

**THE CHILD'S RIGHT AGAINST EXPLOITATION IN
THE FORM OF PORNOGRAPHY ON THE
INTERNET:
A SOUTH AFRICAN PERSPECTIVE**

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature:

Date:

SUMMARY

With the arrival of the Internet, the availability of pornography, and especially child pornography, has increased tremendously. This rapidly developing technological wonderworld has brought the dark syndicate of sexual exploitation of children to the living room of each home equipped with a computer.

In South Africa the right of the child to not be sexually exploited or abused is enshrined in section 28 of the Constitution, 108 of 1996, as well as in several international documents. This thesis analyses the legislative framework in this regard and comes to the conclusion that South African legislation concerned shows much room for improvement. Legislation concerning sexual offences against children makes use of archaic terms that are outdated in the present context. It is also vague, inconsistent and provides insufficient protection to children in this regard. The sexual exploitation of children does not, despite promises made by the South African government in ratifying several international documents, receive high priority in the South African community.

This finding is made in view of the examination of certain key concepts to the subject, international documents such as the United Nations Convention to the Rights of the Child, 1989, and the activities of international organisations combating the sexual exploitation of the child. An analysis of the manner in which countries such as the United States of America, Canada, the United Kingdom, Germany and Japan has implemented protection measures against this form of abuse, is also made. Proposals to increase the protection of children in South Africa are submitted in conclusion.

Although this new domain needs urgent measures of regulation, it is not an impossible task to govern the Internet. Formulating comprehensive, consistent and effective legislation is a fundamental part in the battle against the sexual exploitation of children. The co-operation of all relevant sectors, including the

government, the Internet industry and members of the community, however, remains essential.

OPSOMMING

Die beskikbaarheid van pornografie, en veral kinderpornografie, het met die koms van die Internet onrusbarend toegeneem. Hierdie vinnig ontwikkelende tegnologiese wonderwêreld het die seksuele eksploitasie van kinders vanuit die donker onderwêreld na die voorkamer van elke huis met 'n rekenaar gebring.

In Suid-Afrika word die reg van die kind om teen seksuele uitbuiting en mishandeling beskerm te word in artikel 28 van die Grondwet, 108 van 1996, asook verskeie internasionale dokumente verskans. Hierdie tesis ondersoek die wetgewende raamwerk rakende die groeiende probleem van seksuele eksploitasie op die Internet en vind dat Suid-Afrikaanse wetgewing in hierdie verband nog ver te kort skiet. Wetgewing met betrekking tot seksuele misdade teen kinders maak tans gebruik van argaïse terme wat glad nie meer in vandag se konteks relevant is nie. Dit is voorts ook onsamehangend, onduidelik en verskaf onvoeldoende beskerming aan kinders in hierdie verband. Ten spyte van beloftes deur die Suid-Afrikaanse regering, gemaak tydens die ratifisering van verskeie internasionale dokumente, geniet die aangeleentheid van beskerming van die kind teen seksuele uitbuiting op die Internet nog nie prioriteit in die Suid-Afrikaanse samelewing nie.

Hierdie bevinding word gemaak in die lig van die bestudering van definisies van sekere kernbegrippe, internasionale dokumente soos die Verenigde Nasies se Konvensie van die Regte van die Kind, 1989, en die werksaamhede van internasionale organisasies bemoeid met die bekamping van seksuele eksploitasie van die kind. Daar word ook veral aandag gegee aan die wyse waarop lande soos die Verenigde State van Amerika, Kanada, die Verenigde Koninkryk, Duitsland en Japan te werk gegaan het om kinders in dié onderskeie lande te beskerm. Voorstelle ten einde die beskerming van Suid-Afrikaanse kinders teen seksuele eksploitasie op die Internet te verbreed, word ter konklusie gegee.

Alhoewel dié nuwe terrein dringend regulering benodig, is dit nie 'n totaal onmoontlike taak om die Internet te kontroleer nie. Die formulering van omvattende, eenvormige en effektiewe wetgewing in dié verband is 'n fundamentele proses in die stryd om kinders te beskerm. Die samewerking van relevante rolspelers en veral die regering, die Internet sektor en lede van die gemeenskap is egter van uiterste belang.

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Thank you, Mama, for your love, support and raising such a beautiful "ingelink". If only all children could be as fortunate and happy as I am.

Dear Mimi, thank you for always believing in me, even if I did not. Thank you for all your love and care and for all the good information of the United Kingdom. And yes, even though I was never only help you still, the way with it. Thank

"Youth is the turning point in life, the most sensitive and volatile period, the state that registers most vividly the impressions and experiences of life."

**RICHARD WRIGHT (1908 – 1960)
AMERICAN WRITER**

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CHAPTER 1

INTRODUCTION

1 1 INTRODUCTION AND AIM

In 1995 South Africa joined 190 countries in the acknowledgement of children's rights by ratifying the United Nations Convention on the Rights of the Child¹. Upon ratification, Member States committed themselves to respect these rights, placing themselves under the obligation to implement legislation to further the aim of the Convention. South Africa has accordingly promised to protect the child from all forms of sexual exploitation and sexual abuse and in particular to take all appropriate national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials.²

The increase in the incidence of child pornography on the Internet has become a cause for serious concern on a global level. The international media reported in 2000 and 2001 on the arrests of thousands of users of child pornography on the Internet, which has placed governments under pressure to improve national legislation to combat this growing problem. Since South Africa has not been excluded from this new form of sexual abuse, it is important to critically review its legislation in this respect. The aim of this research is therefore to analyse South African legislation with regard to the sexual exploitation of the child in the form of pornography on the Internet, and to offer some practical suggestions to increase the protection of the child in this regard.

1 2 RATIONALE

In a study in the United Kingdom conducted by Baker and Duncan in 1985³, 10% of the respondents answered that they had experienced sexual abuse

¹ 1989. Hereafter the CRC

² A 34 of the CRC

³ Freeman *The Moral Status of Children: Essays on the Rights of the Child* (1997) 265

before the age of sixteen. If these results can be generalised, it would mean that four and a half million adults in Great Britain were sexually abused as children.⁴ The average age of children being abused is between eight months and nine years.⁵ The American National Center on Child Abuse and Neglect confirms the extent of the problem, reporting that 60 000 to 100 000 children are being sexually abused in the United States every year and that 40 million citizens of the United States are abused at some time or other during their lives.⁶ It is significant that 23% of the respondents in the United Kingdom study refused to answer the question. This refusal may reflect on the reluctance of people to talk about the subject, even today.

It is estimated that 14 000 children were raped in South Africa during the first eleven months of 1998.⁷ In the same year, according to information released by the Child Protection Unit in September 1999, 37 352 crimes were reported against children under the age of 18. Of these, 3 451 were cases of indecent assault and 3 584 of indecent assault causing serious injuries.⁸

Although pornography can be created artificially, more often than not it is irrefutable evidence that child abuse has occurred.⁹ According to a study by US customs, 80% of all users of child pornography are also child abusers.¹⁰ It has also been shown that child pornography is inextricably linked with the prostitution and sex trafficking of children. Itzin¹¹ therefore warns that to conceptualise paedophilia as a separate category from incest, organised abuse, pornography and prostitution, ignores the fact that the perpetrator can appear in some or all categories.

While traditionally the term "pornography" has referred to sexually explicit images in publications such as books, magazines and films, it has recently

⁴ Freeman *The Moral Status of Children* 265

⁵ Le Roux "Kindermishandeling, die seksueel-mishandelde kind en getuienisaflegging" 2000 *Stell LR* 483

⁶ Le Roux 2000 *Stell LR* 482

⁷ Le Roux 2000 *Stell LR* 483

⁸ Le Roux 2000 *Stell LR* 483

⁹ "The Regulation of Pornography and Child Pornography on the Internet" *The Journal of Information, Law and Technology (JILT)* Available at http://elj.warwick.ac.uk/jilt/internet/97_1akdz/akdeniz.htm#1 01/06/01

¹⁰ Barnes, Brown, Mayne, Kowen, Dyason *Child Victims of Prostitution in the Western Cape* (2000) 34

¹¹ In Barnes et al *Child Victims* 32

found a new pervasive but also secret home in cyberspace. Ever since it was introduced, the Internet has made communication instant and information easily accessible, which has changed people's lives profoundly. Without much effort, it is now possible to read almost any publication or watch the latest film releases in the comfort of one's own home. The Internet has become a new model of interactive communication, which allows each user to become a supplier.¹² As the Internet has become a means of education and empowerment¹³, children are amongst the main beneficiaries of this technological development.

Unfortunately some of the advantages of the World Wide Web, such as anonymity, privacy and global access, have also introduced serious risks and dangers to its users. In fact, it has created several new crimes.¹⁴ A crime that has gained momentum since the development of the Internet is the sexual exploitation of children. Paedophiles now have instant access to one another¹⁵ and can meet children in so-called chat rooms on the net. According to an Interpol fact sheet¹⁶, there are roughly 100 million Internet users, one million of whom are from Africa and over 700 000 from South Africa. Carr¹⁷ estimates that there are 80 000 pornographic sites on the World Wide Web, to which at least 200 new sites are introduced daily. More alarming, however, is the fact that seventy percent of the top thirty popular web sites contain pornography.¹⁸ The Internet Watch Foundation¹⁹ announced that during 1999 they reported 434 items with illegal content to law enforcement agencies and 10 189 items to Internet Service Providers recommending removal from their services.²⁰ The Internet does not respect national boundaries. It has no central organisation and little possibility of being monitored. All these factors

¹² "Protecting Children online" Available at <http://www.ecpat/childpornbook/childporn.html> 23/02/01

¹³ Maree and Van Der Merwe "Exposure to Child Pornography on the Internet" 1999 *Acta Criminologica* 59 59

¹⁴ Such crimes include that of hacking, distributing viruses or hate e-mail and Internet fraud. See also <http://www.techtv.com/cybercrime> for more on computer crimes.

¹⁵ Maree and Van der Merwe 1999 *Acta Criminologica* 61

¹⁶ "Fact sheets" Available at <http://www.ecpat.net/Childporn/facts.htm> 19/01/01

¹⁷ Maree and Van der Merwe 1999 *Acta Criminologica* 61

¹⁸ Barnes et al *Child Victims* 35

¹⁹ Of the United Kingdom, hereafter IWF

²⁰ <http://www.internetwatch.org.uk/hotline/stat/stat.htm> 23/05/01

contribute to the increasing popularity of the Internet amongst child sex abusers, pornographers and paedophiles.²¹

On 14 February 2001, seven men were sentenced in the United Kingdom for their involvement in the "W0nderland-club".²² The seven men were part of a group of 107 people arrested by police in a swoop that spanned 12 countries across the globe.²³ This club is an Internet sex-ring, for which the "admission fee" is 10 000 sexually explicit images of children per new member.²⁴ During the raid, 750 000 images depicting the sexual abuse of children were confiscated.²⁵ Jane Corbin, a journalist for the BBC, reported during the program that she produced for BBC's "Panorama"²⁶:

"For two years now we've been piecing together the inside story of the W0nderland Club through the unique access that we've had to the worldwide police operation to track down the members of the club. I've had to look at many of the images of children they collected. They are just too explicit, too distressing to show in their original state. These images present disturbing evidence of the extensive but secret world of paedophiles on the Internet."

The sentences passed on the seven men ranged from twelve to thirty months imprisonment.²⁷

On the 27th of March 2001 police from Manchester arrested 33 people suspected of distributing paedophilic material on the Internet, during Operation Appal. One of the suspects was a 13 year old boy caught with over

²¹ "Child Pornography on the Internet" Available at <http://www.ecpat.net/Childporn/childporn.html> 21/02/01

²² Ward "Tackling online child pornography" Available at http://news.bbc.co.uk/1/hi/english/uk/newsid_1166000/1166135.stm 14/02/01 The "o" was replaced by the number "0" to minimise the chances of detection.

²³ http://news.bbc.co.uk/1/hi/english/uk/newsid_1166000/1166135.stm 14/02/01

²⁴ Coetzee "Brittanje woedend oor ligte straf vir pedofiele" *Die Burger* (15/02/01) 10

²⁵ Coetzee *Die Burger* (15/02/01) 10

²⁶ Television program shown on BBC 2 on 14 February 2001, transcript available at http://news.bbc.co.uk/1/hi/english/static/audio_video/programmes/panorama/transcripts/transcript_11_02_01.txt 14/02/01

²⁷ http://news.bbc.co.uk/1/hi/english/uk/newsid_1169000/1169457.stm 14/02/01

300 images of child pornography on his computer.²⁸ His name was put on a sex offenders list in the UK for two and a half years.²⁹

On the 22 of December 2000, Russian police arrested 2 suspects accused of selling child pornography on the Internet in Europe and the United States of America. Police seized 588 video cassettes, 112 video discs and more than 1000 pornographic photographs.³⁰ In October of the same year, 1 491 people in Italy were charged with sending or receiving child pornography from a website. A month earlier, police had swooped over 600 homes and arrested 8 people on charges of possessing or trading in child pornography, all of it from Russia. This ring kidnapped children from orphanages and filmed them being forced to have sex, sometimes being raped and tortured to death.³¹

According to the United States Department of Justice, the abuse of 1 million children has been recorded in some form of pornography or another. Child pornography generates between US\$2 billion and US\$3 billion per year,³² while Germany's annual sales of such publications reach beyond US\$250 million, with up to 40 000 consumers.³³ In Asia the child sex industry accounts for US\$2.4 billion per year.³⁴

In July 2000, police seized the computer hard-drive of South African media personality, Leon van Nierop. Van Nierop and Tascoe Luc de Reuck were arrested on charges of possession of child pornography.³⁵ The involvement of other South African well-known personalities, judges and lawyers as members of an international child porn syndicate are still also under investigation.³⁶ On the 4th of July 2001, a 71 year old man, who volunteered as Santa Clause at the Red Cross Children's Hospital, was arrested for allegedly indecently

²⁸ Tender "Boy, 13, arrested in paedophile swoop" Available at <http://www.thetimes.co.uk/article/0,,2-105874,00.html> 16/05/01

²⁹ Wilkinson "Judge says boy's interest in child porn is healthy" Available at <http://www.thetimes.co.uk/article/0,,2-201773,00.html> 16/05/01

³⁰ "Russian childporn-ring uncovered" Available at http://www.sabcnews.com/SABCnews/sci_tech/internet/0,1009,8938,00.html 17/07/01

³¹ http://www.sabcnews.com/SABCnews/sci_tech/internet/0,1009,8938,00.html 17/07/01

³² Barnes et al *Child Victims* 29

³³ Barnes et al *Child Victims* 33

³⁴ Barnes et al *Child Victims* 29

³⁵ "Police say child porn case is a first" Available at <http://www.legalbrief.co.za/secure/archives/ChildpornSA.htm> 23/03/01

³⁶ <http://www.legalbrief.co.za/secure/archives/ChildpornSA.htm> 23/03/01

assaulting young children.³⁷ Thousands of images of sex, violence and bestiality with children, some as young as four years, were found on Alfred James McNeil's computer.³⁸ McNeil had been previously arrested on similar charges in 1991 and underwent therapy until 1994. McNeil testified that to him, his actions were merely games and fun in which no one got hurt or were traumatised. He also said that the actions of some of the children lead him to believe that they wanted sexual contact with him.³⁹

ECPAT⁴⁰ International, a global network of organisations and individuals working together to protect children against commercial sexual exploitation⁴¹, reports that the sexual exploitation of children online primarily involves the following activities:⁴²

- a) The dissemination of photographs and videos of child pornography via websites. A technique called "morphing" is sometimes used whereby new faces of children are "morphed" onto the bodies in other, sometimes older, images of pornography. Recently produced material is often more violent, depicting child torture.⁴³
- b) Online arrangements for the exchange, sale or purchase of child pornography. The actual exchange or delivery would occur through the mail or in hand-to-hand exchanges.
- c) Arrangements between adults seeking sexual access to children and adults willing to provide and/or trade children for sexual purposes. The majority of these arrangements take place in chat rooms, which form an integral part of a number of sex-rings.⁴⁴
- d) Adults seeking sexual contact with children on-line. These "friendships", which normally start in chat rooms in which privacy and anonymity is

³⁷ Coetzee "Kersvader 'kan nie kinders, porno los'" *Die Burger* (06/07/01) 1

³⁸ Coetzee *Die Burger* (06/07/01) 1

³⁹ "Santa told all in magazine" Available at http://www.news24.co.za/contentDisplay/level4Article/0,1113,2-13_01047787,00.html 26/07/01

⁴⁰ End Child Prostitution and Trafficking in Asian Tourism

⁴¹ "Background of ECPAT" Available at <http://www.ecpat.net/ecpat1/whatisep.html> 22/02/01

⁴² <http://www.ecpat.net/Childporn/childporn.html> 16/05/01

⁴³ Barnes et al *Child Victims* 35

⁴⁴ <http://www.ecpat.net/Childporn/childporn.html> 16/05/01

guaranteed, would then lead to face-to-face meetings and ultimately, the sexual exploitation of the child.

- e) The latest form of child pornography is “virtual child pornography”, which does not involve real children but computer-generated pornographic images of children. The technology of body suits with fibre-optic sensors allows a person to sensually interact with his computer. The user can perform or simulate acts, which would be crimes if they were actually carried out, but as they only take place within the computer and the imagination of the user, they are only “virtual molestation”. Other users of the chat room can then request certain acts to be performed.⁴⁵

Ruth Dixon, deputy chief executive of the web watchdog, the IWF, explains that paedophilia is not a new problem but that the net offers a new vehicle for their content and fantasies. It allows paedophiles to reassure one another that what they are doing is normal.⁴⁶

The effect of this form of exploitation is enormous. Dammerman⁴⁷ reports that children who have been used for the production of pornographic material are seriously traumatised by the knowledge that images of their abuse were being reproduced. What they find most disturbing, is the fact that they can do nothing to stop the distribution of such material and that their injury and pain will be used to entrap other children. Once a pornographic image is in the public domain, it is likely to be distributed and reproduced, regardless of the fact that the perpetrator has already been caught.⁴⁸ Pornographically abused children are the victims of emotional withdrawal, anti-social behaviour, mood swings, depression, fear and anxiety. Children who have been exposed to pornography may be desensitised and socialised into believing that pornographic activity is normal for children.⁴⁹ It is a vicious circle, one of which the consequences will probably never be fully known.

⁴⁵ Barnes et al *Child Victims* 35 See also <http://www.ecpat.net/Childporn/childporn.html> 15/05/01 The “morphing” technique can also be used in conjunction to create these virtual images.

⁴⁶ http://news.bbc.co.uk/1/hi/english/uk/newsid_1166000/1166135.stm 18/02/01

⁴⁷ In Barnes et al *Child Victims* 30

⁴⁸ Barnes et al *Child Victims* 37

⁴⁹ “What other common software do child pornographers use?” Available at <http://www.ecpat.net/childpornbook/danger1.html> 21/02/01

Paedophiles are often abused from a young age themselves. When a convicted paedophile was asked whether he had been abused himself, he replied:

“Yes, it’s true. And I know now what will happen because of what I did. Let’s say fifty percent of the children are going to go the same way as I went, especially those that I molested more than once. This means there are two hundred and fifty copies of me out there.”⁵⁰

Children clearly need to be protected. The research question that will be addressed in this study is how South African legislation can be improved to increase the protection of the child’s right against sexual exploitation in the form of pornography on the Internet. The South African Law Commission is conducting an investigation into the review of the Child Care Act.⁵¹ This investigation includes a comprehensive review of all legislation that affects children. International child protection, including the protection of children against pornography on the Internet, falls squarely within the mandate of the Commission and underlines the importance of this research. This study will offer some practical suggestions on how to improve legislation in this regard. As South Africa has committed itself to the protection of children’s rights, it is important to set legislation in place that will support this commitment.

The challenge of addressing computerised child pornography and the Internet was raised at the World Congress against the Commercial Sexual Exploitation of Children in Stockholm in August 1996. In its Agenda for Action, state parties agreed to develop, strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child pornography, including the possession of child pornography.⁵²

Measured against the new international technological and legal developments, South African legislation still proves to be archaic and unclear with regard to the sexual exploitation of the child on the Internet. South

⁵⁰ Marais *Children of Sorrow: Child Sex Abuse in South Africa* (1990) 21

⁵¹ SA Law Commission *Review of the Child Care Act* Project 110 Issue Paper 13 (1998)

⁵² “The Stockholm Agenda for Action” Available at <http://www.ecpat.net/projects/AforA.html> 07/05/01

African law does not recognise “child neglect” or “sexual abuse” as criminal offences. Many of the relevant provisions are inappropriate and inapplicable to the current context. Before the amendment to the Films and Publications Act in 1999, no definition of “child pornography” or “the Internet” existed. The fact that four statutes have to be read in conjunction with each other, namely the Child Care Act, 74 of 1983, the Act on Sexual Offences, 23 of 1957, the Domestic Violence Act, 116 of 1998, and the Films and Publications Act, 65 of 1996, leads to further confusion.

The Films and Publications Act, as amended in 1999, represents an attempt to address the growing concern of the production and distribution of child pornography with special regards to the Internet. The practical enforcement of this new act, as well as other legislation that is applicable to sexual exploitation of the child, still poses several problems. Police are often not qualified to apprehend and arrest these perpetrators.

A further cause for concern is that no watchdog or monitoring body has as yet been set in place to combat this new form of crime. There are still some loopholes in the definition of child pornography and questions with regard to the legal liability of the Internet Service Providers still need to be answered. As the Internet does not respect or respond to national boundaries, it is important that a clear set of rules regarding the jurisdiction of acts performed on the net, be formulated.

1 3 VALUE AND UNDERLYING ASSUMPTIONS

The ever-increasing number of instances of sexual abuse involving children in South Africa has reached alarming proportions in the last ten years.⁵³ This may or may not be directly related to the increased availability of pornography on the Internet. However, as a link between pornography and other forms of abuse has been established,⁵⁴ the exposure of children to pornography and

⁵³ See for example statistics released by the Child Protection Unit in 1999 as cited on p 2

⁵⁴ See for example studies conducted by US Customs which found that at least 80% of those who buy child pornography are active abusers, and a “proportion of the rest will not have yet been caught”.

Carr “Child Pornography” Available at

http://www.focalpointngo.org/yokohama/themepapers/theme1.htm#_ednref13 07/11/01 See also

child pornography on the Internet has become a source of serious concern. As computers and the Internet become increasingly popular in the South African workplace, homes and schools, legislation regulating its use is indispensable.⁵⁵

The point of departure of this study is that the formulation and enforcement of effective legislation is a powerful instrument in the battle against the sexual exploitation of children. The main value of this study therefore lies in the suggestions with regard to the introduction of a legislative and institutional framework that will ensure the protection of children against sexual abuse.

The value of this study can also be found in the fact that South Africa is seen to have some influence on other developing countries. Paedophiles target developing countries with non-existing or poorly enforced laws. If South African legislation provides adequate protection for children against sexual exploitation, countries targeted by paedophiles such as Zimbabwe, Nigeria, Russia and Costa Rica may adopt similar preventative legislation. As South Africa has developed into a leader in the field of Information Technology, it is only logical that this knowledge should feed into the legislation that governs child pornography on the Internet. South Africa could therefore play a leading role also with regard to the prevention of sexual exploitation of children on the Internet on both a regional and an international level.

1 4 METHODOLOGY

This is an exploratory analytic study, which aims at providing suggestions for the improvement of the protection of South African children against sexual exploitation on the Internet. Recommendations will be formulated on the basis of the rights of children as enshrined in international conventions, the South African Constitution and useful practices of selected countries.

Healy "Child Pornography: An International Perspective", delivered at the World Congress against Commercial Sexual Exploitation of Children in August 1996 found on

<http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01 as discussed on p 135 -136

⁵⁵ It is estimated that by the year 2005 77 million children globally will be using the Internet. Video Conference: United States Embassy, Cape Town 27/07/01

The countries selected for more intensive analysis in this study are the United States of America (USA), Canada, the United Kingdom (UK), Germany and Japan. The United States was selected because it has passed a number of comprehensive acts regarding child pornography on the Internet that has been subjected to several constitutional tests. In Canada legislation governing sexual exploitation of children has also been tested by the courts. Some of these judgements may provide fundamental guidance in the South African constitutional context.⁵⁶ The United Kingdom government has continually committed itself to increase the safety of children online. Despite the expansion of resources, however, this country recently experienced a public outcry due to the lenient sentences received by the leaders of the Wonderland sex-ring. For this reason it provides an excellent basis for comparison. Germany has been labelled as the most Internet unfriendly country in the world as Internet Service Providers have been held responsible for the content of their service. Japan only enacted a law that defined child pornography and prohibits its distribution, sale and display for commercial purposes on 18 July 1999.⁵⁷ Before the new law, a great deal of child pornography came from Japan, and it continues to do so. Since a large number of children from Asia are exploited on the Internet and Japan will be hosting the second World Congress against the Commercial Sexual Exploitation of Children later in 2001⁵⁸, it offers important additional information for this study.

1 5 SEQUENCE OF CHAPTERS

Chapter 2 of this study focuses on identifying key concepts. A number of definitions of terms such as child, sexual victimisation, pornography, child pornography, publication, possession, production and distribution, the Internet, Internet Service Providers as well as on child pornography on the Internet will be discussed. In Chapter 3 the provisions of international

⁵⁶ As the constitutions of the USA, Canada and Germany have been instrumental during the drafting process of the South African Constitution, it further provides a basis for comparison.

⁵⁷ "What are the major legal issues?" Available at <http://www.ecpat.net/childpornbook/legal4.html#laws> 21/02/01

documents and activities of international organisations concerned with the rights of the child are discussed. The ways in which the countries selected for the study have implemented these provisions are also analysed critically in Chapter 4. Chapter 5 analyses South African legislation regarding the protection of children against sexual exploitation. Chapter 6 concludes with a proposal for changes to existing South African legislation to ensure the extensive protection of children online.

⁵⁸ ECPAT Homepage Available at <http://www.ecpat.net/ecpat1/index2.htm> 20/02/01

CHAPTER 2

DEFINITIONS OF AND APPROACHES TO KEY CONCEPTS

2 1 INTRODUCTION

During the drafting of extensive, cogent and effective legislation, key concepts need to be identified and formulated. Identifying key concepts and gaining clarity on the actual content of these concepts present a tremendous challenge to any legislature. A failure to meet this challenge creates legislative loopholes and the opportunity for alleged perpetrators to escape prosecution based on technicalities.

It is the purpose of this chapter to provide an overview of existing key concepts relevant to the study, defined and given content by a variety of sources. Concepts such as the Internet, Internet Service Providers, sexual victimisation and child pornography will be discussed while paying attention to possible obstacles. This analysis is fundamental for any attempt to formulate and refine practical, workable and clear definitions that can be included in South Africa legislation.

2 2 CHILD

Society's, and consequently the law's, perception of the child has changed emphatically over the ages. In Roman law children were considered to be girls under the age of twelve and boys under the age of fourteen.¹ They married very young and generally a girl was already someone's wife by the age of sixteen or seventeen.² A child was subject to the power of his or her *paterfamilias*, which could have been the father, grandfather or great-grandfather.³ The *paterfamilias* had extreme powers in that he could decide whether newborn babies should be accepted into the family or not. If the child

¹ Johnston *Roman Law in Context* (1999) 37

² Dixon *The Roman Mother* (1988) 31

³ Johnston *Roman Law in Context* 30

were not to become a member of the family, the *paterfamilias* had the power to sell this unwanted child.⁴ Children were not seen to be the bearers of rights.

This notion continued for a great length of time. The common occurrence of child slavery or abuse was rarely questioned.⁵ In 1874 social workers in New York found a girl, who had been fed only on bread and water, chained to a bed. She was seriously ill and had been beaten frequently. The only way in which the parents of the girl could be prosecuted was on the basis that the child was a member of the animal kingdom. There were more laws in the United States protecting cats and dogs than there were protecting children.⁶ Children were deemed to be an economic asset. Although under the common law they were not considered as property, a child's labour was still a valuable resource to parents and other custodial adults.⁷

Today the rights of the child are enshrined in a number of international conventions.⁸ Hammarberg comments on the rights set out in the United Nations Convention on the Rights of the Child⁹ as follows:

“More than any earlier international agreement, the Convention recognizes children as human beings of equal value. It marks the end of the age-old idea that children, at least in legal terms, are no more than possessions of their guardians. At the same time it recognizes children as children.”

Many psychologists point out that childhood is a social artefact.¹⁰ Turner notes that age, like sex and race, are not facts about being. There is no justification to describe persons in terms of age, gender or race.¹¹

Freeman however, disagrees in the following manner:¹²

“[We] should [not] ignore the significance of using an ascriptive category: in the case of age it is an association with incapacity, incompetence, immaturity, irresponsibility, characteristics which are informed by a postulate about the paramount importance of adulthood.”

⁴ Johnston *Roman Law in Context* 30

⁵ Mason *From Father's Property to Children's Rights* (1994) xii

⁶ Van Bueren *The International Law on the of the Child* (1995) xxi

⁷ Mason *From Father's Property to Children's Rights* xii

⁸ Most international conventions define a child as being under the age of eighteen years.

