued support and interest in my academic career I would not have been able to do this. Another person who, on a personal level, has sustained me through my studies and this dissertation, is Mandy. Thank you for your love, your enthusiasm and understanding through almost three years of working towards attaining my goal. I will always remember your steadfast support.

To two unique women, who started me off on this path and who lit the flame of my interest in child sexual abuse research: my heartfelt appreciation and gratitude to Karen Müller and Karen Hollely of the Institute of Child Witness Research and Training. Your endless inspiration, encouragement and support have carried me through difficult times during the past few years. I will never forget that. I felt enriched by your presence during the course work programme and numerous courses you have presented. Your professionalism and devotion to the plight of child victims of sexual abuse is an inspiration, not only to me, but to countless other people.

I would like to thank my supervisor, Dr Deon Erasmus, for his support, constructive feedback and assistance during this study. Your gentle and thoughtful assistance nurtured my confidence and academic growth.

The role that my colleagues and friends have played deserves to be mentioned here. In particular, I extend my gratitude to Eddie du Plessis for repeatedly reading and correcting the numerous drafts of this dissertation and the valuable advice you have offered. A big thank you to Linda, Andreas, Babré, Hans, Charlotte, Naomi and also the members of staff of the
Middelburg Magistrate’s Office for your sustained interest in my studies and, more specifically, this research project. Your encouragement and inspiration have carried me through long nights and early mornings. Thank you for your faith in my ability to do this.
SUMMARY

Child sexual abuse in its various guises is a phenomenon that has been part and parcel of society for centuries. It is only in the last few decades, however, that professional and societal interest in this social tragedy has been triggered, and continues to increase. The consequences and impact of child sexual abuse are far-reaching. Not only are individual victims marred by its consequences, but so too does it profoundly affect family systems and societies. As a result of professional interest in this field which has been fuelled by the popular media, the cloak of social secrecy which has covered this previously taboo subject has been shed. Although still hugely under-reported, sometimes even denied and buried by some individuals and societies, it is now widely acknowledged that child sexual abuse is a stark reality. Definitions of this phenomenon abound, with some definitions being more descriptive than others.

The grooming process often forms an integral part of child sexual abuse. Through purposefully constructed relationships with their victims, sex offenders make their victims feel responsible for, complicit in and guilty about the abuse. The child is therefore tricked into keeping the abuse a secret. Often the child may not realise that what is happening is in fact abusive. Through grooming the abusive behaviour is normalised and the child may believe that it is part of an affectionate and caring relationship with the offender. The victim often gets lost in the labyrinth of confusion created by a web of deceit, which may result in consensual sexual activities between the child and the sex offender, a fact which is widely acknowledged.

Consent is often raised as a defence when sex offenders are charged with and prosecuted for their crimes, more specifically in relation to victims who are over the age of twelve years and more frequently in relation to victims who are sixteen years and older. This consent, however, ought not to be valid for purposes of any sexual activities between such adults and children. Consent is often given as a consequence of the unique dynamics of the grooming process and the imbalance of power and authority. Furthermore, the child’s level of understanding and life experience, as shaped by the grooming process, may also have an important impact on ostensible consent given.
South African courts, in accordance with international trends, have apparently started acknowledging the impact of the grooming process on consent given by children in sexual abuse cases. Some courts, as of late, are prepared to more readily reject the defence of consent in such cases. It is noteworthy that this trend has started to develop in South Africa even prior to the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. This act defines consent for purposes of the newly created offences, and also stipulates the circumstances in which ostensible consent does not comply with the definition. This definition does not differ materially from the “traditional” approach to consent that was applied prior to the commencement of this act. Furthermore, a number of new offences were created, amongst them the offence of sexual grooming of children. Courts can therefore no longer ignore the existence of the grooming phenomenon and the impact thereof in child sexual abuse cases.
CHAPTER 1

INTRODUCTION

“You think that a child of five, or nine, or thirteen, has the capacity to decide for himself to be in a sexual relationship with an adult … [c]hildren may, perhaps, want to be physically close to adults and behave in ways that adults find seductive … [b]ut it is the adult’s responsibility to recognize the child’s vulnerability, not to exploit it for his or her own pleasure’”

Sexual abuse of children is not a modern day phenomenon; it has occurred throughout history. Societal perceptions about sexual practices have led to particular sexual behaviours having been defined as normal at certain times in history, but later these same behaviours were defined as immoral and still later as criminal. This progression in thought has occurred in a continuous cycle rather than in a linear continuum, with the result that some sexual behaviours have once again become defined by some subgroups of society as normal.

Thus, in ancient Grecian and Roman civilisations sexual practices between adults and children were perceived as normal. With the advent of Christianity the notion of childhood innocence became established and sexual involvement between adults and children were viewed as being immoral. Children were viewed as having no sexual thoughts, feelings or capacities and this attitude hindered the protection of children until the 17th century when the Catholic Church took a firm stand against sexual practices between adults and children. It was only in the 16th century that legislation was passed in England which started the process of protecting children from sexual abuse when boys were protected from forced sodomy and girls under the age of ten years were protected from forcible rape. With the decline of the Church as the main authoritarian body, the sanctions against sexual involvement with children

4 Ibid.
5 In other ancient civilisations such as the Incan of pre-Spanish Peru, the Ptolemaic Egyptian and old Hawaiian, certain types of incest were permissible in isolated and privileged classes of society.
6 Mrazek Definition and Recognition of Sexual Child Abuse 6.
7 Id 7.
8 Id 6 – 7.
were relegated to the judicial systems of most Western countries and perceived as criminal acts. By the time of the establishment of the United States of America sexual prohibitions were becoming more defined. A case was reported of a father convicted of incestuous acts with his daughter in 1672. The father was executed and his daughter was sentenced to a whipping for her participation in the crime.

An early indication that society started to recognise the vulnerability of children to sexual abuse, was in the 18th century when some educators issued warnings to parents to supervise their children at all times and not to let them appear naked in front of other adults. By the 1920s the notion had developed that the sexual abuse of children was primarily perpetrated by strangers, and the seductive powers of the victims were often emphasised. It was only after Kempe’s identification of the battered child syndrome in the early 1960s that society started acknowledging that child sexual abuse at the hands of family members was a stark reality.

It has been argued that the reason for this was society’s inability or lack of preparedness at the time to accept that sexual abuse occurred within family context and at the hands of family members upon whom children were dependent and whom they were able to trust. Society was more readily prepared to ascribe to the notion of “stranger danger” than to the threat of sexual abuse within the family. Some researchers have been accused of minimising the prevalence of child sexual abuse because they were of the opinion that society was not yet ready or able to acknowledge intra-familial sexual abuse.

Although the existence of the phenomenon of child sexual abuse has been widely recognised for some decades and public awareness has increased exponentially, society often still entertains the belief that children are more often sexually abused by strangers than by persons known to them. Research indicates quite the contrary, however, and researchers and practitioners alike now accept that more children are being abused by someone they know and

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10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
trust, like a relative or a family friend.\textsuperscript{20} Children are more vulnerable to adults or older persons who have power or authority over them,\textsuperscript{21} although sexual abuse may also be perpetrated by younger family members and friends of the victim.

In terms of the provisions of article 34 of the United Nations Convention on the Rights of the Child,\textsuperscript{22} all State Parties undertake to protect children from all forms of sexual exploitation and sexual abuse; children being defined as persons under the age of eighteen years. In particular, they undertake to implement measures to prevent the inducement or coercion of children to engage in any unlawful sexual activities, the exploitative use of children in prostitution and other unlawful sexual practices and the exploitative use of children in pornographic performances and materials. The Republic of South Africa became a State Party by ratifying the Convention on 16 June 1995. The content of this prohibition on the sexual exploitation and abuse of children is substantially duplicated in article 17 of the African Charter on the Rights and Welfare of the Child,\textsuperscript{23} which was ratified by South Africa on 7 January 2000. The Constitution of the Republic of South Africa, 1996\textsuperscript{24} provides in section 28(1)(d) that every child has the right to be protected from maltreatment, neglect, abuse or degradation. Although no specific protection against the sexual abuse or exploitation of children is contained in the Bill of Rights in the Constitution, it is submitted that the term “abuse” as referred to in section 28(1)(d) should be interpreted widely to include sexual abuse and sexual exploitation. The Children’s Act\textsuperscript{25} also gives effect to these rights of children. The objects of this act,\textsuperscript{26} amongst others, are to give effect to every child’s rights in term of section 28(1)(d) of the Constitution and to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic. A further objective is to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards. Once again it is submitted that sexual abuse of children may be implied in the terms physical-, emotional- and moral harm. Section 1 of the Children’s Act specifically states that exploitation in relation to a child shall include sexual exploitation. The latest initiative in the protection of children against sexual abuse and

\textsuperscript{21} Lewis \textit{An Adult’s Guide to Childhood Trauma} (1999) 99-100.
\textsuperscript{22} Which came into force on 2 September 1990.
\textsuperscript{23} Which came into force on 29 November 1999.
\textsuperscript{24} Hereafter referred to as the “Constitution”.
\textsuperscript{25} 38 of 2005; hereafter referred to as the “Children’s Act”.
\textsuperscript{26} S 2.
exploitation in South Africa is the Criminal Law (Sexual Offences and Related Matters) Amendment Act.\textsuperscript{27}

As the title suggests, this dissertation deals with the grooming process and the defence of consent in child sexual abuse cases. The aim of this paper is to indicate that even when children do consent to sexual abuse and practices related thereto, as is alleged they often do, this is not true or real consent. This ostensibly consent is often obtained in a fraudulent manner by skilled and clever manipulators who often stand in a position of authority to the child.

The following questions will be analysed and answered in the chapters that follow. Firstly, should the sex offender be able to successfully raise the defence of consent when he is charged with the commission of sexual offences against children? If not, why not? Furthermore, how do the courts in South Africa deal with the defence of consent where it is raised in sexual crimes involving children?

Chapter 2 deals with the important question of what constitutes child sexual abuse as well as the issue of consent. It investigates what the legal concept of consent entails. In order to be a successful defence in law, consent has to meet certain requirements. These requirements will be examined in depth. Despite the concept of consent now having been defined in legislation\textsuperscript{28} relating to sexual offences committed against children, it is submitted that prosecutions may still be instituted under the common law for the offences of rape and indecent assault, and in terms of section 14 of the Sexual Offences Act\textsuperscript{29} for crimes committed prior to the commencement of the Act. Therefore the “traditional” concept of consent is still very relevant for purposes of investigating the impact of the grooming process on ostensibly consensual sexual relationships between children and adults.

The aim of chapter 3 is to analyse the legal concept of consent in relation to sexual offences committed against children in terms of the Act. This act created various new sexual offences that can be committed against, amongst others, children under the age of eighteen years. It contains a definition of consent for purposes of the Act and also sets out circumstances under

\begin{itemize}
\item \textsuperscript{27} 32 of 2007; hereafter referred to as the “Act”.
\item \textsuperscript{28} The Act.
\item \textsuperscript{29} 23 of 1957; hereafter referred to as the “Sexual Offences Act”.
\end{itemize}
which ostensible consent is not regarded as true consent. This definition and the circumstances under which ostensible consent do not comply with the definition, will be investigated and compared to the “traditional” concept of consent to indicate that there is no material difference between the “traditional” and new concepts of consent - the latter for purposes of the Act.

Chapter 4 explores the dynamics and features of the grooming process. The researcher will concentrate extensively on international research on this phenomenon and investigate some of the definitions that have been advanced by various researchers and practitioners. This chapter also investigates the different stages in the grooming process. The grooming process employed by sex offenders includes a wide range of behaviours, and since the advent of the internet and new developments in the mobile phone industry, these technologies are increasingly being used as tools in the grooming, sexual exploitation and sexual abuse of children. Although online grooming with the intent to abuse is no different from other forms of grooming, the context in which the sexual abuse occurs is somewhat different. The use of the internet and other technological advances in the grooming process will be investigated and compared with hands-on grooming.

Chapter 5 investigates the impact of the grooming process on the child and protective adults in his environment and more importantly, on the ostensible consent given by the child. It has been found that children often consent to sexual abuse after having been groomed by a sex offender. However, it will be argued that this ostensible consent is not real and valid consent, neither in the “traditional” context, nor in terms of the Act. A number of selected cases will be referred to, analysed and compared to determine how the courts have approached the defence of consent in relation to the grooming process.31

30 For purposes of this dissertation the child victim of sexual abuse is referred to as a male child (“he”). So too, is the sex offender referred to as a male person (“he”). This is done merely for ease of reading, as it may cause cumbersome reading should the genders of the victims and the offenders be referred to as “he or she” in each instance where reference is made to them. It is acknowledged that victims of child sexual abuse may be either male or female and that sexual offences may be perpetrated by offenders of either gender. Where reference is made to the common law offence of rape, however, the victim is referred to as a female (“she”), since this common law offence could only be committed against a female person.

31 These cases were decided prior to the commencement of the Act. It does not appear that, at the time of the submission of this paper, any cases in which the provisions of the Act relating to consent and grooming, had been decided.
Chapter 6 concludes the arguments advanced by the researcher, and contains the final inference that a sex offender should not be able to successfully raise the defence of consent in instances where the victim’s consent had been obtained as a result of a grooming process.
CHAPTER 2

CHILD SEXUAL ABUSE AND CONSENT: DEFINING THE PARAMETERS

“He came back to the bed and, without speaking, moved the cards aside. I sat passively. He kissed me on the forehead and cheeks, and then on my mouth … closed-mouth kisses. Inside, I recoiled. Jeremy lay me down and moved his hands down to the top of my shorts. I raised myself slightly and he pulled them down, along with my underpants.”

2.1 INTRODUCTION

For purposes of understanding the framework within which consent may feature as a defence in child sexual abuse cases, it is necessary to define the concept of child sexual abuse. The fact that some children may enter into consensual sexual relationships with adults or much older persons is widely accepted. In this regard Hines and Finkelhor33 state as follows:

“All through the era of concern about sex crimes against children, there has generally been some awareness that certain juveniles enter into sexual relationships with adults in a manner that appears to be voluntary and even enthusiastic, though still proscribed under law. Less attention has been paid to these non-forcible relationships, even while the literature on sex offenses has grown tremendously. And the reason almost certainly has to do with the difficult policy and moral issues that these relationships pose... [because] there is considerable disagreement about how to define and refer to these relationships ... [which is] indicative of the controversial nature of the topic. They have been referred to with terms like voluntary, consensual, non-forcible, and cross-generational, and the juveniles have been referred to as compliant victims, statutory victims or even co-offenders.”

This statement poses three questions which add to the controversy. The first is whether these young people can indeed be described as victims in view of the fact that they apparently enter into these relationships consensually. Secondly, are such children or young persons morally, legally and in terms of cognitive development, capable of consenting? And thirdly, where on the continuum between coercion and voluntary choice should the line be drawn between these relationships and those that are viewed as sexual abuse?34 The answers to the first two

32 Lowe The Family Friend 67.
34 Id 301 - 302.
questions will become apparent from the discussions that follow in the next four chapters. Graupner\textsuperscript{35} struggles with the latter question where he remarks that it is not problematic to view sexual contact with a five-year old child as always constituting abuse, but it becomes more problematic in the case of sexual relations with a twelve-year old. It can not be said that such sexual contact constitutes abuse in each and every case, and it is almost impossible to hold that sexual contact with a sixteen-year old is abusive in each and every case. What can be seen from this is the tension between the need of children to be protected from sexual relations with adults or older persons on the one hand and on the other, the freedom of adolescents to engage in self-determined sexual relationships as a manifestation of their freedom of choice.\textsuperscript{36}

In order to find the golden mean between these two extremes of protection and freedom most jurisdictions have developed legislative systems which provide for provisions relating to three interactive aspects. These are provisions relating to of the age of consent, the seduction of minors and thirdly provisions relating to sexual contact in relationships of authority.\textsuperscript{37} South Africa has legislative provisions relating to the age of consent and sexual contact in relations of authority, the latter having recently been enacted in the Act.\textsuperscript{38} South Africa does not have any specific legislative provisions relating to sexual activity between adults and children as a result of the seduction of a child. It is submitted, however, that such instances may also be covered by section 1(3) of the Act. As will be indicated later,\textsuperscript{39} the circumstances under which the complainant’s consent is not regarded as true consent in terms of the Act are set out in section 1(3), but the latter does not constitute a \textit{numerus clausus}. It may well be found that consent given by a child as a result of his seduction does not comply with the definition of consent in the Act. The grooming process is in essence a process of seduction, and thus it should be covered by the provisions of section 1(3).

The concept of consent has been a feature of the criminal law since times immemorial.\textsuperscript{40} More specifically so the defence of consent, which is reflected in the adage \textit{volenti non fit}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item S 1(3) of the Act.
\item Ch 3 infra.
\item Strauss \textit{Aspekte van die Begrip ‘Toestemming’ in die Strafreg en die Deliktereg} (1963) 5-6.
\end{enumerate}
\end{footnotesize}
injuria (an injury is not done to one who consents). However, consent is not a defence to each and every offence. The general rule of criminal law determines that consent by the victim will not exclude culpability on the part of the offender because some crimes are considered not so much to be a crime against an individual as a harm against society as a whole. There are, however, exceptions to this general rule as some crimes are defined as being committed only in cases where the victim has not consented. An example of this is the offence of rape, where the consent of the victim, provided it meets the requirements indicated below, will constitute a valid defence. In the case of some other offences, consent as a defence may be determined by public policy and thus consent will be able to stand as a defence only where it is in the interest of public policy to regard the consent of the victim as a defence. Thus it is clear that moral and social policy considerations play an important role in society’s decisions about where to draw the boundaries of consent. An example of such an offence would be indecent assault, which may be committed with or without the use of force or injuries.

