

# QUESTIONNAIRE

## SOUTH AFRICA

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### 1. Introduction

**Please read carefully before answering the questionnaire**

The RAYUELA project is aimed at protecting children in their online interactions. For this purpose, the project will develop a “game”, which will present the children with realistic scenarios relating to the following cybercrimes/cyber-facilitated crimes:

- ***Online grooming*** (further: OG) is the crime where the perpetrator (usually an adult) uses electronic communication services, including social media, to contact a minor and build rapport with the aim of eventually meeting in person for the purposes of sexual activity. The perpetrator may employ various strategies (deception, romantic/emotional attachment, promise of material or other benefits, blackmail, coercion, etc.) to lower a child's inhibitions, heighten their curiosity about sexual experiences, or otherwise convince them to meet up.
- ***Cyber bullying*** (further: CB) is a broad term that includes all types of bullying behaviour online. This includes cyber stalking and cyber harassment, and any other type of behaviour online aimed at hurting the victim. Cyber bullying may also have a sexual component.
- ***Misinformation and deception*** (further: MD) is a behaviour that may or may not be punishable by law depending on the context. It involves all kinds of information sharing that is fake, or deceptive. For a criminal qualification to apply, typically the behaviour will need to be intentional and there will need to be material consequences to this intention.
- ***Human trafficking with a cyber component*** (further: HT) is the online facilitation of human trafficking by grooming and attracting potential victims for human trafficking.

The purpose of the game is to teach children how to remain safe online, while the obtained insights will be used to provide policy recommendations and educational tools.

The game does not focus solely on the threats of potentially falling victim to one of these four crimes. It also aims to raise awareness about the general threats of using IT, such as the Internet and connected devices, and minors' capacity to make responsible choices in this regard.

A particular point of interest is understanding whether minors are aware of when they, or someone else, is crossing the line in becoming offenders themselves, as this is an important aspect of protecting children online. Due to the nature of online communication, inhibitions may be lowered, and certain actions may feel more innocent or less “real” than in real life. In addition, a perception may exist that what happens on the Internet has little or no impact beyond the digital world. This creates situations where minors engage in what they perceive to be relatively innocent behaviour (“everyone does this on the internet”), that may however have serious legal consequences.

One of the goals in RAYUELA is to ensure that minors realize when their behaviour may turn into actions that are punishable by law.

The present study and questionnaire are set up in the context of the RAYUELA project in order to provide an overview of the **legislative framework and relevant policies** in a number of countries, both in the EU and beyond, in relation to:

- How the main crimes of OG, CB, MD and HT are dealt with by the legal system i.e., which behaviours are punishable and under which conditions?
- How cybercrime and cyber-facilitated crime perpetrated by minors is dealt with in the legal system (both in general and specifically in relation to the crimes in focus)?
- What international instruments and cooperation mechanisms are available in dealing with cybercrime perpetrated by minors?

Importantly, we want to know both the legal rules and policies which are implemented in practice, and their effect on the **real enforcement situation**. If you have knowledge about the effects of current policies on crime rates by minors and on the crime rates for OG, CB, MD and HT, this would be of interest.

We are specifically interested in **case law** that illustrates the “why and how” of certain legal rules, principles and policies in practice. Case law will help us illustrate the similarities and differences between jurisdictions and is therefore *essential*. Please ensure to have a good amount of case law processed in your answers.

In addition, we want input on **international legal instruments and international cooperation** relevant for cybercrime, and in particular for cybercrime perpetrated by minors. What happens when cybercrimes is perpetrated in a cross-border context? What are the legal rules in place for cooperation with authorities from other countries, and how does this work out in practice (issues, problems, etc.)?

Lastly, we are interested in some **statistical information on cybercrime** in your country and cybercrime by minors specifically.

The purpose of this questionnaire is to help you provide this information for your jurisdiction.

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## 1. Introduction and General Remarks

Snail Attorneys @ Law Inc ( hereafter referred to as “Snail Inc” ) has been requested by Timelex Ceba ( hereafter referred to as “Timex”) to assist with a Country Study on Cyber Crime / Cyber Facilitated Crime with specific emphasis on Cyber Crimes that affect Children looking at Online Grooming (hereafter referred to as OG), Cyber Bullying (hereafter referred to as CB), Misinformation and Deception (hereafter referred to as MD) as well as Human Trafficking with a Cyber Component (hereafter referred to as HT).

## 2. Question 1 – Online Grooming

“Child grooming is defined as befriending and establishing an emotional connection with a child (and sometimes their family), to lower the child’s defences for the purpose of sexual abuse,” the South African Police Service ( hereafter “SAPS”) stated in a post wherein it was discussing Online Child Grooming.<sup>1</sup>

Grooming may be sexual or non-sexual in content and is defined as the process that paedophiles use to achieve the trust and lower the inhibitions of vulnerable Minors to ultimately make sure that the Minors are ready to perform or take part in sexual acts.<sup>2</sup> It is common that grooming is an assault upon the Dignity of the Minor and thus a violation of the Right to Dignity as embodied in Section 10 of the Constitution.<sup>3</sup> When evaluating the effect on the Dignity of the Child it’s vital to specifically take note that grooming affects the process of individuation that every Minor will go through.<sup>4</sup>

Grooming can be prosecuted under the common law crimes of *crimen iniuria* or indecent assault.<sup>5</sup> *Crimen iniuria* consists in the unlawful, intentional and serious violation of the dignity or privacy of another.<sup>6</sup> Indecent assault customarily is *crimen iniuria* and it’s up to the prosecutor to decide which the crime will be tried under, however in case of grooming *crimen iniuria* would be considered to be more appropriate as the assault upon the Minor’s Dignity should be highlighted. Professor Burchell further provides that with regards to grooming that “the supple common-law descriptions of indecent assault and *crimen iniuria*...give a more effective ways of proscription than the limiting terms of a law.<sup>7</sup> Professor Burchell believes that the “grooming” of a Minor via the Internet as a preliminary step towards engaging in sexual acts with the Minor would amount to an impairment of the Dignity of the Minor, making it *crimen iniuria*.<sup>8</sup>

The elements of *crimen iniuria* are illegal and intentional impairment of the Dignity or privacy of an individual. The test to determine whether dignity has been impaired is if the sensibility of a reasonable person is or would be offended by the act.<sup>9</sup> The victim of such an indecent act doesn’t have to be aware that their dignity after the act has been committed. There are extraordinary cases where the victim doesn’t have to be aware of the impairment of their dignity.<sup>10</sup> Section 24 of the Sexual Offences and

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<sup>1</sup> “Act against child grooming” in *Overpot Rising Sun* ( Accessed on 17 May 2022 <https://risingsunoverport.co.za/84186/act-child-grooming/>)

<sup>2</sup> P, Pletts “Criminalising child grooming over the internet in South Africa – common law or legislation” 2006, 6.