⁹ 1989, hereafter the CRC. Hammarberg “The UN Convention on the Rights of the Child and how to make it work” 1990 *Human Rights Quarterly* 99

¹⁰ See for example Postman in Freeman *The Moral Status of Children* (1997) 7

¹¹ Freeman *The Moral Status of Children* 7

¹² Freeman *The Moral Status of Children* 7

Children should therefore still be recognised as a special group of people whose rights have to be recognised.

The CRC sets the age of childhood at below the age of eighteen years by establishing the following in Article 1:

“[A] child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”

In sole opposition to the final draft of the CRC, the United States argued that the age should be lowered to fifteen, but due to a lack of support, it remained at eighteen.¹³ The African Charter on the Rights and Welfare of the Child¹⁴ provides its definition of a child in Article 2 where it also defines a child as every human being below the age of eighteen years.

According to indigenous law in South Africa, adulthood is sometimes attained by certain initiation ceremonies. Legal majority for males, in contrast, can be achieved at the time of marriage or the establishment of a home. Females never reach majority and are considered minors throughout their lives.¹⁵ In South African common law, childhood is divided into three age categories. A child under the age of seven is known as an *infans*. At the attainment of puberty (twelve for girls and fourteen for boys), the first milestone is reached. From 21 years, the minor achieves majority. A child and young person's status within the common law depends on these age categories.

Foreign legislation often refers to the term “minor” as opposed to “child” used in South African legislation. For the purposes of this study, “child” includes all persons from the moment of birth until they reach the age of eighteen. The study therefore regards both the *infans* and the minor up to the age of eighteen to be the bearer of children's rights.

¹³ Esposito “Regulating the Internet ” 1998 *Case Western Reserve Journal of International Law* 541 560

¹⁴ 1990, hereafter the African Charter

¹⁵ SA Law Commission *The Review of the Child Care Act* Project 110 Issue Paper 13 (1998) 99 – 100 In terms of s 6 of the Recognition of Customary Marriages Act, 120 of 1998, a wife in a customary marriage attains full status and capacity to, for example, enter into contracts or to litigate. This status is based on equality with her husband and subject to the matrimonial property system governing the marriage. Even though the purpose of this act is to provide for the equal status and capacity of spouses in customary marriages, indigenous law still does not recognise these principles.

This definition corresponds with the South African Constitution¹⁶ which defines a child as a person under the age of eighteen years. Therefore anyone under the age of eighteen years qualifies and is regarded as a child, irrespective of whether such a person has attained the age of majority by entering into marriage. Legally such a person is still regarded as a child with reference to accountability and the right to protection.¹⁷ South African legislation accordingly defines a child in the Child Care Act¹⁸ as being any person under the age of eighteen years.¹⁹ Majority, in contrast, is reached at the age of 21.²⁰

South African legislation still sustains a distinction between girls and boys with regard to sexual offences against children. The Sexual Offences Act²¹ can be used as an example where in section 14 the following acts are criminalised:

“Sexual offences with youths’ – (1) Any male person who –

- (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
- (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or
- (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,

shall be guilty of any offence...

(3) Any female who –

- (a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or
- (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or
- (c) solicits or entices such a boy or girl to the commission of an immoral or indecent act,

¹⁶ The Constitution of the Republic of South Africa No 108 of 1996, s 28(3)

¹⁷ Maree and Van Der Merwe “Exposure to Child Pornography on the Internet” 1999 *Acta Criminologica* 59 59

¹⁸ 74 of 1983

¹⁹ S 1

²⁰ The Age of Majority Act, 57 of 1972 s 1. A new draft bill, the Births and Deaths Amendment Bill, proposes that the age of majority should be brought in line with the Constitution and therefore also be set at the age of eighteen years. “Coming of age” Available at http://www.news24.co.za/News24/South_Africa/0,1113,2-7_1075199,00.html 05/09/01

²¹ 23 of 1957

shall be guilty of an offence.”

Of special significance for this study is the fact that in the United Kingdom²² as well as in Australian States and Territories, child pornography legislation defines a child as a person under sixteen years of age.²³ Before new legislation was passed in July 1999, a statute in Japan prohibiting “forced indecency” protected only children under the age of thirteen and only from child prostitution and pornography.²⁴ In Canada a minor, for purposes of child pornography, is a person under eighteen years²⁵ even though sexual activity is permitted from the age of fourteen. In various jurisdictions of the United States minors as young as fifteen may legally consent to sexual activity with an adult. However, that same adult cannot create, distribute, or possess a visual record of that activity because federal child pornography statutes²⁶ define a minor as any person under that age of eighteen years.²⁷

This also seems to be the case in South Africa where the age of sexual consent, providing that it is a male having intercourse with a girl or a female having intercourse with a boy, is sixteen.²⁸ The Films and Publications Act²⁹, however, prohibits images of persons engaged in sexual activity who are under the age of eighteen.³⁰

South Africa admitted to indiscrepancies in its definitions of childhood when it stated the following in its Initial Country Report on the Convention on the Rights of the Child:³¹

“By providing for the right of every child to a name from birth, the Constitution recognises birth as the start of legal status. Both the Constitution and the Child Care Act (1983) define a child as a person under the age of 18 years. However, national laws defining children do not uniformly comply with the Convention, nor is there separate legislation for children in certain areas.”

²² S 1 (1)(a) of the Child Protection Act of 1978

²³ Healy “Child Pornography: An International Perspective” Available at <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

²⁴ Sayle “Net Nation and the Digital Revolution” 2000 *Wisconsin International Law Journal* 257 273

²⁵ Penal Code s 163

²⁶ 18 U.S.C. 2252, 2256

²⁷ See also <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

²⁸ S 14 of the Sexual Offences Act 23 of 1957

²⁹ 65 of 1996

³⁰ See the definition of child pornography in s 1 of the Act, as discussed in chapter 5

³¹ P 26 of the Report of November 1997

These indiscrepancies need to be addressed and legislation pertaining to children should be dependable. Children are a special group of people who should be encouraged to stay children for as long as they possibly can. Childhood should be protected and promoted as opposed to forcing children into premature adulthood.³² South African legislation should aim to do so in a consistent and extensive manner.

2 3 SEXUAL VICTIMISATION OF CHILDREN

The terms “exploitation” and “abuse”, when used with regard to children, are often used interchangeably. However, different definitions have been provided in different environments. Although it does not appear as if one term is more comprehensive than the other, the term “abuse” seems to be more commonly used outside the legal perimeter. The term “sexual victimisation” has also appeared in literature. Finkelhor³³ defines it as sexual encounters such as sexual intercourse, anal-genital contact, fondling, or an encounter with an exhibitionist. Although it is not widely used, it most aptly describes what happens between adults and exploited children.

Earlier definitions of child abuse did not include sexual and emotional abuse or neglect but focused primarily on intentional bodily harm. Today definitions are derived from a number of international documents that enshrine the child’s right to have a happy childhood and enjoy the rights and freedoms for his own good as well as for the good of society.³⁴ The modern perception of child abuse is therefore based on the model of children’s rights.³⁵

³² The fashion industry can be used as an example where ten or twelve year old girls are often encouraged to select modelling as a career. Children at a very early age are exposed to a harsh world of pressures and competition, as well as sexual activity, alcoholism, drug abuse and crime.

³³ In Freeman *The Moral Status of Children* 261

³⁴ Preamble of the Declaration of the Rights of the Child 1959. See also the preamble of the Declaration of the Rights of the Child 1924: “The child must be given the means requisite for its normal development, both materially and spiritually;” and the preamble of the CRC: “Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,”

³⁵ Loffel and Matthias *Legislation for Child Protection* 7

2 3 1 SEXUAL ABUSE

No universally accepted definition of what constitutes child sexual abuse exists. One fact that has been widely accepted by psychologists and child therapists is that abuse is the exploitation of power. Sexual abuse is any sexual act between a child and a person who is more powerful in terms of for example age, assertiveness or physical strength, and which is for the gratification of the more powerful person.³⁶ The abuser manipulates his/her victim for his/her own gratification.

Categories of physical, sexual and emotional abuse are not entirely separate categories. Certain instances of sexual abuse, such as rape, fall under the definition of physical abuse. There can be no doubt though that all forms of physical or sexual abuse are also emotional abuse. Garbarino³⁷ defines emotional abuse as a pattern of psychologically destructive behaviour involving the rejecting, isolating, terrorising, ignoring and/or corrupting of a child, or the exposure of the child to traumatic events including family or community violence. Even in cases where children feel no immediate emotional trauma at the time, adverse effects to their self-esteem frequently surface later in their lives. Sexually abused children are more prone to develop other psychological problems.³⁸

The report of the South African National Commission of Inquiry into the Prevention of Child Abuse³⁹ includes all these categories of child abuse, defining it as consisting of anything which individuals, institutions, or processes do or fail to do which directly or indirectly harms children or damages their prospects of a safe and healthy development into adulthood.

This perception, which focuses on the abuser, describes sexual abuse as any activity that brings gratification to the perpetrator. Paedophiles like to make a distinction between consensual and non-consensual sexual contact, often asserting that the former is not harmful to children.⁴⁰ Organisations such as

³⁶ Loffel and Matthias *Legislation for Child Protection* (2001) 8

³⁷ In Loffel and Matthias *Legislation for Child Protection* 8

³⁸ Pedo-Stop Homepage <http://www.pedo-stop.org> 12/03/01. See also p 7

³⁹ Loffel and Matthias *Legislation for Child Protection* 8

⁴⁰ <http://www.pedo-stop.org/irc.htm> 21/05/01

NAMBLA⁴¹, the Rene Guyon Society⁴², paedophilic magazines such as *Ganymede*⁴³ and *Paidika*⁴⁴ proclaim that they are also concerned about children's rights, especially the right of children to be sexually active with adults.⁴⁵ Another excuse that paedophiles often use is to claim to have a caring relationship with children, suggesting that they are paying the child for sex in order to help the child and her family financially, or to help the child to learn about sex from a caring person.⁴⁶

However, a number of courts and legislators world-wide have recognised that children are too young to give informed consent to such activity. They are often too young and trusting to know that they are being manipulated, or feel powerless to stop it, for fear of displeasing the adult.⁴⁷ Most children do not even realise that certain acts will be used for the sexual pleasure of adults, reducing them to a sexual object. The intent of the abuser is therefore an important factor in sexual abuse.

In line with this view, Schechter and Roberge define sexual abuse in the following manner:⁴⁸

“[T]he involvement of dependant, developmentally immature children and adolescents in sexual activities that they do not fully comprehend and to which they are unable to give informed consent or that violate the social taboos of family roles.”

There are many forms of sexual abuse. Non-contact abuse takes place in the form of “sexy talk”, exposure and voyeurism. Sexual contact includes touching of intimate body parts and frottage. Another form is oral-genital sex, which involves the perpetrator's licking, kissing, sucking or biting the child's genitals or inducing the child orally to copulate with him. The perpetrator can also insist on inserting his penis into the child's mouth or between the child victim's thighs. This technique is used with especially younger children where the vaginal opening is too small or to avoid the risk of pregnancy with older girls.

⁴¹ North American Man/Boy Love Association

⁴² An international paedophile organisation

⁴³ An overtly homosexual paedophilic publication in the United Kingdom

⁴⁴ The journal for paedophiles published in The Netherlands

⁴⁵ Barnes, Brown, Mayne, Kowen, Dyason *Child Victims of Prostitution in the Western Cape* (2000) 25 - 26

⁴⁶ “The Sex Exploiter” Available at <http://www.usis.usemb.se/children/csec/2182.htm> 20/03/01

⁴⁷ <http://www.pedo-stop.org/irc.htm> 21/05/01

Sexual penetration can occur in inserting objects such as vibrators, crayons, carrots or cucumbers and the penis into the vagina or anus of the child.⁴⁹

The International Child Abuse Network⁵⁰ describes child sexual abuse as:

“[I]nappropriate sexual behavior with a child. It includes fondling a child’s genitals, making the child fondle the adult’s genitals, intercourse, incest, rape, sodomy, exhibitionism and sexual exploitation. To be considered child abuse these acts have to be committed by a person responsible for the care of a child (for example a baby-sitter, a parent, or a daycare provider) or related to the child. If a stranger commits these acts, it would be considered sexual assault and handled solely by the police and criminal courts.”⁵¹

In the United Kingdom the Standing Committee on Sexually Abused Children gave the following definition of sexual abuse in 1984:⁵²

“Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has, by design or by neglect of their usual societal or specific responsibilities in relation to the child, engaged or permitted the engagement of that child in any activity of a sexual nature which is intended to lead to the sexual gratification of the sexually mature person. This definition pertains whether or not this activity involves explicit coercion by any means, whether or not initiated by the child, or whether or not there is discernible harmful outcome in the short term.”

2 3 2 SEXUAL EXPLOITATION

Freeman distinguishes between sexual abuse and sexual exploitation in terms of financial gain, not sexual gratification.⁵³ Geraldine van Bueren agrees by stating that sexual exploitation can involve sexual abuse but that sexual exploitation can be distinguished from abuse because exploitation conveys a commercial connotation.⁵⁴ However, she defines sexual exploitation of

⁴⁸ Freeman *The Moral Status of Children* 261

⁴⁹ Freeman *The Moral Status of Children* 263

⁵⁰ Yes ICAN

⁵¹ “Defining Child Maltreatment” Available at <http://www.yesican.org/articles/index.html> 08/03/01

⁵² Freeman *The Moral Status of Children* 263 - 264

⁵³ Freeman *The Moral Status of Children* 263

⁵⁴ Van Bueren *Rights of the Child* 275

children only as the use of children to meet the sexual needs of others, at the expense of the child's emotional and physical needs.⁵⁵

The Oxford English Dictionary⁵⁶ supports this broader position by defining the action of exploitation only as:

" To utilize for one's own ends, treat selfishly as mere workable material"

It is therefore suggested that financial gain is not fundamental to sexual exploitation. Today the majority of child pornography, as an example of sexual exploitation, is in fact exchanged between paedophiles and child molesters without any commercial motive.⁵⁷

The exploitative use of children in prostitution, pornographic performances and materials as well as child trafficking for sexual purposes are amongst the practices included within the term "sexual exploitation". These forms of exploitation are not exclusive and it is often found that they become interlinked, forming a chain of exploitation. According to the United Nations Children's Fund⁵⁸, it is often found that children who are used in the production of pornography may also be involved in prostitution.⁵⁹

The commercial sexual exploitation of children has many characteristics of an organised industry sector: from small businesses to large enterprises, with bank accounts, advertising campaigns and glossy brochures. There are marketers who use technology to sell the "product", hierarchies of profit-takers, always with the child on the bottom of the ladder, and strategic planners who work to protect and promote "good business". This industry is a flagrant abuse of children, involving deception, kidnapping, enslavement, smuggling, false passports, bribery, and corruption at many levels.⁶⁰

In South Africa the definition of commercial sexual exploitation is set out in the Child Care Act⁶¹:

⁵⁵ Van Bueren *Rights of the Child* 275

⁵⁶ Simpson and Weiner (ed) *Oxford English Dictionary (Second edition)* 1989

⁵⁷ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

⁵⁸ Hereafter UNICEF

⁵⁹ Van Bueren *Rights of the Child* 275

⁶⁰ <http://www.usis.usemb.se/children/csec/218e.htm> 20/03/01

⁶¹ 74 of 1983, as amended by s 1 of Act No13 of 1999

“‘[C]ommercial sexual exploitation’ means the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person”.

In recent years, the demand for children for sex has increased. The reasons for this include rising incomes and purchasing power, which have put children as goods within the reach of more people. Misconceptions about children’s immunity to infection (including HIV/AIDS), an explosion in the number of entertainment services offered for the sexual stimulation of the consumer and the growing consumerism of recently industrialised societies such as Slovenia, Czechoslovakia and Russia also create an environment in which children are devalued. In such environments, the child’s person is not the subject of equal respect and concern.⁶² Instead, children are reduced to the level of consumer disposables, available for sale and abuse.⁶³

This explains why most researchers embrace a broad definition of sexual abuse, including exposure to pornographic material⁶⁴ and talking about sexual things in an erotic way. Any conduct that is harmful to the child but performed for the gratification of the more authoritative person, is abusive and exploitative behaviour that should be eradicated. Legislation should therefore provide enough protection against all these activities to enable children to have a happy childhood and just be children.

2 4 PORNOGRAPHY

The classification of what constitutes pornography is probably one of the most complex definitions and has been the subject of debates for many years.⁶⁵ Essential to the definition are the moral and cultural interpretations of the society involved. Subsequently the views on what may be considered to be obscene or suggestive are abundant and diverse, changing its boundaries

⁶² Freeman *The Moral Status of Children* 261

⁶³ <http://www.usis.usemb.se/children/csec/218e.htm> 20/03/01

⁶⁴ Freeman *The Moral Status of Children* 260

⁶⁵ See for example Pollard “The Modern Pornography Debates” available at <http://www.capital.demon.co.uk/LA/pamphlets/modeporn.htm> for a discussion on the conflicting views concerning the debate in the UK or some of the arguments used in the pornography debate in feminist circles “Feminism, Pornography and Censorship” by Wicclair, available at <http://www.cas.ilstu.edu/philosophy/horvath/PHI202/wicclair.htm>

depending on evolving social and political values.⁶⁶ Some forms of erotica⁶⁷ may be considered to be pornographic⁶⁸ while others regard only so-called “hard core porn” as pornography.⁶⁹

Goode distinguishes between three different definitions of pornography:⁷⁰

- (a) Functional definition: the distribution of material for sexual stimulation. The distributor judges the application of the work and response to it by means of sexual stimulation.
- (b) Labelling definition: most people regard such material as obscene. People opposing pornography emphasise that the material elicits thoughts of lust or desire and are sexually vulgar, disgusting, shameful and repulsive.
- (c) Genre definition: the main aim of the material is to stimulate desire. If the product meets the needs of the consumer and earns profits, the creators are satisfied.

Pornography may be defined as any representation of any degrading sexual practice for the purposes of pleasure or profit and can involve much commercial activity.⁷¹ It can exist in many different forms. The most common form is that of visual pornography which includes the visual display of genitals and/or the visual depiction of explicit sexual activity, albeit real or simulated.⁷² Audio pornography is the use of any audio devices using voices, real or simulated, intended for the sexual gratification of the user.⁷³ Another form of pornography can be simple text that describes sexual acts or is intended to provide sexual gratification.⁷⁴ According to White, the pornography industry

⁶⁶ Grant, David, Grabosky “Child Pornography in the Digital Age” 1999 *Illegal Immigration and Commercial Sex* 171 172

⁶⁷ According to the *Oxford English Dictionary* something will be described as being erotic when it pertains to the passion of love or when it is concerned with the treating of love. It may also be of a sexual nature or pertaining to sexual love. Simpson and Weiner (ed) *Oxford English Dictionary (Second edition)* 1989 See also Healy's definition of child erotica as discussed on p 27.

⁶⁸ “What is child pornography?” Available at <http://www.ecpat.net/childpornbook/legal1.html#childporn> 20/02/01

⁶⁹ The word “pornography” finds its origin in the Greek word “*pornographos*” which literally means “the writing of harlots”. “Harlots” is the archaic word for “prostitutes”.

⁷⁰ In Maree and Van Der Merwe 1999 *Acta Criminologica* 59

⁷¹ Van Bueren *Rights of the Child* 276

⁷² <http://www.ecpat.net/childpornbook/legal1.html#childporn> 20/02/01

⁷³ <http://www.ecpat.net/childpornbook/legal1.html#childporn> 20/02/01

⁷⁴ <http://www.ecpat.net/childpornbook/legal1.html#childporn> 20/02/01

today grosses annually more than the movie and music business combined but reinvests nothing into society.⁷⁵

2 5 CHILD PORNOGRAPHY

A socio-historical review of the development of child pornography conducted by Tate in the late 1980's revealed that it is linked with the prostitution and sex trafficking of children.⁷⁶ Drawings of sex with children and writings describing these acts could be found in bookshops as early as the seventeenth century.⁷⁷ With the invention of the camera in the nineteenth century, the recording of the sexual abuse of children on film became possible. As this new medium allowed the visual depiction of real children, it became quite popular and by 1857 there were at least 26 shops selling pornography in London alone.⁷⁸ During the 1960's and 1970's the United States, Britain and Europe experienced an explosion of child pornography, some of which are still found on the Internet today.⁷⁹ As the harm caused by child pornography was not well known or recognised, child pornography could even be bought as place-mats in the gift section of ordinary shops in the United States.⁸⁰

It can be said that legal definitions of obscenity, indecency and subsequently also that of pornography, have always been vague, subjective and open to interpretation.⁸¹ While these terms have always been formulated in terms of morality and immorality⁸², the simplest and probably the most precise definition of child pornography is that it is the sexually explicit reproduction of a child's image.⁸³ It is a demeaning form of exploitation which takes away a child's dignity and self-respect. It reduces the value of the child's body, teaching the child that the body is for the gratification of others and has no other value.⁸⁴

⁷⁵ Barnes et al *Child Victims* 29

⁷⁶ Barnes et al *Child Victims* 24

⁷⁷ Barnes et al *Child Victims* 24

⁷⁸ Barnes et al *Child Victims* 24

⁷⁹ Barnes et al *Child Victims* 25

⁸⁰ Barnes et al *Child Victims* 25

⁸¹ Itzin in Barnes et al *Child Victims* 25

⁸² Itzin in Barnes et al *Child Victims* 25

⁸³ "Pornography" Available at <http://www.usis.usemb.se/children/csec/2186.htm> 20/03/01

⁸⁴ <http://www.usis.usemb.se/children/csec/2186.htm> 20/03/01

The Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography⁸⁵ defines child pornography as any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristic of which is depiction for a sexual purpose.⁸⁶

Interpol's Specialist Group on Crimes against Children describes child pornography in the following manner:⁸⁷

"[C]hild pornography is the consequence of the exploitation or sexual abuse perpetrated against a child. It can be defined as any means of depicting or promoting sexual abuse of a child, including print and/or audio, centered on [a] sexual act or the genital organs of children."

Lanning⁸⁸ defines child pornography as any visual or print medium depicting sexually explicit conduct involving a child. Child pornography is also described as photographs, negatives, slides, magazines, films or videotapes, computer stiffies, computer floppies or compact disks⁸⁹ of children being sexually molested, who is engaged in or is depicted as being engaged in explicit sexual activities. These acts of molestation can include sexual intercourse, bestiality, masturbation, sadomasochism or exhibitionism. Violence and coercion are often involved in the production of child pornography, whether or not it forms part of the plot or story line or whether it is inflicted on the unwilling child to secure submission and co-operation.⁹⁰

The Council of Europe defines child pornography as any audiovisual material which uses children in a sexual context.⁹¹ Interpol⁹² gives a definition of both visual child pornography and audio child pornography. Visual child pornography can be described as the visual depiction of a child engaged in explicit sexual activity, real or simulated, or the lewd exhibition of genitals intended for the sexual gratification of the user. It involves the production,

⁸⁵ Of 2000

⁸⁶ <http://www.ecpat.net/childpornbook/legal1.html#childporn> 20/02/01

⁸⁷ <http://www.ecpat.net/childpornbook/legal1.html#childporn> 20/02/01

⁸⁸ In Barnes et al *Child Victims* 23

⁸⁹ Maree and Van Der Merwe 1999 *Acta Criminologica* 60

⁹⁰ <http://www.usis.usemb.se/children/csec/2186.htm> 20/03/01

⁹¹ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

⁹² International Criminal Police Organisation

distribution and/or use of such material. Audio child pornography can be described as the use of any audio device using a child's voice, real or simulated, intended for the sexual gratification of the user, and involves the production, distribution and/or use of such material.⁹³

In South Africa the Films and Publications Act⁹⁴, as amended by Act 34 of 1999, defines child pornography as follows:

“[C]hild pornography’ includes any image, real or simulated, however created, depicting a person who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children”.⁹⁵

Healy⁹⁶ of ECPAT⁹⁷ argues that child pornography should be distinguished from child erotica which is any material relating to children that serves a sexual purpose for a given individual. Child erotica includes such items such as toys, games, children's clothing, sexual aids, manuals, drawings, catalogues and non-pornographic photographs of children. Child erotica is not illegal but is frequently used by prosecutors as corroborating evidence in cases against child molesters. Paedophiles regularly obtain pornography involving children for collection purposes. They are collectors of photos, videos and other keepsakes of the children they come into contact with, in order to "freeze" the age of the child and replay it time and again.⁹⁸

In *United States v Dost*⁹⁹ a US court put forth six factors which should be considered in trying to ascertain whether a visual depiction of a minor constitutes a lascivious exhibition. It concluded that if the focal point of the visual depiction is on the child's genitalia or pubic area, the setting of the visual depiction is sexually suggestive, the child is depicted in an unnatural pose or in inappropriate attire or partially clothed or nude, the depiction

⁹³ Maree and Van Der Merwe 1999 *Acta Criminologica* 60

⁹⁴ 65 of 1996

⁹⁵ Definition of 'child pornography' inserted by s 1 (a) of Act No 34 of 1999

⁹⁶ In her paper, "Child Pornography: An International Perspective", delivered at the World Congress against Commercial Sexual Exploitation of Children in August 1996 found on <http://www.usis.usem.se/children/csec/215e.htm>

⁹⁷ End Child Prostitution in Asian Tourism

⁹⁸ <http://www.usis.usem.se/children/csec/2182.htm> 20/03/01

suggests sexual coyness or willingness to engage in sexual activity or the depiction is intended to elicit a sexual response with the viewer, the depiction was a manifestation of lasciviousness.¹⁰⁰ The attitude of the photographer is significant since children are not necessarily mature enough to pose in a sexually provocative manner.¹⁰¹

Nudity is not an essential or sufficient requirement for a finding of lasciviousness as was held in *United States v Knox*¹⁰². In this case a video-camera zoomed in for an extended period of time to a close-up view of the genital area of children dancing in abbreviated attire. Although the pubic and genital areas were covered with clothing, the videotape still qualified as a lascivious exhibition.¹⁰³

The act of photographing or filming children in sexual poses or children engaging in sex act is in itself a form of sexual abuse.¹⁰⁴ This is unfortunately not a globally recognised crime. In Japanese legislation, until recently, the definition of what would be considered to be pornographic required the depiction of sexual organs. Internet sites therefore escaped prosecution under these definitions by showing abuse or torture without displaying actual sex organs.¹⁰⁵ In the United States sexual activity of an adult with 16 or 17 year old may be legally permissible in some jurisdictions. The filming of that encounter would be illegal under federal law but the depiction could not be considered a record of the abuse of a child.¹⁰⁶ South Africa finds itself in a similar position with its current legislation on sexual offences against children.¹⁰⁷

Among the issues that cause disagreement in the debate on child pornography is the age of consent to sexual relations, whether simple possession of child pornography should be a crime, and whether an actual

⁹⁹ 636 F Supp 828, 832 (SD Cal 1986)

¹⁰⁰ Burke "The Criminalization of Virtual Child Pornography" 1997 *Harvard Journal on Legislation* 439 454

¹⁰¹ Burke 1997 *Harvard Journal on Legislation* 455

¹⁰² 977 F2nd 815 (3rd Cir 1992)

¹⁰³ Burke 1997 *Harvard Journal on Legislation* 455. See also Adler "The Perverse Law of Child Pornography" 2001 *Columbia Law Review* 209 239 - 241

¹⁰⁴ Barnes et al *Child Victims* 23

¹⁰⁵ Sayle 2000 *WILJ* 273

¹⁰⁶ <http://www.usis.usem.se/children/csec/215e.htm> 20/03/01

¹⁰⁷ See discussion on p 17

child had to be involved and whether morphed images constitute pornography.¹⁰⁸ Some countries do not consider child pornography as a crime in itself but rather because child pornography depicts the sexual abuse of children, which is a criminal act.¹⁰⁹ Child pornography is criminalised in the United States because it represents the permanent record of the sexual abuse or exploitation of an actual child.¹¹⁰ It follows that most laws seek to destroy the child pornography market because its production requires the abuse of children. The truth of the matter is that children do not have to be used in child pornography to be harmed by it. Child pornography destroys children's inhibitions, teaches the performance of sexual acts,¹¹¹ and they may be desensitised and socialised into believing that pornographic and sexual activity is normal for children.¹¹² The advances in technology have made it increasingly difficult to distinguish between a real and an artificially created child.¹¹³ It becomes clear from the above that artificially generated child pornography should also be criminalised. Among the aspects of child pornography which are criminalised in international legislation are possessing, stocking, selling, distributing, exporting, importing, intending to distribute, intending to depict or encourage child abuse, supplying, or aiding or abetting any of the above.¹¹⁴

Child pornography is also, once produced, a means of fuelling demand for child sex.¹¹⁵ Media interest in child pornography and prostitution can unintentionally fuel demand and the ease of access of information both opens

¹⁰⁸ ECPAT Homepage Available at <http://www.ecpat.net/ecpat1/index2.htm> 20/02/01

¹⁰⁹ Esposito 1998 *CASE W RES J INT'L L* 544. See for example the approach of the American courts in *New York v Ferber* 458 US 747 (1982) and *Osborne v Ohio* 495 US 103 (1990) as discussed in chapter 5.