It has been held that indecent assault can not be committed in instances where the victim has consented. This view has been criticised, and both Burchell and Snyman are of the opinion that consent can not be a valid defence where bodily harm has been inflicted on the victim in a case of indecent assault. Conversely, where no serious bodily harm has been inflicted, the consent of the victim has been held to be a valid defence on a charge of indecent assault. In other words, consent has been recognised as a valid defence even where bodily harm has resulted, but it had been slight. The question in this regard is whether consent should be regarded as a valid defence as a matter of public policy. It should be established whether the act is contra bonos mores or not. Various factors ought to be considered in determining the bounds of public policy, such as the nature and extent of the physical and

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42 Ibid.
43 Ibid.
44 Ibid.
47 R v Sagaye 1932 NPD 236 237.
48 S v D 1963 3 SA 263 (E) 265; hereafter referred to as “S v D 1963.”
49 Burchell Principles 339.
50 Snyman Criminal Law 126.
51 S v Matsemela 1988 2 SA 254 (T).
52 R v Njikelana 1925 EDL 204.
53 Burchell Principles 339.
psychological harm suffered by the victim as well as the ages and relationship of the parties involved.\textsuperscript{54} The latter is of particular importance in cases of child sexual abuse and the exploitation of a position of trust or the abuse of a position of authority relating to child victims.\textsuperscript{55} In view of the recent paradigm shift which is evident from a number of cases in South Africa,\textsuperscript{56} it is submitted that, in cases where the nature of the act is such that it constitutes a sexual assault on a child, the consent of the victim ought not to be regarded as a valid defence. This argument holds even if no bodily injuries have been inflicted or if the bodily injuries had been slight, purely because of the imbalance in power between victim and offender. The dynamics of the relationship between the two parties with regard to power and authority should be considered, and where the child consented to such sexual contact because of the abuse of a position of trust or authority, the \textit{boni mores} should, as matter of course, militate against the defence of consent being raised successfully.

At the heart of this argument lies the fact that sexual relations between adults and children are exploitative in nature. It can be argued that this is the very reason why the age of consent, which is presently sixteen years in South Africa, is determined, and why it is considered, at least legally, that a child of sixteen years or older can consent to such sexual activities. It is, however, submitted that consent should not be the overriding consideration in instances like these. What about a sexual relationship between a sixteen-year old and a 49-year old? There is something that should strike us as inappropriate, sordid, even unethical and certainly exploitative about such a relationship.\textsuperscript{57} The older adult has years of experience and seasoning, and certainly the \textit{boni mores} should expect more maturity in judgment from such a person. The fact that sexual activities between two such persons are legal or consensual should not mean that it is good, decent, fair or reasonable.\textsuperscript{58} There are, of course, many instances where the \textit{boni mores} do not permit persons to consent to certain actions or behaviour, and the same ought to apply to sexual relations between a child and an older adult.

In South Africa, as in many other jurisdictions, certain requirements have to be met before consent can succeed as a defence. These are that the consent of the complainant in the circumstances must be recognised in law as a defence, it must be real consent and only a

\textsuperscript{54} \textit{Ibid.}
\textsuperscript{55} \textit{Ibid.}
\textsuperscript{56} Ch 5 infra.
\textsuperscript{57} Elshtain “Beyond Consent” 1998 \textit{New Republic} 8 9.
\textsuperscript{58} \textit{Ibid.}
person capable in law of consenting can do so.\textsuperscript{59} This chapter not only deals with the
definition of the phenomenon of child sexual abuse, but also with the concept of consent in its
“traditional” sense, as it was available as a defence to the common law and statutory offences
which sex offenders could be charged with prior to the commencement of the Act.

\section{Defining Child Sexual Abuse}

In this section the phenomenon of child sexual abuse will be investigated. It is a complex
problem which embraces social, psychological and legal considerations and has been
described as a pervasive social tragedy that has global impact.\textsuperscript{60} There are problems in
arriving at clear definitions of this phenomenon\textsuperscript{61} and definitions and descriptions vary
greatly. It has been suggested that deciding on a so-called best research definition may not,
however, be possible or even desirable.\textsuperscript{62} Kempe and Kempe\textsuperscript{63} define child sexual abuse as:

\begin{quote}
\enquote{[t]he involvement of dependent, developmentally immature children and adolescents in
sexual activities which they do not fully comprehend, are unable to give informed
consent to and that violate sexual taboos of family roles.}
\end{quote}

This definition acknowledges the limitation of children to give truly informed consent.\textsuperscript{64} The
Australian Institute of Health and Welfare describes child sexual abuse as:

\begin{quote}
\enquote{any act which exposes a child to, or involves a child in, sexual processes beyond his or
her understanding or contrary to accepted community standards.}\textsuperscript{65}
\end{quote}

Tomison\textsuperscript{66} defines child sexual abuse as:

\begin{quote}
\enquote{the use of a child for sexual gratification by an adult or significantly older
child/adolescent … [which] may involve activities ranging from exposing the child to
sexually explicit materials or behaviours, taking visual images of the child for
pornographic purposes, touching, fondling and/or masturbation of the child, having the
\end{quote}

\textsuperscript{59} Burchell \textit{Principles} 324.
\textsuperscript{60} Van Dyk \textit{Telling the Secret: A Qualitative Study of Adult Male Survivors Disclosure of Childhood Sexual
\textsuperscript{61} Tomison \textit{Issues in Child Abuse Prevention}.
\textsuperscript{62} Haugaard & Emery \textit{“Methodological Issues in Child Sexual Abuse Research”} 1989 \textit{Child Abuse and
Neglect} 89 99.
\textsuperscript{63} Kempe & Kempe \textit{Child Abuse} (1978) 60.
\textsuperscript{64} Tomison \textit{Issues in Child Abuse Prevention}.
\textsuperscript{65} \textit{Ibid}.
\textsuperscript{66} \textit{Ibid}; the importance of the \textit{boni mores}, as explained \textit{supra}, is evident from this definition.
child touch, fondle or masturbate the abuser, oral sex performed by the child, or on the child by the abuser, and anal or vaginal penetration of the child.”

The protocol document developed by the Institute for Child and Family Development and the Western Cape Child Abuse and Neglect Forum\textsuperscript{67} provides the following extensive working definition of child sexual abuse:

“Sexual abuse is any act or acts which result in the exploitation of a child or young person, whether with their consent or not, for the purposes of sexual or erotic gratification. This may be by adults or other children or young persons. Sexual abuse may include but is not restricted to the following behaviour:

- Non-contact abuse: exhibitionism (flashing), voyeurism (peeping), suggestive behaviours or comments, exposure to pornographic materials or producing visual depictions of such conduct.
- Contact abuse: genital/anal fondling, masturbation, oral sex, object or finger penetration of the anus/vagina, penile penetration of the anus/vagina and/or encouraging the child/young person to perform such acts on the perpetrator.
- Involvement of the child/young person in exploitive activities for the purposes of pornography or prostitution.
- Rape, sodomy, indecent assault, molestation, prostitution and incest with children.”

This definition acknowledges the fact that sexual abuse may be committed with the consent of the child. The definitions referred to above also recognise the fact that the sexual abuse of children may include a wide range of behaviours. It further acknowledges the concomitant exploitation of the victim, which is one of the dynamics of sexual abuse.\textsuperscript{68} Kinnear\textsuperscript{69} also identified a number of factors which forms part of the dynamics of sexual abuse, which include lack of consent, exploitation and force. Hollely\textsuperscript{70} states unequivocally that children do not consent to sexual abuse. It is rather a case of the child not fully comprehending what the sex offender proposes to him and being unable to refuse sexual contact with a person in an authoritative position in relation to the child.\textsuperscript{71} The child is manipulated or coerced into sexual contact with the adult who is stronger, more resourceful and more knowledgeable.\textsuperscript{72} The grooming process may be utilised as a means to manipulate and exploit the child through the offering of gifts and privileges and fulfilling basic voids in his life and remodeling the

\textsuperscript{68} Hollely Disclosure 145-146.
\textsuperscript{69} Kinnear Childhood Sexual Abuse 3-4.
\textsuperscript{70} Hollely Disclosure 146.
\textsuperscript{71} Kinnear Childhood Sexual Abuse 3.
\textsuperscript{72} Ibid.
The coercion and manipulation employed by the sex offender to engage in sexual contact with the child is not necessarily physical; it may also be of a psychological nature, and therefore more difficult to identify.

From the definitions referred to above, some of the salient features and dynamics of child sexual abuse become evident. It clearly shows that the cognitive and moral development of children may play an important role, and that the issue of consent may play a central role in the phenomenon of child sexual abuse. Thus Fishman classifies sexual abuse of boys mostly on the basis of age differences, stating that age discrepancies imply sufficient differences in developmental maturity and knowledge to indicate an element of victimisation. The manipulation and exploitation of the victim for the sexual gratification of the offender are two other striking aspects of child sexual abuse.

Child sexual abuse is not only committed by adults. This much is evident from the definitions above. It may also be committed by children and adolescents. Men and women may be sex offenders, although a common social perception exists that most perpetrators are male. It is true, however, that female sex offenders are in the minority. Sexual abuse is committed against children of all ages and both genders. Sexual abuse against female victims between the ages of seven to twelve years is more predominant, but even infants and preschool children of both genders are sexually abused. It is difficult, if not impossible, to gauge the prevalence and incidence of child sexual abuse, mainly due to the fact that it is a secretive and hidden offence which is highly under-reported. Yet it is a deeply ingrained part of our social fabric. As a result of professional interest in this field, which has been fuelled by the media, it is no longer a taboo subject which is shrouded in secrecy.
As with the phenomena of child sexual abuse and grooming, there are also varying definitions of the concept of a child sex offender. The term most commonly used to refer to a child sex offender is a “paedophile”. Howitt states that a paedophile is “a person who has sexual desire, the object of that desire being children”. From this definition it should be clear that not all paedophiles are abusers of, or offenders against, children. A person who is a paedophile, or has paedophilic tendencies, may not act on his feelings, urges and fantasies and may therefore never become a child sex offender. Once he acts out his fantasies, however, he becomes a sex offender.

2.3 THE “TRADITIONAL” APPROACH TO CONSENT

As stated above, consent has to comply with certain requirements before it will constitute a valid defence. This is due to the fact that consent can only be a valid defence to certain offences and then only in certain circumstances. These requirements are discussed below.

2.3.1 CONSENT MUST BE RECOGNISED AS A DEFENCE IN LAW

The first requirement is that the law must recognise consent as a defence against the offence alleged to have been committed. In relation to sexual offences committed against children, consent as a defence may be raised in relation to the offences of rape and indecent assault in certain circumstances. Rape is a crime in respect of which consent may be raised as a valid defence provided all the requirements have been met; not as a ground of justification, but because the lack of consent forms part of the definition of the offence of rape. Consent to sexual intercourse, however, is not always recognised by law. A girl under the age of twelve years cannot legally give consent to sexual intercourse. Even is she consents, sexual intercourse with such a girl will amount to the offence of rape. From the age of twelve years and over, but under the age of sixteen years, a girl may consent to carnal intercourse. Such act, however, committed by a male where the defences contained in section 14(2) are

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83 Holley The Child Sex Offender 249.
84 Ibid 249.
86 For this reason the term “sex offender” is used in this paper, as opposed to the term “paedophile”. This paper is concerned with persons who actually sexually offend against children and who raise the defence of consent during a criminal trial.
87 Snyman Criminal Law 123.
88 Id 124.
89 Snyman Criminal Law 127.
not available to him, will be in contravention of section 14(1)(a) of the Sexual Offences Act, and will therefore constitute an offence.

The age from which a girl is able to legally give valid consent to sexual intercourse is sixteen years. Therefore, if a girl aged sixteen years or older consents to sexual intercourse, such consent may constitute a valid defence against a charge of rape. If the intercourse takes place without the girl’s consent, however, such an act will constitute the offence of rape. Section 14(3)(a) contains a similar provision relating to a female who has or attempts to have carnal intercourse with a boy under the age of sixteen years. Therefore, if a boy under the age of sixteen years of age consents to intercourse with a female person and the defences contained in section 14(4) are not available to her, the female’s acts will constitute an offence.

With regard to indecent assault consent is sometimes recognised as a ground of justification, and sometimes not. It has been recognised as a justification in cases where no injuries have been inflicted upon the victim in S v Matsamela and S v D. Conversely, where injuries have been inflicted in the course of the commission of the offence, it has been held in S v D that consent may not be raised as a valid defence. Snyman and Burchell both argue that a better approach would be to consider the boni mores in such cases, and that consent may be regarded as a valid defence where no serious injuries have been sustained by the victim, as was held in S v Matsamela.

Similarly, according to the provisions of section 14(1)(b) of the Sexual Offences Act, a male who commits or attempts to commit an immoral or indecent act with a girl under the age of sixteen years or a boy under the age of nineteen years commits an offence. The consent of the girl or the boy is no defence to a charge under this section. The same applies to a female who commits any of the prohibited acts with a boy under the age of sixteen years or a girl under the age of nineteen years in contravention of section 14(3)(b) which criminalises indecent or immoral acts, or an attempt thereto, committed in these circumstances. The defences contained in sections 14(2) and 14(4) which may successfully be raised by alleged male and

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90 Id 363.
91 Id 125.
92 Supra.
93 1998 1 SACR 33 (T) 39; hereafter referred to as “S v D 1998”.
94 1963 supra.
95 Snyman Criminal Law 126.
97 Supra.
female offenders respectively also apply to immoral or indecent acts committed in contravention of sections 14(1)(b) and 14(3)(b) respectively. The actions of a male person who entices or solicits a girl under the age of sixteen years or a boy under the age of nineteen years to commit immoral or indecent acts, or a female person who does so in relation to a male child under the age of sixteen years or a female child under the age of nineteen years, are criminalized in terms of the provisions of sections 14(1)(c) and 14(3)(c) respectively. Once again the respective defences as indicated above are available to such persons. It should be noted that the consent of the boy or girl child will not constitute a valid defence against any of the offences provided for in sections 14(1) or 14(3).

232 ACTUAL CONSENT

Several factors play a role to establish whether consent given by a victim of a sexual offence was indeed real consent. Burchell\(^98\) is of the opinion that the concept of consent as a defence to criminal liability is not easily defined. In order to qualify as real consent, a number of prerequisites need to be met.

Firstly, consent may be given impliedly (tacitly) or expressly.\(^99\) There is no qualitative difference between these two types of consent.\(^100\) Still, however, mere submission is insufficient to qualify as consent. What is required is active consent.\(^101\) Just how wide this term is interpreted is clear from the fact that consent is often conveyed by “colloquial phrases or by body language, gestures and responsive actions”.\(^102\) Whether consent has been given is a factual question which will have to be determined by the trier of fact, taking into account the totality of the circumstances which prevailed at the time that the alleged offence was committed. \(R \textit{v Swiggelaar}\(^103\) illustrates how difficult it can be to distinguish between mere submission and active consent. Murray AJA observed as follows:

“\[I\]f a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the  

\(^98\) Burchell \textit{Criminal Law and Procedure} 137.  
\(^99\) Snyman \textit{Criminal Law} 128; \textit{Ibid}.  
\(^100\) Snyman \textit{Criminal Law} 128.  
\(^101\) Burchell \textit{Criminal Law and Procedure} 137; \textit{Id} 126.  
\(^102\) Baker \textit{Understanding Consent} 59.  
\(^103\) 1950 1 PH H61 (A).
woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.”

Secondly, the person consenting must be fully aware of the true and material facts to which he or she consents. This prerequisite was stated as follows in *Waring and Gillow Ltd v Sherborne*:

> “It must be clearly shown that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent – these are the essential elements.”

The material facts of the act to which the consenting party consents will depend on the definitional elements of the particular offence. The complainant’s consent must cover the harm to which he or she is exposed, as a person can not consent to be exposed to a risk of which he or she is totally unaware. Fraud, in the form of an active misrepresentation or a fraudulent non-disclosure, may vitiate consent. In the case of rape, for instance, in order to nullify consent, the fraud must induce either an *error in negotio* (error as to the nature of the conduct) or an *error personae* (error as to the identity of the person participating in the act). Therefore, with regard to an *error in negotio*, the complainant must be aware that she is consenting to sexual intercourse. If, for example, she is of the opinion that the act is performed as an operation, valid consent is absent. If, however, she is aware of the fact that she is consenting to sexual intercourse, but she is mistaken regarding the consequences (as where she thinks the sexual intercourse will cure her of a prevailing medical condition) there is valid consent. Similarly, there is no valid consent if the complainant commits an *error personae*. Thus, if she thinks that she is having sexual intercourse with her boyfriend or some identifiable third person, whereas it is in fact another person, there is no valid consent.

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104 Snyman *Criminal Law* 127; Burchell *Criminal Law and Procedure* 138-139.
105 1904 TS 340 344.
106 Snyman *Criminal Law* 127.
107 Burchell *Criminal Law and Procedure* 139.
109 Ibid; Snyman *Criminal Law* 127-128.
110 Id 127.
111 *R v Williams* 1931 1 PH H38 (E); *S v K* 1966 1 SA 366 (RA); *S v W* 2004 1 SACR 460 (C).
112 *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 1 SA 234 (A) 240; *R v Stanbridge* 1959 3 SA 274 (C) 280.
Thirdly, consent must be given before or at the time the act is committed. Ex post facto condonation or ratification of the act by the complainant has no effect. Once consent has been given, it may be revoked before the act is committed. No person can waive the right to revoke consent, as this would be contra bonos mores.

Fourthly, consent must be given by the complainant in person. Another person can not consent to sexual intercourse or any other bodily violation on behalf of the victim. This would also be contra bonos mores.

233 BY A PERSON CAPABLE IN LAW OF CONSENTING

In order to be effective, consent must be given by a person who is capable in law of consenting. This means that the consenting person must not only possess the mental capacity to know the nature of the act he or she is consenting to, but also the ability to appreciate its consequences. A victim who is under a certain age, drunk, mentally ill, asleep or unconscious can therefore not give valid consent to sexual intercourse or any other bodily violation.

As far as children are concerned, the position is that a child under the age of seven years is legally incapable of giving consent. An irrebuttable presumption exists that a girl under the age of twelve years is incapable of consenting to sexual intercourse or indecent assault. This presumption has been described as a “fiction”, as a girl under the age of twelve years might well be fully knowledgeable regarding the nature of the sexual activity. This rule is, however, justified on the grounds of the boni mores. No such presumption exists in respect of a male child. Therefore, even if a girl under the age of twelve years consents to sexual
intercourse, it will still amount to rape. The same applies to indecent assault. Sexual intercourse with a girl over the age of twelve years but under sixteen years is, however, an offence and consent is ineffective on a charge of a sexual offence under section 14 of the Sexual Offences Act.