<sup>3</sup> Section 10 of the Constitution of South Africa 1996.

<sup>4</sup> P, Pletts “Criminalising child grooming over the internet in South Africa – common law or legislation” 2006, 11.

<sup>5</sup> J, Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed (2005) 740.

<sup>6</sup> CR, Snyman, *Criminal Law*, 6th Ed. (2014), 474

<sup>7</sup> P, Pletts “Criminalising child grooming over the internet in South Africa – common law or legislation” 2006, 13.

<sup>8</sup> J, Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed (2005) 740.

<sup>9</sup> P, Pletts “Criminalising child grooming over the internet in South Africa – common law or legislation” 2006, 13.

<sup>10</sup> Ibid.

Related Matter Amendment Act <sup>11</sup> (hereinafter called the “SORMAA”) <sup>12</sup> states that the offense of sexual grooming would also apply to a mentally disabled person or Minor.

Section 18 of the SORMAA <sup>13</sup> provides for the sexual grooming of children. Sexual grooming criminalises a long list of acts which all amount to requesting, influencing, inviting, persuading, encouraging or enticing a child (Y) – that is, a person under the age of 18 years – to indulge in a sexual act or to diminishing his or her resistance to the performance of such acts.<sup>14</sup>

Section 18 of the Criminal Act<sup>15</sup> provides that an individual, who makes; possesses; shares or coordinates the making, production or sharing of an article, which is specifically meant to coordinate the commission of a Sexual Act with or by a Minor.<sup>16</sup>

An individual who makes; possesses; shares or coordinates the making, production or sharing of a publication or film that promotes or is meant to be used in the commission of a Sexual Act with a Minor.<sup>17</sup> A person who provides, exposes or displays to a third party, an article which is meant to be used in the performance of a sexual act, child pornography or pornography, as well as a publication or film with the intention to encourage, enable, instruct, or persuade a third party will perform sexual acts with the Minor.<sup>18</sup>

Furthermore, a person who is guilty of the offence of promoting the sexual grooming of a child; supplies, exposes or displays to a Minor complainant an article which is meant to be used in the performance of sexual act, child pornography or pornography, or a film and/or publication with the intention to encourage, enable, instruct, or persuade a Minor to take part in sexual acts.<sup>19</sup>

A person who commits any act with or in the presence of a Minor or who describes the commission of any act to or in the presence of a Minor with the aim to encourage or persuade the Minor or to reduce or do away with any resistance or unwillingness on the part of the Minor to perform a Sexual Act with the Paedophile or even a third party. Furthermore to perform an act of self-masturbation in the presence of a Minor or a third party while the Paedophile and/or the third party is watching, be in the presence of or watch the Paedophile or a third party perform same. The Minor being exposed to child pornography or pornography, be used for pornographic reasons as stated in Section 20(1) of the SORMAA<sup>20</sup>, or expose his body to the Paedophile or a third party in a manner or in situations which violate the sexual integrity of a Minor.

A person who arranges a meeting or communication with a Minor with the intention that the Paedophile will perform sexual acts with the Minor.<sup>21</sup> Having communicated with a Minor by any means from, to or in any part of the world, invites, persuades, seduces or entices the Minor.

A person arranges to travel to any part of the world in order to meet the Paedophile with the aim to commit a sexual act with a Minor or during such a meeting to discuss, explain or define the commission of a sexual act, or provide a Paedophile by ways of any form of communication (including electronic communication) with any image, publication, depiction, description or sequence of child pornography

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<sup>11</sup> Section 18

<sup>12</sup> Act 32 of 2007

<sup>13</sup> Section 18

<sup>14</sup> CR, Snyman, *Criminal Law*, 6th Ed. (2014)

<sup>15</sup> Ibid.

<sup>16</sup> Section 18 .

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Section 20(1)

<sup>21</sup> Section 18

of the Minor himself or any other person. Furthermore, having met or communicated with the Minor by any means from, to or in any part of the world, intentionally travels to meet the Minor with the intention of committing a sexual act with the Minor will be held accountable for committing sexual acts with the Minor.<sup>22</sup>

Section 61(1) of the SORMAA<sup>23</sup> provides for the extra-territorial jurisdiction and states that even the conduct said to amount to a sexual offense or another offense under this Act occurred outside the Republic, a Court of the Republic, whether or not the conduct amounts to an offense at the place of its commission, has, subject to sub Section (4) as well as (5), jurisdiction in respect of that offense if the person to be charged is a citizen of the Republic, is a resident, was arrested in the territory of the Republic, or in its waters or on an aircraft registered or required to be registered in the Republic as such under any statute, or any person, corporate or unincorporated body which is registered in the Republic.

Section 61(2) of the SORMAA<sup>24</sup> states that subject to the above-mentioned subSection (4) and (5), any conduct said to amount a sexual offense or other offense under the Act and which is committed outside of the Country by a person, other than a person contemplated in subSection (1), is, whether or not the act amounts to an offense at the place of its commission, deemed to have been committed in the Country if that act was committed against an individual referred to in paragraphs (a) or (b) of subSection (1) of the Act.<sup>25</sup> If an individual is found in the Country, and for any reason, not extradited by the Country or if there's no Application to extradite that individual.

Section 61(3) of the SORMAA<sup>26</sup> provides that any offense committed in a Country outside the Republic as contemplated in the previous subSection is, for purposes of determining the jurisdiction of a Court to try an offense, was seen to have been committed at a place where the complainant is ordinarily a resident or at the accused person's principle place of business.