¹¹⁰ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹¹¹ Esposito 1998 *CASE W RES J INT'L L* 544

¹¹² "Resources" Available at <http://www.ecpat.net/childpornbook/resource.html> 14/03/01

¹¹³ "The Regulation of Pornography and Child Pornography on the Internet" *The Journal of Information, Law and Technology (JILT)* Available at http://elj.warwick.ac.uk/jilt/internet/97_1akdz/akdemiz.htm#1 01/06/01

¹¹⁴ "What aspects of child pornography are criminalised?" Available at <http://www.ecpat.net/childpornbook/legal4.html#aspects> 17/03/01

¹¹⁵ <http://www.usis.usemb.se/children/csec/2186.htm> 20/03/01

up supply routes and increases demand.¹¹⁶ The most important factor in the supply and demand equation though, remains human greed.¹¹⁷

The definition of what constitutes child pornography has been the subject of the debate of free speech versus censorship for some time. A recent example is an exhibition at a London gallery during March and April 2001. An American photographer displayed pictures in the Saatchi Gallery that she had taken of her naked children on a beach and urinating in the snow.¹¹⁸ It provoked outrage and accusations that the pictures are pandering to paedophiles.¹¹⁹ The question therefore arose whether these pictures could be considered obscene or indecent. In view of the British Protection of Children Act of 1978 and the Police and Criminal Evidence Act 1984 the following had to be considered:

“The circumstances in which the alleged indecent photograph was taken and the motives of the photographer are not relevant to the question whether the photograph is, in fact, indecent for the purposes of section 1(1)(a). In a case of ‘taking’, the jury must consider two questions: (a) is it proved that the defendant deliberately and intentionally took the photograph of the subject as disclosed by the photograph produced; and (b) if so, is it indecent?”¹²⁰

In order to prosecute under the Obscene Publications Act, according to Jennifer McDermott, a partner at the Law Firm, Lovells of London, it has to be shown that the photographs are likely to deprave and that removing them is necessary for the protection of morals.¹²¹

Another example of this type of displays can be seen in a South African advertisement. A swimming-pool chlorine manufacturer makes use of a naked baby swimming in clear water to promote its product. An album cover of the rock group, Nirvana, caused public outcry with a similar depiction of a naked baby boy, clearly displaying his genitals. On the 31st of January 2000, a woman in Burbank, USA was arrested when she picked up prints handed in

¹¹⁶ <http://www.usis.usemb.se/children/csec/218e.htm> 20/03/01 See also Adler 2001 *Columbia Law Review* 209 - 273

¹¹⁷ <http://www.usis.usemb.se/children/csec/218e.htm> 20/03/01

¹¹⁸ Ahuja and Midgley “Legally indecent?” *The Times* (13/03/01) 2

¹¹⁹ Ahuja and Midgley *The Times* (13/03/01) 2

¹²⁰ Ahuja and Midgley *The Times* (13/03/01) 1

¹²¹ Ahuja and Midgley *The Times* (13/03/01) 3

for development at her nearest supermarket.¹²² The photographs in question showed her two children playing in the bath with two sausages. The children's uncle, who thought the children's play with the sausages was amusing, apparently took the pictures.¹²³

If these examples are measured against the definition given by The Optional Protocol to the Convention on the Rights of the Child¹²⁴, it has to be shown that the dominant characteristic of the representation of the sexual parts of the child, is the depiction for a sexual purpose. According to the Interpol definition¹²⁵ the photographs must contain a lewd exhibition of genitals intended for the sexual gratification of the user. Once again the question that needs to be answered is that of what can be considered to be obscene. The South African definition¹²⁶, however, requires that the display of genitals should amount to sexual exploitation. In this case the exhibition of these photographs in London and the other examples mentioned should rather be considered as erotica, which is any material relating to children that serves a sexual purpose for a given individual.¹²⁷ The pictures in question in the United Kingdom were not removed during the exhibition.

Esposito¹²⁸ describes the main obstacle to comprehending the need for specific regulation to combat child pornography by stating the following truth:

"While definitions are helpful and informative, they fail to adequately convey the content of child pornography. In order to understand why something must be done about the distribution of child pornography over the Internet, one must understand the content of these materials."¹²⁹

2 6 PUBLICATION

¹²² "Salon Mothers who think: Is this Child Pornography?" Available at <http://www.salon.com/mwt/feature/2000/01/31/kincaid/index.html> 26/03/01

¹²³ <http://www.salon.com/mwt/feature/2000/01/31/kincaid/index.html> 26/03/01

¹²⁴ See p 26

¹²⁵ See p 26

¹²⁶ Found in the Films and Publications Act, see chapter 2 p 14

¹²⁷ See Margaret Healy's definition in chapter 2 p 14

¹²⁸ 1998 *CASE W RES J INT'L L* 543

¹²⁹ Some of the names of the websites and videos give an indication of how graphic and sordid these hunting grounds can be. Names include "sex.babies.com", "sex.boys.com", "sex.children.com", "Dad&DaughterSex", "barelylegal.com", "Sucking Daddy", "Jo and his Uncle" and "Fucking Children".

In the United States of America the following definition for “visual depiction” is found in the Child Pornography Prevention Act of 1996:

“Visual depiction includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.”¹³⁰

The South African Films and Publications Act gives a more comprehensive and elaborate definition of both “publication” and “visual presentation”:

“[P]ublication’ means –

- (a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript which has in any manner been duplicated;
- (c) any drawing, picture, illustration or painting;
- (d) any print, photography, engraving or lithograph;
- (e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
- (f) computer software which is not a film;
- (g) the cover or packaging of a film;
- (h) any figure, carving, statue or model; and
- (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet;

[Para. (i) added by s. 1 (b) of Act No. 34 of 1999.]

“[V]isual presentation’ means –

- (a) a drawing, picture, illustration, painting, photograph or image; or
- (b) a drawing, picture, illustration, painting, photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout.”¹³¹

2 7 POSSESSION, PRODUCTION, DISTRIBUTION

2 7 1 POSSESSION

¹³⁰ 18 U.S.C. 2256

¹³¹ Definition of ‘visual presentation’ substituted by s 1(c) of Act No 34 of 1999

The term “possession” is derived from the Latin word *possessio* which in turn is a combination of the words *potestas*¹³² and *sedere*¹³³. It follows that possession includes elements of both physical (*corpus*) and mental control (*animus possidendi*) over a subject.¹³⁴

The Oxford English Dictionary defines the term “possession” simply as the holding or having something (material or immaterial) as one's own, or in one's control.¹³⁵ The Drugs and Drug Trafficking Act¹³⁶ defines it as follows:

“[P]ossess”, in relation to a drug, includes to keep or to store the drug, or to have it in custody or under control or supervision;”

The content of the term possession in terms of data found on a computer however has not been defined by either international or South African legislation. The storage of electronic data by means of a computer can either be accomplished by downloading the data onto a disc or the harddrive of a computer. When visiting a website on the Internet, and thus accessing the information contained on this website, a file is automatically created within the harddrive¹³⁷ of the computer. Forensic detectives can use information stored in these files in establishing how many times a website has been accessed. These files can in some instances be used as corroborative evidence in proving intentional possession.¹³⁸

2 7 2 PRODUCTION

Some of the definitions given by the Oxford English Dictionary for the word “produce” is to bring something forward or to bring into view.¹³⁹ Legislation in

¹³² This word may be translated as “the power to do something” or “the power over something” according to Simpson *Cassell's Latin Dictionary (Fifth Edition)* 1979

¹³³ This may be translated to mean “to sit” or “to remain fixed” according to Simpson *Cassell's Latin Dictionary (Fifth Edition)* 1979

¹³⁴ Van der Merwe *Sakereg* (1989) 90

¹³⁵ Simpson and Weiner (ed) *Oxford English Dictionary (Second edition)* 1989

¹³⁶ 140 of 1992 s 1

¹³⁷ Also referred to as the “Internet cash” of the computer.

¹³⁸ Personal interview with Inspector Natheer Brown, Computer Crimes Specialist, Crime Intelligence Centre, Western-Cape, 29/08/01

¹³⁹ Simpson and Weiner (ed) *Oxford English Dictionary (Second edition)* 1989

the United States describes production not only as producing, but also as directing, manufacturing, issuing, publishing, or advertising.¹⁴⁰

In the United Kingdom the court of appeal held that to download or print the images, was to create new material.¹⁴¹ The Court found that the words of section 1(1)(a) of the Child Protection Act¹⁴², “to make”, had to be given their natural and ordinary meaning, and in the context meant to cause something to exist; to produce it by action, or to bring about.

2 7 3 DISTRIBUTION

The United Kingdom Child Protection Act regards distribution as the parting of possession to, or exposing or offering it for acquisition by, another person.¹⁴³

The South African Films and Publications Act¹⁴⁴ defines the term “distribute” as follows:

- “(a) [I]n relation to a film, without derogating from the ordinary meaning of that word, includes sell, hire out or offer or keep for sale or hire and, for purposes of section 26 (1) (a) and (b), includes hand or exhibit a film to a person under the age of 18 years;
- (b) in relation to a publication, without derogating from the ordinary meaning of that word, includes display in public, or sell, hire out or offer or keep for sale or hire and, for purposes of section 25 (a) and (b), includes hand or display a publication to a person under the age of 18 years;”

The term “distributor” is defined only in relation to a film and means a person who conducts business in the selling, hiring out or exhibition of films. No definition is given of a distributor in relation to a publication. As the Internet is considered as a form of publication¹⁴⁵, attention should be given to this matter.

¹⁴⁰ 18 U.S.C. Section 2256

¹⁴¹ Three judges ruled that a teacher, Jonathan Bowden, who downloaded images of young boys, was indeed making them. See also “Key ruling on net child porn” Available at http://news.bbc.co.uk/1/hi/english/uk/newsid_514000/514660.stm 19/11/01. A discussion of the case is available at <http://www.cyber-rights.org/documents/rvbowden.htm> 01/06/01

¹⁴² 1978

¹⁴³ S 1(2)

¹⁴⁴ 65 of 1996 s 1

¹⁴⁵ See para (i) of the definition of publication chapter 2 p 19

28 THE INTERNET

One of the less commonly known facts about the Internet is that it was originally developed by the United States Military, through the Advanced Research Projects Agency (ARPA), an agency of the Department of Defense. Their system was called "ARPAnet".¹⁴⁶ It was designed as a computer telecommunications network which connected, via phonelines, the computers of the military, defence contractors and universities conducting defence-related research, in order to communicate, exchange data and co-ordinate their efforts.¹⁴⁷ ARPAnet spread through to most major American universities during the seventies where it was used for research purposes.¹⁴⁸ The National Science Foundation took control of the extensive expansion of the system in 1984 and by the late eighties it had developed into an international network. In order to meet demands, a second network, called ANS, was designed by IBM, MCI, and Merit Inc.¹⁴⁹ This system suddenly became not only limited to governmental agencies and elite universities¹⁵⁰ as this network of networks soon became the Internet as we know it today. Its original creators probably never intended it to be the multipurpose, global system that it had developed into and in all probability never foresaw the need for regulation it has today.¹⁵¹

At present, some of the significant applications of the Internet are electronic mail, file downloading (using file transfer protocol (ftp¹⁵²)), Usenet newsgroups¹⁵³, Internet Chat Relay (IRC)¹⁵⁴ and the World Wide Web.¹⁵⁵ The official description of the World Wide Web is that it is a wide area hypermedia information retrieval initiative aiming to give universal access to a large

¹⁴⁶ Sayle 2000 *WILJ* 261

¹⁴⁷ Esposito 1998 *CASE W RES J INT'L L* 549

¹⁴⁸ Esposito 1998 *CASE W RES J INT'L L* 549

¹⁴⁹ Esposito 1998 *CASE W RES J INT'L L* 549

¹⁵⁰ Sayle 2000 *WILJ* 262

¹⁵¹ Esposito 1998 *CASE W RES J INT'L L* 548

¹⁵² Ftp is the protocol used to download a software programme or other file from an Internet site to the user's own computer. Ftp is invoked automatically when a user selects a file to download from a website to his computer. Smith (ed) *Internet Law and Regulation* (1996) 3

¹⁵³ These newsgroups are public discussion forums to which users can post articles and contribute to a particular topic. Users can read and reply to posted messages days or weeks later. Smith (ed) *Internet Law* 3

¹⁵⁴ IRC allows the participants to converse in real time on their screens. The conversation scrolls up the screen as the conversation continues. Smith (ed) *Internet Law* 3

universe of documents.¹⁵⁶ To put it into simpler terms: the Web is an Internet-based computer network that allows users on one computer to access information stored on another computer through the world-wide network.¹⁵⁷

One of the main characteristics of the Internet that is relevant to this study, is that it has a universal membership of users. If information is available, then any authorised person will be able to access it from anywhere in the world.¹⁵⁸

A user needs only one telephone number to access his Internet access provider. The user then types in or clicks a relatively simple address to access each Internet site.¹⁵⁹ The Internet is based on a client-server model. In this model, a user relies on a program (the client) to connect to a remote machine (the server), where data is stored. The client (such as Netscape or LINX) know how to present data but not what its origin is. The servers know how to extract the data but are unaware of how it will be presented to the user.¹⁶⁰

Another feature of the World Wide Web is its hypertext structure. Underlined text or an icon can represent a particular reference and by clicking on it with the mouse, the referenced document appears. This makes the copying of information unnecessary and information only needs to be stored once. All references to it can also be linked to the original document.¹⁶¹

These features all attribute to the popularity of the Internet among criminals. The Internet is a complex, anarchic, and multi-national environment where old concepts of regulation may not be easily applicable or enforceable.¹⁶² The regulation of criminal activity online is nevertheless not an uncontrollable minefield of lawlessness as is sometimes commonly believed. The Internet rather poses a fundamental challenge for effective leadership and governance.¹⁶³

2 9 INTERNET SERVICE PROVIDERS

¹⁵⁵ Smith (ed) *Internet Law* 3

¹⁵⁶ "How does the Internet work?" <http://homepage.seas.upenn.edu/~lzeltser/WWW> 22/02/97

¹⁵⁷ <http://homepage.seas.upenn.edu/~lzeltser/WWW> 22/02/97

¹⁵⁸ <http://homepage.seas.upenn.edu/~lzeltser/WWW> 22/02/97

¹⁵⁹ Smith (ed) *Internet Law* 1

¹⁶⁰ <http://homepage.seas.upenn.edu/~lzeltser/WWW> 22/02/97

¹⁶¹ <http://homepage.seas.upenn.edu/~lzeltser/WWW> 22/02/97

¹⁶² http://elj.warwick.ac.uk/jilt/internet/97_1akdz/akdemiz.htm#1 01/06/01

¹⁶³ http://elj.warwick.ac.uk/jilt/internet/97_1akdz/akdemiz.htm#1 01/06/01

The first access providers were academic institutions and government bodies with high capacity links to other such bodies.¹⁶⁴ Today the typical access provider is a commercial organisation selling Internet access to home and commercial users, commonly known as Internet Service Providers. (ISPs)¹⁶⁵ ISPs can range from large organisations with their own geographically dispersed networks and numerous connections to other Internet-compliant networks, to small providers who provide one or two local telephone numbers and a single connection into someone else's network.¹⁶⁶ These small providers are often local re-sellers of capacity on a large ISP's network such as a telephone company. Telephone companies often provide local telephone numbers for the ISP around the country. The calls are routed through the telephone company's network to the ISP, the caller only paying for a local rate call.¹⁶⁷

ISPs can also provide additional services such as Web hosting¹⁶⁸ and design. This ISP that stores Web pages for its customers or maintains a collection of Usenet newsgroups plays more than just the role of access provider. The main function of an ISP still remains that of providing facilities of communication on the Internet.¹⁶⁹

2 10 CHILD SEXUAL EXPLOITATION ON THE INTERNET

Delli-Colli, the head of the CyberSmuggling Centre, a unit within the US Customs that combats the import of child-sex photographs and films, says that child pornography was essentially eradicated in the 1980s. With the advent of the Internet, the availability of child pornography once again exploded.¹⁷⁰ Paedophiles used to be lonely and hunted individuals¹⁷¹ who were too ashamed to admit to their fantasies.¹⁷² The Internet has given them

¹⁶⁴ Smith (ed) *Internet Law* 9

¹⁶⁵ Smith (ed) *Internet Law* 9

¹⁶⁶ Smith (ed) *Internet Law* 9

¹⁶⁷ Smith (ed) *Internet Law* 9

¹⁶⁸ A host is a digital storage place accessible via the Internet. The type of data may vary from text documents to graphics or any other kind of data. Smith (ed) *Internet Law* 9

¹⁶⁹ Smith (ed) *Internet Law* 9

¹⁷⁰ Nordland and Bartholet "The Web's Dark Secret" 2001 *Newsweek* 36 38

¹⁷¹ Nordland and Bartholet 2001 *Newsweek* 36

¹⁷² Nordland and Bartholet 2001 *Newsweek* 38

the freedom to form communities of child molesters online where they can repeatedly find reassurance that what they are doing is normal.¹⁷³

The sexual exploitation of children has taken on a number of new and imaginative forms online. Photographs and videos of child pornography are now being circulated via websites. These images have often been altered by a computer using a technique called “morphing”¹⁷⁴. New faces of children are “morphed” onto the bodies in other, sometimes older, images of pornography. Other new objects can also be added or parts of a photo can be deleted.¹⁷⁵ A child’s face may be superimposed onto an adult’s body, pubic or facial hair erased and breasts minimised so that images of adults appear to be children.¹⁷⁶ Recently produced material is often more violent, depicting child torture.¹⁷⁷

One of the features that make the Internet very attractive to paedophiles is found in Internet Chat relay. The ability to send and receive files is made extremely quick and easy. The simplest way to accomplish this is via Document Carbon Copy (DCC). To send another user a file, one has only to right-click on the user’s name, select “DCC Send” from a drop-down menu and attach the file. Most of the illicit pornographic material is transferred in this way. Files are also exchanged via ftp, a similar transfer protocol requiring a little additional software and know-how.¹⁷⁸

The Internet is today used by paedophiles to make online arrangements for the exchange, sale or purchase of child pornography. Any individual may now trade and/or sell images of almost any kind from one end of the world to the other.¹⁷⁹ The actual exchange or delivery would occur through the Internet, mail or in hand-to-hand exchanges.¹⁸⁰ Other arrangements and contracts made on the Internet include those between adults seeking sexual access to

¹⁷³ http://news.bbc.co.uk/hi/english/uk/newsid_1169000/1169457.stm 14/02/01

¹⁷⁴ “Morphing” is short for “metamorphosing”. This technique allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image. See Burke 1997 *Harvard Journal on Legislation* 440

¹⁷⁵ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁷⁶ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁷⁷ “Child Pornography on the Internet” Available at <http://www.ecpat.net/Childporn/childporn.html> 15/05/01

¹⁷⁸ <http://www.pedo-stop.org/irc.htm> 21/05/01

¹⁷⁹ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁸⁰ <http://www.ecpat.net/Childporn/childporn.html> 15/05/01

children and adults willing to provide and/or trade children for sexual purposes. The majority of these arrangements take place in chat rooms, which form an integral part of a number of sex-rings.¹⁸¹ Letter writing by paedophiles, extensive in the past, is now being replaced by much more rapidly transmitted computer conversations.¹⁸²

Chat rooms are also extensively used by adults seeking sexual contact with children online. Paedophiles pretending to be children, enter these chat rooms, where privacy and anonymity is guaranteed, and initiate friendships with other children. Adult pornography is often used to start conversations with children about sex and coercing them to believe that it is normal to perform sexual acts with adults.¹⁸³ These “friendships” would then lead to face-to-face meetings and ultimately, the sexual abuse of the child.¹⁸⁴

Chat rooms are also used for the online broadcasting of the sexual molestation and rape of a child. One of the men arrested for his involvement in the W0nderland-club¹⁸⁵, Gary Salt, better known as “Jazz” to other online paedophiles, was considered to be a hero by the other members of the club for his dissemination of live online abuse. Other chat room members requested him to perform certain acts during these broadcasts.¹⁸⁶

Computer bulletin boards can be set up exclusively to exchange information about sexual interest in minors or specifically to allow for running conversations by computer on such subjects. Monitoring of such sex oriented bulletin boards has indicated that these boards receive thousands of calls. In most countries, neither licences nor registration for bulletin boards is required.¹⁸⁷

The latest form of child pornography is “virtual child pornography”, which does not involve real children but computer-generated pornographic images of

¹⁸¹ <http://www.ecpat.net/Childporn/childporn.html> 15/05/01

¹⁸² <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁸³ Barnes et al *Child Victims* 29

¹⁸⁴ <http://www.ecpat.net/Childporn/childporn.html> 15/05/01

¹⁸⁵ See also p 4

¹⁸⁶ Transcript from the BBC programme, Panorama, broadcasted on 13/02/01 in the UK. Available at http://hi/english/static/audio_video/programmes/panorama/transcripts/transcript_11_02_01.txt One of the other members, David Hines said: “I suppose he was considered a hero. Somebody who was standing up for what the group believed in who wasn't just mouthing it and saying it, he was actually doing it.”

children. One method uses the technology of body suits with fibre-optic sensors that allow a person to sensually interact with his computer. The user can perform or simulate acts, which would be crimes if they were actually carried out, but as they only take place within the computer and the imagination of the user, they are only "virtual molestation". Other users of the chat room can then request certain acts to be performed.¹⁸⁸

The Internet provides anonymity to its users. A user can manufacture virtually any identity and send a message so that no one will be able to determine the origin. This is known as "anonymous re-mailing." The user will take an incoming message, remove the source address, assign an anonymous identification code number with the re-mailer's address, and forward it to the final destination. Responses to the anonymous messages are then similarly encoded and the responder likewise remains anonymous. Finland appears to be the host country for most of these paedophile "re-mailers".¹⁸⁹

The use of encrypted messages and images increases the anonymity of paedophiles on-line. The software is cheap and as user-friendly as the Internet itself.¹⁹⁰ Law enforcers are faced with the task of unravelling these codes, often making use of ex-computer hackers and a limited group of computer experts. Even if law enforcement officials discover the image, the ability to distribute it may not be impaired.¹⁹¹ Once an image is introduced on the Internet, it can be downloaded by any number of users and can be reproduced repeatedly without any loss of quality.¹⁹²

The Internet, albeit one of the most consequential discoveries of the previous century, is not the only form of technology aiding paedophiles in their perverse pursuit. With the development of digital cameras, video equipment and colour scanners, pictures can now be scanned and video clips can be captured into a computer without any loss of quality. This process can be repeated a number of times over a length of time. It is also possible to attach these images and video clips to e-mail text. The expenses involved in obtaining this

¹⁸⁷ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁸⁸ Barnes et al *Child Victims* 35

¹⁸⁹ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁹⁰ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁹¹ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

equipment have dropped dramatically over the last couple of years, making it affordable household items.¹⁹³ Computers now come with built in microphones and speakers and will soon be routinely equipped with cameras. Monitors also frequently come with built-in speakers and microphones. This equipment will enhance the capacity for production and distribution of home videos.¹⁹⁴

Advanced technology is making transmission increasingly faster. High speed modems of 28,800 bits per second ("BPS") are currently available but soon it will be possible to boost that capacity to 550,000 BPS via high speed modems using cable television wire. This is significant since transmission and downloading of images can be time consuming and therefore costly.¹⁹⁵

2 11 CONCLUSION

It is clear from the overview of relevant International Conventions and the legislative approaches followed by other jurisdictions that sexual exploitation and sexual abuse can take on many forms. As some of these key concepts have a number of synonyms and do not always allow for one encompassing definition, it is often very difficult to confine these concepts within a set of legal boundaries. Technological development has also introduced new ways to escape prosecution. The Internet does not respect and respond to national boundaries and the regulation of the world-wide web presents many new challenges to the both the industry and the legislator. It is nevertheless essential that the law should always be one step ahead of criminals as opposed to lagging behind. South Africa, as a member of the international community, has pledged to do this when protecting its children. In the following chapter, this international commitment will be analysed. The approaches followed by international organisations in their endeavour to formulate practical, workable and clear solutions, will also be examined.

¹⁹² <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁹³ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁹⁴ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

¹⁹⁵ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

CHAPTER 3

INTERNATIONAL GUIDELINES ON THE PROTECTION OF CHILDREN

3 1 INTRODUCTION

The analysis of key concepts in the previous chapters emphasises the tremendous challenges presented in order to protect children. They are easy targets, vulnerable and cannot protect themselves. This undeniable truth has been recognised by the international community as it soon realised that the protection provided by treaties concerned with human rights in general is not sufficient.¹ As a result, several international documents safeguarding the rights of children have been drafted, adopted and ratified by almost every country in the world. Legally binding norms have been created and standards set for States Parties to meet in their domestic legislation.² As the rights of the child to protection are derived from these documents, it is imperative to analyse these documents in this study. It is also important to emphasise the work of several international organisations and monitoring bodies promoting the safety of children online. These organisations, many of which are the product of individuals' initiative, are playing a vital role in an attempt to safeguard the World Wide Web.

3 2 INTERNATIONAL DOCUMENTS COMMITTED TO THE PROTECTION OF THE CHILD

3 2 1 DECLARATIONS ON THE RIGHTS OF THE CHILD

¹ Badran in Van Bueren *The International Law on the Rights of the Child* (1995) xv

² Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child" 1995 *SAJHR* 402

The first declaration of the rights of the child was adopted by the League of Nations in 1924.³ The international community recognised the child's need for protection against exploitative practices by enshrining the following rights in the Declaration:

“By the present Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

...

IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;”

Although the Declaration was the first international document to acknowledge the special need for the protection of children, it does not, however, refer to obligations of States but rather places duties on men and women of all nations. It also does not regard children as the holders of rights but rather as the recipients of treatment.⁴ This Declaration nevertheless preceded the Universal Declaration of Human Rights by twenty-four years.⁵

After the Second World War, the international community again focussed their attention to the plight of children. In March of 1949 South Africa was one of the five governments to submit draft texts for a new Declaration of the Rights of the Child to the Secretary-General of the newly formed United Nations⁶. In the Declaration of the Rights of the Child of 1959 the General Assembly of the United Nations adopted⁷ the child's right to be protected against all forms of neglect, cruelty and exploitation. It also recognises that the child should not be the subject of traffic in any form.⁸ It further acknowledges the fact that children need special

³ Van Bueren *International Law* 6

⁴ Van Bueren *International Law* 7

⁵ Van Bueren *International Law* 6

⁶ Hereafter UN. Van Bueren *International Law* 10 fn 68

⁷ On 20 November 1959. Van Bueren *International Law* 10

⁸ Principle 9

protection and in the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.⁹

Although these Declarations are non-binding resolutions, they provide an essential foundation and set the standard for Conventions in recognising the rights of children. A number of States, including Poland, stated that they would have preferred to adopt a Convention on the Rights of the Child so that State Parties would amend their legislation in accordance with the Principles expressed in the Declaration of 1959.¹⁰ This was opposed by the majority of States for reasons of great economic, social and cultural differences and the greatly divergent views on morality and religion prevailing in the various Member States.¹¹

3 2 2 THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Poland nevertheless persisted in their endeavour by submitting a proposal for a Convention on the Rights of the Child¹² to the General Assembly of the United Nations in 1978¹³. The General Assembly in turn submitted the proposal to the Commission on Human Rights.¹⁴ Among the bodies that contributed to the drafting of the Convention were those of governments, UN agencies and a network of more than 50 non-governmental organisations serviced by Defence for Children International.¹⁵ On 20 November 1989 the General Assembly adopted the Convention by consensus and it entered into force on 2 September 1990.¹⁶

Geraldine van Bueren's analysis of the Convention distinguishes between four "P's", thus categorising the rights enshrined in the document into four groups.

⁹ Principle 2

¹⁰ Van Bueren *International Law* 11

¹¹ Van Bueren *International Law* 12

¹² Hereafter the CRC

¹³ The following year being the International Year of the Child

¹⁴ Sloth-Nielsen 1995 *SAJHR* 401

¹⁵ Badran in Van Bueren *International Law* xv

The Convention provides for the participation of children in decisions affecting their destiny; the provision of assistance for their basic needs; the prevention of harm to children; and the protection of children against discrimination and all forms of neglect and exploitation.¹⁷ These complementary principal approaches need to be applied equally¹⁸ where the rights of children are concerned. The best interests of the child shall always be a primary consideration.¹⁹ The CRC ultimately recognises that the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world.²⁰

One of the five goals of the Convention, according to Van Bueren, is that it imposes new obligations with regard to the provision and protection of children. These include the obligation on a state to provide for rehabilitative measures for child victims of neglect, abuse and exploitation.²¹ In Article 4 it places the duty on States Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. This duty is repeated in Article 19 where it states the following:

“1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include the effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

¹⁶ Van Bueren *International Law* 15

¹⁷ In “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” 2000 Davel (ed) *Introduction to Child Law in South Africa* 203

¹⁸ Van Bueren *International Law* 15

¹⁹ A 3

²⁰ Preamble of the CRC

²¹ Van Bueren *International Law* 16. See a 39 of the CRC

The CRC places a responsibility on State Parties to the Convention to respect the responsibilities the community have to provide appropriate direction and guidance to the child in a manner that is consistent with his/her evolving capacities.²² It also recognises the important influence of the mass media and accordingly encourages State Parties to disseminate information and material of social and cultural benefit to the child.²³

The protection of children against exploitation, albeit in way of sexual exploitation or economic exploitation in the form of performing hazardous work, is the subject of Articles 32²⁴, 34, 35²⁵, 36²⁶ and 39. Article 34 enshrines the child's right against all forms of sexual exploitation and sexual abuse and reads as follows:

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) the exploitative use of children in prostitution or other unlawful sexual practices;
- (c) the exploitative use of children in pornographic performances and materials.”