The constitutionality of section 14(1)(b) of the Sexual Offences Act was recently challenged on a number of grounds in the case of *S v Geldenhuys*. Firstly it was argued that section 14(1)(b) of this act criminalises sexual intercourse or the commission of immoral or indecent acts of one person with another. This section unfairly discriminates where the latter, irrespective of gender, is twelve years or older and capable of forming the relevant intention, and subsequently participates voluntarily in such sexual activity. The argument is based on the ground that unfair discrimination on the basis of gender and/or sexual orientation is invalid. It was contended that the South African common law recognises that a girl of twelve years or older, with the capacity to form the necessary intention, may legally consent to sexual intercourse and that if she does so, the other party is not committing the offence of rape. Counsel for the defence submitted that a “necessary implication” of section 9(3) of the Constitution in this context is that boys of twelve years and older must have the same capacity to consent to sexual activities. It was also contended that, to categorise voluntary sexual activities by a girl or a boy older than twelve years, who has the capacity to form an intention, as immoral or indecent, constitutes unfair discrimination against such children because they are not free to make their own decisions about sexual activities. Moreover, as section 14(1)(b) criminalises the conduct of any person who engages in voluntary sexual activities with such a boy or girl, the section must of necessity constitute indirect discrimination against the former persons and is, for that reason, unconstitutional.

The court held that, while it may be true that the cognitive development of a child of twelve years of age may in certain cases be such that the child may be competent to make rational and informed decisions concerning sexual activities with other persons, this does not mean that the legislator necessarily acted unconstitutionally by setting the age of consent above the age of twelve years for all children. South Africa is both constitutionally and internationally obliged to protect children against all forms of abuse. Therefore the setting of a legal age of consent to sexual activities is perfectly in accordance with South Africa’s constitutional and

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126  Snyman *Criminal Law* 127.
international obligations\textsuperscript{128} in this regard. The State is obliged to protect children against sexual exploitation where such children have not yet reached an age at which, in the majority of instances, they have the requisite cognitive development and intellectual maturity to fully comprehend and appreciate the nature and consequences of sexual activities and to be able to give informed consent to such activities. The court rejected the argument that section 14(1)(b) of the Sexual Offences Act is unconstitutional in that it sets the legal age for consent to sexual activities at higher than twelve years for boys and girls, despite the fact that there may be individual cases where such children might be capable of forming an intention and participating voluntarily in such sexual activities.

The court \textit{mero motu} raised another constitutional question in respect of which the respective parties\textsuperscript{129} were requested to advance arguments. This was whether the distinction drawn in section 14 of the Sexual Offences Act between homosexual and heterosexual sexual activities by setting the legal age of consent at nineteen and sixteen years respectively, was constitutional. Counsel for the applicant, for the respondent and for the Minister conceded that this distinction does constitute discrimination on the grounds of sexual orientation and/or age in terms of section 9(3) of the Constitution. In terms of section 9(5) of the Constitution such discrimination is deemed unfair unless the contrary is established. Counsel for the Minister further conceded that no justification exists in terms of section 36(1) of the Constitution for maintaining the age differences in respect of homosexual and heterosexual sexual activities in terms of the act. It would appear that the legislature came to the same conclusion by repealing section 14 of the Sexual Offences Act and replacing it with sections 15 and 16 of the Act. These sections set a uniform age of consent of sixteen years for both homosexual and heterosexual sexual activities. The court also weighed the legitimate purpose underlying section 14, which is the protection of children against potentially exploitative conduct, against the fact that homosexual persons are a uniquely vulnerable group as far as legal protection and the exercise of political power are concerned. It was found that sections 14(1) and 14(3) of the Sexual Offences Act are unconstitutional to the extent that they set different legal ages of consent for homosexual and heterosexual sexual activities.\textsuperscript{130}

\textsuperscript{128} Compare Ch 1 \textit{supra}.
\textsuperscript{129} The court invited the Minister of Justice and Constitutional Development, Doctors for Life International (and its legal representative in his personal capacity), the Marriage Alliance of South Africa and the Lesbian and Gay Equality Project to submit arguments on this issue.
\textsuperscript{130} This declaration of invalidity, however, will have no force until such time that it is confirmed by the Constitutional Court.
The above-mentioned case once again illustrates that, with regard to the age of consent, it is important to establish whether the child was indeed capable of understanding the nature of the act.\textsuperscript{131} Aspects which may be of importance in deciding this issue are the child’s intelligence, life-experience, standard of education and social background.\textsuperscript{132} Another factor which may be relevant is the child’s decision-making abilities, especially with regard to sexual matters, as interpersonal pressures and the likelihood of manipulation are factors which may impact on a child’s capacity to make decisions in this regard.\textsuperscript{133} Thus it has been stated that from an ethical and legal perspective consent can mean only informed consent, which presupposes a certain level of knowledge and life experience.\textsuperscript{134}

Research into young people’s sexual knowledge established that the average young adolescent does not have extensive knowledge regarding sexual matters.\textsuperscript{135} It therefore stands to reason that not many young adolescents have the required knowledge to make informed decisions about their sexual behaviour, and particularly sexual interaction with adults or significantly older persons.\textsuperscript{136} It may be argued that some adolescents who are involved in sexual relationships with adults have had previous sexual experiences, which should give them the ability to make informed decisions about sex and its consequences. This, however, ignores the fact that sexual knowledge cannot be equated to maturity.\textsuperscript{137} Therefore a child with a history of sexual abuse may possess knowledge of sexual matters that may create the impression of an increased ability to make informed decisions about sexual activities. This is not always the case. Such a child is vulnerable and may act in a sexually provocative manner in order to gain love, attention and affection,\textsuperscript{138} which may therefore result in a situation where the child is too immature to make informed decisions about sexual relations.\textsuperscript{139}

\textsuperscript{131} Burchell Criminal Law and Procedure 141.
\textsuperscript{132} Snyman Criminal Law 127.
\textsuperscript{133} Hines & Finkelhor 2007 Aggression and Violent Behavior 310.
\textsuperscript{134} Press release by the Family Research Council “FRC Responds to Criticism by American Psychological Association and Authors of Child Sexual Abuse Study” 2003-05-20 3.
\textsuperscript{135} Hines and Finkelhor 2007 Aggression and Violent Behavior 309.
\textsuperscript{136} \textit{Ibid}; however, in \textit{S v W supra} two of the complainants were thirteen years old at the time of the commission of the offences. The court held that it would be surprising in this day and age to find that a normal thirteen year old would not have realised that sexual intercourse was to take place in the circumstances. It was found that both complainants had in fact consented to sexual intercourse.
\textsuperscript{137} Hines and Finkelhor 2007 Aggression and Violent Behavior 310.
\textsuperscript{138} Inappropriate sexual behaviour has been identified as one of the symptoms of complex post-traumatic stress disorder. Lewis \textit{An Adult’s Guide to Childhood Trauma} (1999) 8–10 argues that sexual abuse gives rise to several serious symptoms of a complex post-traumatic disorder, one of which is inappropriate sexual behaviour. This may result in the victim of sexual abuse experiencing difficulties in distinguishing between sex and affection, and sex may be used to attain attention and affection. Similarly, Finkelhor & Browne “The Traumatic Impact of Child Sexual Abuse: A Conceptualization” 1985 American Journal of Orthopsychiatry 530 531 have developed a systematic model that conceptualises the impact of sexual
2.4 CONCLUSION

It should be clear from the requirements referred to above that it is not easy to make a broad normative statement as to the existence of consent in child sexual abuse cases. Each case has to be judged on its own merits and the unique circumstances which prevailed at the time of the alleged sexual abuse. Consent is more than mere acquiescence or submission. Yet it is not always given as a result of physical force. It presupposes that the child who consents must be able to give informed or real consent. Whatever the child’s perceptions of the situation are, it should be borne in mind that his consent or willingness to participate in sexual activities with an adult or significantly older person cannot legally, ethically, morally, mentally or emotionally be construed as true, real or informed consent. It is, however, not always easy to determine whether consent had been truly freely given. For consent to constitute a meaningful expression of a person’s interests and desires it must be given free of coercive pressures to grant or withhold such consent. ¹⁴⁰

Coercion takes into account the victim’s cognitive and conative faculties, and per definition someone who is incapable of practical reasoning regarding those interests, cannot be coerced. ¹⁴¹ The nature of coercion has been described as follows:

“[T]o coerce someone into doing something, one has to manipulate the situation so that the world as perceived by the victim presents the victim with a range of options the least unattractive of which (or the most unattractive of which) in the judgment of the victim is the act one wants the victim to do.” ¹⁴²

Thus, in cases of coercion by means of threats, the victim is basically left with a choice. He can either comply or he can choose to suffer the probable, and in his eyes, foreseeable, consequences. In cases where the alternative to compliance is some unthinkable disaster, as it

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may often be in the eyes of a child, he may be faced with no other choice but to comply.\textsuperscript{143} This is exactly what the sex offender attempts to do. He wants the child to believe that disclosing the abuse will result in a serious disaster which may have, in the eyes of the child, life-threatening consequences. Thus, the child acquiesces to being a consenting partner in the sexual activities. He may think that he will forfeit the advantages he gets from his interaction with the adult. The child therefore finds himself in a situation from which there is apparently no escape.

The circumstances surrounding a defence of alleged consent ought to be carefully scrutinised to determine whether ostensible consent did in fact amount to informed consent. It is submitted that a proper understanding of the dynamics of child sexual abuse, the grooming process and the cognitive, moral and emotional development of the child, which bring with it certain limitations, may result in a finding that the child’s level of knowledge, understanding and life experience precludes the existence of true consent.

In the next chapter the provisions relating to consent for purposes of the Act will be scrutinised.

\textsuperscript{143} Feinberg \textit{Social Philosophy} (1983) 7-8.
CHAPTER 3

CONSENT FOR PURPOSES OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007

“Not a word had been spoken. It was impossible to avoid the impression that we’d been doing something deeply distasteful and absolutely not to be talked about.”

3.1 INTRODUCTION

Certain provisions of the Act, including those provisions relating to sexual offences in general and sexual offences against children, came into operation on 16 December 2007. The objects of the Act, amongst others, 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 repeal certain common law sexual offences and to replace them with new or, in some instances, expanded or extended statutory sexual offences, irrespective of gender.

The Act specifically repeals the common law offence of rape and it is replaced with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. The common law offence of indecent assault is repealed and replaced with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent. New statutory offences relating to certain compelled acts of penetration or violation are created. The Act also enacts comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and mentally disabled persons. This includes offences relating to sexual exploitation and grooming, exposure to, or display of, pornography and the creation of child pornography. Despite some of the offences being similar to the offences created in respect of adults these offences aim to identify and address the particular vulnerability of children in respect of sexual abuse or exploitation. Furthermore, the differentiation drawn between the age of

144 Lowe The Family Friend 67-68.
145 Ch 1 (definitions and objects), 2 (sexual offences), 3 (sexual offences against children), 4 (sexual offences against persons who are mentally disabled) and 7 (general provisions) commenced on 16 December 2007. Ch 5 (services for victims of sexual offences and compulsory HIV testing of alleged sex offenders) commenced on 21 March 2008 and chapter 6 (national register for sex offenders) on 15 June 2008.
146 S 2.
consent for different consensual sexual acts has been eliminated and provision have been made for the prosecution and adjudication of consensual sexual acts between children older than twelve years but younger than sixteen years.

Since the advent of the Act the notion of consent in relation to certain sexual offences has apparently undergone a slight change, and the concept of consent for purposes of certain sections of the Act is now more clearly defined. A number of new offences have been created in the Act, some of which are consensual offences, while new non-consensual offences have also seen the light.

It is submitted that the “traditional” concept of consent is still applicable to the offences created in sections 15 and 16 as sections 1(2) and 1(3) do not apply to these offences. It is therefore important to look at the “traditional” concept of consent, as discussed in the previous chapter, in this regard. In respect of the offences created in sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 consent means “voluntary or uncoerced agreement”. Section 1(3) enumerates the circumstances in which a victim does not voluntarily or without coercion agree to acts of sexual penetration, sexual violation and some other prohibited acts in terms of the Act. The circumstances enumerated in section 1(3), however, do not constitute a *numerus clausus*, as the subsection specifically states that those circumstances “include, but are not limited to” the situations as set out in the said section.

### 3.2 THE OFFENCES

Whereas Chapter 2 of the Act deals with sexual offences in general, Chapter 3 deals

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147 S 1(2) and 1(3) of the Act. In some other jurisdictions consent is also defined in legislation. Thus in England the Sexual Offences Act 2003 defines consent in s 74 as follows: “A person consents if he agrees by choice, and has the freedom and capacity to make that choice.” The Canadian Criminal Code defines consent in s 273.1(1) as “[t]he voluntary agreement of the complainant to engage in the sexual activity in question, and conduct short of a voluntary agreement to engage in sexual activity does not constitute consent as a matter of law.”

148 An act of consensual sexual penetration with a child, otherwise referred to as “statutory rape”.

149 An act of consensual sexual violation with a child, otherwise referred to as “statutory sexual assault”.

150 S 1(2). Similar to the Act in South Africa, s 273.1(2) of the Canadian Criminal Code sets out specific situations and circumstances where there is no consent in law. This is where the “agreement” referred to above is expressed by someone else than the complainant, where the complainant is incapable of consenting, or the accused induces the complainant to engage in the sexual activity by abusing a position of trust, power or authority, where the complainant expresses a lack of agreement to engage in the sexual activity or where the complainant expresses a lack of agreement to engage in the activity after having consented at an earlier stage.
specifically with sexual offences against children. A child is defined in section 1(1) as a person under the age of eighteen years, and for purposes of sections 15 and 16, a person older than twelve years but under sixteen years of age. The offences created by sections 3, 4, 5, 6 and 7 are not enumerated as sexual offences specifically against children. It is therefore submitted that these offences may also be committed against children, and that sex offenders may be charged with the commission of any of these offences when they are committed against a person under the age of eighteen years.

It should be noted that the offences relating to the sexual exploitation of children, the exposure or display of pornography to children, using children for, or benefiting from, child pornography and “flashing” specifically refer to the fact that these offences are committed irrespective of any consent given by the child complainant. This means that a person charged with any of these offences will not be able to raise consent as a valid defence. Section 21, however, does not contain a similar provision. This means that in respect of these offences a person so charged will be able to raise the consent of the child as a defence.

Sections 15 and 16 deal with consensual sexual acts with certain children. Despite the consent of the child, the accused may be convicted of statutory rape in terms of section 15 or statutory sexual assault in terms of section 16 of the Act. The offender so charged will thus not be able to raise consent as a valid defence against such charges.

In respect of the offences created in sections 3, 4, 5, 6 and 7, consent is an element of the definition of these offences. Therefore the consent of the complainant in these

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151 The offence of statutory rape.
152 The offence of statutory sexual assault.
153 Rape.
154 Compelled rape.
155 Sexual assault.
156 Compelled sexual assault.
157 Compelled self-sexual assault.
158 S 17.
159 S 19.
160 S 20.
161 S 22.
162 Which creates the offences of compelling or causing children to witness sexual offences, sexual acts or self-masturbation.
163 Rape.
164 Compelled rape.
165 Sexual assault.
166 Compelled sexual assault.
167 Compelled self-sexual assault.
instances may constitute a complete defence to a charge under any of these sections. It is submitted that this will also be the case where the complainant is a child. However, the consent will have to comply with the definition contained in section 1(2).

In terms of the provisions of section 55 further offences relating to attempt, conspiracy, incitement or inducing another person to commit a sexual offence in terms of the Act are enumerated. Also included in these offences are the acts of a person who aids, abets, instigates, instructs, commands, counsels or procures another person to commit a sexual offence.

A wide range of behaviours has been criminalised in an attempt to protect children from sexual abuse and against their inherent vulnerabilities which may result in consent being given.

3.3 THE CONCEPT OF CONSENT FOR PURPOSES OF THE ACT

Apart from providing a definition of consent for purposes of the Act certain circumstances are set out in which the complainant’s consent does not comply with the definition, and will thus not be regarded as true or real consent. Some of these circumstances are the same or similar to those that have been discussed above, although a number of new circumstances are also enumerated. These circumstances are, however, only applicable to some of the offences created by the Act, and will not find application in respect of other offences, be it statutory or common law offences. The circumstances mentioned in section 1(3) in which the complainant’s consent does not comply with the definition of consent in section 1(2) are, however, not a *numerus clausus*, and it would appear that the courts may interpret other circumstances not mentioned in the Act as having the effect of not complying with the statutory definition of consent.171

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168 S 1(2).
169 S 1(3).
170 Ch 2 supra.
171 S 1(3) provides that “Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration … or an act of sexual violation … or any other act … include, but are not limited to, the following:…” (emphasis added).
In terms of the Act, and only for purposes of certain sections, consent is defined as voluntary or uncoerced agreement. Subsection 1(3) of the Act stipulates circumstances in respect of which the complainant does not voluntarily or without coercion agree to acts of sexual penetration, sexual violation or any other acts as contemplated in the sections above. It thus states the circumstances under which the consent of the complainant is not regarded as real consent.

These circumstances include, but are not limited to, the following:

“(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-
   (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
   (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-
   (i) B is committing such a sexual act with a particular person who is in fact a different person; or
   (ii) such a sexual act is something other than that act; or
(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-
   (i) asleep;
   (ii) unconscious;
   (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgment is adversely affected;
   (iv) a child below the age of 12 years; or
   (v) a person who is mentally disabled.”

The “traditional” requirements for consent as a valid defence have now been codified, while the concept of consent is defined in the Act. The requirements for purposes of the Act are virtually similar to the “traditional” requirements as set out in Chapter 2. The only circumstance under which consent is not regarded as voluntary and uncoerced agreement which has been added to the “traditional” requirements is to be found in section 1(3)(b). This relates to the abuse of power and authority by the accused person, which has the effect that the victim is inhibited from indicating his or her unwillingness or resistance to participate in the sexual act. This instance appears to be similar to the situation postulated in R v

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172 S 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22.
173 S 1(2).
174 S 1(3).
Swiggelaar. However, in the latter case the court did not specifically refer to the abuse of power or authority. Some courts have recently started to acknowledge the impact that a relationship of power or authority between offender and victim can have on ostensible consent or submission. The enactment of these provisions seems to have been a logical extension of the course that the courts have started taking as of late. The impact of a relationship of trust or power of authority is also acknowledged in section 56(4) of the Act. These provisions refer to the fact that a child may not be convicted of the offence of incest in terms of section 12, where the other party to the offence exercised power of authority over the child or a relationship of trust existed between the child and such other person at the time when the act of sexual penetration was first committed.