Section 61 (4) of the SORMAA<sup>27</sup> provides that no prosecution may be brought up against an individual in terms of this Section with respect to the actions which formed the basis of an offense under this Act in respect of which such an individual has already been convicted or acquitted by a Court of another jurisdiction.

Section 61 (5) of the SORMAA<sup>28</sup> states that the Institution of a prosecution regarding this Section must be authorised in writing by the National Director of Public Prosecutions.

Furthermore, Section 56 (A) of the SORMAA<sup>29</sup> provides for the sentencing of the person said to have committed such an offense by a Court. Section 56(1)(A)(a) and (b)<sup>30</sup> state that a Court shall, if that or another Court has convicted a person of an offense in terms of an Act and a penalty is not provided regarding that offense in terms of this Act or by another Act impose a sentence, as provided for in Section 276 of the Criminal Procedure Act ( hereafter "CPA" )<sup>31</sup> which states that the Court considers an appropriate sentence and which is within that Court's penal jurisdiction.

Section 56(2)(A) provides that if an individual is convicted of any offense under this Act, the Court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the

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<sup>22</sup> Section 18 of Act 32 of 2007,

<sup>23</sup> Section 61(1) (a), (b), (c), (d) and (e)

<sup>24</sup> Section 62(1) (a), (b) and (c)

<sup>25</sup> Ibid.

<sup>26</sup> Section 61(3) (a) and (b).

<sup>27</sup> Section 61(4)

<sup>28</sup> Section 61(5).

<sup>29</sup> Section 56(A) (a), (b)

<sup>30</sup> Ibid.

<sup>31</sup>Section 276 of Act 51 of 1977.

offense with the aim to gain financially, or receive any favour, reward, or any other advantage.<sup>32</sup> Moreover, gained financially, received reward, or any other advantage.<sup>33</sup>

Amended Section 18 of the CPA provides for the State's right to institute Criminal proceedings up to a period of 20 years does not extend to murder, treason, robbery, kidnapping, child-stealing, as well as any form of sexual offenses, that will include grooming.<sup>34</sup>

### **3. Question 2 – Cyber/Online Stalking, Cyber harassment and Sexual Harassment.**

Watney provides a concise summary of the legal position relating not harassment in the context of Cybercrime. She highlights that a significant feature of online activity is that is often characterized by harassment, which is understood as a pattern of behaviour or course of conduct pursued by an individual, which is designed to intimidate and distress another individual<sup>35</sup>. In this context, the Cybercrimes legal framework must be considered in line with the Domestic Violence Act<sup>36</sup> 118 of 1996.

Interestingly, Watney correctly points out that harassment is a criminal conduct that may occur outside the confines of a domestic relationship, therefore victims may find protection through the Protection from Harassment <sup>37</sup>( hereafter “Harassment Act”). Where a Complainant regarding harassment is laid against a person, the applicable includes the applicability of Section 15 of the Cyber Crimes Act<sup>38</sup> 19 of 2020 (hereto “CCA) which outlaws the sending of malicious communication that threaten a person via electronic communications, however must be found to be in existence in order for legal consequences to follow.

The Harassment Act's aim is to consider the best interests of the child as paramount importance. <sup>39</sup>Any incident of bullying is harassment, this Act can be applied to situations of bullying and aims at protecting the best interest of the child.<sup>40</sup> A victim of any incident of bullying can apply for a protection order against the bully, the victim can be assisted by his or her parents but can apply for the order without assistance. The clerk of the court has the duty to inform the complainant that he or she may lodge criminal charges against the bully for any other offence that relates to the person or the property of the complainant. <sup>41</sup>

This could include charges such as *crimen inuria* and assault. The protection order is a great remedy to ensure that the victim is not bullied further and/or to ensure that other children bully the victim on behalf of the child against whom the protection order was applied for.

The court can impose various conditions that provides for therapy, involve families and remedy the incident with meditation and restorative justice. In this way criminal prosecution of a child could be prevented.

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<sup>32</sup> Section 56 (A)(a)

<sup>33</sup> Section 56 (A)(b)

<sup>34</sup> Ibid.

<sup>35</sup> Papadopoulos and Snail , Watney ch 13 in Cybercrime – Cyberlaw @ SA IV Van Schaick (2021) 490

<sup>36</sup> Act 118 of 1996.

<sup>37</sup> Act 17 of 2011.

<sup>38</sup> Act 19 of 2020

<sup>39</sup> TA Du Toit, “Cyber Bullying Dilemma: A case for Ubuntu South Africa – ” (2019)15-16

<sup>40</sup> A Laas and T Boezart, “The Legislative Framework Regarding Bullying in South African Schools” in PER (2014) Vol. 17 No 6.

<sup>41</sup> TA Du Toit, “Cyber Bullying Dilemma: A case for Ubuntu South Africa – ” (2019)15-16

Amended Section 18 of the CPA<sup>42</sup> provides for the State's right to institute Criminal proceedings up to a period of 20 years.

#### **4. Question 3. – Online Misinformation and Deception**

Prior to the Electronic Communications and Transactions (hereafter “ECT”) Act, the Common and Statutory Law at that time could be extended as widely as possible such as Common Law Fraud to acts of Cyber fraud, Misinformation or Deception. In this regard reference is made to the case of *S v Van den Berg*<sup>43</sup> where the Court confirmed the applicability of Common Law Fraud to a Cyber Fraud matter. In the case of *Msomi v S*,<sup>44</sup> the court considered an appeal from the Port Elizabeth Specialised Commercial Crimes Court, where the appellant had been charged with E-Fraud in terms of Section 87 of the ECT. Sections 8 of the new CCA<sup>45</sup> outlaws Cyber Fraud and Section 9 of the CCA also outlaws Forgery and uttering. Cyber Forgery is defined in Section 9 (1) as making, with intent to defraud, a false data or false computer programs to the actual or potential prejudice of others. Section 9 (2) then is the element of passing off the said false data or false computer programs to the actual or potential prejudice of others