From the above it should be noted that Article 34 has both a protective as well as a preventative facet. The recovery component can be found in Article 39 which provides the following:

²² A 5

²³ A 17

²⁴ “1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) provide for a minimum age or minimum ages for admission to employment;
- (b) provide for appropriate regulation of the hours and conditions of employment;
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.”

²⁵ “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

²⁶ “States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.”

“States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

One of the significant aspects of the CRC is that no other treaty has been ratified by so many states in such a short period of time.²⁷ At present, 191 countries²⁸ have committed themselves in this way to the implementation of children’s rights by means of legislative, administrative, social and educational measures. South Africa did so by signing the Convention in January 1993 and ratifying it on the 16th of June 1995.²⁹

The first implication of ratification of a Convention is that the State Party should refrain from acts which would defeat the object and purpose of the Convention. It should also review its current legislation to ensure that its domestic law coincides with the Convention.³⁰ Progress on the implementation of the CRC is monitored by the Committee on the Rights of the Child, which was established in 1991. State Parties ratifying the Convention undertake to submit reports to this Committee detailing the measures they have adopted to give effect to the rights contained in the Convention and on the progress made on the enjoyment of those rights.³¹ The first report must be submitted within two years of ratification³² and thereafter reports should be submitted every five years.³³ South Africa has

²⁷ It came into force seven months after it was adopted. Sloth-Nielsen 1995 *SAJHR* 402

²⁸ All the United Nations Member States with the exception of the USA and Somalia, as well as some non-member states

²⁹ Sloth-Nielsen 1995 *SAJHR* 403

³⁰ Sloth-Nielsen 1995 *SAJHR* 417. It thus follows that South Africa, as a member of the CRC, should continuously examine and measure its legislation pertaining to children against the principles it agreed to by ratifying the Convention.

³¹ A 44

³² A 44 (1) (a)

³³ A 44 (1) (b)

submitted its first report in November 1997³⁴ and a Supplementary Report in January 2000.³⁵

3 2 3 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

On 7 January 2000³⁶ South Africa became a member of the group of 21 states that have ratified a less known but equally important international document on children's rights. The African Charter on the Rights and Welfare of the Child³⁷ only came into force on 29 November 1999 as the required number of states ratified this Charter almost a decade after it was first adopted on 11 July 1990.³⁸ The Charter is the result of the commitment of a number of African countries that felt that certain issues unique to the continent³⁹ were omitted from the CRC. It therefore states that the virtues of children of Africa's cultural heritage, their historical background and the values of the African civilization should inspire and characterize their reflection on the concept of the rights and welfare of the child.⁴⁰

The Charter also adopts the principle that the best interests of the child shall be the primary consideration in all actions concerning the child.⁴¹ The child's right against sexual exploitation is enshrined in Article 27 which reads as follows:

"States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;

³⁴ *Initial Country Report on the Convention on the Rights of the Child: South Africa*

³⁵ *Implementation of the Convention on the Rights of the Child: South Africa's Supplement to the Initial Country Report*

³⁶ Viljoen "The African Charter on the Rights and Welfare of the Child" 2000 Davel (ed) *Introduction to Child Law in South Africa* 229

³⁷ Hereafter the African Charter

³⁸ Viljoen 2000 in Davel (ed) *Introduction to Child Law* 214

³⁹ These issues include that of *apartheid*, female circumcision and other disadvantages influencing the female child. See Viljoen 2000 in Davel (ed) *Introduction to Child Law* 218

⁴⁰ Preamble to the Charter

⁴¹ A 4

- (b) the use of children in prostitution or other sexual practices;
- (c) the use of children in pornographic activities, performances and materials.”

The Charter also prohibits the abduction, sale and trafficking of children.⁴²

3 2 4 THE WORLD CONGRESS AGAINST SEXUAL EXPLOITATION OF CHILDREN

The international community addressed the challenge of child pornography on the Internet at the World Congress against the Commercial Sexual Exploitation of Children held in Stockholm in August 1996. The aims of the Congress were:

- “ - To develop a framework for concerted global action to combat prostitution of children, child pornography and the trafficking of children for sexual purposes in accordance with the Convention on the Rights of the Child;
- To bring together decision makers from many major disciplines, including political leaders and government officials working in the fields of social work, religion, law enforcement, tourism, the military sector and the media; and
- To adopt a statement and devise a plan of action to combat the commercial sexual exploitation of children, taking due account of commitments made at the World Summit for Children and recommendations made by the Commission on Human Rights and the UN Special Rapporteur on the Sale and Trafficking of Children, Child Prostitution and Child Pornography.”⁴³

The 122 governments, non-governmental organisations and inter-governmental organisations that attended the conference, unanimously adopted an Agenda for Action⁴⁴ as confirmation to their commitment to a global partnership against the commercial sexual exploitation of children.⁴⁵ This Agenda for Action provides for the co-operation and co-ordination of actions at local, national, regional and international levels while taking preventative measures through the formal and informal sector to sensitise relevant target groups to their rights. Laws, policies

⁴² A 29. As in the case of the CRC, the South African government is bound to implement these provisions.

⁴³ “Monitoring the Stockholm Agenda for Action” Available at <http://www.ecpat.net/projects/stockholmp.htm> 07/05/01

⁴⁴ “The Stockholm Agenda for Action” Available at <http://www.ecpat.net/projects/AforA.html> 07/05/01

⁴⁵ “What is the Stockholm Congress?” Available at <http://www.ecpat.net/projects/whatis.html> 07/05/01

and law enforcement programmes should be strengthened to increase the protection of children but the recovery and reintegration of abused children should also be prioritised. The Agenda for Action encourages the participation of children, including child victims and their families, so that they can express their views to take action to protect children from commercial sexual exploitation.⁴⁶

Governments were urged to propagate a National Plan for Action, involving the relevant sectors of civil society in the process, which would develop, strengthen and implement national laws to establish the criminal responsibility of service providers, customers, and intermediaries in child pornography, including the possession of child pornography.⁴⁷ Police should be adequately trained, resourced and given the authority to be proactive in the pursuit of child abusers.⁴⁸ These National Plans for Action should be made public in order to help other countries formulate their own plan.⁴⁹

The South African delegation to the Congress comprised of government department officials, police officers and NGO representatives. In delivering his message at the Congress, Mr Nelson Mandela promised that South African resources will be used to ensure that each day, fewer children in the world, in each country, are treated as insignificant objects to be traded, mangled and mocked. He conveyed unequivocal support for the intentions and objectives of the Congress and pledged South Africa's willingness to take appropriate steps to implement the outcome of the deliberations.⁵⁰

The delegation also participated in a regional Africa consultation, resolving to encourage research and to establish networks within Africa in order to facilitate

⁴⁶ <http://www.ecpat.net/projects/AforA.html> 07/05/01

⁴⁷ <http://www.ecpat.net/projects/AforA.html> 07/05/01

⁴⁸ "Mandela Message To The World Congress In Stockholm" Available at <http://www.polity.org.za/govdocs/pr/1996/pr0903b.html> 05/09/01

⁴⁹ <http://www.ecpat.net/projects/AforA.html> 07/05/01 The South African Government has its National Programme of Action for Children (NPA) on 6 November 1999. The programme undertakes to meet the World Summit call for the survival, protection, development and participation of children, and the creation of a society that prioritises the needs of children, especially those in difficult circumstances. See also *Implementation of the CRC: South Africa's Supplement to the Initial Country Report Appendix A(2)* and <http://www.polity.org.za/govdocs/pr/1996/pr0903b.html> 05/09/01

⁵⁰ "World Congress Against Commercial Sexual Exploitation" Available at <http://www.polity.org.za/govdocs/pr/1996/pr0828h.html> 05/09/01

support for countries that do not have the capacity to do so. It also called on states to support and encourage the ongoing United Nations effort in drafting an Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.⁵¹

3 2 5 THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

On the 25th of May 2000 the General Assembly of the United Nations adopted two new additional and optional protocols to the CRC. One of them⁵² is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. The purpose of this Protocol is to extend the measures that State Parties to the CRC should undertake in order to guarantee the protection of the child from the sexual exploitation.⁵³ The Optional Protocol was drafted in response to the growing availability of child pornography on the Internet and other evolving technologies⁵⁴, emphasising the importance of closer co-operation between governments and the Internet industry.

The Protocol also supports the International Conference on Combating Child Pornography on the Internet, held in Vienna in 1999. The Conference in Vienna called for the worldwide criminalisation of production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography.⁵⁵ By ratifying the Optional Protocol, State Parties agree to the above and to make such offences punishable by appropriate penalties that take into account their grave nature.⁵⁶

At present only three countries, namely Andorra, Bangladesh and Iceland, have ratified this Protocol, while 70 more countries have signed it.⁵⁷ Even though a

⁵¹ <http://www.polity.org.za/govdocs/pr/1996/pr0903b.html> 05/09/01

⁵² The other is concerned with the involvement of children in armed conflict

⁵³ Preamble to the Protocol

⁵⁴ Preamble to the Protocol

⁵⁵ Preamble to the Protocol

⁵⁶ A 3(3)

⁵⁷ <http://www.unicef.org/crc/opsx-tableweb.htm> 07/09/01

non-member to the CRC, the USA, and neighbouring countries of South Africa such as Namibia, Malawi and Lesotho have signed the document⁵⁸, the South African government has not committed itself to the protection of children in this manner.

3 2 6 COUNCIL OF EUROPE CYBERCRIME TREATY

On the 22nd of June 2001, the 41 members of the Council of Europe, the USA, Canada and Japan agreed on a blueprint for a global code on cybercrime.⁵⁹ This draft convention contains a range of procedural powers, including search of computer systems and interception, intended at governing, amongst other computer crimes, child pornography. Its main objective is to pursue a common criminal policy aimed at the protection of society against cybercrime by adopting appropriate legislation and fostering international co-operation.⁶⁰ It is expected that the convention will be rubber-stamped at ministerial level in September 2001.⁶¹

3 3 INTERNATIONAL ORGANISATIONS COMMITTED TO THE PROTECTION OF THE CHILD

A number of inter-governmental and non-governmental organisations have made it their immutable enterprise to combat child pornography on the Internet. Their efforts have been invaluable to governments to such an extent that some of their proposals have been recognised and consequently included in national legislation.⁶² These organisations are non-profitable and have often found their origin in the concern of ordinary members of public who stumbled onto child pornography web-sites by pure accident. It is encouraging to witness the growing number of these organisations of which only a few will be discussed below.

⁵⁸ <http://www.unicef.org/crc/opsx-tableweb.htm> 07/09/01

⁵⁹ http://www.partners.nytimes.com/thestandard/standard_27391.html?todayshadlines 26/06/01

⁶⁰ http://www.partners.nytimes.com/thestandard/standard_27391.html?todayshadlines 26/06/01

⁶¹ http://www.partners.nytimes.com/thestandard/standard_27391.html?todayshadlines 26/06/01

⁶² In this way proposals made by the Internet Watch Foundation have played a vital role in the drafting of legislation in the United Kingdom.

3 3 1 UNICEF⁶³

The United Nations Children's Fund is one of the twenty non-governmental organisations of the United Nations. It was established after the Second World War by the General Assembly of the United Nations with the original purpose to provide supplies and direct relief to child survivors of the war.⁶⁴ UNICEF has expanded its interests to take on broader cultural and social efforts and has an excellent reputation as a well-structured organisation protecting the rights of children⁶⁵, meeting their basic needs and expanding children's opportunities to reach their full potential.⁶⁶ UNICEF insists that the survival, protection and development of children are universal development imperatives that are comprehensive to human progress.⁶⁷ The organisation is guided by the CRC in striving to establish children's rights as enduring ethical principles and international standards of behaviour towards children.⁶⁸

UNICEF attempts to address the roots of child sexual exploitation by focusing on certain principal areas. Firstly it believes that by providing economic support to families, their children will not be at risk of sexual exploitation. Access to and quality of education, especially for girls, should be improved and awareness of sexual exploitation as well as its consequences should be raised. Essentially, the rights of the child should be advocated.⁶⁹ UNICEF therefore played a crucial role in the drafting of the Declaration of the Rights of the Child in 1959, the United Nations CRC, the Optional Protocols to the CRC and was a co-sponsor of the World Congress Against the Commercial Sexual Exploitation of Children. This group of committed people and volunteers continues to exert themselves for the eradication of child pornography.

⁶³ United Nations Children's Fund

⁶⁴ Esposito "Regulating the Internet" 1998 *Case Western Journal of International Law* 541 558

⁶⁵ Esposito 1998 *CASE W RES J INT'L L* 558

⁶⁶ "UNICEF Mission Statement" Available at <http://www.unicef.org/mission.htm> 24/05/01

⁶⁷ <http://www.unicef.org/mission.htm> 24/05/01

⁶⁸ <http://www.unicef.org/mission.htm> 24/05/01

⁶⁹ "Sexual Exploitation of Children" Available at <http://www.unicef.org/programme/cprotection/traf.htm> 17/08/01

3 3 2 ACPO⁷⁰

Antichildporn.org is a non-profit organisation founded to actively seek out and stop the exploitation of children on the Internet.⁷¹ They focus on protecting children from becoming victims of child pornography and to keep it from spreading over the Internet. One method used to achieve this is to educate individuals and organisations about the Internet and the risks associated with it, as well as advising governments on the danger the Internet may pose to the collective social interest. ACPO's main aim is to give all children the chance of leading a normal, healthy childhood.⁷² They plan to do this by accomplishing the following goals:⁷³

- To provide a maximum of information to law enforcement authorities, including activity hot spots on the Internet as the result of their own investigations into the activities of online child pornographers;
- To put a halt to sensationalism and hype regarding the Internet while promoting quality investigative journalism on pedophile pornography;
- To create enough public pressure to bring authorities to the point of action; and
- To form a co-operative with other Internet groups with similar goals that will benefit all and increase their impact.

3 3 3 ECPAT

ECPAT⁷⁴, a global network of organisations and individuals campaigning to protect children against commercial sexual exploitation, was established in 1990.⁷⁵ At that stage it mobilised an action plan for the abolishment of sex tourism in Asia. After a re-evaluation of its activities in 1996, ECPAT decided to

⁷⁰ antichildporn.org

⁷¹ <http://www.antichildporn.org/about.cfm#ACPO> 22/05/01

⁷² <http://www.antichildporn.org/about.cfm#ACPO> 22/05/01

⁷³ <http://www.antichildporn.org/about.cfm#ACPO> 22/05/01

⁷⁴ End Child Prostitution in Asian Tourism

broaden its focus to become an international campaign.⁷⁶ This organisation was a co-sponsor of the World Congress against Commercial Sexual Exploitation of Children held in Stockholm in 1996⁷⁷ and played a vital role in drafting the Agenda for Action at this conference.⁷⁸ ECPAT is also one of the organisers and sponsors of the Second World Congress against Commercial Sexual Exploitation of Children to be held in Japan in December 2001.⁷⁹

ECPAT's campaign in the battle against the sexual exploitation of children includes the following:

- Motivat[ing] local communities to find strategies which will protect children;
- Work[ing] closely with non-governmental organisations, intergovernmental organisation and other individuals and groups;
- Involv[ing] young people in seeking solutions to commercial sexual exploitation of children;
- Provid[ing] training for personel working to rehabilitate child victims of sex abusers;
- Seek[ing] ways to control the flow of child pornography in shops and on the Internet;
- Provid[ing] expert consultancy to governments on legal changes needed to protect children;
- Work[ing] closely with Interpol and local law enforcers to ensure laws are implemented;
- Assist[ing] the tourism industry in its campaign to end sex tourism;
- Monitor[ing] the implementation of the Agenda for Action adopted at the World Congress against Commercial Sexual Exploitation of Children in Stockholm in 1996.”⁸⁰

⁷⁵ “Background of Ecpat” Available at <http://www.ecpat.net/ecpat1/whatissep.htm> 07/05/01

⁷⁶ The organisation is therefore now also known as End Child Pornography and Trafficking <http://www.internetwatch.org.uk/about/index.htm> 23/05/01

⁷⁷ <http://www.ecpat.net/ecpat1/whatissep.htm> 23/05/01

⁷⁸ See p 49 - 51

⁷⁹ <http://www.ecpat.net/second/second1.htm> 23/05/01

⁸⁰ <http://www.ecpat.net/ecpat1/whatepdo.htm> 07/05/01

Apart from increasing public awareness, ECPAT has also created tiplines where the public can report child pornography on the Internet. In this way ECPAT in The Netherlands has created www.surfsafe.nl where people can complain about web sites, chat rooms and inappropriate e-mails. Save the Children in Norway working closely with ECPAT Norway, operates a cyber tipline, children@risk.sn.no. In 1999, reports to the tipline resulted in the closure of 1235 pages that contained child pornography.⁸¹ ECPAT Taiwan (www.ecpat.org.tw) established Web547. This website also allows Internet viewers to report child pornography. Since July 20th, 1999 over 4,200 reports have been made.⁸² ECPAT has also assisted in sending blocking software to Costa Rica and plan to make it available in all Spanish speaking countries.⁸³

3 3 4 IWF⁸⁴

The Internet Watch Foundation was established in the United Kingdom in September 1996 following a warning from the Metropolitan Police to the Internet industry that self-regulation would be the best option.⁸⁵ This independent organisation addresses the problem of illegal material on the Internet and implements the proposals which the government, the police and two major service provider trade associations, ISPA⁸⁶ and LINX⁸⁷, jointly agrees on. The IWF is funded by the UK industry on a subscription basis but their hotline activity receives 50% of their funding from the European Union. Their membership consists of stakeholders in the Internet industry as well as members from child, education, consumer, libertarian and media organisations.⁸⁸

⁸¹ "Prevention of Child Pornography" Available at http://64.78.48.196/eng/Ecpat_inter/projects/preventing_pomography/prevent.asp 17/08/01

⁸² http://64.78.48.196/eng/Ecpat_inter/projects/preventing_pomography/prevent.asp 17/08/01

⁸³ http://64.78.48.196/eng/Ecpat_inter/projects/preventing_pomography/prevent.asp 17/08/01

⁸⁴ Internet Watch Foundation

⁸⁵ http://www.cyber-rights.org/reports/crl_iwf_newsgroups.htm 01/06/01

⁸⁶ Internet Service Providers Association

⁸⁷ London Internet Exchange

⁸⁸ <http://www.internetwatch.org.uk/about/index.htm> 23/05/01

The IWF encourages the classification of legal material on the Internet to enable users to customise the Net according to their own preferences.⁸⁹ They therefore support rating and filtering developments in this respect.⁹⁰ The hotline is an on-line reporting mechanism for reporting criminal content on the Internet but the IWF makes it clear that they are concerned with the law, not personal taste or morality and will only act on material that could be prosecuted under UK legislation.⁹¹

3 3 5 PEDO-STOP

Pedo-Stop is a private non-profit organisation that is dedicated to exposing and educating the public about the growing and disturbing phenomena of the trade and distribution of child pornography within the on-line services.⁹² Their ultimate goal is to reduce the sexual victimisation of children by informing law enforcement officials of specific Internet locations where child pornography exists and to inform the public of the on-going sexual abuse of children in this form. They see it as their constitutional right to defend children as the US Constitution was engineered to protect those that cannot protect themselves.⁹³

3 3 6 NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

The National Centre for Missing and Exploited Children works in close partnership with the Federal Bureau of Investigation, US Customs Service, and the US Postal Inspection Service.⁹⁴ NCMEC's website, www.missingkids.com, also serves as the national Cyber tipline in the United States. Information received is forwarded within minutes to the respective law enforcement

⁸⁹ <http://www.internetwatch.org.uk/about/index.htm> 23/05/01

⁹⁰ <http://www.internetwatch.org.uk/about/cons.htm> 23/05/01

⁹¹ <http://www.internetwatch.org.uk/hotline/index.htm> 23/05/01

⁹² Pedo-Stop Homepage <http://www.pedo-stop.org> 21/05/01

⁹³ "Our mission" Available at <http://www.pedo-stop.org/mission.htm> 24/05/01 Although this website is based in the USA, it aims to raise an international awareness campaign.

⁹⁴ NCMEC Homepage <http://www.missingkids.com/cybertip> 17/08/01

agencies⁹⁵ for investigation and review and when appropriate, to the relevant Internet Service Provider.⁹⁶ This initiative for reporting child sexual exploitation is funded by the US Congress.⁹⁷

3 4 CONCLUSION

From the above discussion of international and regional documents it becomes clear that a framework for the implementation of national legislation, based on prevention and protection of children, should be formulated. Member states to these documents are in fact compelled to implement such legislation. The commitment of non-governmental organisations reflects the individual and collective approach at grassroot-level towards the eradication of child pornography. These members of the international community all believe that international co-operation, education, reporting, referral, investigation and rehabilitative treatment plays an integral part in combating sexual exploitation of children. South Africa has much to learn from other countries that have successfully included these measures into their legislation. The following chapter will examine the manner in which the selected countries have attempted to do so.

⁹⁵ NCMEC works in close relationship with the FBI as well as law enforcement agencies from all over the world.

⁹⁶ <http://www.missingkids.com/cybertip> 17/08/01

⁹⁷ <http://www.missingkids.com/cybertip> 17/08/01

CHAPTER 4

REGULATION OF CHILD PORNOGRAPHY ON THE INTERNET: A COMPARATIVE PERSPECTIVE¹

4 1 INTRODUCTION

States Parties to international documents as discussed in the previous chapter, are bound to implement the duties as set out in these documents. The manner in which member states went about doing so and problems experienced with implementation provide an excellent basis for comparison and criticism of South African legislation. Although the regulation of child pornography on the Internet is a relatively new domain, legislation attempting to do so, has come under scrutiny on a number of occasions. Human rights groups and Internet Service Providers² have contested the constitutionality of various acts in the United States (US), United Kingdom (UK), Canada and Germany with varied amounts of success. As South African jurisprudence on the matter is rather limited, it is important that these debates are analysed to pre-empt possible costly and time-consuming courtbattles while children are being exploited online. Toko Mkwanazi-Xaluva, the director of Child Rights in the Office of the President, also deemed a comparative analysis necessary by making the following remark:

"I think lessons from other countries that have dealt with the issue before are lessons we can learn from. And I think if we look at what has worked and what has not worked, then we avoid what hasn't worked in other countries and we go with best practices."³

This chapter will therefore analyse approaches followed by the US, Canada, the UK, Germany and Japan in protecting the child against sexual exploitation. It pays particular attention to legislation and case law on child pornography on the

¹ For a brief summary of some other countries than the ones discussed in this study, see Healy "Child Pornography: An International Perspective" available at <http://www.usis.usemb.se/children/csec/215e.htm>

² Hereafter ISPs

Internet. It will also examine methods used by these countries to address the questions surrounding the constitutionality of prohibiting pornography and child pornography, enforcing liability provisions on ISPs, as well as the unique situation of jurisdiction on the Internet.

4 2 THE UNITED STATES OF AMERICA

4 2 1 LEGISLATION

The case of Mary Ellen, the girl found chained to a bed in New York in 1874⁴, presents a landmark ruling in the protection of children in the United States. Today the annual amount budgeted for support placements of abused, neglected or abandoned children exceeds \$4.5 billion. The first child welfare services programme in the USA was established in 1935 in accordance with the Social Security Act. During the 1960s mandatory reporting of interfamilial child maltreatment was introduced but the first legislation addressing child abuse at home, namely the Child Abuse Prevention Act, only came into force in 1974. The collection of nation-wide data on child abuse and neglect reports were made possible by the US Department of Health and Human Services in the mid-1970s. In 1980 the Adoption Assistance and Child Welfare Act was passed, followed by the Adoption and Safe Families Act in 1997.⁵

The first campaigns that focused primarily on combating sexual exploitation and pornography of children were initiated during the 1970's when the United States experienced an explosion in the production and popularity of child pornography. Three Congressional Committees were instructed to investigate the matter and in 1977 the Sexual Exploitation of Children Act was enacted.⁶ By this time it became clear that child pornography and prostitution had become highly

³ "SA leads international delegation on sexual exploitation of children" Available at http://www.SABCnews/south_africa/general/0,1009,14204,00.html 16/05/01

⁴ See p 14

⁵ Davidson "Child Protection Policy and Practice at Century's End" 1999 *Family Law Quarterly* 765 766-767

⁶ Barnes, Brown, Mayne, Kowen, Dyason *Child Victims of Prostitution in the Western Cape* (2000) 26

organised multi-million-dollar industries.⁷ The Act made the commercial production and dissemination of any visual or print medium of minors under sixteen years of age engaging in sexually explicit conduct illegal.

In 1984 the Child Protection Act eliminated the requirement that the material had to be considered obscene by refining the definition of sexual conduct and replacing the term "lascivious" with "lewd". It raised the age limit of protection from sixteen to eighteen years. The requirement that the production or distribution be for the purpose of sale was also eliminated. The phrase "visual or print medium" was replaced with "visual depiction". This Act was further amended in 1986 by the Child Sexual Abuse and Pornography Act, placing a ban on the production and use of advertisements for child pornography. The Child Abuse Victims Rights Act of 1986 provided a civil remedy for personal injuries incurred as a result of the production of child pornography.⁸ In 1988 the Child Protection and Obscenity Enforcement Act made the use of a computer to transport, distribute or receive child pornography unlawful.⁹

In 1994 an act concerned with "Certain Activities Relating to Material Involving the Sexual Exploitation of Minors"¹⁰ was passed. This provided for the prohibition of child pornography in the following manner:

"[A]nyone who knowingly ships, distributes, or receives ... by any means including [a] computer or knowingly possesses, three or more copies of, any visual depiction of sexually explicit conduct, is guilty of a felony punishable by up to ten years in prison ... and fines."

This act required the use of a minor in the production of the material in order for it to be considered illegal. By passing the Child Pornography Prevention Act¹¹ in 1996, Congress formally recognised the fact that child pornography advances, promotes and invites sexual abuse and inappropriate sexual behaviour of children and that it is often used as part of a method of seducing other children

⁷ Burke "The Criminalisation of Virtual Child Pornography" 1997 *Harvard Journal on Legislation* 439 449

⁸ Burke 1997 *Harvard Journal on Legislation* 450 - 451

⁹ Burke 1997 *Harvard Journal on Legislation* 451

¹⁰ Codified at 18 U.S.C. §2252

¹¹ Codified at 18 U.S.C. §§2251-2252A, 2256 Hereafter CPPA

into sexual activity.¹² The use of a minor in the depiction is no longer required for the depiction to be considered illegal. In 1998 The Federal Code was again amended by the Child Protection and Sexual Predator Punishment Act.¹³

The definitions for terms relating to child pornography are found in 18 U.S.C. §2256:

- “(1) ‘minor’ means any person under the age of eighteen years;
- (2) ‘sexually explicit conduct’ means actual or simulated –
 - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sadistic or masochistic abuse; or
 - (E) lascivious exhibition of the genitals or pubic area of any person;
- (3) ‘producing’ means producing, directing, manufacturing, issuing, publishing, or advertising;
- ...
- (5) ‘visual depiction’ includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;
- ...
- (8) ‘child pornography’ means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –
 - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

¹² Sayle “Net Nation and the Digital Revolution” 2000 *WILJ* 257 266

¹³ “Legislation of Interpol Member States on Sexual Offences Against Children: USA” Available at <http://www.interpol.com/public/Children/SexualAbuse/NationalLaws/csaUSA.asp> 28/05/01

- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
- (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and
- (9) 'identifiable minor' –
- (A) means a person –
- (i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or
 - (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
 - (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
- (B) shall not be construed to require proof of the actual identity of the identifiable minor.”