Section 1(3)(d)(iv) provides that a child below the age of twelve years is not capable in law of understanding the nature of sexual activities. In terms of the “traditional” approach to consent there is an irrebuttable presumption that a girl under the age of twelve years is incapable of consenting to sexual intercourse. The effect of the provisions of section 1(3)(d)(iv) is that any such child, irrespective of gender, is now deemed incapable of understanding the nature and impact of sexual activities. Section 57(1) further provides that a male or a female child under the age of twelve years is incapable of consenting to a sexual act as defined in the Act. As stated before, various factors play a role in the determination of whether a child of twelve years of age or older is able to enter into a voluntary and uncoerced agreement in respect of sexual activities.

3.4 CONCLUSION

The Act has made significant inroads into the common law and statutory offences which existed prior to its commencement. The common law offences for which sexual offenders have been charged in the past have now been repealed, and in its place various new offences have been created. In addition, the concept of consent is now defined for purposes of the Act, and the circumstances under which ostensible consent will not be regarded as true consent have been codified. These, however, do not constitute a numerus clausus and it is foreseeable

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175 Supra 2 2 2.
176 Ch 5 infra.
177 In terms of s 12(3)(a) of the Act the National Director of Public Prosecutions must authorise, in writing, the institution of a prosecution against a child for the offence of incest.
that other circumstances may be interpreted by the courts as circumstances where consent do
not comply with the definition contained in section 1(2).

The Act is a welcome addition to legislation aiming to protect children from sexual abuse and
exploitation. The definition of consent and the circumstances in which consent is not deemed
to have been given, do not differ greatly from the “traditional” concept of consent,
specifically as the latter has been interpreted by some courts in South Africa. Another
important aspect relating to consent is that children of both genders and who are under the age
of twelve years are now deemed incapable in law of appreciating the nature of sexual
activities and incapable of consenting to any act of sexual penetration or sexual violation as
defined in section 1 of the Act. The creation of the offence of sexual grooming of a child
acknowledges the important impact of this phenomenon on child sexual abuse, and
specifically on ostensible consent given by the child victim.

The next chapter investigates the phenomenon of grooming and the dynamics of the grooming
process. The different stages in the grooming process will be analysed and compared to
indicate the usual course of this gradual desensitisation process to which some child victims of
sexual abuse are subjected.

178 Ch 5 infra.
CHAPTER 4

A COURTING DANCE: THE GROOMING PROCESS

“I knew – I’m not sure how – that Jeremy’s touching my penis had to be kept a secret. Perhaps it was because Jeremy himself seemed so ashamed, almost revolted, by what he did with me. He never told me to keep it a secret, but his silence spoke volumes … [h]e, after all, was an adult and a friend of the family.”

4.1 INTRODUCTION

In recent years the use of the term sexual grooming, and acknowledgment of this phenomenon, has increased significantly. It has now become a common term to describe a wide range of behaviours employed by sex offenders in their quest to satisfy their deviant sexual desire for children. Practitioners and academics have different definitions, descriptions and theories relating to this phenomenon, but there seems to be some consensus about the essential elements of the grooming process. What is clear from the various definitions is that grooming is a process, which may last from a short time up to a number of years. The sex offender’s ultimate aim is to engage in sexual contact with the identified victim, and to achieve this, the grooming process is often employed as a means to an end. It is, however, often difficult to distinguish sexually motivated behaviour from non-sexually motivated behaviour, purely because in essence, these behaviours may appear similar, despite the different motivations of the persons employing it.

In order to protect children from possible sexual abuse, various jurisdictions have introduced sexual grooming legislation. However, in some jurisdictions it is not the actual grooming process which is criminalised, but rather a meeting or intended meeting between the sex

179 Lowe The Family Friend 129.
181 Id 66.
offender and his victim, after the former has groomed the child. This, in itself, provides a mechanism for preventative action before sexual abuse occurs.

4.2 DEFINING GROOMING

Grooming is a complex process to define; there is no agreement amongst psychologists and other practitioners over the notion of grooming because it covers a wide variety of behaviours, settings or circumstances. Furthermore, it is virtually impossible to establish exactly when the grooming process starts and when it concludes. It should be borne in mind that the grooming process is a means to an end, and in this regard it may be important to establish exactly when the victim became exposed to the influence of the sex offender’s distorted thinking, beliefs, attitudes and manipulative behaviour.

Definitions vary from succinct to extremely elaborate, and in essence this goes to show that it is almost impossible to capture the full range of behaviours which constitute the sexual grooming process in a definition. It may therefore be tempting to simply describe this phenomenon in terms of the methods used by sex offenders and child molesters to prepare their victims for future sexual contact. However, this is a somewhat simplistic approach and does not entertain the various complexities which are crucial in understanding the grooming process, such as the manipulative behaviour the sex offender engages in to gain the victim’s compliance and prevent him from disclosing the sexual abuse.

Grooming behaviours are not uniform and it may come in various guises, such as physical, psychological, emotional or a combination of two or more of these tactics. Furthermore, the sex offender often grooms not only the potential victim, but also adults around the child and even the environment in which these role-players find themselves. This serves to

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186 Ibid.
188 Sill 2003 Community Care.
indicate that these offenders throw their nets very wide in order to succeed in their ultimate aim.

Some definitions of grooming contained in legislation also appear to lack clarity because the relevant sections can hardly be said to provide definitions at all. It may be more correct to state, as Craven et al suggest, that section 15 of the Sexual Offences Act 2003 in England and Wales “does not provide a definition of sexual grooming; it simply states the specifics of the offence”.190 This is certainly not the case with the provisions of section 18 of the Act. The relevant section reads as follows:

“18(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 any 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.”

Although no definition of grooming is contained in Chapter 1 (definitions and objects) of the
Act, it is submitted that section 18(2) adequately covers the various behaviours which may
form part of the grooming process.

The Sexual Offences Act 2003191 applicable in England and Wales merely sets out the
specific acts which constitute the offence of “meeting a child following sexual grooming”,
without providing a precise definition of grooming. Thus, if a person, having met or
communicated with a child younger than sixteen years on at least two earlier occasions,
intentionally meets such child or travels with the intention of meeting the child in any part of
the world, such person will be guilty of this offence if this person does not reasonably believe
that the child is sixteen years or older and this person at the time, intends to do anything to or
in respect of the child, during or after the meeting and in any part of the world, which if done
will involve the commission of a relevant offence by such person.192

The lack of clarity in the definitions has an impact on the detection and identification of the
comprehensive range of sexual grooming behaviours. This in turn, impacts negatively on the
effectiveness of legislation relating to grooming offences in that it limits the scope of the
legislation.193 The general public, parents, caregivers and law enforcement agencies need to
be aware of grooming behaviours and the various disguises it can take in order to effectively
protect potential victims – only then will they be in a position to identify, detect and report
suspicious behaviour and to prevent grooming and subsequent sexual abuse.

Grooming has been described in various terms. Kim194 defines grooming as “the process by
which child molesters build trust with the child to transition from a nonsexual relationship to
a sexual relationship in a manner that seems natural and nonthreatening”. There is often an

191  S 15(1).
192  Criticism has been levelled against the wording of this section, and the concurrent problems experienced
Howard Journal of Criminal Justice 66.
194  Kim “From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children”
interaction between the perpetrator and the child, directed at relaxing the child’s defences, coupled with inappropriate escalating physical contact. It is comparable to a normal courting process, and is somewhat of a seduction ritual, the ultimate goal of which is the sexual victimisation of the child. Still\textsuperscript{195} refers to the grooming process as “manipulative tactics used by a perpetrator to gain a child’s compliance and prevent them from telling”. Hollely\textsuperscript{196} also refers to grooming as a process, which progresses from the initial planning of how to engage the child in a sexual relationship, forming a friendship with the child, to building trust and engaging in seemingly non-sexual physical contact. Encyclopedia Wikipedia\textsuperscript{197} defines grooming as “conditioning used to lower a child’s sexual inhibitions in preparation to engaging in sexual activities with the child”. From these and other definitions, it would appear that grooming is usually a gradual process, and that the tactics employed by the perpetrator may come in many different guises.\textsuperscript{198} It may be practical, psychological, emotional or a combination of any of these. The strategies often employed by the offender to get the child to take part in sexual activities tend to involve the gradual desensitisation of the victim which has been described as the corruption of the child.\textsuperscript{199}

In an attempt to define sexual grooming behaviour with reference to the full range of behaviours that may form part of the process, Craven \textit{et al} suggested the following definition:

“A process by which a person prepares a child, significant adults and the environment for the abuse of the child. Specific goals include gaining access to the child, gaining the child’s compliance and maintaining the child’s secrecy to avoid disclosure. This process serves to strengthen the offender’s abusive pattern, as it may be used as a means of justifying or denying their actions.”\textsuperscript{200}

It is submitted that this definition is to be favoured above other definitions, as it takes cognisance of the fact that grooming is a process, which by implication may continue over days, weeks, months or even years. During this period the sex offender grooms not only the potential victim, but probably also significant adults and other support networks in the child’s life and may even manipulate the environment in which the abuse will eventually occur. Furthermore, this definition makes specific mention of some of the goals of the grooming

\begin{itemize}
\item[195] Still 2003 \textit{Community Care}.
\item[196] The Child Sex Offender 262-263.
\item[198] Still 2003 \textit{Community Care}.
\item[199] Hollely \textit{The Child Sex Offender} 248.
\end{itemize}
process, as well as the offending cycle of the sex offender. The latter manifests itself in certain stages, which are: targeting the child, the grooming process, the molestation process and reinforcement.\textsuperscript{201} The definition referred to above does not contain any reference to the modus operandi employed to gain access to the victim, neither to any methods to gain the child’s compliance, nor behaviours employed to prevent disclosure. It is submitted that, since the sex offender may employ a myriad of methods and behaviours to engage a child in sexually abusive activities, it would be almost impossible to capture these in a definition.

Although grooming is not a feature in every case of child sexual abuse,\textsuperscript{202} it is a very common phenomenon which has become so prevalent that its existence is widely recognised. Sex offenders do not usually begin an abusive relationship with a child by having sexual intercourse or performing any of the acts that constitute sexual abuse.\textsuperscript{203} Grooming is a process of conditioning and desensitisation which serves several purposes. Whichever angle this concept is approached from, it is clear that it is based on trickery and deception. In the process the sex offender tries to win the confidence and trust of the child and those in his support system. They portray themselves as caring, loving and supportive confidants who would do their utmost to assist the significant adults and the child alike, in various ways. This, however, is merely a ploy, and the sex offender certainly has ulterior motives.

Children are a vulnerable group of victims. Young children do not have a frame of reference for deciding what constitutes appropriate behaviour, except from what they experience. Older children, however, might realise that what is happening to them is wrong, but may decide not to disclose the abuse, since disclosure may harm those they care about or are dependent on.\textsuperscript{204} These situations are exploited by sex offenders, which ultimately lead to many children feeling like active participants in their own abuse.\textsuperscript{205} Furthermore, children are dependent on adults in various ways. Not only are they raised to respect and obey adults, but adults hold positions of authority and power and as a rule, exercise control over children. Children are naturally trusting and curious and need attention and affection. These factors are usually

\textsuperscript{201} Hollely \textit{Child Sex Offenders: A Complicated Entity} in Müller \textit{The Judicial Officer and the Child Witness} (2002) 248-251.
\textsuperscript{202} Hines & Finkelhor 2007 \textit{Aggression and Violent Behavior} 310.
\textsuperscript{204} American Prosecutors Research Institute \textit{Investigation and Prosecution of Child Abuse} 3 ed (2004) 2.
\textsuperscript{205} \textit{Ibid.}
exploited by the sex offender in the sexual abuse situation. In the case of adolescents, the sex offender may use children’s natural defiance of parental control and susceptibility to peer pressure to his own advantage.

4.3 STAGES IN THE GROOMING PROCESS

The grooming process, when it is used by the sex offender, entails a number of different stages. Not all sex offenders will necessarily follow exactly the same pattern, and great variance may occur in the process. So too, will not all child molesters progress through all these stages sequentially. Some may remain in one stage for longer periods than others, while others may skip one or more stages entirely. There seems, however, to be a relatively predictable pattern which is usually followed and which consists of a number of phases. Sgroi identified five separate phases which consist of the engagement phase, the sexual interaction phase, the secrecy phase, the disclosure phase and the suppression phase which often follows on disclosure. Berliner and Conte present another view of the grooming process from the victim’s perspective, and identify three overlapping processes, namely sexualisation of the relationship, justification of the sexual contact, and maintenance of the victim’s cooperation. Hollely describes the stages in the grooming process as targeting the child, the grooming process, the molestation stage and the reinforcement stage.

Irrespective of the names being given to the different stages some clearly defined and individual processes can be identified which will be categorised as follows: identifying and meeting the child, the friendship-forming stage, the relationship-forming stage, the molestation stage and finally, maintaining the victim and preventing disclosure. In this regard it should be borne in mind that most children who become victims are sexually abused by someone they know, like a family friend, family member, clergy, teachers and other significant persons in their lives. Thus, the first stage identified above may not always

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206 APRI Investigation and Prosecution 2-3.
207 Id 3.
210 Hollely The Child Sex Offender 261-266.
211 For example S v Kock (music teacher); S v O (gymnastic coach); S v S 1977 3 SA 830 (A) (teacher); S v D 1989 4 SA 225 (C), hereafter referred to as “S v D 1989 (C)” (director of children’s drama group); S v D 1989 4 SA 709 (T), hereafter referred to as “S v D 1989 (T)” (stepfather); S v V 1991 1 SACR 59 (T), hereafter referred to as “S v V 1991 (T)” (co-creator); S v V 1991 1 SACR 68 (E), hereafter referred to as “S v V 1991(E)” (knew parents of victims); S v N 1991 1 SACR 271 (C) (children in wife’s foster care); S v L
occur, or will be more prevalent in cases where the perpetrator first has to procure a child in order to abuse him. In a study of 182 convicted sex offenders conducted by Smallbone and Wortley they found that only 6.5% of offenders had their first sexual contact with a stranger. Lang and Frenzel state that:

“[v]irtually all studies suggest that 75%-80% of child sexual abuse occurs within the context of ‘affinity systems’ – fathers, step-relatives, family friends, neighbors or authority figures.”

Similarly, a study conducted by Elliot, Browne and Kilcoyne revealed that 66% of their group of offenders knew their victims through family or friends or caretaking.

One of the basic assumptions of the United Nations Convention on the Rights of the Child, contained in the preamble thereto, is that the family is the natural environment for the growth and well-being of all its members, and particularly children. This statement recognises the fact that the family system has the greatest potential to protect children and provide for their physical and emotional safety. Sadly, however, this is often not the case, and in many instances children are abused and exploited by members of the very same family system who are supposed to protect them. This fact has also been acknowledged by the United Nations in a report where it was found that up to 36% of women and up to 29% of men in 21 countries reported sexual victimisation during childhood, mostly within family context.

4.3.1 IDENTIFYING AND MEETING THE VICTIM

The first step towards succeeding in his aims is identifying, targeting and meeting the potential victim. Different types of strategies may be used in this stage, depending on various circumstances. A sex offender will often choose a target area. He may visit places where children are likely to go for example schools, malls, playgrounds, movie theatres or

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216 Holley The Child Sex Offender 261.
swimming pools.\textsuperscript{217} He may also work towards being welcomed in the child’s home by befriending, assisting or courting significant adults, caregivers or other family members in the child’s support system.\textsuperscript{218} Sex offenders need to gain the trust of these persons and they can be quite persuasive in convincing the parents that their relationship with the child is in the latter’s interest.\textsuperscript{219}

In $S v V$\textsuperscript{220} the accused would invite his victims to stay overnight or at weekends with the consent of their parents. During the course of the trial the parents of these children all testified “to having consented to their children visiting the appellant’s home and [that] they obviously did not regard it as an undesirable environment”.\textsuperscript{221}

Some molesters actually become part of the child’s family. One sex offender stated as follows: “I was able to molest my friend’s children by gaining trust first so I could take them to my place.”\textsuperscript{222} Another common ploy is to meet potential victims through organised activities such as cultural, religious or sporting associations.\textsuperscript{223} They will often join such institutions as volunteers or in other capacities. In this regard one convicted sex offender stated: “I used camp counselling and sports coaching as a way to gain access to children.”\textsuperscript{224} In $S v D$\textsuperscript{225} the accused was the director of a children’s drama group who committed indecent and immoral acts with young boys in the group. The accused in $S v O$\textsuperscript{226} was a gymnastics coach who sexually abused a number of his students, while the accused in $S v Kock$\textsuperscript{227} was a music teacher.