In terms of Section 19 of the CCA court which convicts a person of an offence in terms of Section 8 of the CCA a Court may, where a penalty is not prescribed in respect of that offence by any other law, impose a sentence, as provided for in Section 276 of the CPA, which that court considers appropriate and which is within that court's penal jurisdiction. Common law Fraud usually carries a minimum sentence of 10 - 15 years which should be the guideline by a sentencing Court. Section 24 of the CCA provides for extra-territorial jurisdiction and universal jurisdiction to deal with the borderless nature of cyber crimes.<sup>46</sup>

#### **5. Question 4. – Human Trafficking and Punishment thereof and how do online grooming activities find victims and prosecution of same**

Bello and Olutola state that in South Africa the Common-Law and legislation were used to prosecute human trafficking offenses in the past. The authors go further by stating that the most notable pieces of legislation were the SOMRAA and the Children's Act.<sup>47</sup> The key provisions of these Acts in addition to other Section contained therein are the protection of children, prevention of maltreatment, or abandonment of children and the protection of children as contained in Section 50 of the Children's Act.<sup>48</sup> However, the prosecution of some of the offenses under the Act(s) was problematic because no provision was made for the definition of some of the offenses. Although sexual exploitation was described, but these Acts fail to prescribe specific penalties for the crime.<sup>49</sup>

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<sup>42</sup> Section 18 of Act 51 of 1977.

<sup>43</sup> 1991 (1) SACR 104 (T).

<sup>44</sup> *Msomi v S* (39/2018) [2019] ZAECGHC 80; 2020 (1) SACR 197 (ECG).

<sup>45</sup> Act 19 of 2020

<sup>46</sup> S Papadopoulos and S Snail, Watney ch 13 in *Cybercrime – Cyberlaw @ SA IV Van Schaick* (2021) 486

<sup>47</sup> 38 of 2005

<sup>48</sup> P O Bello and A A. Olutola, *Effective Response to Human Trafficking in South Africa: Law as a Toothless Bulldog* in *SAGE Open* January-March 2022, 3

<sup>49</sup> *Ibid.*

Human Trafficking is outlawed by Section 4(1) of the Prevention and Combating of Trafficking in Persons (hereafter “PCTP”) which defines “trafficking in persons,” or “human trafficking”, as any person who delivers, recruits, transports, transfers, harbors, sells, exchanges, leases or receives another person within or across the borders of the Republic. The said Trafficking can be by means a threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability, fraud, deception, abduction, kidnapping, the abuse of power, the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person, having control. Alternatively having authority over another person or the direct or indirect giving or receiving of payments or any other material benefit for the purpose of any form or manner of exploitation render a person guilty of the offence of trafficking in persons.

Section 4(2) of the PCTP also outlaws the adopting a Child, facilitating same or securing legal or illegal means or conclude forced marriages for the purpose of the exploitation of a child or any other person in any manner. In addition Section 7 of the PCTP states anyone who uses services of a victim of trafficking knowing or reasonably ought to have known that the person has been trafficked will be guilty of an offence as well.

Section 8 of the PCTP speaks of the further offence where a person ought to have reasonably known, suspected, facilitates or promotes trafficking by ways of the leasing or subleasing any house, room, building or establishment for the purposes of trafficking a person and failed to report such knowledge to a police official.

It further states that any person who advertises, promotes, broadcasts or publishes any information that promotes, aids, finances or organises the commission of the trafficking of any persons is guilty of an offence. Section 8(2)(a) – Section 8(3) of the PTCP states that any electronic communication service provider operating within the Republic must take reasonable steps to prevent any publishing or advertisement of information linked to trafficking, the service providers must take reasonable steps to preserve such information and report same without any delay, failure to do so the service provider will be guilty of an offence.

Although it is important to note that these service providers do not have a general obligation to monitor the data it transmits or stores, or actively seek any unlawful activity, as a result the electronic service provider will not be liable for any damages caused to any person for any actions taken in good faith.<sup>50</sup>

Section 12 of the PTCP states that A Republic will have extra- territorial jurisdiction in respect of any act which would have would have constituted an offence under the under Chapter 2 of the PTCP if the person charged:

- i. is a citizen of the Republic;
- ii. is ordinary resident in the Republic;
- iii. has committed the offence against a citizen of the Republic or a person who is ordinary resident in the Republic;
- iv. is available within the territory of republic after the commission of the crime (Only a High Court will have jurisdiction over such person);
- v. is for any reason, not extradited; or
- vi. is a juristic person or partnership registered in terms of any laws in the Republic

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<sup>50</sup> Section 4 and Section 5

Section 12(4) of the PTCP provides that the National Director of Public Prosecution must designate an appropriate Court for prosecution.

Section 13 states any person convicted of an offence in section 4(1) and section 4(2) will be liable to a fine not exceeding R100 million or imprisonment (or life imprisonment), Section 5, 7 or 23 will be liable to a fine or imprisonment period not exceeding 15 years or both and Section 8(3), 9, 18(9) or 19(3) will be liable for a fine or imprisonment period not exceeding 5 years or both.

Section 18 states that any persons who knows, suspects, or oughts' to have reasonably known of a child who is a victim to trafficking should report that knowledge to the police

## **6. Question 5. – Crimes Committed by Juveniles**

The Children's Act and the Child Justice Act<sup>51</sup> in South Africa are provided with more legal protection provided for in Section 28 of the Constitution, which speaks to the best interest of the child, specifically in Section 28(2). Furthermore Section 6 of the Children's Act provides for the applicable principles dealing with children in action proceedings and decisions about children.<sup>52</sup>

The Children's Act provides for the right for children to approach the Courts / bring a matter to Court or to be assisted in same. When discussing any matter which relates to the Children's Act as well as the protection of children it is important to include the Child Justice Act, which deals with children's criminal capacity while simultaneously attempting to rectify injustice through restorative justice.