The CPPA makes it illegal to knowingly mail, transport or ship¹⁴; knowingly receive or distribute¹⁵; knowingly reproduce for distribution¹⁶; knowingly sell or possess with the intent to sell¹⁷ or knowingly possess¹⁸ any child pornography or any material that contains an image of child pornography. Material that may contain child pornography includes books, magazines, periodicals, films, videotapes and computer disks.¹⁹ The Act also acknowledges the fact that a computer can be used to produce, ship or transport, receive or distribute, possess or sell child pornography.²⁰

According to section 2252A(b)(1) a first-time offender of paragraph (1), (2), (3) and (4) could be sentenced to fifteen years imprisonment, or fined, or both, while

¹⁴ 18 U.S.C. §2252A (a)(1)

¹⁵ 18 U.S.C. §2252A (a)(2)

¹⁶ 18 U.S.C. §2252A (a)(3)

¹⁷ 18 U.S.C. §2252A (a)(4)

¹⁸ 18 U.S.C. §2252A (a)(5)

¹⁹ 18 U.S.C. §2252A (5)(A) & (B)

²⁰ 18 U.S.C. §2252A (a)(1) – (5)

a repeat offender would be fined and imprisoned for a period between five to thirty years. A repeat offender possessor would be fined and/or imprisoned for a period of two to ten years while a first time possessor shall be fined and/or imprisoned but for no more than five years.²¹

A person shall not be charged with the above offences if he or she can prove that each person depicted, was an actual person and an adult at the time of production and that the material was not advertised, promoted, presented, described or distributed in such a manner to convey the impression that it contains a minor engaging in sexually explicit conduct.²²

In terms of 18 U.S.C. §2251, any person, parent, legal guardian or person having custody or control of a minor who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, or permits these acts, shall commit an offence. This person shall be punished if he or she knows or has reason to know that such visual depiction will be mailed or transported in interstate or foreign commerce, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.²³ Punishment for a first time offender shall range from a fine or imprisonment of not less than ten years nor more than twenty years, and/or both. Repeat offenders may be fined and imprisoned not less than thirty years but not more than life.²⁴

Section 2260 makes it an offence for a person, outside the United States, to entice or coerce any child to engage in sexually explicit conduct for the purpose

²¹ 18 U.S.C. §2252A (b)(2)

²² 18 U.S.C. §2252A (c)(1)-(3)

²³ 18 U.S.C §2251 (A) – (B)

²⁴ 18 U.S.C §2251 (D)

of producing any visual depiction of such conduct if it is intended that the visual depiction be imported to the United States.²⁵ It is also an offence to knowingly receive, transport, ship, distribute, sell or possess with the intent to transport, ship, sell or distribute any visual depiction of a minor engaging in sexually explicit conduct if that depiction is intended to be imported into the United States. The use of a minor in the production of the visual depiction is still required.²⁶ Punishment for violation hereof is a fine or imprisonment of no more than ten years for a first time offender²⁷ and no more than 20 years for a person with a prior conviction of sexual exploitation of children.²⁸ In terms of section 2253 an offender of section 2252A or 2260 will forfeit any interest or claim he had with regard to the article in question.

The transfer of obscene material to minors under the age of sixteen has also been criminalised by an amendment in 1998, leaving 18 U.S.C. §1470 to read as follows:

"Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfer obscene matter to another individual who has not attained the age of sixteen (16), knowing that such other individual has not attained the age of sixteen (16) years, or attempts to do so, shall be fined under this title, imprisoned not more than ten (10) years, or both."

Children who suffered personal injuries as a result of the violation of section 2252A or 2260, are entitled to recover the actual damages he or she sustained which shall be deemed to be no less than \$50 000, as well as the cost of the legal proceedings.²⁹ The child has to bring the action within six years after the right of action first accrues.³⁰ This is confirmed by 18 U.S.C. 2259 which provides for the mandatory restitution of the victim's losses by the defendant.

²⁵ 18 U.S.C. §2260 (a)

²⁶ 18 U.S.C. §2260 (b)

²⁷ 18 U.S.C. §2260 (c)(1)

²⁸ 18 U.S.C. §2260 (c)(2)

²⁹ 18 U.S.C. §2255 (a)

4 2 2 THE COURTS' INTERPRETATION

4 2 2 1 THE PROHIBITION OF OBSCENE AND INDECENT MATERIAL

The prohibition of obscene and indecent material, pornography and child pornography has been the subject of a number of cases in the United States. In 1973 the Supreme Court of the USA established a definitive test for obscenity by differentiating between constitutionally protected pornography and unprotected obscenity.³¹ In *Miller v California*³² the court held that in order for material to be classified as obscene and as a result constitutionally unprotected by the First Amendment, the material has to

- (1) under contemporary community interests appeal to the prurient interest;
- (2) depict or describe in a patently offensive way sexual conduct specifically defined by state law; and
- (3) lack serious literary, artistic, political or scientific value.³³

Attempts to define unprotected obscenity or clarifying this test have failed on a number of occasions.³⁴ The Court did however adjust the *Miller* formulation in respect of the prohibition of child pornography in *New York v Ferber*³⁵ and in *Osborne v Ohio*.³⁶ The *Miller*-test was also criticised by the Supreme Court in 1997. In determining the constitutionality of the Communications Decency Act³⁷,

³⁰ 18 U.S.C. §2255 (b)

³¹ Soma, Muther and Brissette "Transnational Extradition for Computer Crimes" 1997 *Harvard Journal on Legislation* 317. In 1957 the Court in *Roth v United States* 354 US 476 (1957) held that obscenity is not protected speech.

³² 413 US 15 (1973)

³³ *Miller* (supra) at 24

³⁴ See for example *Brockett v Spokane Arcades Inc* 472 US 491 (1985) at 504-5.64 or *Jacobellis v Ohio* 378 US 184 (1964) where Justice Potter Stewart famously declared at 197: "I shall not today attempt further to define (obscenity) . . . and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." One influential study found that the *Miller* test had little effect on the regulation of obscene materials; this was attributed, inter alia, to the fact that the test "requires law enforcement officials to make 'largely subjective evaluations of sexually explicit materials'". Harold Leventhal "An Empirical Study into the Effects of *Miller v California* on the Control of Obscenity" 1977 *NYU L Rev* 810, cited in *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) (supra) at para 47

³⁵ 458 US 747 (1982) Available at

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=458&page=747>

³⁶ 495 US 103 (1990) See also the discussion of these two cases on pp 68 - 70

³⁷ Hereafter the CDA

the court described the second prong of the test as reducing the inherent vagueness of its own patently offensive term by requiring that the proscribed material be specifically defined by the applicable state law.³⁸

The CDA was passed in 1996 by the US Congress as a part of the Telecommunications Act of 1996.³⁹ Title 47 U.S.C. §223(a)(1)(B)(ii) criminalised the transmission of obscene or indecent messages to any recipient under 18 years of age. Section 223(d) prohibited a person from knowingly sending or displaying to a person under eighteen any message that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. The CDA thus made it illegal to create, solicit or transmit using a telecommunications device, any obscene, lewd, lascivious, filthy or indecent communication.⁴⁰ In so restricting Internet users, the CDA provided two defenses to prosecution, namely

(1) the use of a credit card or other age verification system; and

(2) any good faith effort to restrict access by minors.

Within minutes of its passing, the American Civil Liberties Union⁴¹ brought a suit asserting that the CDA was unconstitutional in violating the right of freedom of speech.⁴² The Supreme Court finally held in *Reno v ACLU*⁴³ in 1997 that the terms “indecent” and “patently offensive” were unconstitutionally vague as they could apply to constitutionally protected communications between adults.⁴⁴

4 2 2 2 THE PROHIBITION OF CHILD PORNOGRAPHY

³⁸ *Reno, Attorney General of the United States, et al v American Civil Liberties Union et al* 117 S Ct 2329 (1997) Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=96-511>

³⁹ Esposito “Regulating the Internet” 1998 *Case Western Reserve Journal of International Law* 541 551

⁴⁰ Esposito 1998 *CASE W RES J INT'L L* 552

⁴¹ Hereafter ACLU

⁴² Sayle “Net Nation and the Digital Revolution” 2000 *Wisconsin International Law Journal* 257 266 fn 56

⁴³ *Reno* (1997) *supra*

⁴⁴ Sayle 2000 *WILJ* 267 fn 56

Child pornography is not and has never been constitutionally protected by the First Amendment to the US Constitution in the USA.⁴⁵ In 1982 the US Supreme Court created an exception to the First Amendment, proclaiming child pornography to be a new category of speech that does not enjoy constitutional protection.⁴⁶ In what was the first case of child pornography decided by the US Supreme Court, the Court in *New York v Ferber*⁴⁷ had to rule on the constitutionality of a New York state statute⁴⁸ prohibiting distribution of sexual materials to persons under the age of sixteen. The statute thus prohibited a person from knowingly promoting sexual performances by minors by distributing the depictions of such performances. The Court determined that the statute was not unconstitutional, even if the materials were found not to be legally obscene.⁴⁹ In its judgement the Court distinguished between pornography depicting adults and child pornography and set out five reasons why states were entitled to greater leeway in the regulation of pornographic depictions of children.⁵⁰ Firstly it found that the state had a compelling interest⁵¹ in safeguarding the child⁵² against child pornography as it recognised the harm inflicted onto the physiological, emotional, and mental health of the child.⁵³ Sexually exploited children often are predisposed to self-destructive behaviour such as drug and alcohol abuse or prostitution, have difficulty developing healthy relationships,

⁴⁵ Esposito 1998 *CASE W RES J INT'L L* 550

⁴⁶ Adler "The Perverse Law of Child Pornography" 2001 *Columbia Law Review* 209 236

⁴⁷ *Ferber* (supra)

⁴⁸ The statute prohibited the use of a child in a "sexual performance" which was described as "any play, motion picture, photograph, or dance" portraying "sexual conduct". "Sexual conduct" was defined as "intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals". See also Adler 2001 *Columbia Law Review* 238

⁴⁹ The films at issue were that of young boys masturbating. Burke 1997 *Harvard Journal on Legislation* 442; Soma et al 1997 *Harvard Journal on Legislation* 334

⁵⁰ *Ferber* (supra) at 756

⁵¹ This interest includes the state's interest in the health, safety, morals, and general welfare of its citizens, its independent interest in the well-being of its youth under its *parens patriae* and police powers, the state's interest in supporting the parent's right to raise their children, and the state's interest in safeguarding and strengthening familial relationships. Burke 1997 *Harvard Journal on Legislation* 445. These interests reflect the obligations set upon state parties by A 5 of the CRC and A 18 and A 20 of the African Charter

⁵² Soma et al 1997 *Harvard Journal on Legislation* 334 fn 99

⁵³ The Court stated that the character of the state's interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films. *Ferber* (supra) at 758

have sexual dysfunctions and a tendency to become sexual abusers themselves.⁵⁴ Secondly it could be concluded that sexual abuse is linked to the creation and distribution of child pornography.⁵⁵ It further held that the advertising and selling of child pornography plays an integral role in the production of such materials which provides an incentive to make money out of the abuse of children.⁵⁶ The fourth reason the Court gave was that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*.⁵⁷ The Court therefore rejected an overbreadth challenge in stating that it doubted whether permissible educational, medical, or artistic works would amount to more than a tiny fraction of the materials within the statute's reach.⁵⁸ Even if visual material had some value, its protection would still have to be weighed against any harm caused to the child.⁵⁹ Finally the Court concluded that even non-obscene child pornography cannot receive protection from the First Amendment, particularly when the class of materials bears so heavily and pervasively on the welfare of child engaged in its production.⁶⁰

The Court modified the *Miller* test by stipulating that the

- (1) the trier of fact did not need to find that the material appeals to the prurient interest of the average person;
- (2) the sexual conduct portrayed did not need to be done in a patently offensive manner; and
- (3) it was not necessary to consider the material as a whole.⁶¹

Although the definition of unprotected child pornography to some degree shares the same difficulty in consistent application as that of obscenity under the *Miller* test, the court found that the statute's intention was to outlaw the very hard core

⁵⁴ *Ferber* (supra) at 758

⁵⁵ *Ferber* (supra) at 758

⁵⁶ *Ferber* (supra) at 761

⁵⁷ *Ferber* (supra) at 762

⁵⁸ *Ferber* (supra) at 773

⁵⁹ Burke 1997 *Harvard Journal on Legislation* 444

⁶⁰ *Ferber* (supra) at 764

of child pornography.⁶² The suppression of this form of speech could be justified as the state has a compelling interest in protecting children from sexual abuse. As the materials produced are a permanent record of the child's participation and the harm to the child only increased by the circulation thereof, the distribution network must be disabled.⁶³ The Court consequently upheld the statute.

In delivering judgement eight years later in *Osborne v Ohio*⁶⁴ the US Supreme Court again emphasised the need to protect children from sexual abuse by prohibiting child pornography. An Ohio statute prohibiting the possession and viewing of child pornography was compared to a Georgia statute punishing the private possession of obscene materials, which was struck down in *Stanley v Georgia*⁶⁵. In contrast to the *Stanley* case, the court found that three interests of the state outweighed any privacy interest associated with the possession of child pornography. Firstly the Court held that child pornography is the permanent recording of a child victim's abuse which will continue to harm the child for years to come.⁶⁶ Secondly, since evidence suggested that paedophiles use child pornography to seduce children, states should be encouraged to prohibit the possession thereof in order to eradicate distribution and production.⁶⁷ It lastly found that it was reasonable to conclude that production would decrease if demand decreased as a result of penalising possession.⁶⁸

The number of online child pornography and child sex exploitation cases opened in the US has increased by 1264% during the last four years and it is anticipated

⁶¹ *Ferber* (supra) at 764

⁶² Burke 1997 *Harvard Journal on Legislation* 444

⁶³ Adler 2001 *Columbia Law Review* 242.

⁶⁴ *Osborne* (supra)

⁶⁵ 394 US 557 (1969) The court recognised that a provision prohibiting the private possession of obscene material, violated a person's right to receive information in the privacy of his home. The Court held that the argument that obscenity would poison the minds of its viewers was insufficient and that, even though the material at issue was concededly obscene, the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.

⁶⁶ Burke 1997 *Harvard Journal on Legislation* 447

⁶⁷ This was the first time that the court acknowledged that freedom of speech could be violated because of the possibility that someone might use it for nefarious purposes. Adler 2001 *Columbia Law Review* 243

⁶⁸ Burke 1997 *Harvard Journal on Legislation* 447

that the number of prosecutions will continue to rise.⁶⁹ While condemning this growing problem, United States courts have responded by passing severe sentences. In November 1997 three members of the Orchid Club, an international child pornography ring that used the Internet to transmit pictures of children, were sentenced in San Jose.⁷⁰ According to prosecutors, this was the first case involving real-time transmission of pictures of children being sexually molested to others online. Two of the children were five year old little girls who were sexually exploited repeatedly. The men pleaded guilty to charges of conspiracy to sexually exploit a minor, aiding or abetting in the sexual exploitation of a minor, conspiracy to traffic in child pornography and sending and receiving pornographic images of children over the Internet.⁷¹ Ronald Riva was sentenced to thirty years in prison, David Tank to nineteen years and seven months and Christopher Saemisch to eleven years. On Monday the 6th of August the man behind an international child cyber-porn ring based in Texas, was sentenced to 1 335 years in prison.⁷² According to police Thomas Reedy's company, Landslide Promotions, earned up to \$1.4m each month by selling pictures displaying the sexual abuse of young girls, some as young as four years of age.⁷³

4 2 2 3 THE PROHIBITION OF VIRTUAL CHILD PORNOGRAPHY

Child participation has been fundamental to the definition of child pornography given by the US Supreme Court in *New York v Ferber*⁷⁴ and *Osborne v Ohio*⁷⁵. The Court repeatedly used phrases such as "the use of children", "children engaged in its production", and "sexual abuse of children" in these and other

⁶⁹ "Online Child Pornography: Innocent Images National Initiative" Available at <http://www.fbi.gov/hq/cid/cac/innocent.htm> 26/07/01

⁷⁰ "USA Cases" Available at <http://www.cyber-rights.org/reports/usacases.htm> 01/06/01

⁷¹ <http://www.cyber-rights.org/reports/usacases.htm> 01/06/01

⁷² "US breaks cyber-porn ring" Available at http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1481000/1481253.stm 23/08/01

⁷³ http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1481000/1481253.stm 23/08/01

⁷⁴ *Ferber* (supra)

⁷⁵ *Osborne* (supra)

cases⁷⁶ where it upheld statutes prohibiting child pornography as being constitutionally sound. Since child pornography creates the permanent record of actual abuse, it cannot be protected by the First Amendment.

The Court in the matter of *New York v Ferber*⁷⁷ noted, however, that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.⁷⁸ In doing so, the category of unprotected expression created has been limited to visual depictions of actual minors engaged in sexually explicit conduct. The Court limited the scope of protection further by suggesting the use of “alternatives” as opposed to real children where necessary for literary or artistic works. Either a person over the statutory age who looked younger or a simulation outside of the prohibition of the statute⁷⁹ could be used.

The primary emphasis in *Osborne v Ohio*⁸⁰ fell on the possible exploitation of child victims in the production of pornography. The concern of the court for the prevention of actual abuse weighed so heavily that the Court justified the proscription of both the dissemination and possession of child pornography.

The question arose whether the Supreme Court concentrated on the participation of children because the statutes that it was confronted with, was thus limited, or whether the Court used this definition as a matter of constitutional law.⁸¹ The answer to this question proved to be more than just of an academic nature when the US Congress passed an amendment to legislation in 1996 prohibiting computer-generated child pornography.

In December 1999 the US Ninth Circuit Court of Appeals in San Francisco, California, declared the CPPA of 1996 to be unconstitutional in so far as it bans

⁷⁶ See for example *United States v X-Citement Video* 115 S Ct 464 (1994)

⁷⁷ *Ferber* (supra)

⁷⁸ *Ferber* (supra) at 762 – 763

⁷⁹ *Ferber* (supra) at 763

⁸⁰ *Osborne* (supra)

⁸¹ For a detailed discussion of the US Constitutional framework on the subject up to 1997 see Burke 1997 *Harvard Journal on Legislation* 439 - 472

virtual child pornography.⁸² The court's ruling in *American Civil Liberties Union et al v Janet Reno, Attorney General of the United States*⁸³ focused on the relevant parts of 18 U.S.C. 2256 which defines child pornography as any computer or computer-generated image or picture that appears to be of a minor engaging in sexually explicit conduct or that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.⁸⁴

A three-judge panel ruled two to one that the CPPA violates free speech because it criminalises ideas by prohibiting images created by computers or other methods that do not use actual children in the production of pornographic materials depicting children.⁸⁵ The Court explained that the language of the statute can criminalise images that involve no human being, whether that fictional person is over the statutory age but looks younger, or whether it is a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalised. The Court held that the constitutionality of the definition of child pornography is not supported by existing case law.⁸⁶ It was further found that because the 1996 Act attempts to criminalise disavowed impulses of the mind, which are manifested in illicit creative acts, censorship through the enactment of criminal laws intended to control an evil idea, cannot satisfy the constitutional requirements of the First Amendment.⁸⁷ The Court subsequently concluded that the government does not have the requisite compelling interest in regulating pornography when no actual children are involved in the illicit images either by production or depiction.⁸⁸

⁸² "Free Fakery: Ninth Circuit Declares Virtual Child Porn Ban Unconstitutional" Available at <http://www.law.about.com/library/weekly/99122099.htm> 17/07/01 <http://www.cyber-rights.org/reports/usacases.htm> 01/06/01

⁸³ No 97-16536, 1999 WL 1206649 (9th Cir) Available at <http://laws.findlaw.com/9th/9716536.html> See also a discussion of the case available at <http://www.law.about.com/library/weekly/99122099.htm>

⁸⁴ See p 62

⁸⁵ <http://www.law.about.com/library/weekly/99122099.htm> 17/07/01

⁸⁶ <http://www.law.about.com/library/weekly/99122099.htm> 17/07/01

⁸⁷ <http://www.law.about.com/library/weekly/99122099.htm> 17/07/01

⁸⁸ <http://www.law.about.com/library/weekly/99122099.htm> 17/07/01

At the same time other Appeal Courts have upheld the illegality of virtual child pornography⁸⁹, reaching the conclusion that the government's interest in protecting children weighs more than freedom of speech. This clearly created a predicament of uncertainty and confusion. In January 2001 the Supreme Court of the United States agreed to end this uncertainty by announcing that it will decide on the matter.⁹⁰ It is expected that the judgement will be delivered during September or October 2001.⁹¹

4 2 2 4 THE LIABILITY OF INTERNET SERVICE PROVIDERS

One of the means to regulate the content of the Internet is to make Internet Service Providers responsible for the material provided by their service. It has been debated though whether a provider of a service can be made responsible for the actions of its users. In the US the courts have struck down several attempts by state and federal legislators to censor the Internet.

The Supreme Court has determined in the matter of *Reno v ACLU*⁹² that content providers cannot control the content which access providers choose to disseminate. It further found that access providers could not restrain content providers from posting what they choose to on their servers and that effective economical or technological methods of reasonably separating adults and children on the Internet do not exist.⁹³ The Court accordingly also struck down the CDA in its attempt to hold ISPs responsible for the content provided by their servers.⁹⁴ The US Congress' next attempt in increasing the liability of ISPs was

⁸⁹ In *United States v Acheson* 195 F3d 645 (11th Cir 1999) and *United States v Hilton* 167 F3d 61 (1st Cir 1999) where the First Circuit indicated that serious value would be a defence under the CPPA when the prosecution was based on virtual child pornography that did not involve a real or recognisable child but still upheld the statute. "Virtual Child Pornography: Should it be illegal?" Available at <http://crime.about.com/library/weekly/aa0123019.htm?once=true&> 16/07/01 See also Adler 2001 *Columbia Law Review* 243 fn 188, 244 fn 200

⁹⁰ <http://crime.about.com/library/weekly/aa0123019.htm?once=true&> 16/07/01

⁹¹ "Paedophile protection orders proposed" Available at <http://www.nandotimes.com/noframes/story/0%202107%2C500307380%2D50049328%2D503447230%2D0%2C00.html> 17/07/01

⁹² *Reno* (1997) *supra*

⁹³ Sayle 2000 *WILJ* 267 fn 56

⁹⁴ See also the other reasons why the Court found it necessary to strike down the act as discussed on p 67.

the Child Online Protection Act⁹⁵, signed by then-President Bill Clinton in 1998. This Act required commercial site operators on the World Wide Web to impose electronic proof-of-age systems before allowing Internet users to view material deemed harmful to minors. First-time violators would face up to six months in prison and a \$50,000 fine.⁹⁶ The Act never came into operation as the ACLU and seventeen other groups and businesses immediately contested the constitutionality thereof, arguing that that the law would suppress a large amount of speech on the Web that adults are entitled to communicate and receive.⁹⁷ The Appeals Court declared the COPA to be unconstitutional while objecting to the law's reliance on contemporary community standards.⁹⁸ It found that ISPs cannot be compelled to abide by the standards of the community most likely to be offended by the content of their websites. Another obstacle for website operators would lie in the fact that they would be unable to determine the geographic location of site visitors using a worldwide computer network. Operators would have to severely censor their websites or would have to adopt age or credit card verification systems⁹⁹ to shield children from material which they deemed to be harmful.¹⁰⁰

4 2 3 CONCLUSION

⁹⁵ Hereafter COPA

⁹⁶ "Online child protection issue goes to top court" Available at <http://www.legalbrief.co.za/secure/archives/01052315.htm> 23/05/01

⁹⁷ <http://www.legalbrief.co.za/secure/archives/01052315.htm> 23/05/01

⁹⁸ *American Civil Liberties Union et al v Janet Reno, Attorney General of the United States* 217 F.3d 162 2000 Available at <http://laws.lp.findlaw.com/3rd/991324.html> 24/07/01 See also <http://www.legalbrief.co.za/secure/archives/01052315.htm> 23/05/01

⁹⁹ The District court found that the cost of these credit card systems could range from \$300 to thousands of dollars while an "Adult Check Password" could be purchased for only \$16,95. The Appeals Court however based its decision on the overbreadth of the COPA's definition of the terms "harmful to minors" and "contemporary community standards" rather than deciding on the practicality of protective software.

¹⁰⁰ <http://www.legalbrief.co.za/secure/archives/01052315.htm> 23/05/01 The Justice Department has since drawn up a petition asking the Supreme Court to overturn the Appeals Court's decision. In another development civil liberties groups, library associations, websites and individual library patrons are planning to challenge a federal law that mandates the use of filtering software for Internet access in schools and libraries receiving federal grants. The Children's Internet Protection Act requires schools and libraries to install technology protection measures to shield children from adult content. "Child protection law to be put to legal test" Available at <http://www.legalbrief.co.za/secure/archives/childprotlaw.htm> 23/03/01

With 1 541 investigations in 2000 alone¹⁰¹, United States law enforcement agencies such as the FBI remain leaders in the field of tracking down child pornographers and child sex rings. Punishments for these offences of possession, production, distribution and advertisement of child pornography are some of the most severe in the world. Legislators in the United States have however been challenged to formulate comprehensive legislation protecting children without violating constitutional rights. The US Courts have accordingly tried to strike a balance in protecting both the rights of children and freedoms of citizens. It nevertheless remains to be seen to what extent the Supreme Court will be willing to protect the interests of children with the expected judgement regarding the constitutionality of prohibiting virtual child pornography in the fall of 2001. It is expected that the US Supreme Court will follow suit in the judgement of the Supreme Court of their North American neighbours.

4 3 CANADA

4 3 1 LEGISLATION

According to section 151 of the Criminal Code, the legal age for consent to sexual activity is fourteen years. Section 163.1 of the Criminal Code of Canada however defines child pornography in the following manner:

“[A] photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, ... that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity; or the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this act.”

Subsections 163.1 (2), (3) and (4) target four groups of people who are involved in child pornography, namely producers, distributors and sellers, and possessors of the illegal material. Under subsection 163.1 (2), which makes it an offence to

¹⁰¹ <http://www.fbi.gov/hq/cid/cac/innocent.htm> 26/07/01

create¹⁰² child pornography, and subsection 163.1(3), which prohibits distribution¹⁰³, an offender can be imprisoned for a term not exceeding ten years or be punished on a summary conviction.

The mere possession of child pornography is also an offence under subsection 163.1(4):

" Every person who possesses any child pornography is guilty of

a) an indictable offence and liable to imprisonment for a term not exceeding five years ; or

b) an offence punishable on summary conviction. "

The procurement of children into sexual activity is criminalised by sections 152¹⁰⁴ and 170¹⁰⁵ while the sexual exploitation of children is prohibited by section 153. Section 153(1) states that it is an offence for a person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency to touch or invite that young person into sexual activity. Subsection 173(2) makes it an offence to expose genital organs to a person who is under the age of fourteen. Under section 160(3) it is also an offence to commit bestiality in the presence of a person under the age of fourteen or to incite a person younger than fourteen to commit bestiality.

¹⁰² This includes making, printing, publishing or possessing for the purpose of publication

¹⁰³ Distribution includes importing, distributing, selling or possession for the purposes of distribution

¹⁰⁴ It reads as follows: "Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen (14) years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of a person who so invites, counsels or incites and the body of the person under the age of fourteen (14) years, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction."

¹⁰⁵ This section states the following: "Every parent or guardian of a person under the age of eighteen (18) years who procures that person for the purpose of engaging in any sexual activity prohibited by this Act with a person other than the parent or guardian is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person procured for that purpose is under the age of fourteen (14) years, or to imprisonment for a term not exceeding two years if the person so procured is fourteen (14) years of age or more but under the age of eighteen (18) years."

4 3 2 THE COURTS' INTERPRETATION

4 3 2 1 THE PROHIBITION OF OBSCENE AND INDECENT MATERIAL

In the celebrated case of *R v Butler*¹⁰⁶ the validity of section 163.8, prohibiting obscene publications of which the dominant characteristic is undue exploitation of sex, or sex, crime, horror, cruelty and violence, was contested. The Canadian Supreme Court held that the challenged statute violated the freedom of expression right guaranteed under the Canadian Charter. This violation was however found to be justifiable under the limitations clause because the Code did not prohibit serious work of scientific, artistic or literary merit. It also did not affect the private possession or viewing of explicit materials.