Babysitting and child minding may also provide opportunities to get into contact with potential victims.\textsuperscript{228} Sometimes the sex offender merely “takes a chance” when approached by a child, by asking the child a question or requesting assistance. In some instances he may

\textsuperscript{217} Elliot et al 1995 Child Abuse & Neglect 584.
\textsuperscript{218} Ibid.
\textsuperscript{219} Wyre Paedophile Characteristics and Patterns of Behaviour in Itzin (ed) Home Truths About Child Sexual Abuse 49 52.
\textsuperscript{220} 1991 (T) supra.
\textsuperscript{221} 71f.
\textsuperscript{222} Singer, Hussey & Strom “Grooming the Victim: An Analysis of a Perpetrator’s Seduction Letter” 1992 Child Abuse and Neglect 877 879.
\textsuperscript{223} Smallbone & Wortley 2001 Trends and Issues.
\textsuperscript{224} Singer et al 1992 Child Abuse and Neglect 879.
\textsuperscript{225} 1989 (C) supra.
\textsuperscript{226} 2003 2 SACR 147 (C).
\textsuperscript{227} 2003 2 SACR 5 (SCA).
\textsuperscript{228} Smallbone & Wortley 2001 Trends and Issues.
attempt to gain access to more children by having his established victims recruit other children.\textsuperscript{229} In order to maintain this scheme he might offer incentives to or threaten his victim(s), or he may give bribes, gifts or attention to the children recruited.\textsuperscript{230} One child, who was being abused by a number of sex offenders and who recruited other children at their request, described the tactics he followed in the recruiting process as follows:

“They knew they could trust me, I had been having sex with a group of men since I was six and they had no come-back. If I wanted a boy, I would even write on the toilet wall at the school that X [giving his full name] was gay. This, in a homophobic society, would lead to this boy being ridiculed, he might not want to go to school and would be likely to be bullied. I would then befriend him; remember I am only a couple of years older. I would then take him to my friends, the ‘paedophiles’, who would give him attention, and turn this into abuse.”\textsuperscript{231}

The sex offender often offers to play games with the child, or teaches him a sport or assists in hobbies or other leisure activities. He may also give bribes, take the child for an outing or give the child a lift home. Love, affection and understanding are often utilised as tools to recruit possible victims,\textsuperscript{232} as are lies, magic rituals\textsuperscript{233} or treasure hunts.\textsuperscript{234} They may also hold professions which provide ready access to children.\textsuperscript{235}

Another factor which plays an important role in the selection of a victim, is the type of child a sex offender targets. There is great variation in this regard as sex offenders are not a homogenous group, and their preferences vary greatly. Many sex offenders claim to possess a special ability to identify children vulnerable to sexual abuse.\textsuperscript{236} Some describe the type of child they are attracted to as “[s]omeone who had been a victim before; quiet; withdrawn, compliant”, “[q]uieter, easier to manipulate, less likely to put up a fight, goes along with

\begin{itemize}
\item \textsuperscript{229} Elliot \textit{et al} 1995 \textit{Child Abuse and Neglect} 584.
\item \textsuperscript{230}\textit{Ibid}; S v McMillan 2003 1 SACR 27 (SCA) 32 c-d: “… het die appellant sy visier veral gerig op jong seuns wat weens fisieke en emosionele verwaarloosig weersloos en kwesbaar was, wat hy dan met aandag en geskenke omgekoop en verlei het.” (“… the appellant targeted young boys who were vulnerable as a result of physical and emotional neglect and bribed and seduced them with attention and gifts”); see also the cases discussed in ch 5 infra.
\item \textsuperscript{231} Wyre \textit{Paedophile Characteristics} 63.
\item \textsuperscript{232} S v V 1991 (E) 71: “According to the evidence of the appellant’s wife they had a happy home, with a friendly and homely attitude towards children visiting the house … she and the appellant gave such children a lot of love and affection. Children were on occasion invited to stay overnight or at weekends, always after prior arrangement with their parents. They would then take them out during the day and generally provide what she described as a fun environment which visiting children enjoyed.”
\item \textsuperscript{233} In S v Kock \textit{supra} the accused had been “… leading [his victims] in the practice of ‘white magic’ rituals.”
\item \textsuperscript{234} Elliot \textit{et al} 1995 \textit{Child Abuse and Neglect} 585.
\item \textsuperscript{235} In S v S \textit{supra} and S v R 1995(2) SACR 590 (A) the accused were teachers.
\item \textsuperscript{236} Singer \textit{et al} 1992 \textit{Child Abuse and Neglect} 879.
\end{itemize}
things” or “[t]he look in their eyes. It’s a look of trust. They like you. If they are going to show resistance, they’ll look away”.237

With regard to an adolescent male victim’s recruitment the sex offender will probably be aware of the fact that adolescence is the period in the development of boys when their sexual attitudes and desires play an important role in the moulding of their sexual identity.238 This identity struggle may be used to the advantage of the perpetrator by exploiting and manipulating the natural sexual curiosity of most adolescents, coupled with the position of power or trust that the sex offender has built up in his relationship with the victim.239

Children from broken homes, single-parent families or children who have been exposed to emotional or physical neglect, are often targeted.240 Sex offenders are often attracted to a single mother with children and ensnare a needy or lonely parent by lavishing attention, affection and adoration on her offspring.241 These children and their parents, usually a single mother, possess certain weaknesses and vulnerabilities, which the perpetrator exploits by offering them what they require.242 He carefully ensures that he meets the needs of the vulnerable child as this will reduce the likelihood that the child will disclose the abuse. It also secures the probability that the child will accommodate the abuse.243 Some sex offenders: stated as follows: “[f]requently I molested children who clearly needed some attention from a caring adult … [t]hey seemed to crave being singled out and wanted”,244 “[u]sing the fact that the child has a poor relationship with his parent, I’d move in and use this poor relationship to my advantage”245 and “I have to feel as if I am important and special to the child and giving the child the love she needs and isn’t getting.”246

237 Ibid.
238 Id 883.
239 Ibid.
240 Wyre Paedophile Characteristics 54; in S v D 1995 1 SACR 259 (A), hereafter referred to as “S v D 1995” the victim was a street child and likewise, in S v K 1995 2 SACR 555 (O) the 7 victims were also street children. In the latter case the accused was referred to as a “gesofistikeerde manipuleerder” (“sophisticated manipulator”).
241 Lang & Frenzel 1988 Annals of Sex Research 314; S v B 1990 1 SACR 541 (C), hereafter referred to as “S v B 1990”: “The evidence shows that the accused maintained the child and her mother with whom he lived.”
243 Wyre Paedophile Characteristics 54.
244 Singer et al 1992 Child Abuse and Neglect 883.
245 Ibid.
246 Elliot et al 1995 Child Abuse and Neglect 584.
The physical characteristics of the potential victim also plays a role in the victim selection process, but is apparently not as important as the way the child behaves. Thus, many offenders select children who are innocent or trusting and they are attracted to children who seem to lack self-confidence, self-esteem or assertiveness. The fact that a child is young or small is also of significance to some sex offenders. In the words of sex offenders: “I am turned on by little girls wearing tights and mini skirts” and “you can spot the child who is unsure of himself and target him with compliments and positive attention.”

In recent years, since the advent of the internet and developments in the mobile phone industry, it has become much easier for some sex offenders to find and identify possible victims. Sexual grooming through the internet has been acknowledged as a mechanism whereby sex offenders gain access to children and young people. Online technology has certain advantages for the sex offender. For one, it offers anonymity, which is something that a sex offender desires in order to prevent detection. Anonymity allows the perpetrator to create an identity, a role, a gender or even a lifestyle which is fictitional. He can thus mask his real identity without fear of being discovered. Without the necessity of physical interaction during the grooming process, the online sex offender is able to convince his potential victim that he is indeed what he professes to be. The internet provides the sex offender access to many more potential victims simultaneously, while the trust-building period is shortened.

Another advantage of online grooming is that if a potential victim rejects the sex offender’s advances, the latter is able to “disappear”, change his identity and “reappear” as someone else. He may then approach the same child, but this time he is more knowledgeable about his victim’s preferences and he is aware of the boundaries or limits with regard to that specific

247 Ibid.
248 Ibid.
249 Ibid.
250 Ibid.
251 Ibid.
254 Ibid.
255 Ibid.
Interactive communication on the internet thus makes it easier for sex offenders to access potential victims, because the child is usually alone and therefore susceptible to influence and persuasion by the offender. Yet another advantage of the internet is that it allows sex offenders into the child’s environment, which is usually perceived as being safe – at home, at school, at a library or at a friend’s home. This provides mixed messages and ambiguity about reality for the child.

It has been suggested that sex offenders may misuse the internet in four possible ways: it may be used to traffic child pornography, to locate and identify children to molest, to engage in inappropriate sexual communication with potential victims and to communicate with other sex offenders. The availability of adult and child pornography on the internet has the added advantage of being used as a tool in child sexual abuse. It has also been suggested that cyber sex allows an individual to act out his sexual fantasies because of the immediate feedback provided by online interactions.

The internet and mobile phones may be used in several ways in the sexual abuse of children. Some children may be used in the creation of abusive images, while others could be enticed to download sexually abusive images of children or they may view adult or child pornography. Children may be groomed or even sold online for sexual abuse offline or they may be abused through prostitution, using the internet and mobile phone technology to contact their abusers. Children may also be groomed online for sexual abuse offline.

Online grooming is a modern-day reality, despite the fact that many online groomers never meet their victims in person. Sex offenders who use online grooming to meet and sexually abuse their victims often have cybersex with the latter, and may also expose the victims to

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260 Ibid.

261 Ibid.

262 Wayment “‘Just One Click’: The Impact of New Technology on Children” 2004 *Childright* 8 8-9.

inappropriate and illegal pictures, films, websites, stories, messages and texts. They may further manipulate and exploit their victims to send pictures of sexual acts and videos of themselves from their computers, webcams and mobile phones for the gratification of the sex offender.

Sex offenders may find victims online in several ways. Some of the tactics they employ are to seek and select victims in chat rooms, especially those rooms that are focused on young people’s interests, such as music-themed chat rooms and gaming forums. They often pretend to be younger than they actually are, or of a different gender, so as to let their victims think that they might be a potential friend. They may introduce themselves to the chat room as a particular kind of child and of a particular age to establish contact. Another common practice is to enter a chat room and observe conversations between chat room users before introducing themselves. This enables them to get some idea of the type of child they are dealing with, perhaps establishing his preferences, likes and dislikes. However, many sex offenders do not pretend to be younger, and still manage to find victims. Online sex offenders may manipulate victims to contact them first, which may make the sex offender appear more innocent and trustworthy while at the same time the victim feels more complicit in the grooming process. Many sex offenders search for potential victims by looking through personal websites, blogs, websites of schools or clubs and other sites which contain personal information and pictures of young people.

It is a well-known fact that sex offenders often work or organise themselves in groups. They may use the internet to help each other find and groom victims. They may also use different cyber technologies to identify and groom potential victims. They may select a victim from a picture found online from a school website, whereafter they may then meet the child in an open chat room before going into a private chat room. There they may start exchanging e-mails, messages, pictures and videos and may use various other online

264 Ibid.
265 Fn 262.
266 Ibid.
267 Ibid.
268 O’Connell “Online Abuse – How It Happens” 2003 Outlook 8 8.
269 Ibid.
270 Ibid; Fn 262.
271 Ibid.
272 Ibid.
273 Fn 262.
technologies such as texts, voice transmission, viruses and Trojan programmes to aid them in the grooming and abusing processes. They may use viruses and Trojan programmes to control certain aspects of the victim’s computer in order to get more information about the child. It has been reported that some online groomers have used viruses to activate the victim’s webcam. This enables him to watch the child, and take pictures and videos without the victim being aware of this. Online phone books, profile searchers and other online databases are also helpful aids in the search for, and identification of, potential victims.

It is not uncommon for a sex offender, once he has identified and recruited a potential victim offline - in the real world - to encourage this situation to go online in order to develop further. An example would be when the abuser identifies a potential child victim in a shopping mall, strikes up a conversation with the child and when they part, requests the child for his e-mail address. Once in possession of the latter information, grooming can begin, or proceed, online. Thus online grooming may lead to sexual abuse online or offline and offline-initiated contact may lead to further grooming online, which may result in either of the two situations referred to above.

4.3.2 FRIENDSHIP-FORMING STAGE

The friendship-forming stage involves the sex offender getting to know the child’s interests, likes and dislikes and is an important precursor to the next stage (the relationship-forming stage). The offender may delve into the child’s personal life, showing an interest in the child’s problems at home or at school. By doing this he creates a counselling role between himself and the child, which deepens their bond of friendship. He may also give gifts to the child, or spoil him in other ways which may appear innocent enough, but is part of his deceptive tactics. During this stage they may start to share innocent secrets. He will

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276 Holley The Child Sex Offender 262.
277 Holley The Child Sex Offender 262-263.
278 In S v D 1989 (C) supra the accused’s modus operandi was described as follows by Munnik JP: “… he would single out a young boy in the group, lavish attention on him in various forms, such as encouraging him, awarding him parts in plays, etc, and manipulate matters in such a way that when he took members of the group home in his car after rehearsals, the boy in question would be the last to be dropped. He would then drive to some isolated or dark spot and there either merely touch the boy’s genitals or get the
often spoil the child by taking him to the cinema, theatre, parks or engage in games with the child, thus enabling a more intimate level of social contact to develop between them. He creates the illusion of being the child’s best and trusted friend. This process, however, is not only limited to the child.

The sex offender often grooms not only the potential victim, but also significant adults and the environment in which the child and his family operate. Strategies commonly used by offenders to desensitise significant adults in the child’s support group are to befriend the parents or caretakers, spending time with the child in their presence or helping the adults around the house. The sex offender takes his time to form a relationship not only with the child, but also with the family. This is because he needs the child’s caregivers to trust him. Children who do not have fathers or other adult males in their family circle are especially susceptible to men who give them attention, irrespective of the motives of the man. He may therefore adopt a pseudo-parental role within the family structure. The child and his family members are prepared in a psychological manner and in return a dependency, be it emotional, financial or otherwise, may develop. The sex offender will then often abuse this situation to his own advantage.

The friendship-forming stage may manifest itself in various forms in the case of online grooming. During this stage the sex offender gets to know the child. He will usually try to establish the age of the child, what the child looks like, his mobile phone number and e-mail address and when the child is alone at home. Personality traits and other personal information, which the sex offender may try to obtain, is whether the child is emotionally vulnerable, lonely, feeling neglected by his parents or caregivers, has poor peer relationships, has been abused in the past, struggles with low self-esteem and is non-assertive. He may also ask the child to send him a picture. It has been suggested that this may serve the purpose of ensuring that the victim is indeed a child as he professes to be. Furthermore, the sex

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279 Holley The Child Sex Offender 263.
280 Id 262.
282 Wyre Paedophile Characteristics 52.
283 Ibid.
284 Ibid.
285 Holley The Child Sex Offender 262.
offender is able to see the physical characteristics of the child on the photo, thus ensuring that the child meets his requirements in this regard.\textsuperscript{286} Online grooming allows a sex offender to be very specific and selective in the kind of child he selects as a victim.\textsuperscript{287}

Another reason for requesting a picture, in the case of adults targeting children in their immediate vicinity, is that it may enable the sex offender to identify the child in real life, which may then assist the sex offender in establishing contact with the child in the real world.\textsuperscript{288} Online grooming may therefore lead to offline abuse. The length of time that sex offenders spend in the friendship-forming stage varies considerably and depends on the level and nature of contact they maintain with the child. During this stage the sex offender and the child may also move their online conversations from a public to a private chat room at the request of the former. This ensures more privacy and the opportunity to form an intimate friendship with the child without being detected by others. It also allows the sex offender to start testing boundaries within the realm of one-on-one conversations with the child. If the child succumbs to the sex offender’s request to move to a private chat room, this may be an indication that the child is willing to strike up a friendship.

In befriending the child online, the sex offender wants to be viewed as a trusted and respected peer or a caring and understanding older person. They may pose as someone in need of help or a person in distress, which may make the victim less suspicious. Throughout, however, the sex offender’s aims are to get the child to believe things which are not true, and he also attempts to manipulate the child to suspend his disbelief and abandon his usual sense of caution and skepticism.\textsuperscript{289}

\textbf{4 3 3 RELATIONSHIP-FORMING STAGE}

This stage is a natural extension of the previous stage and is closely connected to it. It is often not possible to distinguish the two stages as they are interlinked. During this stage the sex offender may attempt to provide some emotional or material gain or reward that is of some value to the child.\textsuperscript{290} He will ideally find and fill voids in the child’s life, thus creating the

\textsuperscript{286} O’Connell 2003 \textit{Outlook} 8.
\textsuperscript{287} Wayment 2004 \textit{Childright} 8-9.
\textsuperscript{288} O’Connell 2003 \textit{Outlook} 8.
\textsuperscript{289} Holley \textit{The Child Sex Offender} 262.
\textsuperscript{290} Ibid.
impression of trust. This process may continue for some time. The end result is that the sex offender often forges a strong emotional bond with his victim. Sex offenders are normally seductive in their approach to a potential victim, and this approach has been compared to the seduction process, which occurs within adult relationships. The consequences of the sex offender’s seductive approach, however, differ vastly from a seductive approach in an adult relationship, as “[t]his seduction can go to the very being of the child, and their identity, beliefs and fantasies will be affected by it”.

During this stage the sex offender may use various strategies to introduce seemingly innocent and non-sexual touch. Thus, he breaks down the child’s defences and increases the child’s acceptance of touch. This process involves a gradual desensitisation of the child. He may spend a lot of time with the child, give the child a lot of attention and engage in activities which the child enjoys. The first physical contact between the sex offender and the child is often non-sexual touching designed to identify and test limits and to lower the child’s inhibitions.

Should the child resist or object, the touching will cease, but the offender may try again at a later stage. Elliot et al found in their study that during the first sexual contact between the offender and the child, 19% of the participants used physical force on the child, 44% used coercion and persuasion, 49% talked about sexual matters, 47% used accidental touch as a ploy and 46% used bribery and gifts in exchange for sexual touches. They also report that if the child was fearful or resisted, 61% of the offenders in their group used passive methods of control such as stopping the abuse and then coercing and persuading the child again at a later stage. It would appear that the majority of sex offenders use coercion by testing the child’s reaction to sex, by talking about sexual matters or by having sexual materials such as pornographic or sexually explicit magazines, videos or DVDs around the house and by subtly increasing sexual touching.

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291 Wyre Paedophile Characteristics 52.
293 Wyre Paedophile Characteristics 52.
294 Smallbone and Wortley 2001 Trends & Issues.
296 Holley The Child Sex Offender 263.
297 Elliot et al 1995 Child Abuse and Neglect 585.
298 Ibid.
During this stage the sex offender will usually introduce the element of secrecy into the relationship. The child is manipulated into keeping the abuse secret by subtle tactics such as bribery, threats of harm to the child, the offender or the child’s significant family members, withdrawal of affection, break-up of the family, promises of rewards to the child or taking advantage of the child’s innocence.

Another common strategy employed by sex offenders in the grooming process is to introduce pornography or sexually explicit material to the potential victim. The use of pornography is a very common feature of the grooming process.299 The introduction of pornography serves several purposes. Firstly, it serves as a method to arouse the sex offender and assists him in fantasising, which forms an integral part of his offending cycle and is therefore used for purposes of stimulating sexual arousal.300 Secondly, it may sexually arouse the child or arouse his sexual curiosity, depending on his age.301 Thirdly, the exposure to sexually explicit material may lead to sexual discussions,302 which opens the door for future sexual contact and may encourage the child’s participation.303 Fourthly, pornography may be used to create a collusive secret which should be kept from the child’s parents or other adults in his support system, while at the same time, the sex offender offers reassurance about their secret.304 Fifthly, pornography may create a sexualised environment. This may be conducive to children becoming sexual with each other or with the sex offender; a situation which the latter may then capitalise on for his own benefit.305 The child may want to mimic the sexual acts depicted in the material.306 Lastly, it may happen that the sex offender takes compromising pictures or videos of the child while engaged in sexual activities. The fear of public disclosure may then ensure continued participation in, and submission to, further sexual activities with the offender.307

The sex offender often uses both adult pornography and child pornography as aids during the grooming process, albeit for different purposes.308 Adult pornography is most often used to

299 Carter, Prenlty, Knight, Vandermeer & Boucher “Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders” 1987 Journal of Interpersonal Violence 196 211.
301 Wyre Paedophile Characteristics 53.
302 Ibid.
304 Wyre Paedophile Characteristics 53.
305 Ibid.
307 APRI Investigation and Prosecution 3.
308 Kim 2004 Child Sexual Exploitation Update.
arouse the victim and break down his barriers to sexual behaviour, while child pornography serves the same purpose, with the additional purpose of communicating the perpetrator’s sexual fantasies to the child.\textsuperscript{309} It further serves the purpose of diminishing the victim’s inhibitions, and creates the impression that sexual acts between adults and children are normal, acceptable and enjoyable.\textsuperscript{310} It also contains within itself certain myths and fantasies concerning women, and in the case of child pornography, portrays children as sexual objects which can be used at whim for sexual gratification.\textsuperscript{311}

Another relatively common strategy sex offenders employ is to introduce the victim to alcohol or drugs during this stage. This is a particular useful ploy in the case of adolescent children who are in a stage of exploration. The adolescent’s natural defiance of parental control is often used to the advantage of the sex offender by influencing the victim to disobey his parents by, for instance, introducing alcohol.\textsuperscript{312} The knowledge that this is something which his parents will not approve of, and knowing that the forbidden fruit is available from the sex offender may create a bond of secrecy between offender and victim.