It is apparent that the aim of the legislation is to rehabilitate a child and not punish a child punitively<sup>53</sup>, it further strives to protect children who finds themselves in conflict with the law, therefore there should be a balance between the rights to the child offender and he rights of the victim, hence accountability and restorative justice is important in the Child Justice Act. This does not mean the child will get away with wrongdoing by apologising.<sup>54</sup>

## **7. Question 6 and Question 7- Specific Rules on Cyber Crime by Minor's and Issues of Minor's Intent and Capacity**

No, but Sections 7, 9, 10 and 11 of the Child Justice Act are prominent, in that they deal with criminal capacity of children and how to deal with children under the age of 14 years and the age of 10 years.<sup>55</sup>

Section 9 deals with children under the age of 10 years who come in conflict with the law, it is implied that it would be beneficial for the child offender to go for counselling or therapy as it does not explicitly provide for that in the Section. While in a child centered system, the victim and the bully psychological profile must be taken into consideration, as the system will be consider the child's best interest as of paramount importance.<sup>56</sup>

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<sup>51</sup> Act No. 75 of 2008.

<sup>52</sup> TA Du Toit, "Cyber Bullying Dilemma: A case for Ubuntu South Africa " (2019) 17 - 18

<sup>53</sup> A Laas and T Boezart, "The Legislative Framework Regarding Bullying in South African Schools" in PER (2014) Vol. 17 No 6.

<sup>54</sup> TA Du Toit, "Cyber Bullying Dilemma: A case for Ubuntu South Africa – " (2019) 17 - 18

<sup>55</sup> Ibid 19

<sup>56</sup> Ibid

Section 78(1) of the CPA provides for the test for criminal capacity where the Courts has to ascertain whether at the time of the child committing the crime, the child had the necessary mental capacity to know that his/her actions were wrong and if the child acted with the appreciation that his/her actions are wrong and can be punished for same.<sup>57</sup> It was stated in the case of *S v Dyk*<sup>58</sup> that it is doubtful that a child of 11 years of age will have the necessary mental capacity to appreciate wrongdoing. The Child Justice Act provides that children up to 10 years of age lack criminal capacity, children from 10 years up to 14 years of age have criminal capacity, but onus rests on the State to prove beyond reasonable doubt that the child had criminal capacity when committing the crime, and children above 14 years of age are regarded by law to have the mental ability to distinguish between right and wrong and appreciate the consequences of their actions.<sup>59</sup>

Furthermore, Section 8 of the Child Justice Act deals with diversion, wherein the aim of diversion is *to deal with the child offenders outside the formal criminal justice system; to encourage accountability, taking into account the needs of the specific child; facilitate reintegration within the family and society, give an opportunity to the victim to give an impact statement, consider compensation, reconciliation, prevention, stigmatization and secondary victimisation and reduce the risk of re-offending, and promote the dignity and well-being of the child offender.* In South African common law, the prosecutor is *dominus litis* and has discretion with regards to prosecution, therefore such diversion rests in the prosecutors' discretion.<sup>60</sup>

## **8. Question 8 – Can minors be punished for purely online behaviour with a sexual intent when other minors are victim?**

The notion of age when it comes to criminal capacity relates to the age when a child has the mental capacity to distinguish between right and wrong and can appreciate the consequences of the actions and act in line with such appreciation, which will render them liable for prosecution.<sup>61</sup>

Wherein the minimum age of criminal capacity is the lowest age at which a State or the international community is willing to hold a child liable for their criminal acts in the court of law. Furthermore the Child Justice Act provides for intervention which are civil law measures of welfare, educational or non-punitive measures for children below the minimum age of criminal capacity who commit criminal acts, rather than criminal sanctions.

Prior to the Child Justice Act the age of criminal capacity in South Africa was regulated by the Common Law, wherein a child below the age of 7 years of age was irrebutably presumed to be lacking criminal capacity (*doli incapax*) and a child between the ages 7 and 14 years were rebuttably presumed to be *doli incapax* and a child older than 14 years was regarded as having full criminal capacity.<sup>62</sup>

The current legislation has raised the minimum age of criminal capacity to 10 years of age, meaning in terms of Section 7(1) of the Child Justice Act a child below the age 10 years could not be prosecuted. Furthermore in Section 7(2) of the Child Justice Act a child older than 10 years of age but under 14 years is presumed to not have criminal capacity unless it is proven beyond reasonable doubt that the

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<sup>57</sup> Ibid

<sup>58</sup> *S v Dyk* 1969 (1) SA 601 (C) at par 603 C-E

<sup>59</sup> Law 4 All "Criminal Capacity of Children in South Africa" 2019

<sup>60</sup> TA Du Toit, "Cyber Bullying Dilemma: A case for Ubuntu South Africa – " (2019) 19

<sup>61</sup> J. Gallinetti "Getting to know the Child Justice Act" (2009) 17

<sup>62</sup> Ibid 18

child had such capacity at the time of the alleged crime, but children over the age of 14 years continue to have full criminal capacity, however the presumptions of *doli capax* and *doli incapax* are retained.<sup>63</sup>

The reasoning behind this can be found in the Commission's Report on Juvenile Justice where it is stated that the presumptions create a "protective mantle" for children of specified ages children's level of maturity and development differs, and allows for flexibility and protection for children between the ages 10 years and 14 years with different emotional and intellectual understanding.<sup>64</sup>

Further protection is provided for in Section 10, wherein a prosecutor can only prosecute a child if he / she considers various factors such as the nature and seriousness of the alleged offence. The child's educational level, cognitive ability, environmental and domestic circumstances as well as the age and maturity of the child, the impact of the alleged offence, the assessment report of the probation officer, public interest, the appropriateness of diversion, the prospects of establishing criminal capacity, and any other relevant factors.<sup>65</sup>

Section 11 of the Child Justice Acts states that Criminal Capacity must be proved beyond reasonable doubt. This will require the Inquiry Magistrate or Child Justice Court to decide as to whether criminal capacity has been proven or not. In considering the criminal capacity of a child the Court must refer to the report of Probation Officer and any other information that may be material which may include a psychological evaluation in terms of Section 11(3) of the Child Justice Act. In order to prove the Criminal Capacity of a child the state must prove beyond reasonable doubt that at the time of the commission of the alleged crime the child had the capacity firstly, to appreciate the difference between right and wrong and secondly, to act in accordance with that appreciation.<sup>66</sup> In broad terms this test is in line with the general test to determine criminal capacity set out above. The first part of the test contains the cognitive element and the second the conative element.<sup>67</sup>

Section 9 of the Child Justice Act also now sets the minimum age for a child to be prosecuted to the age of 10 (ten). Children who have not yet completed their ninth year, in other words who have not yet reached their tenth birthday, are irrebuttably presumed to lack criminal capacity.<sup>68</sup> They can therefore never be convicted of any crime because of any act or omission on their part before they have reached their tenth birthday. This means a suspect under the age of 10 may not be arrested by the police. Instead, a probation officer must be roped in to deal with a child who has committed a criminal offence.