The Court came to the conclusion that the portrayal of sex coupled with violence will almost always constitute undue exploitation of sex. Explicit sex that is degrading or dehumanising may be undue if the risk of harm is substantial. Hence the Court concluded that explicit sex that is neither degrading, nor dehumanising, is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.¹⁰⁷

4 3 2 2 THE PROHIBITION OF VIRTUAL CHILD PORNOGRAPHY

In the matter of *R v Pecchiarich*¹⁰⁸, a nineteen year old man was convicted and sentenced to two years probation as well as 150 hours of community service for distributing child pornography over the Internet.¹⁰⁹ Pecchiarich created his own child pornography from altering the characteristics of scanned pictures of children modelling underwear and swimsuits from various store catalogues. Although Pecchiarich was never involved in photographing or filming real children and

¹⁰⁶ (1992) 8 CRR (2d) 1.69

¹⁰⁷ *Butler* (supra)

¹⁰⁸ (1995) 22 O.R. (3d) 748-766

¹⁰⁹ "The Regulation of Pornography and Child Pornography on the Internet" *The Journal of Information, Law and Technology (JILT)* Available at http://elj.warwick.ac.uk/jilt/internet/97_lakdz/akdeniz.htm#1 01/06/01

never committed any offence towards children, the court found these materials to be proof of his paedophilic tendencies and fantasies.¹¹⁰

Six years later the Supreme Court of Canada ruled on the constitutionality of prohibiting virtual child pornography in *R v Sharpe*.¹¹¹ In January 1999 the British Columbia Supreme Court acquitted John Robin Sharpe of two counts of possession of child pornography.¹¹² The Court struck down section 163.1(4) of the Criminal Code of Canada as it violated section 2 (b) of the Canadian Charter of Rights and Freedoms. It was found that the law was an intrusion into freedom of expression while the right of privacy is so profound that it is not outweighed by the limited beneficial effects of the prohibition of this kind of pornography.¹¹³ The violation that the relevant section imposed upon these rights could not be justified as a reasonable limitation under section 1 of the Charter.¹¹⁴

This decision was upheld by the Court of Appeal of British Columbia in June 1999 in a ruling by a majority of two to one.¹¹⁵ The Court of Appeal stated that the offence of child pornography was defined too broadly and it could capture, for example, material that was created without abusing children or material found in diaries which was not intended for dissemination, publication or trade.¹¹⁶ It also speculated that the definition could cover a young couple where one or both partners are younger than eighteen recording their own consensual lawful sexual activities.¹¹⁷

The Attorney General of Canada and several non-governmental institutions¹¹⁸ appealed against the decision and the Supreme Court heard the matter on 18

¹¹⁰ http://elj.warwick.ac.uk/jilt/internet/97_1akdz/akdeniz.htm#1 01/06/

¹¹¹ (2001) SCC 2 Available at http://www.cyber-rights.org/reports/sharpe_decision.htm and <http://www.gov.ab.ca/just/upload/CrimPros/sharpe.htm>, discussion found at http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹¹² http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹¹³ http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹¹⁴ http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹¹⁵ *R v Sharpe* (1999) 58 CRR (2d) 261 This decision is also available at <http://www.courts.gov.bc.ca/jdb-txt/sc/99/00/s99-0040.txt>

¹¹⁶ http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹¹⁷ http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹¹⁸ End Child Prostitution in Asian Tourism (ECPAT) and Canadians Against Sexual Abuse (CASE) were two of the NGOs that intervened in this matter.

and 19 January 2000.¹¹⁹ On 26 January 2001, the Court delivered its judgement.¹²⁰ The Court ruled that these provisions struck a constitutional balance between freedom of expression and the prevention of harm to children.¹²¹ The majority¹²² of the Court was however, also of opinion that the legislation would prohibit the possession of certain material in two circumstances in which the protection of children was not significantly advanced, and the restriction on freedom of expression was significant.¹²³ After considering both the judgements and arguments presented by the lower courts, the Supreme Court came to the conclusion that the appropriate remedy was to “carve out” certain applications of section 163.1 by “reading in” two exceptions.¹²⁴ The court stated that the applications of the law that pose constitutional problems are exactly those applications which relation to the objective of the legislation is most remote. By excluding those applications, the force of the law will not be undermined but rather be preserved while also recognising the purposes of the Charter.¹²⁵ While excluding the offending applications will not subvert Parliament’s objective, striking down the statute altogether would do so.¹²⁶ Accordingly it was held that section 163.1(4) should be upheld on the basis that the definition of child pornography in s. 163.1 should be read as though it contained an exception for the following two instances:

“(1) [A]ny written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and
(2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.”

The Court ruled that these two exceptions also apply to the offence of “making” child pornography under s. 163.1(2) but not to printing, publishing or possessing

¹¹⁹ http://www.canada.justice.gc.ca/en/news/nr/2001/doc_25855.html 17/06/01

¹²⁰ Available at <http://www.gov.ab.ca/just/upload/CrimPros/sharpe.htm>

¹²¹ <http://www.gov.ab.ca/just/upload/CrimPros/sharpe.htm> 17/06/01

¹²² This decision was made by a six to three majority

¹²³ <http://www.gov.ab.ca/just/upload/CrimPros/sharpe.htm> 17/06/01

¹²⁴ *Sharpe* (2001) supra at paras 112 - 125

¹²⁵ *Sharpe* (2001) supra at paras 112 - 125

¹²⁶ *Sharpe* (2001) supra at para 122

child pornography for the purpose of publication. The exceptions will not be available where a person harbours any intention other than mere private possession.¹²⁷

The appeal was allowed and Sharpe was remitted for trial on all charges.

4 3 3 PROPOSED LEGISLATION

On the 14th of March 2001 the Minister of Justice and Attorney General of Canada, Ms Anne McLellan, introduced an omnibus bill to protect children from crime and criminals on the Internet. The proposed legislation will create a new offence to target paedophiles who use the Internet to lure and exploit children for sexual purposes. The new luring offence will, for example, make it illegal to communicate with a child for the purpose of committing a sexual offence against that child. It will carry a maximum penalty of five years imprisonment.¹²⁸

It will also amend the current Criminal Code and make it a crime to transmit, make available, export and intentionally access or possess with the intent to do the above, child pornography on the Internet. These offences will carry a maximum punishment of ten years imprisonment.¹²⁹ The legislation will furthermore increase the capacities of judges by allowing them to

- (1) order the deletion of child pornography posted on computer systems posted in Canada;
- (2) order the forfeiture of any materials or equipment used in the commission of a child pornography offence.

It will furthermore also enhance the ability of judges to keep known sex offenders away from children.¹³⁰

¹²⁷ *Sharpe* (2001) supra at para 129

¹²⁸ "Justice Minister Introduces Measures to Better Protect Canadians and Safeguard Children from Cyber Criminals" Available at <http://www.cyber-rights.org/reports/interdev.htm> 01/06/01

¹²⁹ <http://www.cyber-rights.org/reports/interdev.htm> 01/06/01

¹³⁰ <http://www.cyber-rights.org/reports/interdev.htm> 01/06/01 The Bill will also simplify the process to prosecute Canadians who sexually assault children in other countries. At present legislation distinguishes between commercial sexual exploitation (eg child prostitution) and non-commercial

Under the new proposed legislation courts will be able to order a custodian of a computer system, such as an ISP to remove any material that could reasonably be found to be child pornography or any link to such material from its server. The person who posted the material would be given the opportunity to be heard by the court. If the material were found not to be child pornography, it could be re-posted. However if the court found the material to be child pornography, it could order the deletion of the material.¹³¹

4 3 4 CONCLUSION

It would appear that both the Canadian legislature and Courts have acknowledged the necessity and special need that exists in protecting children against sexual abuse on the Internet. The Supreme Court, in its decision in *R v Sharpe*¹³² made use of resourceful constitutional instruments in order to uphold Parliament's objective of prohibiting this perverse form of expression. The Court's conclusion in the matter indicates that striking a constitutional balance between freedom of expression and the prevention of harm to children is not such a difficult task. The Government's proposed new legislation reaffirms this commitment to combat child pornography by means of preventative measures and by increasing the responsibility of ISPs.

4 4 THE UNITED KINGDOM

4 4 1 LEGISLATION

The first Obscene Publications Act in Britain was introduced in 1857. It only placed a ban on "obscenity" and "indecentcy" and made no reference to child or

sexual exploitation. In instances where the allegations do not involve child prostitution, prosecutions can be initiated in Canada only at the request of the country where the crime reportedly happened. The proposed amendment will remove this procedural requirement in non-commercial sexual exploitation cases. This means it will be possible to prosecute Canadian citizens and permanent residents who commit sexual offences against children in a foreign country, in Canada, without first obtaining a formal request from that country. See also http://canada.justice.gc.ca/en/news/nr/2001/doc_26056.html

¹³¹ <http://www.cyber-rights.org/reports/interdev.htm> 01/06/01

¹³² *Sharpe* (2001) *supra*

adult pornography.¹³³ According to the *Hicklin* doctrine, formulated in England in 1868, the state had the right to suppress obscene material, which had a tendency to deprave and corrupt those whose minds are open to such immoral influences.¹³⁴ At this time, there were nearly thirty shops in London selling pornography of which a large proportion was child pornography.¹³⁵

At present the situation is regulated by the Sexual Offences Act 1956, the Protection of Children Act 1978¹³⁶ and the Criminal Justice Act 1988, as amended by the Criminal Justice and Public Order Act 1994, and the Criminal Justice and Court Services Act 2000, making the United Kingdom one of the countries with the most advanced legislation regulating child pornography on the Internet. The government is continually giving its support by introducing new legislation, financial backing and innovative measures to ameliorate the protection of children.

The term “pornography” is still not recognised in legislation but section 1 of the CPA¹³⁷ makes it an offence to take, or permit to be taken, or to make¹³⁸, distribute¹³⁹, possess with the view to distribute¹⁴⁰, or publish or cause to be published any advertisement¹⁴¹ of any indecent photograph or pseudo-photograph¹⁴², negatives or data stored on a computer disc or by other electronic means¹⁴³, of a child. Section 160 of the Criminal Justice Act¹⁴⁴ penalises the possession of such photographs. A child, for the purposes of the CPA, is a person under the age of sixteen.¹⁴⁵ A pseudo-photograph is defined as an image, whether made by computer graphics or otherwise, which appears to be a

¹³³ Barnes et al *Child Victims* 25

¹³⁴ <http://www.eff.org/pub/Misc/Organizations/BCFE/limit2.html> 30/05/01

¹³⁵ Barnes et al *Child Victims* 24

¹³⁶ Hereafter the CPA

¹³⁷ 1978 as amended by the Criminal Justice and Public Order Act 1994

¹³⁸ S 1(1)(a)

¹³⁹ S 1(1)(b)

¹⁴⁰ S 1(1)(c)

¹⁴¹ S 1(1)(d)

¹⁴² “[P]seudo-photograph” inserted by s 84(2)(a) – (d) of the Criminal Justice and Public Order Act 1994

¹⁴³ Inserted by s 84(3)(b) of the Criminal Justice and Public Order Act 1994

¹⁴⁴ 1988

photograph.¹⁴⁶ This definition as a result criminalises virtual child pornography in the UK. Section 84 of the Criminal Justice and Public Order Act is similarly extended as the Scottish Civic Government (Scotland) Act 1982 and the Protection of Children (Northern Ireland) Order 1978. Section 43 of the Telecommunications Act 1984 makes it an offence to send a message or other matter that is grossly offensive or of an indecent, obscene or menacing character, by means of a public telecommunications system.

It shall be a defence to the crimes of distribution or possession with the intent to distribute if the accused can prove that he had a legitimate reason for distribution or possession of the material¹⁴⁷ and that he had not seen the material and did not know, nor had cause to suspect, them to be indecent.¹⁴⁸ The definition of what constitutes indecency still remains unclear as public morality often plays a role in the interpretation of the term.¹⁴⁹ Section 1(1) of the 1959 Obscene Publications Act provides the following test for obscenity:

“For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”

Until 2000 the maximum penalty for the crimes described by the CPA was three years imprisonment and/or an unlimited fine.¹⁵⁰ The penalty for simple possession carried a maximum penalty of six months imprisonment and/or a fine. With the rise in the number of offences¹⁵¹, it was decided to increase the

¹⁴⁵ S 1(1)(a) The legal age of majority is eighteen but consent to sexual activity can be given at the age of sixteen. The age for consent for homosexual males is still eighteen. See section 15 of the Sexual Offences Act 1956.

¹⁴⁶ S 84(3)(c)(7)

¹⁴⁷ CPA 1978 s 1 (4)(a)

¹⁴⁸ CPA 1978 s 1 (4)(b)

¹⁴⁹ See chapter 2 p 15 - 16

¹⁵⁰ S 6(2)

¹⁵¹ The number of prosecutions under the CPA increased from 40 in 1994 to 116 in 1998 and that of possession from 53 to 167. See Explanatory Notes on the Criminal Justice and Court Services Act 2000.

maximum penalty for the crimes under the CPA to ten years¹⁵² and for simple possession to imprisonment for a term not exceeding five years.¹⁵³

4 4 2 THE COURTS' INTERPRETATION

The first person prosecuted in the United Kingdom in a case involving the Internet, was Christopher Sharp¹⁵⁴, a management consultant. He was fined £9000 after he admitted to two charges of possession of indecent photographs of children under the age of sixteen contrary to section 160 of the Criminal Justice Act.¹⁵⁵ In 1996, Martin Crumpton was sentenced to three months imprisonment after admitting to being in possession of indecent pictures of children. This former computer consultant was the first person to be sent to jail for an offence concerning child pornography on the Internet.¹⁵⁶ Melvin Dunstan was sentenced to 120 hours of community service in January 1996. He was charged with four counts of possession of child pornography on the Internet and one of sending an indecent message contrary to Section 43 of the Telecommunications Act 1984. The biggest collection of Internet pornography in Britain was found in the home of Graham Fitchie of Merstham, Surrey. Police confiscated 10 751 pictures, 81 films and more than 500 pages of stories about child-sex stored on computer hard disks and CD drives. In sentencing Fitchie to three years imprisonment the judge said that he was driven to believe that Fitchie represents a serious and significant danger to young children in the future.¹⁵⁷

In Glasgow in October of 1997, Dr George Reid, a research scientist at the Cancer Research Campaign's Beatson Institute, was sentenced to three months in prison. He was found guilty of possessing child pornography which he

¹⁵² S 41(1) of the Criminal Justice and Court Services Act 2000

¹⁵³ S 41(3)(a) of the Criminal Justice and Court Services Act 2000

¹⁵⁴ Sharp was one of the nine British men arrested in 1995 during "Operation Starbust". This paedophile ring had members in Europe, America, the Far East and South Africa. Pictures ranged from nudity, through erotica to sexually explicit material involving children, one as young as three. http://elj.warwick.ac.uk/jilt/internet/97_lakdz/akdemiz.htm#1

¹⁵⁵ "UK Cases" Available at <http://www.cyber-rights.org/reports/ukcases.htm> 01/06/01

¹⁵⁶ <http://www.cyber-rights.org/reports/ukcases.htm> 01/06/01

¹⁵⁷ <http://www.cyber-rights.org/reports/ukcases.htm> 01/06/01

downloaded from a Japanese Internet site. Even though the police found 1871 images containing child pornography stored on his computer, his solicitor claimed that he had stored the pictures accidentally.¹⁵⁸

In passing sentence on Robert Jones in January 1999, a judge condemned the increasing availability of Internet pornography. Jones, the former head of an alternative therapy centre in North Wales, was imprisoned for four months and his name put on the Sex Offenders' Registry for the next seven years after he had pleaded guilty to charges of possession and production of indecent pseudo-photographs of children. Jones, who had two previous convictions for indecent exposure involving teenagers, downloaded¹⁵⁹ 5 000 pornographic images of children onto his computer. He superimposed his own naked form onto some of the pictures. The judge condemned his behaviour and made the following remark towards Jones:

"If there were not people like you prepared to download material of this nature it would not appear on the Internet, and innocent children who have been victims of exploitation and abuse in the most depraved manner would be better protected."¹⁶⁰

The seven British men arrested for their involvement in the W0nderland-club¹⁶¹ were all given sentences of less than three years imprisonment. One of them, Gary Salt, known by the online nickname of "Jazz", had previously been sentenced to twelve years in jail for sexual offences against children.¹⁶² Another, David Hines, better known as "Mutt's Nuts", was given a sentence of thirty months imprisonment¹⁶³ and told police that he was abused as a child, had no

¹⁵⁸ <http://www.cyber-rights.org/reports/ukcases.htm> 01/06/01

¹⁵⁹ In the case of *R v Bowden* 1999, available at <http://www.cyber-rights.org/documents/rvbowden.htm>, it was held that the downloading and/or printing out of computer data of indecent images of children from the Internet was capable of amounting to an offence within the meaning of s 1(1)(a) Protection of Children Act 1978, thus the making of child pornography.

¹⁶⁰ <http://www.cyber-rights.org/reports/ukcases.htm> 01/06/01

¹⁶¹ See p 4

¹⁶² See also p 39

¹⁶³ <http://www.cyber-rights.org/reports/ukcases.htm> 01/06/01

friends but that the W0nderland-club had given him untold friends from all over the world.¹⁶⁴

4 4 3 PROPOSED LEGISLATION

On the 29th of March 2001 the Home Secretary, Mr Jack Straw, announced that a new taskforce will be set up to make UK cyberspace the safest place in the world for Internet users.¹⁶⁵ The taskforce, which will consist of representatives from the Internet industry, child welfare organisations, the police and the government, will work in partnership on reviewing Internet content rating systems and developing a “kite marking” scheme for chatrooms which deliver child-friendly services. They will also develop “Safe Surfing” education and awareness campaigns while continually reviewing legislation protecting children from grooming and other forms of abuse on the Internet. One of their most important tasks though, is enhancing co-operation between the police and communications service providers in the course of their investigations.¹⁶⁶

In April of the same year, in response to the government’s commitment, the National Hi-Tech Crime Unit was launched. This Unit is a national law enforcement organisation consisting of experts from the National Crime Squad, the National Criminal Intelligence Service, HM Customs and Excise and police forces, tasked to combat computer-based crimes. The Unit received funding of £25 million over three years of which over £10 million would be used to develop local force computer crime units.¹⁶⁷

In May 2001 the government announced further plans in increasing the safety of children online. Proposals for cyberspace injunctions to ban paedophiles from using the Internet to lure children and the instalment of “child safety software” have been presented by the Home Secretary and Ms Anne Widdecombe,

¹⁶⁴ Transcript from the BBC programme, Panorama, broadcasted on 13/02/01 in the UK. Available at http://hi/english/static/audio_video/programmes/panorama/transcripts/transcript_11_02_01.txt

¹⁶⁵ “Improving Child Protection on the Internet: A Partnership for Action” Available at http://www.cyber-rights.org/documents/safe_uk.htm 03/05/01

¹⁶⁶ http://www.cyber-rights.org/documents/safe_uk.htm 03/05/01

¹⁶⁷ “Launch of the United Kingdom’s first National Hi-Tech Crime Unit” http://www.cyber-rights.org/documents/ncis_1801.htm 03/05/01

shadow Home Secretary. In terms of these paedophile protection orders proposed, it would be a punishable offence to approach children on the Internet using a false name, gender or age. Police could apply for the order if they suspect an adult of disguising their true identity in chatrooms to entice children for abuse. The order would prevent named individuals from making any approaches to children on the Internet. A breach of the order could lead to a maximum sentence of five years in jail and an automatic inclusion on the sex offenders' register. Child safety software such as filters would be installed in all personal computers intended for the family market.¹⁶⁸

4 4 4 CONCLUSION

Although the United Kingdom possesses some of the most advanced technology and computer experts to trace and apprehend suspected paedophiles on the Internet, child pornography is still defined in terms of indecency. Judging from the amount of successful prosecutions in the UK, however, it appears as though the courts do not have much difficulty in giving content to this concept. The intended new legislation has not been accepted without controversy either. Both the industry and fundamental rights groups have questioned the efficiency of the proposed new measures announced by the UK Government. The Internet provides anonymity through false e-mail addresses and untraceable website addresses and filtering software has in the past proved not to be very effective in screening illegal content. Nevertheless, the example set by the UK in their total commitment to eradicate sexual exploitation online, as well as the system of self-regulation introduced by the IWF, should be used to encourage other countries in their attempt of protecting the vulnerable.

¹⁶⁸ "Paedophile protection orders proposed" Available at <http://www.legalbrief.co.za/secure/archives/01052216.htm> 22/05/01

4 5 GERMANY

4 5 1 LEGISLATION

Germany has been labelled as the most Internet unfriendly country in the world.¹⁶⁹ The laws on child pornography are an example of Germany's willingness to hold Internet Service Providers, as opposed to individuals, responsible for Internet content.¹⁷⁰ These laws have been reviewed in a number of cases in the German court, but unlike in the United States,¹⁷¹ survived the attack from freedom of speech and expression arguments.

German legislation prohibits the possession¹⁷², display¹⁷³ distribution¹⁷⁴, and production¹⁷⁵ of pornographic writings that have acts of violence, sexual abuse of children or sexual acts by persons with animals as its subject. Where the pornographic writings have the sexual abuse of children as their subject, a prison sentence of between three months and five years will be imposed on the offender.¹⁷⁶ If the pornographic writings depict an actual or very realistic event and the offender acts commercially or as a member of a criminal group, which was formed for the repeated commission of such offences, the prison sentence shall be between six months and ten years.¹⁷⁷

German criminal law will also impose a prison sentence of up to one year or a fine on any person who offers, makes accessible, displays or announces pornographic writings to a person under the age of eighteen or to a retailer where children have access to the material.¹⁷⁸ Section 6 of the Penal Code states that German criminal law shall also apply, regardless of the law of the place of

¹⁶⁹ Sayle 2000 *WILJ* 270

¹⁷⁰ Sayle 2000 *WILJ* 268

¹⁷¹ See pp 72 - 75

¹⁷² Penal Code s 184(3)3

¹⁷³ Penal Code s 184(3)2

¹⁷⁴ Penal Code s 184(3)2

¹⁷⁵ Penal Code s 184(3)3

¹⁷⁶ Penal Code s 184(3) A prison sentence of up to one year or a fine will be passed for the possession, display, distribution and production of material containing violence and sexual acts by persons with animals.

¹⁷⁷ Penal Code s 184(4)

¹⁷⁸ Penal Code s 184(1)

commission, if the dissemination of pornographic writings in the cases referred to under section 184 subsections 3 and 4 is committed abroad.

Germany enacted Europe's first comprehensive national Internet law on the 1 August 1997. This act, the Information and Communications Services Act¹⁷⁹, pronounces that ISPs will be held liable for the original content made available by them to the public.¹⁸⁰ They will not be held responsible for any third-party content which they make available for use, unless they have knowledge of such content and are technically able to block the use of such content.¹⁸¹ They will also not be held responsible for any third-party content which they merely provide access to.¹⁸² It shall be expected of an ISP to block the use of illegal content if the provider obtains knowledge of the content and blocking can reasonably be expected as well as technically feasible.¹⁸³ These provisions impose a legal duty of care that if violated, subjects the ISP to a criminal liability under Germany's laws.¹⁸⁴

Section 6¹⁸⁵ of the ICSA requires ISPs to abide by the Protection of Minors Act which makes it a crime to make harmful materials on the Internet accessible to children. This places the responsibility on ISPs to subjectively determine what they consider to be harmful to children.¹⁸⁶

¹⁷⁹ Informations- und Kommunikationsdienste-Gesetz, hereafter ISCA

¹⁸⁰ ISCA art 1 §5(1)

¹⁸¹ ISCA art 1 §5(2)

¹⁸² ISCA art 1 §5(3) Automatic and temporary storage of third-party content due to user request shall be considered as providing access.

¹⁸³ ISCA art 1 §5(4)

¹⁸⁴ Sayle 2000 *WILJ* 269

¹⁸⁵ S 6 states as follows: "Whoever makes available, on a commercial basis, electronic information and communication services which are based on transmission by means of telecommunication, shall appoint a commissioner responsible for the protection of minors, if such services are generally available and might include content morally harmful to youth. The commissioner shall be the contact for users and shall advise providers concerning questions relating to the protection of minors. The commissioner shall be consulted by providers in planning their services and in formulating their general terms and conditions of use. The commissioner may suggest to the providers that services offered be restricted. The provider may also meet his obligation under the first sentence by obligating a self-regulation organisation to take over the duties under sentences 2 through 4 ..."

¹⁸⁶ Sayle 2000 *WILJ* 269

4 5 2 THE COURTS' INTERPRETATION

In May 1998 Mr Felix Somm, managing director of CompuServe's German subsidiary¹⁸⁷, was sentenced to two years in prison.¹⁸⁸ His conviction was the result of a search conducted by German prosecutors and detectives in December 1995 which found a list of 282 newsgroups accessible through CompuServe which they believed contained pornographic material harmful to minors. Five of these newsgroups contained child pornography.¹⁸⁹ CompuServe did not have the technology to ban the offending newsgroups in Germany alone¹⁹⁰ but asked its parent company in the United States to delete or block the newsgroups. CompuServe Inc. in the USA deleted the information on the newsgroups and blocked access to all 282 discussion groups for users in Germany.¹⁹¹ In February 1996 all the newsgroups, except those containing child pornography, were reopened while CompuServe provided its members with child safeguard software. This software should have enabled parents to block out harmful content. Upon subsequent investigations, German police was able to retrieve files containing hard-pornographic content from these newsgroups and found that the blocking software did not function properly.¹⁹²

In his judgement the judge held that CompuServe, and subsequently Mr Somm, had full knowledge of the content of the newsgroups¹⁹³ and knowingly allowed images of child pornography, violent sex and sex with animals to be available on CompuServe's German service. The fact that these files could be found on the newsgroups was enough evidence for the Court to find Mr Somm guilty of intentionally distributing child-pornography pursuant to Section 184(3) of the

¹⁸⁷ CompuServe GmbH Germany is a wholly owned subsidiary of CompuServe Inc. USA. CompuServe GmbH provided German users with dial-up access to CompuServe Inc.'s online service. http://www.gcwf.com/articles/journal/jil_nov98_1.html 14/05/01

¹⁸⁸ Sayle 2000 *WILJ* 271

¹⁸⁹ http://www.gcwf.com/articles/journal/jil_nov98_1.html 14/05/01

¹⁹⁰ Sayle 2000 *WILJ* 271

¹⁹¹ http://www.gcwf.com/articles/journal/jil_nov98_1.html 14/05/01

¹⁹² Another possibility is that the creators of the criminal content devised a method to avoid the blocking mechanisms.

¹⁹³ http://www.gcwf.com/articles/journal/jil_nov98_1.html 14/05/01

German Penal Code.¹⁹⁴ Mr Somm's suspended sentence of two years, three years probation and a fine of 100 000 German Marks¹⁹⁵ was overturned on November 1999 by a German State Court, which ruled that there was no technology available at the time that would have enabled CompuServe to block the publication of the questionable material.¹⁹⁶ This case nonetheless raised the question of liability of ISPs if the blocking material becomes available.¹⁹⁷

4 6 JAPAN

Interpol estimates that 60 to 80 percent of the world's commercially distributed child pornography occurs in Japan.¹⁹⁸ The National Police Agency official Keiji Goto estimated that about 3 000 sites in Japan were selling pornography online in December 1997.¹⁹⁹ Of these, 221 sites were distributing pornographic images of children under the age of twelve years.²⁰⁰

The unconstrained availability of child pornography in Japan can be ascribed to the country's lenient child pornography laws. Before the passing of a new law for punishing acts related to child prostitution, child pornography and the sexual abuse of children in April of 1999, the depiction of sexual organs was required for material to be considered pornographic.²⁰¹ The objective of the new law passed by the Japanese Diet is to protect the rights of children by prescribing punishment for acts related to sexual abuse and by establishing measures including providing appropriate protection to children who have suffered physically and/or mentally from the said acts.²⁰² For the purpose of this act, a

¹⁹⁴ Nathrath "Criminal Liability of Internet Providers in Germany: Conviction of a CompuServe Executive" Available at http://www.gcwf.com/articles/journal/jil_nov98_1.html 14/05/01 The judge also stated that CompuServe wanted the files to be downloaded to increase the number of their customers, thus implying that an ISP would attract more customers by having child pornography on its servers.

¹⁹⁵ This converts to roughly R480 000

¹⁹⁶ Sayle 2000 *WILJ* 272

¹⁹⁷ Sayle 2000 *WILJ* 272 For a detailed discussion on the case in the lower court see Nathrath's article available at http://www.gcwf.com/articles/journal/jil_nov98_1.html

¹⁹⁸ Sayle 2000 *WILJ* 273

¹⁹⁹ Sayle 2000 *WILJ* 273

²⁰⁰ Sayle 2000 *WILJ* 273

²⁰¹ See p 28

²⁰² S 1

child means a person under the eighteen years²⁰³. Section 177 of the Penal Code establishes the age of consent for sexual activity at thirteen years.

Child Pornography means photos, videotapes and other visual materials that depict the following:

- a pose of a child relating to sexual intercourse or an act similar to sexual intercourse;
- a pose of a child relating to the act of touching genital organs of the child or having the child touch someone else's genital organs in order to arouse or stimulate the viewer's sexual desire;
- a pose of a child who is naked totally or partially in order to arouse or stimulate the viewer's sexual desire.

These poses should be depicted in a way that can be recognised visually.²⁰⁴

There is no law that expressly prohibits the production, distribution or possession of child pornography.²⁰⁵ Section 175 of the Penal Code prohibits the distribution, sale, display and possession of obscene objects for the purpose of commercialisation. Considering the fact that the simple exposure of genitals is not generally deemed to be obscene or promiscuous, it remains to be seen how the new act will be used by Japanese courts to prosecute the dissemination of child pornography on the Internet.

4 7 CONCLUSION

When taking the rights to privacy and self-expression into consideration, adult pornography can be regarded as a victimless act, especially when measured against the features of this act. However when pornography involves children,

²⁰³ S 2, even though s 3 of the Japanese Civil Code sets the age of majority at twenty.

²⁰⁴ S 2 Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children

²⁰⁵ "Legislation of Interpol Member States on Sexual Offences Against Children: Japan" Available at <http://www.interpol.com/public/Children/SexualAbuse/NationalLaws/csaJapan.asp> 28/05/01

the situation is quite different.²⁰⁶ Child pornography on the Internet has developed into an international industry that must be combated aggressively by all countries. As the source and destination of child pornography are no longer confined to the same country, co-operation between law enforcement agencies needs to be encouraged in order to establish a universal set of standards.²⁰⁷ From the discussion in the above chapter, it becomes clear that not all countries have adopted comprehensive measures in regulating this problem and that certain questions concerning the restriction of fundamental freedoms can have a substantial influence in attempts to do so. The following chapter will examine what impact these freedoms might have on the efforts of South African legislators in addressing the sexual exploitation of children online.