The influence of peer pressure during adolescence is a factor that should not be underrated. The offender may introduce the victim to a group of other adolescents who share his company, thereby providing a group of peers for a lonely and isolated adolescent.\textsuperscript{313} Should the rest of the group be involved in sexual activities with the adult, peer pressure may result in the new victim submitting and starting to participate in these activities.

In the case of online grooming the relationship-forming stage is an extension of the previous stage. Conversations become more personal and intimate in nature, creating a bond between the adult and the child. The sex offender may try to establish the risks involved in maintaining an online relationship with the child. He may therefore ask the child about the location of the computer which is being used, who else has access to the computer and the times of day those persons are most likely to use it.\textsuperscript{314} He may also try to find out how likely the child is to report the relationship to others.

\textsuperscript{309} Ibid.
\textsuperscript{310} Ibid.
\textsuperscript{311} Wyre Paedophile Characteristics 53.
\textsuperscript{312} APRI Investigation and Prosecution 3.
\textsuperscript{313} Ibid.
\textsuperscript{314} O’Connell 2003 Outlook 8.
Potential victims who feel that reporting the relationship might lead to their parents or caregivers taking away their computers or mobile phones, will probably be less likely to report the grooming and abuse. Furthermore, if a child, who has been warned by his parents not to engage in online conversations because of the potential dangers, does so anyway, he might, for fear of getting into trouble or punishment, refrain from telling a parent or caregiver if he feels that he is being groomed. The sex offender may exploit this situation to his own benefit and may try to isolate the victim from those around him, and especially from his support system. This not only makes the child more reliant on the offender, but also reduces the opportunities to talk to other people about what is happening to him. The offender may therefore try to sabotage the child’s friendships with peers and family members.

This risk assessment stage enables the sex offender to assess the likelihood of the online relationship being detected by significant others in the child’s life. During this stage the element of secrecy is usually introduced into the relationship. The sex offender will therefore investigate and assess all possibilities with regard to secrecy and the likelihood of disclosure. Once he is satisfied that there is a low risk of detection, the tempo and nature of the conversations may change. The element of trust is introduced at this stage as a precursor to the next stage of the conversation, which will become more intimate and sexual in nature. This is when the conversations take on more sexual nuances, and questions of a sexual nature may be posed to the child. Once again this is done to test boundaries, and because of the sense of trust and exclusive mutuality that has been created between the child and the sex offender, the child may unknowingly move his own boundaries further to accommodate sexual topics to be discussed during these conversations. O’Connell describes this stage as follows:

“Certainly the child’s boundaries may be pressed but often gentle pressure is applied and the sense of mutuality is maintained. If the child signifies that they are uncomfortable in some way – implicitly suggesting a risk of some sort of breach in the relationship precipitated by the adult pushing too hard for information – the adult typically expresses profound regret which prompts expressions of forgiveness by the child. This tends to re-establish an even deeper sense of mutuality.”

315 Fn 273.
316 O’Connell 2003 Outlook 8.
317 Ibid.
318 Ibid.
319 Ibid.
320 Ibid.
This is also the time when the child might think that he has discovered someone with whom to engage in a friendly and loving relationship. The sex offender may even discuss the possibility of this relationship continuing when they eventually meet in the real world. Topics covered in these conversations may also include keeping the relationship secret and being companions and soul mates, while describing the relationship as one of true love. The reality, however, is that online groomers often groom more than one victim at the same time, each victim believing that the bond they share is an exclusive, loving and trusting relationship.

As grooming is a process, the contact between the abuser and the victim is seldom limited to one communication and it is not uncommon for the sex offender and the child to reschedule meetings and communications via e-mail or mobile phone. In fact, the grooming-communications may, at this stage, extend to personal conversations via mobile phones or even telephone.

**4.3.4 MOLESTATION STAGE**

This is what the sex offender has been dreaming and fantasising about throughout the grooming process. Once the victim has been desensitised, the perpetrator closes in for the kill. Through weeks, months or even years of building up a seemingly trusting relationship, the deception and manipulation finally pay dividends, as the relationship he has carefully orchestrated, now progresses to actual sexual molestation as he acts out his fantasies. The boundaries have been tested, and the perpetrator now proceeds to sexual touching or other sexual physical contact. This may include, but is not limited to, touching the child’s buttocks, breasts or genitals, oral sex, having the child touch or stroke his genitals or masturbate him, anal sex or vaginal sex.

In the online world the grooming process may culminate in sexual abuse in various ways. Firstly, it may result in molestation in the form of cyber sex, the sole purpose of which is the

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322 Fn 273.
323 Ibid.
324 Smallbone & Wortley 2001 Trends and Issues report that in their study 76.3% of intrafamilial offenders, 27.8% of extrafamilial offenders and 39.1% of the mixed-type offenders had known the child for longer than a year before initiating sexual contact with them.
325 Smallbone & Wortley 2001 Trends and Issues.
immediate sexual gratification for the sex offender. Cyber sex may take many forms. Apart from sexually explicit conversations and suggestions, which are at the lower end of the scale, it may progress to mutual online sexual activity. For example, the two parties may be linked via webcam and each is then able to see what the other is doing in real time. Mutual masturbation may then take place or the abuser may request the child to activate his webcam and engage in sexual activities which he then observes, without the child being able to see the offender. This seems to be more likely in cases where the child is not aware of the sex offender’s real identity, gender and age. He may even tell or threaten the child what to do.

As stated before, child sexual abuse consists of any act or acts which result in the exploitation of a child for sexual or erotic gratification. Thus, cyber exploitation may also be viewed as child sexual abuse when it occurs for the sexual gratification of the sex offender. This includes, but is not limited to, sexually explicit conversations, sending the child pornographic images or requesting the child to send images of himself to the offender.

Secondly, the grooming process may result in the abuser setting up a meeting with the child during which sexual interaction may take place. This form of sexual abuse may include any of the activities referred to above. Grooming has been defined as a subset of “cybersexploitation”, since the ultimate aim of the sex offender may be to sexually abuse the child in the real world, but one of the points of contact occurs in cyberspace.

The sex offender’s thinking patterns become distorted and this enables him to proceed with the actual sexual molestation. He perceives the child’s behaviour as sexual and this provides the justification he needs to carry out the sexual activities. He may therefore deny that the sexual contact ever occurred in order to justify his behaviour - by believing that the child wanted to have the sexual contact – or he may blame the child for wanting it, thus normalising his own behaviour and inventing excuses for the sexual abuse. He might also ascribe adult motives to the child and display ego-centrism.

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326 Fn 273.
327 Ch 2 supra.
329 Holley The Child Sex Offender 263.
330 Ibid.
331 Id 263-264.
332 Id 264.
These justifications are some examples of the distorted thinking patterns that are common amongst child sex offenders and referred to as cognitive distortions. These self-statements enable sex offenders to entertain more deviant and permissive attitudes towards sex between adults and children.\textsuperscript{333} Research has revealed that the number of cognitive distortions in child sex offenders increase with both an increase in the length of time the molesting behaviour continues and an increase in the number of types of behaviour the sex offender employs when molesting his victims.\textsuperscript{334} In a study conducted by Pollock and Hashmall\textsuperscript{335} of 43 incest offenders and the same number of extra-familial sex offenders, the top 5 excuses were that the victim consented (29%), that the offenders were deprived of conventional sex (24%), intoxication (23%), that the victim initiated the sexual activity (22%) and that the offender did not know what was wrong with him to engage in sexual conduct with a child (20%). In a similar study by Kennedy and Grubin\textsuperscript{336} of 102 convicted sex offenders they found that approximately half of the subjects felt that the victim was at least partially responsible for the sexual abuse.

**4 3 5 REINFORCEMENT AND MAINTAINING THE VICTIM**

Once the first sexual encounter between the child and the sex offender has occurred, the grooming process does not necessarily end, because the offender might wish to maintain further contact with the child concerned, and he will most certainly want to ensure the child’s silence about the abuse.\textsuperscript{337} The sex offender may encourage the victim’s compliance and cooperation and will maintain the abusive relationship by using a variety and combination of methods.\textsuperscript{338} Thus the grooming process continues.

In their study Elliot \textit{et al}\textsuperscript{339} found that 33% of the participating child sex offenders specifically told the child not to divulge any information about the abuse, 42% portrayed the abuse as education or a game, 24% used threats of dire consequences, 24% used anger and the threat of physical force, while 20% threatened loss of love or made the child believe that he

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  \item \textsuperscript{333} Cripps \textit{The Association Between the Neutralization of Self-Punishment, Guilt and Psychopathy Among Extrafamilial Child Molesters} (1997) 10.
  \item \textsuperscript{334} Id 11.
  \item \textsuperscript{335} As referred to in Cripps \textit{Neutralization of Self-Punishment} 17.
  \item \textsuperscript{336} Id 17-18.
  \item \textsuperscript{337} Lang & Frenzel 1988 \textit{Annals of Sex Research} 311.
  \item \textsuperscript{338} Elliot \textit{et al} 1995 \textit{Child Abuse and Neglect} 586.
  \item \textsuperscript{339} \textit{Ibid}.
\end{itemize}
\end{footnotesize}
was to blame. Lang and Frenzel\textsuperscript{340} showed in their research study that 40% of sex offenders told the child not to reveal their secret. Smallbone and Wortley\textsuperscript{341} found that the most commonly used means of keeping a child from disclosing the abuse was telling the victim that the offender would go to jail or get into trouble if the child should disclose. Thereby, hoping that the child would not want to lose the offender because he provided affection, and gave the child special rewards or privileges in exchange for silence, disclosure is prevented. Continued compliance with the sex offender’s demands on the part of the child may also occur as a result of the fact that he indoctrinated and desensitised the child over a period of time and has built a relationship of trust.

The internet and mobile phones may also be used during this stage as a means to keep in contact with the child, rewarding him and to arrange subsequent meetings and contact during which further sexual abuse may take place. Conversations may centre around the issue of disclosure, which the abuser will try to prevent.

The distorted thinking patterns of the offender also play an important role in this stage. He may fantasise and masturbate about the sexual encounter he has experienced with the victim.\textsuperscript{342} This in turn reinforces the experience in his mind and may create more fantasies about possible future sexual contact with the same child or other children.\textsuperscript{343} It is not uncommon for the sex offender to experience feelings of guilt about his behaviour and at the same time fear of the child disclosing the abuse. However, his distorted thinking patterns may enable him to either accommodate, or rid himself of, these feelings.\textsuperscript{344} Once these feelings have abated, he may begin the cycle again and, depending on his fantasies, may turn to the same or another child for sexual gratification.\textsuperscript{345}

4.4 CONCLUSION

It is submitted that sexual interaction between an adult and a child can be consensual, but still abusive, depending on the age and maturity of the child. The primary consideration in matters concerning the child is the best interests of the child, and not the views of the child, although

\begin{footnotes}
\item[340] Lang & Frenzel 1988 \textit{Annals of Sex Research} 311.
\item[341] Smallbone & Wortley 2001 \textit{Trends and Issues}.
\item[342] Holley The \textit{Child Sex Offender} 264.
\item[343] Id 265.
\item[344] Ibid.
\item[345] Ibid.
\end{footnotes}
the latter should be taken into account and afforded the weight that the age and maturity of the child suggests. There can, however, be no justification for construing submission or willingness on the part of a child as consent in cases where it has been obtained as a result of the elaborate and intricate grooming process.

The deliberate actions taken by a sex offender to form a trusting relationship with a child, which will ultimately culminate in sexual contact, may include several activities that are legal in and of themselves. As indicated above, these activities are employed to gain the trust of the child as well as those responsible for the child’s well-being. Research has shown that a child is less likely to report suspicious behaviour if it involves someone that he knows, trusts and cares about. Such a person also has the added advantage of stronger control over secrecy, as silence is concomitant to feelings of shame experienced by the child victim. By ingratiating himself to the child and his support system, the sex offender exploits this situation. In the process of building a situation of deceptive trust the sex offender aims towards isolating the child emotionally and physically from his support network. Furthermore, a trusting relationship with the child’s caregiver may have the result that the adults in the child’s life will be less likely to believe any potential accusations made by the child. The sex offender thus ensnares the child victim in his web of deceit, without the child really understanding what is being proposed. The child is deceitfully made to believe that what is happening is what he actually wants. If the child then starts to initiate sexual contact it is viewed by the sex offender as the child “asking” for it.

It has been shown that a large number of sex offenders use the internet and various other technological advances to their advantage in the grooming tactics they employ. The role of technology in grooming children online cannot be denied. It provides the anonymity and secrecy which the sex offender requires as part of his grooming activities. Crime in the modern day technological environment does not represent new forms of criminality, but rather an elevation of conventional crimes into a new operating environment.\footnote{Feather \textit{Internet and Child Victimisation} (1999) Paper read at the \textit{Children and Crime: Victims and Offenders Conference} in Brisbane 1999-06-17, 18.} This merely indicates that the nature of the crime does not change over time, but rather that the sex offender utilises the development of new technology to his advantage, albeit in a different setting, in order to groom potential victims. The ultimate aim remains the sexual abuse of the child.
In the next chapter the impact of the grooming process will be investigated with specific reference to the impact of this phenomenon on consent. A number of selected cases will be referred to and analysed to indicate how the South African courts have interpreted the impact of the grooming process of consent.
CHAPTER 5

WHEN THE MUSICS STOPS: THE IMPACT OF GROOMING

“There were times I knew I’d been keen to participate. And I knew I had loved Jeremy and needed him. At times I doubted if I had grounds for viewing myself as a victim, or for believing that anything untoward had been done to me. After all, I could have told my parents, but I hadn’t.”

5 1 INTRODUCTION

An attempt has been made to indicate that the grooming process is based on trickery, cajolery, deception, coercion, persuasion, seduction and sometimes even physical force. More than one of these tactics or strategies are often employed to desensitise the sex offender’s potential victim in order to sexually abuse the child. It has also been established that children may often consent or agree to the sexual conduct which results from the grooming process. Is this true consent? Why do children consent to the abuse? This chapter is concerned with these issues. The impact of the grooming process on consent, as interpreted by the courts in a number of selected cases will be analysed to indicate that a paradigm shift appears to be taking place and that courts now more readily accept that ostensible consent by a child victim may be influenced by the grooming tactics employed by sex offenders.

5 2 THE IMPACT OF GROOMING ON THE VICTIM AND HIS ENVIRONMENT

Due to the fact that grooming is a process which may last up to several years, it stands to reason that it will have a definite impact on its targets – the child victim, his family or caregivers and the environment in which they function. This is, after all, why sex offenders utilise these tactics – to change attitudes and behaviours - which will enable him to ultimately sexually abuse the identified victim without his actions resulting in disclosure.

The grooming process has a desensitising effect on the child and his family. They are indoctrinated and as a result, the child will often be confused. The child is conditioned and thus it is easier for the sex offender to gain compliance from his victim. Grooming lowers the

347 Lowe The Family Friend 87.
child’s inhibitions, resistance and often unwillingness to take part in the eventual sexual acts, because he has grown used to the sexualised environment which the sex offender has created. This has the effect that the child relaxes his defences while he is slowly being prepared for future sexual contact. The grooming process results in a relationship of trust developing between the sex offender and his victim, as well as between the offender and the victim’s family where they may view him as particularly trustworthy. Through this, however, the sex offender is broadening his power base and a relationship of dependency on the perpetrator may develop. The child is made to feel wanted and loved by the offender as the latter fills voids in the child’s life.

Through this process of persuasion, seduction, corruption and exploitation the child may form the opinion that sexual contact with an adult is normal, acceptable and perhaps even enjoyable. The child may experience feelings of physical enjoyment as a result of the sexual contact, although he may not enjoy the actual abuse.\textsuperscript{348} In \textit{S v Geldenhuys}\textsuperscript{349} the complainant made the following unsolicited remark regarding the mutual masturbation which formed part of the sexual abuse he was subjected to: “it is a nice feeling, with that I am not going to quarrel.” Yet, at the same time, he experienced feelings of sadness and he felt disturbed by what was happening to him. A child victim may also feel a certain degree of complicity because all these factors work together to prevent the child from disclosing the sexual abuse. The complainant in \textit{S v Geldenhuys}\textsuperscript{350} testified that the main reason why he did not disclose the abuse to his parents was the fact that the accused lavished him with gifts of money after the incidents of sexual contact, and although he enjoyed being spoiled by the accused, this at the same time made him feel that he was the guilty party.

5.3 THE IMPACT OF GROOMING ON CONSENT

Taking into account what has been stated above, it is not surprising that a child often consents, or that the impression is created by his behaviour that he consented, or that the child asserts that he has consented to sexual contact with an adult or an older person. Hines and Finkelhor\textsuperscript{351} refer to a theory advocated by Grover to explain why a child who has been exposed to the grooming process, may assert that he freely consented to a sexual relationship

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\item \textsuperscript{348} Hollely \textit{The Child Sex Offender} 268.
\item \textsuperscript{349} Supra.
\item \textsuperscript{350} Supra.
\item \textsuperscript{351} Hines & Finkelhor 2007 \textit{Aggression and Violent Behavior} 310.
\end{itemize}
\end{footnotesize}
with an adult. This dissonance theory postulates that the child holds the perception that he
was compliant in the sexual acts because the adult has given cues to imply that the child had a
choice. This is the case where no force was used by the abuser. Thus the adult gradually
convinces the child over the course of time to consent to the sexual activities. A false
perception is therefore created in the child’s mind that he has chosen the situation and he may
feel that he consented to the sexual relationship, which he may not view as sexual abuse.