The probation officer must then take steps as envisaged by Section 9(3)(a) of the Child Justice Act and refer the child to the children's court, counselling or therapy, an accredited programme or decide that no action must be taken at all.<sup>69</sup>

With regards to sentencing the Court must consider a Pre-Sentence report in terms of Section 71(1)(a) of the Child Justice Act by a probation officer. The Court may impose Correctional Supervision in terms of Section 276 (1)(h) or (i) of the CPA for a child younger and older than 14 (fourteen). A child of younger than 14 (fourteen) years may not be subjected to imprisonment. The Court may also in terms of Section 69(3) of the Child Justice Act.<sup>70</sup>

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<sup>63</sup> Ibid 18

<sup>64</sup> Ibid 18 - 19

<sup>65</sup> Ibid 18 - 19

<sup>66</sup> CR Snyman, *Criminal Law*, 6th Ed. (2014), 174

<sup>67</sup> Ibid

<sup>68</sup> Ibid 173

<sup>69</sup> J. Gallinetti "Getting to know the Child Justice Act" (2009) 20

<sup>70</sup> Ibid 54.

**8. Question 9 – Can minors be punished for Cyberbullying ( cyberstalking/ Cyber harassment**

The Answer contained in Question 2 also applies here.

As discussed in the answer for Question 6, Question 7 and Question 8 above there are rules regarding prosecution of minors depending on their age .

Interestingly a Child-Bully under the age of 10 (ten) cannot be prosecuted in terms of the Child Justice Act but in terms of the Protection from Harassment Act a protection order can be issued against him or her irrespective of Age. Du Toit is of the view that a Protection Order under the Harassment Act is an immediate form of relief to prevent the bully from continuing his or her disruptive and abusive behaviour.<sup>71</sup>

In terms of Section 3 (2) of the Harassment Act a Child Respondent may be served with an interim protection order even in his or her and without notice. This means if the Child contravenes same it may be followed by arrest for contempt of Court . This may be the case in a Child between the Age of 10 (ten) to 14 (fourteen) if the Court is convinced about the Child’s criminal Capacity as discussed previously . In the event of a Child over the age of 14 (fourteen) the position would be different.

**9. Question 10 – Can minors be punished for Misinformation and Deception**

The legal position as per the answer in Question 3 applies.

The legal position is also subject to the Rules pertaining to prosecution of Children (minors) as per the Answer in Question 6, Question 7 and Question 8 above.

**10. Question 11 – Can minors be punished for facilitating Human Trafficking**

Human Trafficking is outlawed by Section 4(1) PCTP which defines “trafficking in persons,” or “human trafficking”, as any person who delivers, recruits, transports, transfers, harbors, sells, exchanges, leases or receives another person within or across the borders of the Republic. The said Trafficking can be the abuse of vulnerability, fraud, deception, abduction, kidnapping, the abuse of power, the direct or indirect. Section 4(2) of the PCTP also outlaws facilitating same or securing legal or illegal means or the exploitation of a child or any other person in any manner.

In addition the legal position on Grooming as per the answer in Question 1 applies here as well.

The legal position is also subject to the Rules pertaining to prosecution of Children (minors) as per the Answer in Question 6, Question 7 and Question 8 above.

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<sup>71</sup> TA Du Toit, “Cyber Bullying Dilemma: A case for Ubuntu South Africa – ” (2019) 19

## **11. Question 12 – Can minors be punished for acts of Online Piracy**

The sale and/or making available of illegal copies of movies or music online (in formats such as mpeg4, Divx, mov, mp3, wav, mwa etc) an individual may be in contravention of the Copyright Act in terms of which Section 27 of the Copyright Act <sup>72</sup> prohibits the unlawful copying,

In terms of Section 27 (1) Copyright Act any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright makes for sale or hire, sells or lets for hire or by way of trade offers or exposes for sale or hire and distributes for purposes of trade; or distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected shall be guilty of a Criminal offence

Section 27 (4) of the Copyright Act goes further and states that any person who causes a broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright, shall be guilty of an offence

Section 27 (6) of the Copyright Act states that any person convicted of an offence under Section 27 of the Copyright Act in the case of a first conviction will be liable to a fine not exceeding R 5000.000 (five thousand rand) or to imprisonment for a period not exceeding 3(three) years or to both such fine and such imprisonment and in any other case, to a fine not exceeding R 10 000.00 (ten thousand rand) or to imprisonment for a period not exceeding 5 (five) years or to both such fine and such imprisonment, for each article to which the offence relates. The provisions of the Counterfeit Goods Act may also be applied where the sale of such counterfeit goods (in this context 'goods' is the illegal copy of a movie or song) was concluded online.

The legal position is also subject to the Rules pertaining to prosecution of Children (minors) as per the Answer in Question 6, Question 7 and Question 8 above

## **12. Question 13 – Can minors be punished for Online Hacking**

Section 2 of the CCA makes provision for the unlawful securing of access in respect of a computer system or a computer storage medium. This section regulates that any person who unlawfully and intentionally secures access to data, a computer programmer, a computer data storage medium or, a computer system is guilty of an offence. Section 11 of the CCA provides for aggravated offences and maps out clearly that its application extends to Sections 3(1), 5(1), 6(1) or 7(1) insofar as the passwords, access codes or similar data and devices are concerned. These are offences against Restricted computer systems which would include banks and any organ of the state and the Courts and any organisation of the state that specifically has security measures in place

Since the CCA is still in its infancy since it entered into force on the 1<sup>st</sup> Dec 2002.

The cases that follow were prosecuted in terms of the old ECT Cyber Crime provisions.