²⁰⁶ Maree and Van Der Merwe "Exposure to Child Pornography on the Internet" 1999 *Acta Criminologica* 59 59

²⁰⁷ Esposito 1998 *CASE W RES J INT'L L* 543

CHAPTER 5

SOUTH AFRICAN LEGISLATION PROTECTING CHILDREN AGAINST SEXUAL EXPLOITATION

5 1 INTRODUCTION

South African legislation affecting children is in a period of transition. A comprehensive review of all institutions and procedures relating to children and their position in society has been put onto the agenda of the South African Law Commission, while special taskgroups have been commissioned to review, amongst others, the Child Care Act¹ and the Sexual Offences Act². Proposals for the amendment of the Films and Publications Act³ are awaiting approval from the government. These intended changes and shift in policy can be ascribed to the new emphasis on children's rights as a result of the ratification of the United Nations Convention on the Rights of the Child⁴, the human rights provisions enshrined in the Constitution⁵, a political awareness of children's needs and a need to develop legislation regulating new technological developments.⁶ This chapter will analyse the current legal framework with regards to children and sexual offences against children in South Africa. Special attention will be paid to the legislation regulating child pornography on the Internet as well as certain key terms as discussed in the previous chapters. Accessible, appropriate, uniform and empowering legislation, which is consistent with constitutional and international obligations of concern for the best interest of the child and protection of children in vulnerable situations⁷, should be a priority in a country where, during a period

¹ 74 of 1983 See also The South African Law Commission *Sexual Offences against Children* Issue Paper 10 (Project 107) 1997

² 23 of 1957 See also The South African Law Commission *The Review of the Child Care Act* Issue Paper 13 (Project 110) 1998

³ 65 of 1996

⁴ 1989, hereafter the CRC

⁵ 108 of 1996. Chapter two of the Constitution contains the Bill of Rights.

⁶ SA Law Commission *Review of the Child Care Act* (1998) 51

⁷ SA Law Commission *Review of the Child Care Act* (1998) 6

from August 1998 to July 1999, police investigated 40 522 cases of sexual crimes against children.⁸

5 2 CONSTITUTIONAL PROTECTION OF CHILDREN

With the introduction of the Bill of Rights⁹, South Africans were, for the first time, provided with an institutional framework that safeguards and promotes their basic human rights. It also ensures that the children of South Africa are recognised as a special group of bearers of rights and responsibilities, compelling the government and all state organs to uphold, protect and promote their fundamental rights.¹⁰ As the Constitution was adopted to improve the quality of life of all citizens and free the potential of each person¹¹, the government is not only obliged to refrain from violating the rights of children but must also take positive steps to fulfil their rights.¹²

Children of South Africa are not only enjoying the rights and freedoms¹³ as enshrined in the Bill of Rights but also receive special protection under section 28 of the Constitution.¹⁴ Section 28 reads as follows:

- “(1) Every child has the right –
- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;

⁸ *Implementation of the Convention on the Rights of the Child: South Africa's Supplement to the Initial Country Report* (January 2000) 58

⁹ Chapter 2 of the Final Constitution

¹⁰ S 7(2) of the Constitution

¹¹ Preamble to the Constitution

¹² Bekink and Brand “Constitutional Protection of Children” 2000 in Davel *Introduction to Child Law in South Africa* 173

¹³ Such rights include the right to human dignity (s 10) and not to be subjected to cruel, inhuman or degrading treatment (s 12(e)).

¹⁴ The first drafts of the Interim Constitution only contained one sentence to enshrine the rights of children. During one of the discussions of these drafts, a representative of the previous government remarked that two pages had been devoted to the rights of “criminals” but only two lines to the rights of children. De Vos “The Economic and Social Rights of Children and South Africa's Transitional Constitution” 1995 *SAPL* 233 234

- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

The 1996 Constitution provides for the possible horizontal application of rights.¹⁵ This means that the Bill of Rights can also be binding between individual parties, binding natural and juristic persons to the extent that the right is applicable. A provision could therefore be enforced between an individual and other private parties. The nature of the right and the duty imposed should be taken into consideration before applying a provision of the Bill of Rights on a horizontal level.¹⁶

This horizontal application of the Constitution is of special significance with regard to the protection of children's rights. Even though the state has the responsibility to respect, protect, promote and fulfil the rights of the child, the

¹⁵ S 8(2)

¹⁶ S 8(2)

primary obligation to maintain a child rests upon the parents.¹⁷ This implies that when the rights are applied to children, an “entitlement-duty triangular relationship” between the state, parent and child becomes pertinent.¹⁸ The consequence is that only when parents of a child fail to or are unable to give effect to a child’s right, does the duty rest on the state.¹⁹ Under section 28 (1)(d) the state is under the obligation to use its resources, such as the criminal justice and welfare system, to prevent and punish the abuse and neglect of children.²⁰

It is also of importance that civil society should be made aware of these rights and obligations. South Africa’s Supplementary Report to the Initial Country Report on the Implementation of the CRC²¹ confirms this and states that one of the most efficient mechanisms for co-ordination of policies and programmes is through a partnership between government and civil society. This responsibility for co-ordination has unfortunately shifted onto the government,²² placing too little or no pressure on the community to assist the state in complying with their obligations. The CRC furthermore places a responsibility on State Parties to the Convention to respect the responsibilities of the community to provide appropriate direction and guidance in a manner consistent with the evolving capacities of the child.²³ The Inter-Ministerial Committee on Young People at Risk provides the following statement in their interim policy recommendations:

“The notion that ‘it takes a whole village to raise a child’ is based on Ubuntu – a spirit of humanity which encompasses a principle of people caring for each others’ wellbeing with an attitude of mutual support In pre-colonial and traditional societies South African children were raised in this spirit, and few if any children were homeless or abandoned.”²⁴

¹⁷ *Grootboom v Oostenberg Municipality and Others* [2000] 3 BCLR 277 (C) at 288B

¹⁸ Bekink and Brand 2000 in *Introduction to Child Law* 174

¹⁹ Bekink and Brand 2000 in *Introduction to Child Law* 174 See also Davis, J in *Grootboom* (supra) at 288B: “Primarily s 28(1)(b) is aimed at the preservation of a healthy parent-child relationship in the family environment against unwarranted executive, administrative and legislative acts. It is to be viewed against a backdrop of disintegrating family structures caused by governmental policies.”

²⁰ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (Second edition) (1999) 434

²¹ January 2000, 8

²² *Implementation of the CRC: South Africa’s Report* (2000) 8

²³ A 5. See also p 45 - 46

5 3 INTERPRETING INTERNATIONAL AND FOREIGN LAW UNDER THE CONSTITUTION

Under section 39(1) of the Constitution a court, tribunal or forum in interpreting The Bill of Rights, must consider international law.²⁵ It should also promote the values that underlie an open and democratic society based on human dignity, equality and freedom²⁶ and may consider foreign law.²⁷

Even though the Constitution states that the courts may consider foreign law, most Constitutional Court cases read like works of comparative constitutional law.²⁸ Constitutional Court Justice Kriegler has expressed a notion of concern in following foreign jurisprudence of countries whose constitutional provisions have only a passing similarity to the South African Constitution.²⁹ The Court has however made the following ruling in *S v Makwanyane*:³⁰

“Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and final Constitutions, moreover, indicate that comparative research is either mandatory or advisable.”

The provisions of section 39 find further significance in sections 233 and 231 of the Constitution. Section 233 declares 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. According to section 231 an international agreement will bind the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces.³¹ An international agreement can become part of the law of South Africa when it is enacted into law by national legislation but self-

²⁴ SA Law Commission *Review of the Child Care Act* (1998) 6

²⁵ S 39(1)(b)

²⁶ S 39(1)(a)

²⁷ S 39(1)(c)

²⁸ See also De Waal et al *The Bill of Rights Handbook* 138 See for example *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) as discussed on p 116 – 120.

²⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

³⁰ 1995 (3) SA 391 (CC) at para 26

³¹ S 231 (2)

executing provisions are already part of the law if these provisions have been approved by Parliament.³²

John Dugard is of opinion that a court should not merely consider treaties to which South Africa is a party to or customary rules that have been accepted by South African courts but should also pay heed to international conventions, international custom, judicial decisions and the general principles of law recognised by civilised nations.³³ The Constitutional Court has confirmed this by declaring in *S v Makwanyane*³⁴ that both binding and non-binding public international law may be used as tools of interpretation. It accordingly held:³⁵

“International agreements and customary international law provide a framework within which [the Bill of Rights] ... can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.”

It is therefore clear that international documents and especially the CRC, the African Charter on the Rights of the Child and the Agenda for Action formulated at the First World Congress Against Sexual Exploitation of Children, which have all been ratified by the South African Government, will have to be taken into consideration when a matter regarding children's rights is brought before a court. With regard to the sexual exploitation of children, it should also refer to the Optional Protocol on the Sale and Exploitation of Children and the European Cybercrime Treaty, even though South Africa has not formally ratified these documents. It is therefore clear from the discussion above that foreign jurisprudence can be considered in interpreting section 28 of the Constitution and international law when legislation concerning children needs interpretation.

³² S 231 (4)

³³ Dugard “The role of International Law in interpreting the Bill of Rights” 1994 *SAJHR* 208

³⁴ *Makwanyane* (supra)

5 4 SOUTH AFRICAN LEGISLATION

Tracking statutory provisions affecting children is a difficult task.³⁶ Several law reforms and incomplete amendments have led to the fragmentation of South African legislation. Furthermore, the intersection between common and statute law has often led to contradictions, creating uncertainty and confusion.³⁷ As stated in chapter 2, both the Constitution and the Child Care Act 74 of 1983 define a child as a person under the age of eighteen years. This definition unfortunately does not find uniform application in the South African legal system. Apart from the fact that majority is achieved at the age of 21,³⁸ adulthood can be attained by initiation ceremonies or even the establishment of a household in terms of South African customary law.³⁹ Legislation causes further confusion with regard to, for example, the age of sexual consent.⁴⁰

Common law rules, which are still part of South African law, add to the complexity. These rules aimed at the protection of the child, are based on rationalisations of immaturity of the child and support a sense of paternalism in order to protect the child against him-/herself.⁴¹ These rules mainly protect the child with respect to his/her criminal and legal capacities, as well as his/her capacity to act and to litigate.⁴² According to a Roman law principle, the age of puberty for girls is twelve and fourteen for boys.⁴³ This rule is also used as the common law ages of sexual consent. A girl under the age of

³⁵ At para 35

³⁶ Examples of legislation pertaining to children are: The Sexual Offences Act 23 of 1957, the Marriage Act 25 of 1961, Age of Majority Act 57 of 1972, the Divorce Act 70 of 1979, the Child Care Act 74 of 1983, the Children's Status Act 82 of 1987, the Mediation in Certain Divorce Matters Act 24 of 1987, the Births and Deaths Registration Act 51 of 1992, the Guardianship Act 192 of 1993, the Prevention of Family Violence Act 133 of 1993, the Choice on Termination of Pregnancy Act 92 of 1996 and the Films and Publications Act 65 of 1996.

³⁷ See for example the current position on corporal punishment: A Constitutional Court decision, *S v Williams* 1995 (3) SA 632 (CC), has abolished judicially imposed corporal punishment and the South African Schools Act, 84 of 1996, prohibits it as a disciplinary measure in schools. Yet parental powers still permits the delegation of their common law right to reasonable chastisement to a person acting in the parent's stead. For a complete discussion see the SA Law Commission's *Review of the Child Care Act* (1998) 52

³⁸ Age of Majority Act No 57 of 1972 a 1

³⁹ SA Law Commission *The Review of the Child Care Act* (1998) 99 – 100

⁴⁰ See S 14 of the Sexual Offences Act as discussed below. See also *Implementation of the CRC Report* (2000) 18, SA Law Commission *Sexual Offences against Children* (1997) 17

⁴¹ SA Law Commission *Review of the Child Care Act* (1998) 54

⁴² See also Davel "The Status of Children in South African Private Law" 2000 *Introduction to Child Law in South Africa* 1 14 – 40 for a complete discussion on factors that determine a child's status

⁴³ Davel 2000 *Introduction to Child Law* 14 -15

twelve is considered legally incompetent and a man who has sexual intercourse with such a girl, can be convicted of rape.⁴⁴

There is no statutory definition of “child abuse”, “child sexual abuse” or even “child neglect” in South African law.⁴⁵ Some parts of legislation pertaining to sexual offences are formulated in archaic terms which are unsuited to the present context.⁴⁶ Fortunately amendments to the Child Care Act are aimed at addressing the problem of commercial sexual exploitation of children⁴⁷ and draft legislation concerning the exploitation of the child on the Internet is awaiting approval from the Minister of Home Affairs.⁴⁸ Existing legislation does not, however, regulate the full extent of sexual exploitation of children online in a satisfactory manner. This will become evident during the following discussion of the Sexual Offences Act⁴⁹, the Child Care Act⁵⁰, the Domestic Violence Act⁵¹ and the Films and Publications Act⁵².

5 4 1 THE SEXUAL OFFENCES ACT 23 OF 1957

Apart from the flaws and inconsistencies between relevant legislation and the common law, as well as questions about rules of evidence relating to sexual abuse cases, a discrepancy between the age of consent for boys and girls is highlighted by the 44 year old Sexual Offences Act⁵³. Section 14 of the Act provides the following:

“(1) Any male person who –

- (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
- (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or

⁴⁴ SA Law Commission *Review of the Child Care Act* (1998) 55

⁴⁵ S 50 of the Child Care Act 74 of 1983 makes it an offence to ill-treat a child

⁴⁶ SA Law Commission *Sexual Offences against Children* (1997) 17 See for example the use of the term “carnal intercourse” in the Sexual Offences Act discussed below.

⁴⁷ S 50A of the Child Care Act 74 of 1983 inserted by s 5 of Act 13 of 1999

⁴⁸ Personal interview with Mr Iyavar Chetty, Legal Council to the Films and Publications Board, 26 June 2001

⁴⁹ 23 of 1957

⁵⁰ 74 of 1983

⁵¹ 116 of 1998

⁵² 65 of 1996

⁵³ 23 of 1957

- (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,

shall be guilty of an offence.

...

- (3) Any female who –

- (a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or

- (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or

- (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,

shall be guilty of an offence.”

This section causes the predicament that children under the age of sixteen cannot give consent to “unlawful carnal intercourse⁵⁴”, but children under the age of nineteen cannot consent to “immoral or indecent acts” with a person of the same sex.⁵⁵

Another insult to modern morality is found in the defences which can be raised to any of these offences. Subsections (2) and (4) respectively provide that it shall be a sufficient defence if it is made to appear to the court that the child concerned was a prostitute at the time of committing the offence, that the person charged was under the age of 21 years and that it is the first occasion on which he is so charged. It shall also be a defence if it is proven that the child, or the person in whose charge he/she was, deceived the accused into believing that the child was over the age of sixteen years at the said time. The penalty for an offence under section 14 (1) and (3) is imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment.⁵⁶

Section 9 of the Act makes it an offence for a parent or guardian of any child to permit, procure or attempt to procure a child under the age of eighteen to have unlawful intercourse, or to commit any immoral or indecent act with any

⁵⁴ “Unlawful carnal intercourse” is described by section 1 of the Act as “carnal intercourse otherwise than between husband and wife”.

⁵⁵ See also *Implementation of the CRC Report* (2000) 18

⁵⁶ S 22 (f) of the Act

person other than the procurer, or to reside in or to frequent a brothel.⁵⁷ Any parent or guardian who permits, orders or in any way assists in bringing about, or receives any consideration for the defilement, seduction or prostitution of such a child shall also be guilty of an offence and could face imprisonment for a period not exceeding five years. If the child concerned is a boy under the age of fourteen years or a girl under the age of twelve years, a life sentence can be passed.⁵⁸

Section 12A prohibits assistance for purposes of unlawful carnal intercourse and declares as follows in subsection 1:

“Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, shall be guilty of an offence.”

If found guilty, a fine or imprisonment of not more than five years may be passed on the offender.⁵⁹

5 4 2 THE CHILD CARE ACT 74 OF 1983

Since it came into operation in 1987, the Child Care Act⁶⁰ has been amended several times, giving rise to various responses, concerns and reservations regarding its efficiency and relevance.⁶¹ The need for a multi-disciplinary approach and inter-sectoral co-operation has become an indisputable fact in redrafting a comprehensive children’s code.⁶²

One of the amendments entails a definition of the term “commercial sexual exploitation” and reads as follows:

⁵⁷ S 9 (1)(a)

⁵⁸ S 22 (b)

⁵⁹ S 22 (d)

⁶⁰ 74 of 1983

⁶¹ SA Law Commission *Review of the Child Care Act* (1998) 1 - 2

⁶² SA Law Commission *Review of the Child Care Act* (1998) 4 - 5

“[C]ommercial sexual exploitation’ means the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person”.⁶³

This amendment makes it a crime to participate or to be involved in the commercial sexual exploitation of a child.⁶⁴ The Act also makes it an offence to be an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs or to fail to, within a reasonable time of gaining information of such occurrence, report such occurrence at a police station.⁶⁵ The punishment for any of these offences is imprisonment of a period not exceeding 10 years or a fine or both such a fine and such an imprisonment.⁶⁶

5 4 3 THE DOMESTIC VIOLENCE ACT 116 of 1998

Three years after the Prevention of Family Violence Act⁶⁷ came into force, another investigation into legislation on family violence was deemed warranted.⁶⁸ This investigation gave rise to the enactment of the Domestic Violence Act.⁶⁹ The Act pays regard to the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child.⁷⁰

The Act also constitutes a substantial broadening of the limited scope of the Prevention of Family Violence Act⁷¹, adding several new definitions pertaining to violence and harassment.⁷² The term “domestic violence” now includes:

- “(a) [P]hysical abuse;
- (b) sexual abuse;

⁶³ Definition of “commercial sexual exploitation” inserted by s 1 (a) of Act 13 of 1999

⁶⁴ S 50A (1)

⁶⁵ S 50A (2)

⁶⁶ S 50A (3)

⁶⁷ 133 of 1993

⁶⁸ SA Law Commission *Review of the Child Care Act* (1998) 46

⁶⁹ 116 of 1998

⁷⁰ Preamble to the Act

⁷¹ See also *Implementation of the CRC Report* (2000) 35 and SA Law Commission *Review of the Child Care Act* (1998) 46

⁷² S 1

- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation⁷³;
- (f) harassment;
- (g) stalking⁷⁴;
- (h) damage to property;
- (i) entry into the complainant's residence without consent, here the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;"

The definition of "harassment" is given as follows:

"[E]ngaging in a pattern of conduct that induces the fear of harm to a complainant including-

- (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;"⁷⁵

The Act also gives a short but comprehensive definition of sexual abuse and describes it as any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant.⁷⁶ The complainant in each case is any person who is or has been in a domestic relationship with the respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant.

⁷³ "[I]ntimidation means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear".

⁷⁴ The definition of stalking is supplied as "repeatedly following, pursuing, or accosting the complainant".

⁷⁵ S 1

⁷⁶ S 1

In terms of this Act a complainant can apply to a court for a protection order⁷⁷, which may provide such remedies as prohibiting the respondent from committing any act of domestic violence,⁷⁸ or if the court is satisfied that it is in the best interests of any child it may

- (a) refuse the respondent contact with such child; or
- (b) order contact with such child on such conditions as it may consider appropriate.⁷⁹

A person who contravenes any prohibition, condition, obligation or order imposed, could be fined and/or imprisoned for a period not exceeding five years.⁸⁰

Section 4 of the Prevention of Family Violence Act places an obligation onto certain categories of people to report the ill-treatment of children in the following manner:

“Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances-

- (a) to a police official; or
- (b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act 74 of 1983).”

The Act does not provide a punishment for failure to do so.

5 4 4 THE FILMS AND PUBLICATIONS ACT 65 OF 1996

The current Films and Publications Act found its predecessors in a number of colonial acts such as the Obscene Publications Act⁸¹, section 14 of the

⁷⁷ S 4 – 6. S 4 (3) provides that an application can be made by a minor, or a person on behalf of the minor.

⁷⁸ S 7 (1)(a)

⁷⁹ S 7 (6)

⁸⁰ S 17

⁸¹ 31 of 1892

Customs Act⁸², section 38 of the Customs Consolidation and Shipping Act⁸³ and section 3 of the Customs Management Ordinance⁸⁴. After Unification in 1910, the Customs Act⁸⁵ prohibited the importation of any goods indecent or obscene or on any other ground whatsoever objectionable.⁸⁶ These goods were subject to forfeiture, and any person who knowingly possessed such goods was guilty of an offence.⁸⁷ Each province of the Union of South Africa still retained its own legislation prohibiting indecent material which were only repealed when Parliament enacted the Publications and Entertainments Act of 1963.⁸⁸ Section 1 of the Indecent or Obscene Photographic Matter Act⁸⁹ provided the following definition of what should be considered “indecent or obscene”:

“[It] includes photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.”

“Photographic matter” was defined as including any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device. This Act remained part of South African legislation until 1996 when it was repealed by the Films and Publications Act.⁹⁰ In 1974 the Publications Act⁹¹ came into force prohibiting

⁸² 10 of 1872

⁸³ 13 of 1899

⁸⁴ 23 of 1902

⁸⁵ 35 of 1944

⁸⁶ S 21

⁸⁷ S 124.7

⁸⁸ 26 of 1963 Section 6 (1)(c) describe indecency and obscenity as: “sexual intercourse, prostitution, promiscuity, white-slavery, licentiousness, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality, abortion, change of sex, night life, physical poses, nudity, scant or inadequate dress, divorce, marital infidelity, adultery, illegitimacy, human or social deviation or degeneracy, or any other similar related phenomenon.”

⁸⁹ 37 of 1967

⁹⁰ 65 of 1996 Section 2(1) of the 1967 Act provided as follows: “Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.” This section of the Act was declared unconstitutional by the Constitutional Court in *Case (supra)* which will be discussed below.

⁹¹ 42 of 1974

the distribution of publications deemed indecent or obscene or harmful or offensive to public morals.⁹²

The Films and Publications Act, 65 of 1996, came into operation on the 16th of January 1998. Sections creating offences however, only became operative on the 1st of June 1998. Paying special regard to regulating child pornography on the Internet, it should be noted that the Act was amended by the Films and Publications Amendment Act, 34 of 1999. The introduction of this Amendment Act declares that the purpose of the Act is, *inter alia*:

“[T]o provide for the protection of children against mental, physical and sexual exploitation or coercion to engage in the production of a pornographic film, publication or visual presentation; and to provide for matters connected therewith.”

During the Parliamentary Debate on the amendments to the Act, the Deputy Minister of Home Affairs emphasised that the Act was not one of censorship but rather one that intends to protect children from harm. The Minister recognised the capacity of abuse provided by the Internet.⁹³ The proposed amendments were welcomed by both the government and political parties and unanimously adopted by all members of Parliament.⁹⁴

The Amendment Act inserted a new and much needed definition of child pornography and defined it as to include:

“[A]ny image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children”.⁹⁵

The Act pertains to a wide range of publications, further extended by the inclusion of the Internet to the list.⁹⁶ The Act further defines “computer

⁹² S 47(2)(a) See also Constitutional Court Justice Mokgoro’s summary of the history of obscenity legislation in *Case (supra)* at paras 6 - 9

⁹³ Hansard 19 March 1999 Col 2887 -2888

⁹⁴ Hansard 19 March 1999 Col 2887 -2899

⁹⁵ Definition of “child pornography” inserted by s 1 (a) of Act 34 of 1999

⁹⁶ After the insertion of para (i) added by s 1 (b) of Act 34 of 1999, “publication” now means:

- “(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
- (b) any writing or typescript which has in any manner been duplicated;
- (c) any drawing, picture, illustration or painting;
- (d) any print, photograph, engraving or lithograph;

software” as a programme and associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows interactive use.⁹⁷

The Films and Publications Board, which is established and regulated by the Act⁹⁸, has to examine and consider the content of films and publications. The Board’s decisions are made using a set of guidelines, of which some are found in the Act itself. Classifications of XX, X18, R18 or F18 can be given to any film or publications if judged with certain content.⁹⁹ Schedule 1, as amended by section 9 of Act 34 of 1999, sets out the following guidelines for XX classifications of publications:

“[A] publication [is] to be classified as XX if, judged within context-

(1) it contains a visual presentation, simulated or real of-

- (a) child pornography;¹⁰⁰
- (b) explicit violent sexual conduct;
- (c) bestiality;
- (d) explicit sexual conduct which degrades a person and which constitutes incitement to cause harm; or
- (e) the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm;

(1) it or any independent part thereof, describes predominantly and explicitly the acts defined in clause (1) (a).”

It is important to note that the Act refers to a “visual presentation” which according to section 1 of the Act means:

“(a) [A] drawing, picture, illustration, painting, photograph or image; or

-
- (e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
 - (f) computer software which is not a film;
 - (g) the cover or packaging of a film;
 - (h) any figure, carving, statue or model; and
 - (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet.”

⁹⁷ S 1

⁹⁸ S 3 – 15

⁹⁹ S 17

¹⁰⁰ Para (a) substituted by s 9 of Act 34 of 1999

- (b) a drawing, picture, illustration, painting, photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout.”¹⁰¹

The definition of “sexual conduct” is found in Schedule 11 and is described as being:

“[G]enitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact.”

Section 25 of the Films and Publications Act prohibits the distribution or advertisement for distribution of a publication classified as XX in terms of a decision of the Board. “Distribution” in terms of section 1 and in relation to a publication, includes displaying in public, selling, hiring out or offering or keeping for sale or hiring. It also includes the handing or displaying of a publication classified as XX, to a person under the age of eighteen years. The Act gives a definition of a “distributor” in terms of a film¹⁰² but not in terms of a publication.

Section 27 (1)(a) makes it an offence to knowingly create, produce, import or possess a publication that contains a visual presentation of child pornography.¹⁰³ No reference is made to publications describing child pornography. Section 28 (1) prohibits distribution of a publication which contains a visual presentation or a description referred to in Schedule 1, thus making it an offence to distribute child pornography. As the extended meaning of the term “distribute” is not included in this section of the Act, it is debatable whether to hand or display unclassified child pornography to a child under the age of eighteen would amount to an offence in terms of the Act.¹⁰⁴

According to section 27 (3), no prosecution shall be instituted in respect of a contravention of subsection (1) and no search warrant shall be issued in terms

¹⁰¹ Definition of “visual presentation” substituted by s 1 (c) of Act 34 of 1999

¹⁰² “[D]istributor, in relation to a film, means a person who conducts business in the selling, hiring out or exhibition of films”

¹⁰³ S 27 (b) makes it an offence to knowingly create, distribute, produce, import or to be in possession of a film which contains a scene or scenes of child pornography.

¹⁰⁴ See also <http://www.interpol.com/public/Children/SexualAbuse/NationalLaws/csaSouthAfrica.asp> 28/05/01

of the Criminal Procedure Act¹⁰⁵ in respect of a publication or film which may be involved in such a contravention, without the written authority of the attorney-general concerned. When prosecuting these offences, the onus of proof is on the State to prove that the Films and Publications Board has not given a decision to the effect that the publication which is the subject of the prosecution does not contain a visual presentation of child pornography.¹⁰⁶

The punishment for the offences of sections 25, 27 and 28 is set out in section 30. A person committing any of these offences may be sentenced to prison for a period no longer than five years, or pay a fine, or, where aggravating circumstances are predominant, both such a fine and imprisonment.¹⁰⁷ *Bona fide* scientific, documentary, literary or, except in the case publications containing child pornography, an artistic publication, or any part of a publication which, judged within context, is of such a nature, is exempted from XX or X18 classification.¹⁰⁸

In order to be classified as X18, a publication must be judged to contain a visual presentation, real or simulated, of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals, or if it describes any act described in Schedule 1.¹⁰⁹ In terms of section 25 (b) it is an offence to distribute a publication classified as such. It is however, also an offence to distribute a publication if it contains any visual presentation or description of these acts described in Schedule 2.¹¹⁰

A publication will be classified as R18 if it is judged within context, necessary to protect children in the relevant age group against harmful or disturbing material in the publication.¹¹¹ Such a publication may only be distributed to persons older than eighteen years of age or older than a specified younger age and the publication must bear a distinct notice of such restriction.¹¹² It should also be sealed, if necessary, in an opaque wrapper, which shall also, if

¹⁰⁵ 51 of 1977

¹⁰⁶ S 27 (2) and 28 (3)

¹⁰⁷ S 30 (1)

¹⁰⁸ Schedule 5

¹⁰⁹ Schedule 2

¹¹⁰ S 28 (2). A classification by the Films and Publications Board is thus not required.