The fact that children may ostensibly consent to such sexual activities has been acknowledged
in literature, by courts and in legislation. Sex offenders often hold the belief that
children consent to sexual acts with them. So too, do they often state that they were
seduced by the victim, who initiated sexual contact without any coercion or persuasion from
the perpetrator. Many sex offenders see children as willing sexual partners, but these
beliefs are all examples of cognitive distortions which the sex offender entertain to rationalise,
justify and validate his behaviour. These beliefs, however, lose sight of the fact that a
child is unable to give informed consent to an adult, specifically since a child does not have
equal bargaining power. A child is unable to fend off the advances of a parental figure, a
trusted family member or friend, an adult in a position of authority or a persuasive stranger.
A child is also unable to understand the consequences of premature sexual contact with an
adult or a much older person.

This indicates that relationship dynamics, which may include power, authority and influence,
play an important role in the ostensible consent given by the sexually abused child. Hines and
Finkelhor refer to research in this regard and state that:

“the seducers treat the [children] better than other adults in their lives have … the
[abusers] listen to [their] problems and concerns and fulfill their emotional, physical and
sexual needs. As testimony to the [abuser’s] skillfulness, the [victims] often willingly
return for sex. According to accounts of other dynamics, adolescents (particularly boys)
are typically curious, rebellious, inexperienced and easily sexually aroused. This makes them targets for adults who wish to sexually seduce them, and once seduced, easily convinced to return. Eventually, the adolescents may initiate sexual contact themselves, which may create the impression that they consented to this process. In addition, some [children] are willing to trade sex for attention, gifts, and affection, and they will deny that they are victims.”

The role of power, authority or influence which a sex offender yields over a child victim was clearly displayed in S v B. The accused was charged and convicted of two counts of rape of his two daughters, who were at the onset of the sexual abuse just over thirteen years of age. This sexual intercourse lasted for approximately six years and followed years of sexual abuse during which the accused touched their private parts and digitally penetrated them. Both complainants testified that they never expressly consented to sexual intercourse with the accused. Both referred to instances where they were unwilling to have sexual intercourse with their father, while on other occasions they didn’t have any choice but to submit to his advances. They portrayed the accused as a person who strictly enforced discipline in the household, and whose will had to be done. He became angry when things did not go his way and did not tolerate being opposed. Therefore, in order to avoid his wrath, they complied with his demands and wishes. Although the accused never physically forced his daughters to submit to sexual intercourse, they were fully aware that their recalcitrance would result in dire consequences, such as physical violence, which he had resorted to before in previous situations.

On appeal, the court found that the accused had physically and emotionally intimidated his two daughters as young children, as a result of which they had submitted to his demands. The court held that the accused could not have entertained a bona fide belief that his daughters had consented to the sexual intercourse. Thus the State had succeeded in proving mens rea on the part of the accused beyond reasonable doubt. The convictions were accordingly upheld.

The impact of the grooming process on consent given by a child, was clearly demonstrated in S v Mugridge. The accused, who was the adoptive father of the complainant, was charged with several counts, ranging from rape to indecent assault and crimen injuria. These alleged offences were committed when the victim was approximately fourteen to eighteen years old. The grooming process followed by the accused in this case closely resembles the process.

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362 1996 2 SACR 543 (C), hereafter referred to as “S v B 1996”.
363 549-550.
364 Supra.
The complainant came to the realisation that the accused was recording her by means of hidden cameras whilst she was using the bathrooms in the family home. She did not tell anybody about this. The accused at some stage read the complainant’s personal diary, in which information was contained that she had been intimate with a certain male friend. His reaction to this discovery was to tell her that he would prefer her to be intimate with him rather than with the male friend, whom he suggested could hurt her. She laughed at what he said, but did not tell her mother about the incident. Thereafter the accused and the complainant became close and shared secrets. They often went out together to restaurants, and he bought her expensive clothes, shoes and compact discs. She also received more household privileges than the accused’s biological children, who shared the home with them. The accused started touching the complainant by rubbing her bottom, her breasts or grabbing her. He would then apologise, saying that it was an accident. She continued to hide this conduct from her mother.

At some stage the accused kissed her, rubbed her breasts and touched her private parts under her clothing as part of an agreement they had, relating to her going out with a friend. Because she was scared, she said nothing and did not disclose this to anybody when the accused did these things. The accused then progressed to have oral sex with her, which she tried to resist, but eventually succumbed to. The relationship between them continued on an even closer level. He started introducing her to alcohol. While she was in an inebriated state, he had sexual intercourse with her. She tried to push him off, but due to her intoxicated state she was unable to. Once again, she did not disclose this incident to her mother as she felt that she had brought the incident upon herself. Thereafter they had sexual intercourse on a number of occasions, and she felt that she had no choice but to go along with what the accused was doing.

Gradually the episodes of sexual intercourse became more frequent, and they often drank alcoholic beverages and watched pornographic films before their sexual escapades. In 2004 she told a friend about everything, but still felt that she had brought it upon herself. Later in the same year, she retracted her disclosure to the friend by saying that what had been happening between her and the accused, had stopped. The truth was that she had lied to her friend for fear that the latter would tell someone about it. In 2005 the accused started

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365 Ch 4 supra.
introducing the complainant to drugs. They continued with their drinking, watching pornographic films and sexual intercourse until the complainant disclosed to the accused that a female friend had tried to kiss her. This led to the accused introducing a female prostitute into their sexual activities. The complainant initially resisted the idea, but finally agreed.

The court evaluated the complainant’s behaviour, specifically regarding her failure to disclose the sexual abuse from the outset and found that her fear to disclose the abuse found support in general logic and in the rest of her evidence. Firstly, she believed that she would not be believed. Secondly, she did not want to cause trouble for her family. Thirdly, she believed that if she caused trouble she would be returned to a detention centre where she had previously been detained. Fourthly, she did not want to cause trouble for the accused at home or in the church community, of which he was the leader. These circumstances led the complainant to believe that she had consented to the accused’s conduct. The court held that her failure to put a stop to the accused’s actions could not be interpreted as her having consented to the sexual activities.366

As far as it relates to the incident where the accused touched the complainant’s breasts and private parts and kissed her as part of an agreement, the court remarked that the pressure which the accused had applied, indicated that she did not consent to his actions. The accused used tactics which created the impression on the part of the complainant that she was indebted to him and had to submit to his gropings.367 As to the first instance when they had oral sex, the court held that the complainant submitted to these actions of the accused because she believed she was indebted to him.368

Regarding the first time sexual intercourse took place between the accused and his daughter, the court remarked that she did consent, but the consent had not been given freely and voluntarily. Furthermore, the accused could not have understood the complainant to have consented freely.369 Concerning the accused’s introduction of the complainant to drugs, the court held that this was done in order to get the complainant to respond to sexual intercourse with him.370 The accused introduced her to drugs to induce her to participate in lesbian acts

366  41-42.
367  46.
368  47.
369  47-48.
370  49-50.
with the prostitute. Furthermore, it was clear that the accused had been in charge of the lesbian acts between the complainant and the prostitute, for he instructed them what to do. The court found that the lesbian show was for the accused’s benefit.\textsuperscript{371}

The court also rejected arguments on behalf of the accused that he believed that the complainant’s consent could have been derived from her initiation or suggestions of sexual intercourse or that she was offering herself to him.\textsuperscript{372} It was held that the perceived consent of the complainant had to be viewed against the totality of the evidence as to what had occurred between the two parties over a period of years. In adopting this approach, it was clear that the accused had been grooming the complainant to ensure that she ultimately submitted to sexual intercourse with him. When considering the grooming process, the court took into account the role and purpose of the gifts and favours, which were extended by the accused to the complainant. It was found that these tactics of the accused were employed to create the impression on the part of the complainant that she was indebted to him and the manner in which the sexual advances were made by the accused, reinforced the idea of her indebtedness to him.\textsuperscript{373}

In conclusion the court found that the complainant did not consent to the sexual abuse which formed the subject matter of this case. The accused had taken advantage of the complainant’s insecurity and eagerness to please him. In doing so, the accused made the complainant his ally by alienating her from the rest of the family and any other support structures. Then he made her aware that he was sexually interested in her and taught her to trade sexual favours for material gains. The court held that the accused’s conduct in making the complainant a consenting party to the recordings, created an improper closeness between them. His tactics of relaxing the home rules and buying her material possessions were calculated to remove the complainant’s will to resist his sexual demands when he eventually made them. The fact that the complainant submitted to the demands, once they were made, was an obvious consequence of the accused employing the grooming process. It was further held that the accused could not raise consent as a defence in circumstances where he abused the position of

\textsuperscript{371} 51-52. 
\textsuperscript{372} 55. 
\textsuperscript{373} 56-57.
authority which he had over her and knew that he had succeeded in removing the complainant’s will to withhold her consent. 374

The court viewed the fact that the accused’s introduction of the complainant to alcohol was no coincidence, due to the fact that alcohol featured in most, if not all, of the incidents where the complainant and the accused had sexual intercourse. The accused encouraged the complainant to consume alcohol to eliminate what remnants of her resistance were left and to cultivate a false sense of romance and happiness. Later the accused went further and introduced her to drugs to subdue her even further. Thus, the accused knew that when he had sexual intercourse with the complainant he had already removed her will to freely consent to sexual intercourse. The accused therefore had the requisite guilty mind at all times when he engaged in sexual intercourse with her. It was clear that even the limited control which the complainant later acquired over the accused, did not give her sufficient strength to stop his conduct. 375 The court therefore recognised that the grooming process had a profound impact on the consent given by this victim of sexual abuse. In fact, the court found that it was not legal consent at all.

Similarly, in S v E 376 the accused was convicted in a Regional Court on ten counts of immoral or indecent acts in contravention of section 14(1)(b) of the Sexual Offences Act and one count of contravening section 2(1) of the Indecent or Obscene Photographic Matter Act. 377 The ten counts related to various acts of masturbation over the period September 1983 to October 1988 which were conducted by the accused with eight teenage boys. Their ages ranged from fourteen to seventeen years. The eleventh count related to the accused’s possession of nineteen pornographic films. The accused pleaded guilty to all the charges. Prior to sentencing, both the defence and the State called witnesses in mitigation and aggravation of sentence respectively. Amongst the witnesses called by the State were five of the eight complainants on the indecency charges.

The accused appealed to the Witwatersrand Local Division of the Supreme Court 378 against the sentences imposed, and the State at the same time applied for an increase in sentences.

374 59-60.
375 60-61.
376 Supra.
377 37 of 1967.
378 As it then was.
Both the appeal and the application by the State were dismissed, but leave to appeal to the Appeal Court\textsuperscript{379} was granted. This discussion concerns the proceedings in the latter court.

The grooming process\textsuperscript{380} employed by the accused in this case was succinctly summarised as follows by Howie AJA:\textsuperscript{381} After having met his victims, the accused invited them to his house, where he offered them refreshments, including alcoholic beverages, whilst they listened to music. After he established a friendly relationship with the victims, he showed them video films in order to sexually arouse them. These films involved explicit scenes of sexual contact between men and women, women and women and men and boys. The accused then initiated the conduct which formed the subject matter of the charge sheet, namely various forms of masturbation. Repeated visits ensued, although it is not clear from the judgment whether these were at the insistence of the accused or whether the victims returned of their own accord. Thus, the sexual contact between the accused and his victims frequently recurred, with some of the victims being abused in this manner for more than three years.

One of the victims, who in view of the promises made by the accused and who wanted to further his music career, was involved with the accused for only two months, before he realised that the accused was not fulfilling his promises.\textsuperscript{382}

Regarding the issue of consent, the court remarked that although the complainants may have been consenting and willing parties to the sexual activities which had taken place, the statutory provision which the accused had contravened was enacted specifically to protect minors from their inherent impressionability, gullibility and lack of judgment and control.\textsuperscript{383}

In \textit{S v Muller}\textsuperscript{384} the interaction between the grooming process and consent, once again came to the fore. In this case the accused was convicted in the Regional Court of raping his stepdaughter when she was fourteen and fifteen years old. The case was then referred to the High Court for sentencing in terms of sections 51 and 52 of the Criminal Law Amendment Act\textsuperscript{385} Satchwell J quoted the definition of child sexual abuse referred to above\textsuperscript{386} and stated that the existence of the grooming process is now widely recognised. This is because of the

\textsuperscript{379} As it then was.
\textsuperscript{380} Howie AJA did not refer to this as a grooming process, but rather the accused’s \textit{modus operandi}.
\textsuperscript{381} 627 c-h.
\textsuperscript{382} 627.
\textsuperscript{383} 631.
\textsuperscript{384} WLD 2006-05-23 Case no 2SH98/2005.
\textsuperscript{385} 105 of 1997.
\textsuperscript{386} Par 2 2 supra.
The fact that physical contact is not a prerequisite to sexual abuse and thus the process of grooming, which is inherent in the preparation of sexual crimes where the perpetrator uses no physical force, enters the arena. The court referred to grooming as “a psychological process used by the paedophile to access his victim(s)”. With reference to research on the grooming process, the court noted that this research assists in understanding how repeated physical or sexual contact between the accused and his stepdaughter could have culminated in rape.

The court further remarked that, in the past, South African courts have interpreted the absence of evidence of undue influence, threats or promises to persuade a child to allow physical interaction, as a mitigating factor. This was because the courts have not always had the benefit of information on the grooming process and tended to look for violence in the normal sense of the word, or undue influence on the part of the perpetrator to persuade victims to allow him to start touching or fondling them.

Satchwell J displayed a thorough understanding of the grooming process and the effects thereof when she remarked that sex offenders often rely on befriending a child and gaining a hold over him. This gave the offender control over his victim. She referred to grooming as an ongoing process aimed at the child ultimately submitting to sexual interaction with the adult sex offender. Because grooming is a transient feature it is difficult to decide when it begins and ends. The court acknowledged the fact that grooming is not restricted to online behaviour and that it is viewed as a cycle of abuse. It involves an aspect of deceptive trust created by the offender, which results in the manipulation of the victim by the perpetrator. It is the very fact that one of the parties to such a relationship is in an unequal position of power over the other, that results in the sexual activity being viewed as morally wrong and punishable by law.

With reference to the position of power and authority the perpetrator often occupies in cases of this nature, the court further remarked that in this case the accused himself admitted that his role was one of a parent to the child he had raped. The victim was thus in a position of vulnerability whereas the accused occupied a position of power in relation to her. She was vulnerable to his seniority in age and familial standing, his affinity with her mother - who was the only other adult in the home - and his role as head of the family. These facts were also
appreciated in *S v Jansen*\(^{387}\) where it was said that the rape of a child is an appalling and perverse use of male power; *S v Swart*\(^{388}\) where reference was made to the manner in which the accused exploited the position of power which he held over the complainants and *S v G*\(^{389}\) where the court commented that the complainant was raped in the safety of her own home by a person towards whom she was affectionate, and from whom she was entitled to expect protection. In doing so the accused has violated the trust which the complainant and her mother had placed in him. Similarly, in *S v P*\(^{390}\) the court commented on how a grandfather had violated a relationship of love and abused his position of trust.

Satchwell J\(^{391}\) also referred to *S v Abrahams*\(^{392}\) where the following was stated by Cameron JA in a case where the accused had raped his daughter:

> “Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter’s best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter’s body constitutes a deflowering in the most grievous and brutal sense. That is what occurred here, and it constituted an egregious and aggravating feature of the accused’s attack upon his daughter.”

In *S v Muller*\(^{393}\) the court also referred to the case of *S v G*\(^{394}\) where Borchers J pointed out that “a physically immature child of ten is no match for an adult man, and little violence was needed to achieve his purpose”. The court was of the opinion that similar considerations apply to the complainant in this case, who was fourteen years old when the accused first raped her, and where the accused had the additional power of paternal status within the family home.

The court addressed the accused in person during the sentencing stage, as follows:

> “[The complainant] was and is a child. Her mother married you and brought you into [the complainant’s] life as her stepfather. You took advantage of your wife’s trust and...”

\(^{387}\) 1999 2 SACR 368 (CPD).  
\(^{388}\) 2000 2 SACR 566 (SCA).  
\(^{389}\) 2004 2 SACR 296 (W).  
\(^{390}\) 2000 2 SA 656 (SCA).  
\(^{391}\) In *S v Muller* supra.  
\(^{392}\) 2002 1 SACR 116 (SCA).  
\(^{393}\) *Supra.*  
\(^{394}\) *Supra.*
[the complainant’s] vulnerability as a child, a daughter and a stepdaughter. You preyed upon her like an animal stalking its [sic] victim. [The complainant] could not escape you. You denied her even one room in her home where she could be safe from you. You forced your experienced, aging, stepfather body into that of an inexperienced, young, subordinate and dependent stepdaughter. [She] had no one at home or in her immediate family who could protect her against you. You forced yourself upon her again. [She] had to wait for this to happen. She feared she would be violated again. You must have known this. [She] stands alone in this terrible ordeal. She is scarred for life.”

In *S v Marx* the accused was convicted in the Regional Court on one count of rape and one count of indecent assault. He was sentenced to ten years imprisonment on the rape charge and two years imprisonment on the indecent assault charge, which sentence was to run concurrent with the ten years imprisonment imposed on the charge of rape. At the time of the alleged offences, the complainant was fifteen and sixteen years old respectively. The accused raised the defence, in respect of both counts, that the alleged indecent assault and rape took place with the consent of the complainant. The trial court rejected this and found that both incidents occurred without the consent of the complainant. The accused appealed unsuccessfully to the High Court, which confirmed the decision of the trial court. Leave was granted to appeal to the Supreme Court of Appeal.

Streicher JA found that the complainant’s version that she did not consent to the accused’s groping and the sexual intercourse with him, was improbable in the circumstances. She testified that she offered physical resistance against the advances of the accused. This version was rejected as not being reasonably possibly true. The convictions by the trial court were set aside and the accused was convicted of a contravention of section 14(1)(b) of the Sexual Offences Act. Nugent JA agreed with the conclusions of Streicher JA regarding the appeal, although not with all his reasoning in arriving at the order that constituted the majority judgment.