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<sup>72</sup> Act 98 of 79

In the case of *Fourie v Van der Spuy and De Jongh Inc. and Others*,<sup>73</sup> the court considered a dispute involving the hacking of emails of innocent individuals and subsequent payments made to hackers who remained unknown. In the case of *R v Douvenga*<sup>74</sup> the court had to decide whether an accused employee GM Douvenga of Rentmeester Assurance Limited (Rentmeester) was guilty of a contravention of section 86(1) (read with sections 1, 51 and 85) of the ECT Act. It was alleged in this case that the accused, on or about 21 January 2003, in or near Pretoria and in the district of the Northern Transvaal, intentionally and without permission to do so, gained entry to data which she knew was contained in confidential databases and/or contravened the provision by sending this data per e-mail to her fiancée (as he then was) to ‘hou’ (keep). The accused was found guilty of contravening section 86(1) of the ECT Act and sentenced to a R1 000 fine or imprisonment for a period of three months. It follows that the crime commonly known as ‘hacking’ was entrenched in our law in section 86(1) of the ECT Act which makes any unlawful access and interception of data a criminal offence.

Section 19 of the CCA sets out the appropriate sentences to be imposed by the courts in the event where a person is found guilty of having contravened the provisions of the CCA save for Section 7, 8 and 9 of the CCA. Section 19(1) provides that a contravention of sections 2(1) or (2), 3(3) or 7(2) renders a person liable on conviction to a fine or to imprisonment for a period not exceeding 5 (five) years, or to both a fine and such imprisonment. Section 19(2) of the CCA provides that any person who contravenes the provisions of sections 3(1) or (2), 4(1), 5(1), 6(1) or 7(1) is liable on conviction to a fine or to imprisonment for a period not exceeding 10 (ten) years or to both a fine and such imprisonment.

Section 19(3) of the CCA provides that any person who contravenes the provisions of section 11(1) is liable on conviction to a fine or to imprisonment for a period not exceeding 15 (fifteen) years or to both a fine and such imprisonment.

The legal position is also subject to the Rules pertaining to prosecution of Children (minors) as per the Answer in Question 6, Question 7 and Question 8 above

### **13. Question 14 – Cross Boarder effect of Cyber Crime and Extra-Territorial Application of the CCA**

Section 24 of the CCA provides for extra-territorial jurisdiction and universal jurisdiction to deal with the borderless nature of cyber crimes.<sup>75</sup>

Section 46 of the CCA provides that sections 48 to 51 of the Act apply in addition to the International Co-operation in Criminal Matters Act.<sup>76</sup> Section 47 of the CCA provides that the National Commissioner or the National Head of the Directorate may provide co-operation to a foreign law enforcement agency.<sup>77</sup> Section 48 relates to foreign requests for assistance and co-operation.

Section 50 of the CCA provides that the National Director of Public Prosecutions (NDPP) must inform the designated judge or applicable authority in a foreign State of the outcome of the request for assistance and co-operation.<sup>78</sup> Section 51 provides for the issuing of a Direction requesting assistance from a foreign State.<sup>79</sup>

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<sup>73</sup> *Fourie v Van der Spuy and De Jongh Inc. and Others* (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP).

<sup>74</sup> District Court of the Northern Transvaal, Pretoria, unreported case no 111/150/2003 (19 August 2003)

<sup>75</sup> S Papadopoulos and S Snail, Watney ch 13 in *Cybercrime – Cyberlaw @ SA IV Van Schaick* (2021) 486

<sup>76</sup> International Co-operation in Criminal Matters Act 75 of 1996.

<sup>77</sup> Section 47(1).

<sup>78</sup> Section 50(1)

<sup>79</sup> Section 51(1)

## 14. Question 15 – What International Treaties apply to South Africa on Cyber Crime

### 14.1 Union Malabo Convention on Cyber Security and Data Protection (AU)

The African Union and other African Regional bodies have developed Conventions and Model laws on Cyber Crime and Cyber Security as well as Data Protection legislation based on the Continent's needs to regulate electronic communications, Cyber Criminality, Cyber Security as well personal Data Protection.

The African Union Convention on the Establishment of a Credible Legal Framework for Cyber Security in Africa (AUCCSPDP) is an African legal framework that has been created following the 14<sup>th</sup> AU 2010 summit which explored the theme 'Information and communication technologies in Africa: Challenges and prospect for development' [Assembly/AU/11(XIV)], Addis Ababa, Ethiopia, 31 January 2010 - 2 February 2010) (U J Orji , 2012 375) and this was subsequently confirmed by the 'Abuja Declaration', CITMC-3 ([AU/CITMC/MIN/Decl.(III)], Abuja (Nigeria), 03-07August 2010 "The AU Draft Convention on Cyber Security and e-transactions: Cooperation against Cyber crime") and brought into law by the African Union in June 2014 namely The African Union Convention on Cyber Security and Personal Data Protection (AUCCSPDP) also known as the "Malabo Convention" (African Union Convention on Cyber Security and Personal Data Protection).

The AUCCSPDP gives effect to a Resolution of the last session of the Assembly of Heads of State of in the Laws of the African Union, and seeks to harmonize African cyber legislations on e-commerce, personal Data Protection, Cyber Security promotion and Cyber-Crime control. It is, however, clear that its focus is more on cyber-security and cyber-crimes than provisions on enablement and regulation of e-commerce in Africa. The salient domestication provision relating to Cyber Crimes and Cyber Security states that each State Party is to,

*"... adopt the strategies they deem appropriate and adequate to implement the national cyber security policy, particularly in the area of legislative reform and development, sensitization and capacity-building, public-private partnership, and international cooperation among other things."*<sup>80</sup>

Furthermore, the Convention specifically calls for legislation against cybercrime by stating the following:

*"Each State Party shall adopt such legislative and/or regulatory measures as it deems effective by considering as substantive criminal offences acts which affect the confidentiality, integrity, availability and survival of information and communication technology systems, the data they process and the underlying network infrastructure, as well as effective procedural measures to pursue and prosecute offenders. State parties shall take into consideration the choice of language that is used in international best practices."*<sup>81</sup>

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<sup>80</sup> Article 24(1)

<sup>81</sup> Article 25(1)

