

THE *SEXUAL OFFENCES ACT* AND THE “KISSING” CONTROVERSY

1 Introduction

1.1 Is the direct or indirect contact between the mouth of one person and the mouth of another person a criminal offence? Yes – according to the interpretation of a section of the *Sexual Offences Act* by South African newspapers. This is not the first time that South African newspapers have missed the point.

1.2 Why does the Act use the expression “the mouth of one person and....the mouth of another person” and not the simple expression used by newspapers – “kissing”? Obviously because Government never intended to make “kissing”, as an expression of mutual love or affection or friendship or greeting, a criminal offence. “Kissing” as an expression of a mutual display of love, affection or friendship, whether mouth-to-mouth or mouth-to-forehead or mouth-to-cheek, is not what the Act criminalises. However, “mouth-to-mouth” contact, or kissing, in situations where the qualifier “mutual” would not apply, such as situations involving a child or a mentally-challenged person or where there is a threat of force or some other form of coercion, is an entirely different matter and is what the Act is all about.

2 The *Sexual Offences Act*

2.1 The “mouth-to-mouth” reference is part of the **definition** of *sexual violation* and not part of any offence provisions. The “mouth-to-mouth” offence must therefore be understood within the context of sexual violation – the offence is **sexual violation** and not “kissing”. What is “sexual violation” in the context of the *Sexual Offences Act*?

2.2 Section 2 of the *Sexual Offences Act* (Act) sets out, as one of its objectives, the criminalisation of all forms of sexual abuse or exploitation.¹ The Act is therefore concerned with sexual abuse and exploitation, which includes “mouth-to-mouth” contact where, in all the circumstances, such an act amounts to sexual abuse or sexual exploitation.

Sexual abuse is an assault within any of the definitions of the sexual offences in the Act which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether or not any “mouth-to-mouth” contact is an act of a sexual nature that violates – infringes, abuses, contravenes, ravages, desecrates, harms or damages – the sexual integrity of one of the complainant, must be an objective one. Do the circumstances of the act bring it within the definition of what is commonly understood to be an act of a sexual nature? The situation in which the act occurred, the words and gestures accompanying the act, the intent of the person committing the act (to the extent that this may appear from the evidence), evidence of threats which may or may not be accompanied by force and all other circumstances surrounding the act, are factors which must be taken into account in determining not only whether or not that “mouth-to-mouth” contact is of a sexual nature but that it also constitutes the offence of sexual abuse or assault.

¹ Section 2(b) of the Act

2.3 The fact that the act might be, in the light of all the circumstances, an act of a sexual nature does not mean that it is, therefore, an act of sexual abuse or assault within the definition of the sexual offences in the Act. The offence of sexual assault in section 5(1) of the Act, for instance, is committed when one person, *unlawfully and intentionally sexually violates² a complainant, without consent*. There must be a *complainant*, and the conduct complained of must be *unlawful, non-consensual* and of a *sexual nature*. The conduct would be of a sexual nature where the act, for instance, was committed for the sexual gratification of the person complained against. However, consent is irrelevant where a child is involved. Any “mouth-to-mouth” contact with a child, with or without the consent of the child, in circumstances where such conduct is sexual in nature, would amount to sexual abuse or sexual exploitation and would constitute the offence of the sexual violation of a child.³

3 “Kissing” is not an expression used in the Act. And “mouth-to-mouth” contact as a *mutual* expression of love or affection or friendship or greeting is, except where a child is involved and the act is sexual in nature, neither sexual abuse nor exploitation.

² Note – “*sexually violates*” and not “kisses”

³ Section 16(1) of the Act