The minority judgment of Cameron JA is of particular importance and pertinent to the issue of consent as a defence and the grooming process. His opening remarks illustrate the profound impact of grooming on the complainant and her consensual interaction with the accused:

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395 The court found that no substantial and compelling circumstances were present and sentenced the accused to life imprisonment in respect of both counts of rape.
“This case is about an adult’s sexual predation on his children’s teenage babysitter who became an intimate of the family. On that we appear to agree … [b]ut the difference between us is more fundamental. It lies in our approach to the essentials of the situation the complainant’s evidence in my view depicted: that of a young girl in a family-like relation to a man who subjects her to sexual conduct which, despite its non-consensual beginnings, thereafter became at least partly consensual … [m]y colleagues both consider it improbable that the complainant, a young girl who claimed to have been subjected to sex against her will, would have continued to associate with a man who continued to foist himself on her … I differ … I do not consider it improbable at all.”

The court evaluated the relationship that existed between the complainant, the accused and the latter’s wife, which Cameron JA described as a “quasi-family situation”. He found that the complainant’s youth, needfulness and vulnerability on the one hand, and the situation of quasi-familial trust, authority and subordination in which she found herself on the other, had resulted in the complainant being susceptible to the accused. This had created an environment in which he was able to manipulate and abuse her for his own sexual gratification.

It appears from the facts of the case that the accused’s modus operandi followed those mentioned above.397 It started with inappropriate touching and conversations which was of a personal nature and contained sexual innuendos. She resisted and initially the accused accepted her refusal and left her. But he continued trying and became more persistent. She showed her dislike when the touching became more intimate, and in response the accused deliberately ignored her and withheld attention. Cameron JA described the situation she found herself in as “a web of rewards and punishments at the hands of an elder” in which she was helplessly ensnared and which made it difficult, if not impossible, for her to extricate herself.

With regard to the accused’s alleged non-consensual fondling of the complainant when his wife was in the immediate vicinity, and the argument that this behaviour of the accused was improbable, Cameron JA remarked that this argument fails to take into account that this was an integral part of the accused’s modus operandi. His wife’s very proximity enabled the accused to impose on the complainant the situation of compromise, embarrassment, shame and resultant complicity that prevented disclosure. This placed the complainant in a position of semi-complicity in, and mutual responsibility for, the accused’s acts. The intrusions increased in intensity and the accused made increasingly explicit and suggestive remarks to the complainant. Thus began what Cameron JA referred as a “quasi-seduction” and

397 Ch 4 supra.
“seductive campaign” which exploited the complainant’s subordinate and dependent position within the family. She was ensnared in a web of complicity and a guilty silence that the accused’s first suggestive comments and ambiguous touching had begun to create at the start of the relationship. He also took advantage of her need for attention and affection. This “quasi-seduction” led to the incidents of sexual intercourse which formed the subject matter of the rape charge.

Cameron JA remarked as follows before coming to the conclusion that the appeal against conviction and sentence should, in his view, be dismissed:

“The phenomenon of domestic sexual predation – of which this case, on any view, is a distressful example – requires like any other crime special understanding, appropriate to its distinct characteristics. The domestic or familial predator’s means are not violence or physical assault; his weapons not the knife or firearm; his means of subordination not the terror of his victim. He exploits the opportunities that intimate engagement offers, and the physical spaces the home affords, to prey upon his victim. And he uses the ties that bind him to her – often both emotional and material – to secure both compliance and concealment. When the victim is less than half his age, as here, and subject to his influence and authority as an elder, these factors operate with acute force. When she is a child craving affection and attention, as the complainant was, her peculiar susceptibility to abuse and exploitation must be appreciated to determine fairly and justly whether all the elements of her account are truthful, even if she failed to denounce him promptly or to remove herself from his proximity thereafter.”

The court remarked that it was clear from the complainant’s version that no physical force was used by the accused to enable him to sexually abuse her. However, he exerted an emotional hold over her. The power exercised over her was that of an adult predator who had entrapped her, not by force, but by complicity, guilt and collusive participation. Therefore, although the complainant was physically free to depart, the accused over-rode her wishes without having to employ any physical force.

A view contrary to that of Cameron JA was held in S v Geldenhuys,398 where the accused was convicted of ten counts of contravening section 14(1)(b) of the Sexual Offences Act in the Regional Court, after he was originally charged with indecent assault. The complainant was fourteen and fifteen years old at the time that the offences were committed. The accused was sentenced to eleven years imprisonment. He appealed to the Pretoria High Court against both his conviction and sentence. His appeal against conviction was unsuccessful, but the court

398 Supra.
reduced his sentence to an effective term of seven years imprisonment. Thereafter the accused appealed to the Supreme Court of Appeal against the convictions. At the same time the State applied for an amendment in terms of the Criminal Procedure Act\textsuperscript{399} of the accused’s convictions on ten counts of contravening section 14(1)(b) of the Sexual Offences Act to ten convictions of indecent assault, with which the accused had initially been charged and also for an increase in the sentences that were imposed by the Regional Court and confirmed by the High Court.

The application for the amendment of the convictions to indecent assault was based on the fact that, from the start, the power relationship between the accused and the complainant had been unequal because of the complainant’s age in relation to that of the accused - the accused was 28 years older than the victim. Furthermore, there was a relationship of friendship and trust that existed between the accused, the complainant and the latter’s family. Based on the evidence of a clinical psychologist who had treated the complainant, the State argued that, although the complainant may have appeared to have consented to the sexual abuse, this was not voluntary consent.

It appears that the Regional Court convicted the accused of contravening section 14(1)(b) of Sexual Offences Act, and not indecent assault, on the basis that the State could not prove beyond reasonable doubt that the complainant had not consented to the sexual acts committed with him. The High Court, per Hartzenberg J, referred to the complainant’s level of development and came to the conclusion that he was an intelligent and well-developed young boy. In view of this, and the fact that the sexual abuse had occurred over a period of four years, the court found that the accused had been justified to infer that the complainant had been a willing participant in the sexual activities which had occurred. The High Court therefore endorsed the convictions of the accused of contravening the Sexual Offences Act and found that the trial court had been correct for not convicting him of indecent assault.

In the Supreme Court of Appeal Van Heerden JA held the view that the onus to prove the absence of consent rests on the State, as was decided in \textit{S v D}.\textsuperscript{400} Therefore the State had to prove the lack of consent by adducing sufficient evidence to negate the reasonable possibility that the complainant consented to the sexual acts in question. Van Heerden JA found that,

\textsuperscript{399} S 32(1)(b).
\textsuperscript{400} 1963 \textit{supra} 266B-D.
from the totality of the evidence, the State did not succeed in discharging its onus of proof in this regard. He thus endorsed the views held by the Regional Court and the High Court.

It is respectfully submitted that a different result may have followed, had the question of consent been fully investigated during the trial in the Regional Court. The failure to canvass the issue of consent fully appears to be the result of the Regional Magistrate’s approach and attitude towards the complainant. He prematurely formed a *prima facie* opinion that the complainant had been a willing participant in all the instances of the sexual acts that occurred between them. It is clear from the facts of the case, as set out by the Supreme Court of Appeal, that the accused employed various grooming tactics throughout his relationship with the complainant and his family. The clinical psychologist who treated the complainant testified to the effect that:

> “a child who becomes sexually involved with an adult in this manner is traumatised and, from the outset, is in the position of a victim. As such, the child is paralysed and one of the common reactions is that the child ‘disassociates’ and places an emotional distance between himself or herself and the adult. Where the adult follows a pattern of ‘spoiling’ the child by, for example, taking the child on outings and giving the child presents and money, there is a gradual process of conditioning and manipulation.”

This, as well as the other evidence tendered by the State, should have alerted the trial court to the very existence of the grooming tactics used by the accused. The impact thereof on the complainant’s perceived consent should have been canvassed further by the State or the court. Regrettably this was not done and thus the impression is created, albeit wrongly, that the court placed reliance on the lack of violence or undue influence on the part of the accused to persuade the complainant to submit to the sexual acts. This view seems to be comparable to that held in by the court in *S v B*\(^{401}\) where the court assumed consent in a case of incest over a period of time, and *S v D*\(^{402}\) where the court commented that “[t]here was never any question of violence in the normal sense of the word [and] [i]n the one case where the boy indicated that [the accused’s] advances were not welcome, he desisted”.

In *S v W*\(^{403}\) it appears that the two accused, a husband and wife who were charged with the rape of three complainants, who were between the ages of nine and thirteen at the time of the alleged offences, may have employed a grooming process over a period of years. The two

\(^{401}\) 1996 *Supra.*

\(^{402}\) 1989 (C) *supra.*

\(^{403}\) *Supra.*
complainants in counts two and three were the younger sisters of the first accused, the wife. The first accused arranged for one of the complainants to visit the two accused at their residence, and sometimes the victim stayed overnight. The first accused then told the particular child that the two accused were unable to conceive children, but that medical doctors had advised them that the problem could be solved if the child would “sleep” with the husband. On various occasions, each complainant agreed to assist the couple with their “problem”, and on each occasion the wife undressed the child in the accused’s bedroom, left the room, whereupon the husband entered, undressed and had sexual intercourse with the child. The children were thus misled and deceived in a fraudulent manner. After having had sexual intercourse the husband then removed a whitish liquid from his genital organs, as well as from the complainant’s. He then placed this substance into a container and handed it over to his wife. After each such episode the complainants were lavished with gifts.

Treurnicht AJ found it improbable that in this day and age a normal thirteen-year old would not have realised that sexual intercourse was to take place in the circumstances. It was found that both the thirteen-year old complainants had in fact consented to sexual intercourse. The fraudulent misrepresentations which were made to them related to the consequences of the intercourse and therefore the consent was not vitiated by the fraud. The two accused were both convicted of a contravention of section 14(1)(a) of the Sexual Offences Act.

5 4  CONCLUSION

Some judicial officers seem reluctant to embrace the existence of the phenomenon of grooming, or are, perhaps, merely uninformed. Others seem to accept it. In some instances they do not even require expert evidence about this phenomenon. This approach is to be applauded, as a paradigm shift has been long overdue. The existence of the grooming process employed by child sex offenders cannot be denied. It is a reality. The acknowledgment thereof can greatly improve the conviction rate in child sexual abuse cases, and the realisation that sex offenders usually follow a certain *modus operandi* in their quest for sexual gratification in their interaction with children can prevent, or at least timely alert, significant persons in the child’s life to their sexual exploitation.

The impact of the grooming process on ostensible consent given by the child victim ought to be acknowledged. As indicated above, a great deal of understanding of, and sensitivity to, the
impact of grooming is displayed by some courts. There are still, however, those who adhere to the notion that children consent to sexual abuse with adults and significantly older persons. A proper understanding of the dynamics of the grooming process will enable them to realise that child victims do not consent to such sexual interaction with sex offenders. The commencement of the Act, it is hoped, will lead to greater awareness of the grooming process and the dynamic role it often plays in child sexual abuse cases. In view of the fact that legislative recognition has now been given to the grooming process, it is submitted that the courts can no longer ignore the existence of this phenomenon and the profound impact it has on consent given by child victims of sexual abuse.

The next chapter is devoted to a brief overview of the salient vulnerabilities of child victims of sexual abuse, which may result in consent being given by such children. It also concludes the researcher’s arguments advanced above and contains some recommendations with regard to the prosecution of sex offenders who offend against children.
CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

“The wishes and beliefs of childhood are among the strongest emotions we’ll experience. For me, I wished and hoped that someone would step in and help me.”

Sexual abuse of children is a phenomenon which has occurred throughout history. Societal perceptions about sexual interaction between adults and children have changed throughout different eras, with most societies presently subscribing to the notion that child sexual abuse constitutes criminal behaviour. The defence of consent is often raised by sex offenders charged with various crimes which may constitute child sexual abuse. In many instances a grooming process is employed by sex offenders to overcome resistance and to prevent disclosure by the victims, thereby ensuring continued access to the child victims. The courts in South Africa have not always been aware of the existence and the impact of the grooming process, although a paradigm shift seems to have been taking place in the recent past. This has culminated in the long-awaited promulgation and implementation of the Act.

The review of the literature and cases in the preceding chapters leads to the conclusion that instances may occur where the behaviour of victims of sexual abuse is not merely a matter of submission or non-resistance, but is arguably voluntary or, on the face of it, consensual. There may be, and there often are, elements of obedience to, or respect for, adult or familial authority or power, and often these elements are abused by a person in authority. However, there are also many other actions and forms of behaviour by sex offenders which may result in a child victim ostensibly agreeing with, or consenting to, sexual interaction with an adult or older person. The child victim is vulnerable because of his moral or social immaturity, inexperience, imperfect understanding of the significance and implications of sexual interaction with an adult or older person. His undeveloped autonomy also has a bearing on his decisions in this regard. These are merely some examples of the vulnerabilities and frailties which are often inherent to children, which the sex offender may exploit to his own advantage.

405 Baker Understanding Consent 57.
Another conclusion which may be drawn from the discussion above is that instances exist where the *boni mores*, as reflected in the decisions of the court, should regard sexual activities between adults and children as wrong and punishable for the simple reason that it involves an unjustifiable and inexcusable exploitation of the vulnerabilities of the victims. Children’s actions, even where it can be construed as voluntary, willing or consenting in nature, should not make the sexual interaction between adult sex offenders and such children permissible or acceptable when they otherwise would not have been. It appears that children may ostensibly consent to sexual activities with adults because they are not acting with the full knowledge and appreciation of what they are doing. They may also consent because they have certain immaturities or inexperience that make them susceptible through persuasion or other means of exploitation. It is submitted that sexual activities between a child and an adult or significantly older person are not in the children’s best interests.\footnote{S 28(2) of the Constitution.}

A victim’s right to bodily integrity, sexual security and sexual self-determination can be violated by the use of physical force, compulsion or coercion that constrains his will or voluntariness or any extension of these ideas. This may create fear on the part of the victim, which prevents him from indicating his unwillingness or resistance to the sexual activities or participation therein. However, in the case of child sexual abuse most of these violations take the form of non-forceful infringements of these rights. This is evident from the dynamics of the grooming process as explained above. It appears, therefore, that the age of the child victim is not the overriding determining factor when considering whether consent has been given in terms of the “traditional” approach or in terms of the definition of consent in the Act. It is submitted that the manner in which the consent had been obtained is equally important, or may even be the most important factor to be considered in this regard. It is submitted that the legislator ought to address this by considering an amendment of the Act which will take place emphasis on, and takes into account, the manner in which the consent has been obtained.

It is opined that a child’s idea of consent can not be said to be fully developed and is further shaped inappropriately by the very tactics sex offenders employ during the grooming process. The voluntary engagement in sexual activity by a child does not take into account the necessary cognitive and mental understanding which is required for real consent and is
therefore not sufficient to constitute consent in the true sense of the word.\textsuperscript{407} It is therefore submitted that children do not consent to sexual abuse by adults or significantly older persons, and persons so charged should therefore not be able to successfully raise the defence of consent in these cases. Voluntary or willing participation in sexual activities by a child is not consensual participation.\textsuperscript{408} It is submitted that it amounts to sexual exploitation to which a child unwittingly acquiesces, because he does not have the necessary emotional, cognitive, moral and conative development to indicate his unwillingness to participate.

Therefore, although sexual interaction between an adult and a child may be consensual it may still constitute sexual abuse. It is recommended that the age and maturity of the child ought to be taken into account to determine whether the consent obtained complies with the requirements of the “traditional” approach to consent or the definition contained in the Act. Furthermore, the nature of the relationship between the victim and the offender ought to be taken into account. Many of the tactics employed by sex offenders include activities that are legal in themselves. Many sex offenders use these tactics to create a position of trust with, or authority over, their victims. This situation is then exploited, as indicated in the analysis of some of the cases referred to above.

The “traditional” concept of consent requires certain conditions to be met before it can be said to be a valid defence. These requirements have been analyzed in Chapter 2. It is submitted that in the case of children over the age of sixteen years but under eighteen years, these requirements are not met where the consent of the child has been obtained as a result of a grooming process. In the case of children over twelve years of age, but under the age of sixteen years, where the sex offender is charged with rape or indecent assault, the consent given by the child ought to be regarded as ineffective in law. The particular circumstances which prevailed at the time of the alleged sexual abuse, particularly the nature of the relationship between the victim and the offender, ought to be carefully scrutinized. Consent obtained as a result of physical force is not always a feature in child sexual abuse cases. The trier of fact should be aware of the possible presence of coercion by other means, and evidence of a grooming process which the sex offender may have employed. Should the evidence prove the other elements of these offences, the accused ought to be convicted of the offences charged with, instead of the statutory offences contained in section 14 of the Sexual

\textsuperscript{407} Baker \textit{Understanding Consent} 56.
\textsuperscript{408} \textit{Ibid.}
Offences Act, as was done in a number of cases discussed above.\textsuperscript{409} It is submitted that a conviction of contravening section 14 of the Sexual Offences Act, as opposed to a conviction of rape or indecent assault, may be an indication that the court does not fully appreciate the fact that child victims may consent to sexual activities with adults or older persons, but that this consent does not comply with the requirements of the “traditional” approach to consent.

The advent of the Act has brought about the codification of the grooming process as an offence. It is submitted that the psychological concept of grooming has now been elevated to the rank of a legal concept, which may no longer be ignored. The legislative recognition of this phenomenon implies that the courts can no longer ignore the existence and the impact of the grooming process. It is submitted that sex offenders ought to be charged with the offence of sexual grooming of a child as an alternative to any other charges he may be facing. In instances where the sex offender is not charged with the offence of grooming, the court still ought to take cognizance of the legal concept of grooming when evaluating the child victim’s evidence and in deciding whether the defence of consent should succeed in law. The Act also provides a definition of consent for the purposes of the Act, and sets out the circumstances in which consent by a victim does not comply with the definition provided in section 1(2). Therefore, where an accused is charged with statutory rape or statutory sexual assault in terms of sections 15 and 16 respectively of the Act, the same considerations as above should apply, and it ought to be found that, where the child consented as a result of the grooming process, there was no consent as defined in section 1(2). It is submitted that, in such cases, there can be no voluntary or uncoerced agreement, as the provisions of section 1(3) ought to find application. For this reason such offenders ought to be charged with the offences of rape or sexual assault as contained in sections 3 and 5(1) of the Act.

It is submitted that the manner in which consent is obtained as a result of the grooming process is tainted as it is based upon the inherent vulnerabilities of children. In such circumstances no legal consent can be said to be present if the dynamics of the grooming process are properly taken into account.

In conclusion, it is submitted that the Act at least elevated the psychological concept of grooming to a legal concept. This fact will secure that courts are aware of the grooming

\textsuperscript{409} Compare par 5.3 \emph{supra}.
process. In turn this will limit the instances in which a sex offender can successfully raise the defence of consent in child sexual abuse cases.
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