Furthermore, also in relation to the harmonization of domestic Cyber Crime regulation, the Convention states that,

*“Each Member State shall ensure that the legislative measures adopted in respect of substantive and procedural provisions on Cyber Crime reflect international best practices and integrate the minimum standards contained in extant legislations in the region ...` to enhance the possibility of regional harmonization of the said legal measures.”*

The Convention initially drew some important differences and proposed amendment to existing law with regards to attacks on computer systems, procedural law, attacks on computerized data, content related offenses, proposes adapting certain sanctions to the information and communication technologies, offenses relating to electronic message security measures, offenses specific to information and communication technologies and proposes adapting certain information and communication technologies offenses.<sup>82</sup>

The Convention provides for National Cyber Security monitoring structures by *inter alia* stating that,

*“Each State Party shall adopt the necessary measures to establish an appropriate institutional mechanism responsible for cyber security governance ...”*<sup>83</sup>

The Convention further obligates African states to adopt strategies and increase capacity building, protect Essential Information Infrastructure and the adoption of strategies and increase capacity building in all African states.<sup>84</sup>

#### **14.2. The Lome Declaration on Cyber Security 2022 (LOME)**

The Lome Declaration, a policy declaration that commits, among other things, to build a specific legislative and regulatory framework and increase Africa's Cyber Security cooperation, is one of the methods put forward to strengthen Cyber Security in Africa.

The Lome Declaration was signed in a bid to establish and ensure the effective implementation of a legal and regulatory framework relative to Cyber Security and the fight against cybercrime and the regulatory bodies that will build the trust of investors and allow the adoption of the activities and services of digital activities by users (Article 2) and more broadly to accelerate the digital transformation.

The Declaration establishes a framework to efficiently fight against cybercrime and promote a Cyber Security culture,<sup>85</sup> including: the creation and the operationalization of the authorities, agencies and teams dedicated to fight against cybercrime and, if necessary, the reinforcement of their human, technical and organizational needs<sup>86</sup>, the creation of a governance structure allowing the consultation of experts from different fields (diplomacy, military, legal, university, civil society etc.) on Cyber Security and fight against cybercrime matters<sup>87</sup>, The creation of teams dedicated to the census and coordination of Cyber

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<sup>82</sup> S Matanzima & S Snail ka Mtuze, S (2014) “Cyber security in Africa - A Cyber Law framework”

<sup>83</sup> Article 27

<sup>84</sup> Article 24(1)

<sup>85</sup> Article 4

<sup>86</sup> Article 4(a)

<sup>87</sup> Article 4 (b)

Lastly, the Lome Declaration serves to reinforce African cooperation on the topic of Cyber Security and on the fight against cybercrime<sup>88</sup> by Encouraging the signing and ratification of the African Union Convention on Cyber Security and Personal Data Protection of 2014 by each and every African States<sup>89</sup>, Promoting to the other members of the African Union the creation of an organ to foster continental cooperation and mutual aid in the matter of Cyber Security and on the fight against cybercrime<sup>90</sup>, Promoting to the regions the creation of a body for regional cooperation and mutual assistance in matters of Cyber Security and fight against cybercrime<sup>91</sup>, Multiplying the regional and international initiatives allowing the authorities and agencies of the Cyber Security sector to reinforce their capacities thanks to trainings and the sharing of their respective experiences<sup>92</sup>and Support African cyber diplomacy efforts to promote regional and international cooperation and commit in setting norm at the international level.<sup>93</sup>

### 14.3 The Budapest Convention - Cyber Crime Convention

Section 233 of the Constitution of the Republic of South Africa<sup>94</sup>(hereafter “The Constitution”) states that:

*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*

South Africa is a signatory to the Budapest Convention - Cyber Crime Convention which it signed on the 23 November 2011, but it has not signed the latest protocols. It is important to note that the South African Cyber Crimes Act<sup>95</sup> follows the tune of the European Convention.

### 14.3 The United Nations Convention against Transnational Organised Crime and the Protocols

South Africa is signatory to the United Nations Convention against Transnational Organised Crime and the Protocols which it signed on the 14<sup>th</sup> December 2000 and Ratified same on the 20<sup>th</sup> February 2004.<sup>96</sup>

The purpose of this United Nations Convention<sup>97</sup> ( hereafter “UNTOCP”) is to combat crimes across borders as well as, amongst many others, Prevent, Suppress and Punish Trafficking in persons, especially Women and Children this is to ensure that there are not only international instruments are in place, but also universal instruments to combat exploitations / trafficking of persons especially women and children.<sup>98</sup>

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<sup>88</sup> Article 5

<sup>89</sup> Article 5 (a)

<sup>90</sup> Article 5(b)

<sup>91</sup> Article 5(c)

<sup>92</sup> Article 5(d)

<sup>93</sup> Article 5(e)

<sup>94</sup> The Constitution of the Republic of South Africa, 1996

<sup>95</sup> Cyber Crimes Act 19 of 2020

<sup>96</sup> General Assembly Resolution 55/25 *United Nations Convention Against Transnational Organised Crime and the Protocol Thereto*, 2002

<sup>97</sup>Ibid

<sup>98</sup> Ibid

Article 4 of the Protocol to Prevent, Suppress and Punish trafficking in persons especially Women and Children (hereafter “The Protocol”) states that this Protocol shall apply to the prevention, investigation and prosecution of the transnational and organised group offences established in accordance with Article 5 which states that each State Party shall adopt such legislative and other necessary measures to establish a criminal offence.<sup>99</sup>

Article 6 of the Protocol provides that each State Party shall, under its domestic law, protect the privacy and identity of the victims of trafficking by making any legal proceedings to such matters confidential. Each State Party must further ensure that the victims of trafficking are provided with the relevant information to the cases relating to the legal and administrative proceedings.<sup>100</sup>

**14. Question 15 – What Agreements does South Africa have on international co-operation on Cyber Crime**

**15. Question 16 - How do Rules ( National and International) affect Cyber Crime by Minors**

**16. Question 17 – Cyber Crime Statistics and Recent Policy with emphasis on Minors**

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<sup>99</sup> Ibid 41.

<sup>100</sup> Ibid 47

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