¹¹¹ Schedule 3

¹¹² Schedule 3 (1)

applicable, bear this notice.¹¹³ It is an offence to distribute a publication without meeting these conditions.¹¹⁴

5 5 THE COURTS' INTERPRETATION

5 5 1 THE PROHIBITION OF OBSCENE AND INDECENT MATERIAL

Although sexual offences against children have been the subject matter of too many cases brought before the courts in South Africa¹¹⁵, no cases have been reported concerning the prohibition of child pornography.¹¹⁶ Some of the earliest cases pertaining to pornography confirmed the common-law offence of public indecency, which was simply defined as conduct in public which of its very nature tends to the depravation of the morals of others.¹¹⁷ In the case of *R v Hardy*¹¹⁸ a newspaper editor was convicted for publishing an obscene newspaper report of public indecency. The article described immoral practices between native men and European women. The Court applied the Hicklin test¹¹⁹ of whether the tendency of the matter was to deprave and corrupt those whose minds were open to such immoral influences, and into whose hands such a publication could fall.¹²⁰ In 1953 the court found a figurine of a naked boy urinating, an alleged reproduction of the famous street fountain in Brussels, to be indecent.¹²¹ The Court held that it was very likely that South Africans would regard as indecent what the people of Brussels are said to have tolerated for more than 300 years.¹²² In the matter of *Republican Publications (Edms) Bpk v Raad van Beheer oor Publikasies*¹²³ the court set

¹¹³ Schedule 3 (2)

¹¹⁴ S 25 (c)

¹¹⁵ See for example S v S 1977 (3) SA 830 (A); S v S 1985 (3) SA 519 (T); S v D 1989 (4) SA 709 (T); V v V 1998 (4) SA 169 (C). The Child Protection Unit in the Eastern Metropole is currently investigating 1 400 cases of which 978 are pending in court. This information was released in a resource packet distributed by the Information Resource Center, US Consulate, during a video-conference with child pornography experts from the US on 27/07/01.

¹¹⁶ At present two suspected paedophiles who were arrested for the alleged abuse of several children as well as possession and distribution of child pornography, are being prosecuted in the Western Cape. One of them was a volunteer at the Red Cross Children's Hospital. See also p 5.

¹¹⁷ *R v Marais* (1886) 6 SC 367 at 370; *R v Bungaroo* (1904) 25 NLR 28 at 29-30

¹¹⁸ (1905) 26 NLR 165

¹¹⁹ See p 83

¹²⁰ At 171

¹²¹ *R v W* 1953 (3) SA 52 (SWA)

¹²² At 55D. See also Constitutional Court Justice Mokgoro's summary of the history of indecency and obscenity in *Case (supra)* at paras 6 - 15

¹²³ 1973 (4) SA 549 (D)

aside the prohibition of a photographic article about a stripdancer. The woman's private parts were not visible in the photographs and only a small part of her breasts were shown. As the court found that neither young schoolboys would be sexually aroused, nor would young girls be persuaded to join the world of stripdancing, the article was not *per se* immoral or undesirable.

The court in *S v R*¹²⁴ held that the human body, if exposed, could by no means be called indecent. The circumstances and manner in which the body is exposed has to be taken into consideration. If however, there is anything suggestive in a posed photograph or if it is a depiction of sexual intercourse or sexual solicitation, it could be concluded that the intention was to produce an indecent picture. In the matter of *Anchor Publishing Co (Pty) Ltd and Another v Publications Appeal Board*¹²⁵ the Court however further explained that a suggestion of sexual impropriety is not a prerequisite for the depiction to be labelled as indecent, nor does the portrayal need to be sexually exciting or stimulating. It in addition confirmed that the test whether matter is indecent, obscene or offensive to public morals is an objective test.¹²⁶ The court once again held, in the recent case of *S v Rautenbach*¹²⁷, that these terms carry a sexual connotation. It further found that the terms "immoral or indecent acts" have wide and indefinable meanings capable of numerous interpretations which could not be used as legal terms. Each depiction or act should therefore be judged on its own and within context.

5 5 2 THE CONSTITUTIONALITY OF PROHIBITING PORNOGRAPHY

5 5 2 1 THE RIGHT TO PRIVACY

Section 14 of the South African Constitution provides for the right to privacy. This right of all citizens of South Africa includes the right not to have

- (a) their person or home searched;

¹²⁴ 1964 (1) SA 394 (T) at 395A - B

¹²⁵ 1987 (4) SA 708 (N)

¹²⁶ At p 735

¹²⁷ 2001 (1) SACR 521. It was subsequently found that the bathing together of the accused with three young boys did not amount to an immoral or indecent act.

- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

The scope of a person's right to privacy only extends in so far as there is a subjective expectation to privacy. This means that a person must have a subjective expectation of privacy which society recognises as objectively reasonable.¹²⁸ The Constitutional Court has held on this matter that the right to privacy has to be limited with respect to the rights of others and the interests of the community. Justice Ackermann acknowledged that a person's right to choose his sexual preference should not be violated but when this preference has an impact on the rights of the community, the scope of protection may be adjusted accordingly. He made the following remarks in his judgement in the matter of *Bernstein v Bester NO*¹²⁹:

“The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

In *Mistry v Interim Medical and Dental Council of South Africa*¹³⁰ the Court referred to the Canadian Judgement of *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*¹³¹ where the court came to the same conclusion:

“[T]he degree of privacy the citizen can reasonably expect may vary significantly depending on the activity that brings him or her into contact with

¹²⁸ De Waal, et al *The Bill of Rights Handbook* 255 Someone cannot complain about an infringement of privacy if they have consented to having their privacy invaded.

¹²⁹ 1996 (2) SA 751 (CC) para 67

¹³⁰ 1998 (4) SA 1127 (CC)

¹³¹ (1990) 47 CRR 1

the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state."¹³²

As with all rights enshrined in the Bill of Rights, section 14 is subject to section 36¹³³ of the Constitution. The limitation clause, as it is popularly known, sets out specific criteria for the restriction of fundamental rights and reads as follows:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose;
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

A violation of a person's right to privacy may thus be permitted if there is a reasonable and justifiable reason for doing so. Content to the meaning of “reasonable and justifiable” is left open for the courts to decide.

The Constitutional Court has had the opportunity to give interpretation to the right to privacy, and the limitation thereof, in context of the prohibition of possession of pornography. In the matter of *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and*

¹³² *Thomson Newspapers (supra)* at 20 See also De Waal et al *The Bill of Rights Handbook* 256 - 257

¹³³ S 33 of the Interim Constitution, Act 200 of 1993

*Others*¹³⁴ the court had to decide on the constitutionality of section 2(1) of the Indecent or Obscene Photographic Materials Act¹³⁵. Justice Didcott found that the relevant section was an infringement on a person's right to privacy¹³⁶, stating that:¹³⁷

"What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which s 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy."

Three other Constitutional Court Judges showed reluctance in agreeing with Justice Didcott's statement. Justice Langa acknowledged the possibility of a reasonable limitation by stating the following:¹³⁸

"My understanding is that this statement is subject to the qualification that the right referred to, as is the case with other chap 3 rights, is not necessarily exempt from limitation. That the limitation may extend to possession even in the privacy of one's home in certain circumstances is a possibility acknowledged by Didcott J in para [93]. The precise circumstances are not a matter we are called upon to delineate here and I agree that it is wise to refrain from attempting to do so in this matter. What is clear is that an intrusion into such privacy cannot, as was the case in the past, be permissible unless it can be adequately justified on the basis of s 33(1) of the Constitution."

Justice Mokgoro also dissented from Justice Didcott's view by expressing her opinion on the matter:¹³⁹

"I must agree with his conclusion that the 1967 Act unreasonably and unjustifiably infringes the constitutional right to privacy. I would, however,

¹³⁴ 1996 (3) SA 617 (CC)

¹³⁵ 37 of 1967. The section provided as follows: "Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment." Section 1 of the Act defined "indecent or obscene" matter as "includ[ing] photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature."

¹³⁶ At the time s 13 of the Interim Constitution

¹³⁷ *Case (supra)* at para 91

¹³⁸ *Case (supra)* at para 99

¹³⁹ *Case (supra)* at para 65

respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the State to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a 'South African's home is his (or her) castle'. But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials. I therefore associate myself with the caveat expressed by Justices Langa and Madala regarding Justice Didcott's opinion."

Justice Madala's view on the matter seems to be a just and comprehensive synopsis of what the South African approach towards pornography and children should be:¹⁴⁰

"While I agree that one's right to privacy should be respected, this, in my view, does not mean that all pornographic or similar material warrants protection under that right or even under the wing of free expression. There seems to be considerable consensus, both here and abroad, that some forms of pornography and obscene matter should not enjoy constitutional protection. In my view, children should not be exposed to or participate in the production of pornography, and that, therefore, possession by them and exposure to pornographic material should be prohibited. However, possession by adults, in the privacy of their homes for personal viewing of sexually explicit erotica, portraying nudity, sexual interaction between consenting adults, without aggression, force, violence or abuse, may not be prohibited, for the benefit of those who derive pleasure in viewing such material. The protection accorded to the right to privacy is broad but it can also be limited in appropriate circumstances. The different circumstances of different cases may require us to take decisions specifically suited to particular cases."

The court found that the provision of section 2(1) was unjustly overbroad in that it introduced vague concepts such as licentiousness and lust, it discriminated against same-sex activities and made no distinction between regulating what is offensive and prohibiting what is harmful. Justice Sachs came to the conclusion that this obscurity could lead to the prohibition of possibly three-quarters of coffee-table art books and even many tastefully illustrated copies of the Bible or Shakespeare.¹⁴¹

¹⁴⁰ *Case (supra)* at para 105

¹⁴¹ *Case (supra)* at para 108

It is therefore clear that courts will pursue all possible methods to try to protect the right to privacy. The South African Constitutional Court has however indicated that it might consider the infringement on this right caused by the prohibition of child pornography to be a reasonable and justifiable violation.

5 5 2 2 THE RIGHT TO FREEDOM OF EXPRESSION

Section 16 of the Constitution protects not only free speech but also the right to freedom of expression. The provision reads as follows:

- “(1) Everyone has the right to freedom of expression, which includes –
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

In a free and democratic society such as South Africa aims to be, it is unacceptable to enforce the moral beliefs of one group in society onto others. Justifications for the prohibition of pornography, such as that the viewing of pornography leads to sexual crimes or that it is degrading and insulting to women, have been rejected by the courts as insufficient in justifying the violation of freedom of speech. There seems to be no conclusive proof that a causal connection between the use of adult pornography and crime exists. However, if it can be proved that the pornography is advocating hatred based on gender,¹⁴² it will no longer enjoy the guarantee in section 16.¹⁴³

¹⁴² See also the definition of the term “degrade” described in the Films and Publications Act, No 65 of 1996, as to advocate a particular form of hatred which is based on gender. The abovementioned Act prohibits material that degrades children or persons. See also the Act’s definition of child pornography as cited on p 109.

¹⁴³ See s 16(2)(c)

The only judge in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*¹⁴⁴ who used the infringement on the right contained in section 16¹⁴⁵ to strike down section 2(1) of the Indecent or Obscene Photographic Materials Act¹⁴⁶ was Justice Mokgoro. In her judgement the judge held that possession of pornography was included in the right to freedom of expression in that the right to express oneself is severely impaired if others' rights to hear speech are not protected.¹⁴⁷ The right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape a person's own expression.¹⁴⁸ After considering foreign jurisprudence¹⁴⁹ and reaching the conclusion that severance of this overbroad provision was not possible, the judge concluded that the relevant section of the Act was unconstitutional. The Court nonetheless did not give the green light for trading in pornography but rather attacked a specific scheme of censorship that has the capacity of hitting both offensive and innocuous materials.¹⁵⁰

5 6 CONCLUSION

South African legislation concerning the protection of children against sexual exploitation is outdated, inadequate and does not fully comply with standards set by international law. The South African government has committed itself to protect children against sexual exploitation by ratifying several international documents and enshrining this right in section 28 of the Constitution. As a key member of the international community, South Africans can no longer be

¹⁴⁴ *Case* (supra)

¹⁴⁵ At the time s 15 of the Interim Constitution

¹⁴⁶ No 37 of 1967. The section provided as follows: "Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment." Section 1 of the Act defined "indecent or obscene" matter as "includ[ing] photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature."

¹⁴⁷ *Case* (supra) at para 25

¹⁴⁸ *Case* (supra) at para 25

¹⁴⁹ Justice Mokgoro used cases and materials on the subject from the United States, Canada, the United Kingdom and India to come to her conclusion.

contempt to leave these promises as hollow words. Given the reality of child pornography on the Internet in South Africa, it becomes clear that amendments to the current legal framework should be a priority. The last chapter of this study will suggest and discuss some proposals in amending South African legislation pertaining to child pornography on the Internet, which will provide more adequate protection to this special group of people.

CHAPTER 6

PROPOSALS FOR AMENDMENTS

6 1 INTRODUCTION

In view of the theoretical and practical perspectives gained from the discussions in the previous chapters, it becomes quite clear that the regulation of pornography on the Internet presents certain age-old but also quite new and unique challenges. Legislative attempts to regulate human conduct¹ and formulated in such a way as to prevent loopholes, are recurring themes. On the other hand, attempts to prevent or curtail exploitation in a world without boundaries as created by the Internet, present unfamiliar terrain to any legislation. However, contrary to popular belief, the Internet is not a lawless place which cannot be controlled but rather poses fundamental challenges for effective leadership and governance.² As governance is about regulating relationships in complex systems, the idea of governance without government has been widely accepted by the International Community as a possible solution to the situation.³ A multi-layered governance system, consisting of a combination of national and international legislation as well as self-imposed regulation by Internet Service Providers⁴ and online users, should be adopted.⁵ Responsibility for the content of material on the Internet should be shared and society should be made aware of the danger lurking on the World Wide Web. The purpose of this chapter is therefore to suggest some amendments to be made to South African legislation in order to implement this idea of governance of the Internet. Proposed amendments⁶ to the Films and Publications Act, 65 of 1996, that are awaiting government approval, will be discussed in view of the further protection it aims to

¹ See for example the difficulties with regard to defining pornography within a society with changing morals. See pp 23 - 24

² Akdeniz "Governance of Pornography and Child Pornography on the Internet" 1997 in Edwards and Waelde *Law and the Internet* 223 224

³ Akdeniz 1997 *Law and the Internet* 225 - 226

⁴ Hereafter ISPs

⁵ Akdeniz 1997 *Law and the Internet* 225

⁶ The Films and Publications Amendment Bill, 2001, hereafter the Amendment Bill

provide concerning pornography on the Internet. The guidelines provided by international documents⁷ and experiences of selected jurisdiction⁸ will also be relied upon in order to provide South Africa with all encompassing legislation that will protect children from sexual exploitation online. South Africa needs to comply with the international standards of prevention, reporting, education, referral, investigation, treatment and follow-up of instances of child abuse, which it has committed itself to.

6 2 AMENDMENTS TO THE SEXUAL OFFENCES ACT 23 OF 1957

The South African Law Commission is currently conducting an investigation with regard to sexual offences against children and difficulties experienced within the criminal justice system in the prosecution of these offences.⁹ The Discussion Paper of the Commission pays particular attention to the indiscrepancies that exists regarding the age of sexual consent.¹⁰ The Commission also criticises the wording of section 14¹¹ of the Sexual Offences Act which states that the offences mentioned can only be committed with youths. It is therefore not sufficient for an immoral or indecent act to be committed in the presence of a young person.¹² For the purpose of this study it is submitted that the scope of the offences created by section 14(1)(b) and 14(3)(b) should be broadened to include intentional exposure of a child to explicit sexual activities¹³ and thus would also prohibit intentional exposure to pornographic material.

It is also submitted that the term “unlawful carnal intercourse” should rather be replaced with a term such as “sexual conduct”, which would be much more suited to the present context. Sexual conduct would include a display of genitals;

⁷ See discussion in chapter 3

⁸ See discussion in chapter 4

⁹ See The South African Law Commission *Sexual Offences against Children* Issue Paper 10 (Project 107) 1997

¹⁰ SA Law Commission *Sexual Offences against Children* (1997) 17, 33 – 37

¹¹ See p 102 - 103

¹² SA Law Commission *Sexual Offences against Children* (1997) 35 This has been confirmed by the Court in *R v H* 1959 (1) SA 343 (C); *S v M* 1970 4 SA 647 (N) and *S v A* 1990 (2) SACR 266 (ZS).

¹³ Work of literary, artistic or educational value should however be permitted.

masturbation; sexual intercourse, including anal sexual intercourse; fondling or touching of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact. The distinction between “unlawful carnal intercourse” and “immoral or indecent acts” should thus also be eliminated. Furthermore, no distinction should be made between the age of consent to sexual intercourse and any of the other activities¹⁴ and no discrimination with reference to gender, be it the offender or the victim, should be allowed within the wording of the Act.

It is submitted that the age of consent to any sexual activity should be sixteen years of age. This would mean that no sexual conduct with, or in the presence of, any person under the age of sixteen would be allowed.¹⁵ The depiction of this sexual conduct should also be criminalised by the Films and Publications Act¹⁶. At present, a child as young as sixteen may consent to sexual intercourse but the depiction thereof is not allowed. Justice Sachs in *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others*¹⁷ remarked that it seems strange that one cannot look in one's bedroom at what one is allowed to do in one's bedroom. In the United Kingdom consent to sexual activity can be given at the age of sixteen. The Child Protection Act of 1978 correspondingly defines a child for the purposes of child pornography, as a person under the age of sixteen years.¹⁸ The same measures have also been adopted in Australia.¹⁹ South African legislation too needs to be systematic and coherent in this regard.

The community should be notified of known sex-offenders living in their community and these offenders should not be allowed to use a computer to approach children online.²⁰ The Sexual Offences Act should also provide for the

¹⁴ As is presently the case with s 14 of the Act See p 103

¹⁵ Once again work of literary, artistic or educational value should be permitted.

¹⁶ 65 of 1996

¹⁷ 1996 (3) SA 617 (CC) at para 112

¹⁸ See discussion of s 1(1)(a) of the CPA and s 15 of the Sexual Offences Act 1956 on p 83

¹⁹ Healy “Child Pornography: An International Perspective” Available at <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

²⁰ See also the approach followed by Canada and the United Kingdom in this regard as discussed on pp 80 – 81 and 87.

rehabilitation of both the sex-offender and the child victim. The Government should set psychological treatment centres in place where the victim can receive extensive follow-up treatment.

6 3 AMENDMENTS TO THE CHILD CARE ACT 74 OF 1983

The Child Care Act can not be isolated from other legislation pertaining to sexual offences against children. Sexual perpetrators should not be given any chance to escape prosecution by relying on technical lacunae in legislation and it is thus essential that the appropriate acts provide ample protection to children. It is therefore submitted that the definition of “commercial sexual exploitation”²¹ should be replaced with a definition of the term “sexual exploitation”. This is deemed necessary as South African legislation does not define “child sexual abuse” and sexual predators of children could easily escape prosecution by claiming that no reward was offered. The sexual exploitation of children, whether or not a reward of some sort has been paid or not, is a serious crime which should be combated. Offenders should not be given any opportunity to escape prosecution. As exploitation is the abuse of power, the only reward involved will be that of the gratification of the abuser. Financial gain is in most cases also of no importance to the sexual abuser. The procurement of a child, which may be done with the aid of pornography, to perform any sexual act, amounts to the sexual exploitation of that child. Any such conduct will be performed for the gratification of another, but will be extremely harmful to the child. It should also be illegal to use the Internet to communicate with a child for the purpose of committing a sexual offence against that child. These offences should be punishable with imprisonment of a period of not less than one year but not exceeding ten years for a first time offender and a period of between five to thirty years for a repeat offender. No option of the payment of a monetary fine should be given.

²¹ See current definition as discussed on p 105

6 4 AMENDMENTS TO THE FILMS AND PUBLICATIONS ACT 65 OF 1996

6 4 1 DEFINITION OF POSSESSION

One of the most important key elements to the prohibition of child pornography is that of possession. Possession first and foremost needs to be criminalised as this action can be the first link in the chain of abuse and distribution of child pornography. Unfortunately no definition of possession in terms of electronic data on a computer has been formulated in either foreign or South African legislation. It is submitted that the common law definition and ordinary meaning of possession, whereby the possessor should have both an element of physical and mental control over an object, should be incorporated into the definition of possession. The possessor should therefore have knowledge of this material. This proposal is included in the definition submitted by the Amendment Bill. The proposed amendment defines possession as keeping or storing in or on a computer or computer system or computer-data storage medium or having custody or control or supervision whether for one's own or another person's behalf.²²

6 4 2 DEFINITION OF CHILD PORNOGRAPHY

Child pornography is currently only defined in terms of images that depict sexual explicit acts of children. A classification of XX will also only be made with regard to visual presentations of child pornography. Section 27(1)(a) does not prohibit the creation, production or possession of material that describes child pornography and it follows that audio material containing descriptions of explicit nature, screams or other horrific sounds of child abuse is not forbidden. The distribution of a publication containing descriptions of child pornography, however, is prohibited by section 28 of the Act. It is submitted that the definition of child pornography should also include descriptions of children engaging in sexual conduct or vivid descriptions of their genitals which will amount to sexual

²² S 1

exploitation. It should furthermore prohibit any audio material, using a child's voice, real or simulated, intended for the sexual gratification of the user.²³

The Amendment Bill also proposes the deletion of the requirement of "a display of genitals" from the definition of child pornography. Images of children which are clearly intended for sexual gratification of the viewer, do not always necessarily depict any genitals. It is thus submitted that this is an appropriate and obligatory amendment.

6 4 3 DEFINITION OF DISTRIBUTE AND DISTRIBUTOR

It is not an offence to hand or display a publication containing a visual presentation or description of child pornography, bestiality, explicit violent sexual conduct or any of the other acts mentioned in Schedule 1 of the Films and Publications Act, to a person under the age of eighteen years if this publication has not been classified by the Films and Publications Board as a XX publication. This is due to the fact that the extended meaning of the term "distribute" is not included within section 28(1)²⁴ of the Act. The Films and Publications Amendment Bill has improved on the definition by accordingly suggesting that distribution should include the following:

“'[D]istribute' in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections 25(a), (b) and (c), 26(1)(a), (a1), and (b), and 28(1) and (2) includes to hand or exhibit a film or a publication to a person under the age of 18 years, or the failure to take reasonable steps to prevent access thereto by such a person.”²⁵

As the Internet is considered to be a publication, it is submitted that the definition of "distributor" should be amended to also include the meaning of the term in relation to a publication. It should not, however, only be restricted to a person who conducts business in the selling, hiring out or exhibition of publications but

²³ See also the Interpol definition of audio child pornography as discussed on p 27.

²⁴ This section prohibits distribution of a publication containing a visual presentation or description of child pornography. See also discussion on p 111.

should include the ordinary meaning of a person who parts possession or offers something to another person. The question however still remains whether sending an Internet address of a website where child pornography, or any other obscene and explicit material can be accessed, can amount to distribution thereof. It is submitted that this method of promoting sexual exploitation should be defined as advertisement of the material.

6 4 4 THE RESPONSIBILITY OF INTERNET SERVICE PROVIDERS

The Amendment Bill offers a definition of an Internet Service Provider by describing it as any person who provides access to the Internet by any means.²⁶ Although Service Providers can provide additional services such as Web hosting and design, its main function is still to provide facilities of communication on the Internet. This proposed definition is therefore a very apt description.

The media and civil society has to take responsibility for the protection of its children against sexual exploitation. This is reflected by articles 5 and 7 of the United Nations Convention on the Rights of the Child as these provisions call for community involvement into the well-being of the child. ISPs therefore have to accept some responsibility with regard to the content of the services that they provide. By introducing a similar type of self-governance of the Internet as done in the UK, Canada and Germany, South African ISPs will be expected to remove any material, that could be reasonably found to be child pornography. All links to this material should also be deleted. ISPs should be compelled to provide the law enforcement agency with any relevant information available with regard to the person who posted the material. In this regard ISPs should standardise the both the subscriber and transactional records they maintain. If the material is judged not to contain child pornography, the material could be re-posted. Service Providers should be held liable for the content that they provide through their service once knowledge of the illegal content becomes available to them. It is

²⁵ S 1

²⁶ S 1

submitted that failure to do so could result in committing the offence of distribution of child pornography.

The Amendment Bill has made provision for the liability of ISPs by proposing that all South African ISP's should register with the Films and Publications Board.²⁷ ISP's should take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.²⁸ If an ISP has knowledge that its services are being used for the hosting or distribution of child pornography, it should report the presence thereof to a police official²⁹, take all reasonable steps to prevent access thereto³⁰ as well as steps to preserve such evidence for purposes of investigation and prosecution.³¹ It should furthermore furnish the particulars of users who gained or attempted to gain access to an Internet site containing child pornography.³² Failure to comply with the above is a criminal offence³³ and could result in imprisonment not exceeding five years and/or a fine.³⁴

It is however essential that ISPs should be able to refer questionable material to a monitoring body responsible for classification of the material. ISPs cannot be held responsible to judge whether the content might be considered harmful to children or not.³⁵

6 4 5 PROSECUTION PROCEDURE AND APPROPRIATE SENTENCING

It is suggested that the Films and Publications Act should set a minimum standard of punishment for the sexual exploitation of children online. When

²⁷ S 27(A)(1)(a) Regulation in countries such as Vietnam, Singapore and Malaysia also state that all ISPs must register with the Government and are subject to official inspections. See also Sayle "Net Nation and the Digital Revolution" 2000 *Wisconsin International Law Journal* 257 260

²⁸ S 27(A)(1)(b)

²⁹ S 27(A)(2)(ii)

³⁰ S 27(A)(2)(i)

³¹ S 27(A)(2)(iii)

³² S 27(A)(3)

³³ S 27(A)(4)

³⁴ Amendment to s 30(1) of the principal Act

³⁵ See also the decision by the US Appeals Court in *American Civil Liberties Union et al v Janet Reno, Attorney General of the United States* 217 F.3d 162 2000 Available at <http://laws.lp.findlaw.com/3rd/991324.html> 24/07/01 as also discussed on pp 74 - 75

sentencing these offenders, it should be kept in mind what grave influence these offences have on the lives of children.³⁶ A first time possessor of child pornography should be sentenced to between one to five years imprisonment or should be fined no less than R50 000. Repeat possession offenders should receive punishment of between five to fifteen years imprisonment without the option of paying a fine. First time offenders of distributing and producing child pornography should be punished no less than two years imprisonment while repeat offenders should be spending between five to thirty years in prison.

It is also submitted that South Africa should follow the example of the USA³⁷ and Canada³⁸ in providing the means for prosecution of a South African citizen committing any sexual offence against a child outside South Africa. These measures should be adopted to prohibit South African citizens from perpetrating in countries with poorly enforced or non-existing laws on child pornography and where the sexual exploitation of children is tolerated. The Amendment Bill makes provision for these measures by the insertion of section 30A. South African courts and any Director of Public Prosecutions shall have jurisdiction in these matters.³⁹

It should further be noted that the Amendment Bill proposes the complete deletion of section 27(3). It should therefore no longer be a requirement to first obtain written authority from the Director of Public Prosecutions prior to the institution of a prosecution or carrying out of a search of suspect premises. Keeping in mind the serious harm caused by these offences, there is no justification in departing from the general provisions of the Criminal Procedure Act⁴⁰ regarding search and seizure. The Amendment Bill also proposes that the onus of proof that a decision by the Films and Publications Board to the effect that the publication does not contain child pornography was not made, no longer rests upon the State. The deletion of section 28(3) is therefore also proposed.

³⁶ See also discussions on pp 7 – 8, 29 - 30

³⁷ See 18 U.S.C. § 2260 as discussed on pp 64 - 65

³⁸ See the proposals for new legislation as discussed on p 81 fn 130

³⁹ See s 30A(3) of the Amendment Bill

⁴⁰ 51 of 1977

6 4 6 THE REPORTING AND MONITORING OF CHILD PORNOGRAPHY

South Africa should follow the example set by the UK and USA as well as several other European countries⁴¹ by providing a monitoring body for the reporting of child pornography online. The rate of successful prosecutions which can be ascribed to governing bodies such as the Internet Watch Foundation⁴² and the Centre for Missing and Exploited Children⁴³, should be encouragement alone to the establishment of such an institution in South Africa. This monitoring body should host a website on the Internet where other Internet users can report their detection of child pornography. The monitoring body should work in close co-operation with the Internet Industry⁴⁴, the South African Police Force and Child Protection Unit by referring these reported sites to them. It should also co-operate with other national tiplines so that an international database of information and best practices could be built up.

Public awareness of the sexual exploitation of children online should be raised. Both the media⁴⁵ and the Internet industry should take responsibility for promoting the safety of children. The reporting of child pornography should also be made compulsory⁴⁶ and failure to do so should be criminalised. Many people are unwilling to become involved in the protection of children from danger. South Africa should build on the concept of *Ubuntu* and adopt a spirit of responsibility,

⁴¹ See for example the tiplines introduced by countries such as The Netherlands and Norway as discussed on pp 55 - 56

⁴² Of the UK, hereafter IWF, see p 3

⁴³ Of the US, hereafter NCMEC, see p 76

⁴⁴ Once the monitoring body becomes aware of illegal content, it should inform all other ISPs of the existence of the material.

⁴⁵ In May of 2001, a new media code for reporting on children was proposed. This code acknowledges that the media should play an active role in the promotion of children's rights and issues by the quality of articles, stories, and photography. Some of the guidelines proposed include media education, decoding media messages, and the use of media in a participatory manner. No advertising, billboard or sponsorship may mislead, deceive or demean children, advocate sexual promiscuity or exploit or coerce children. See also "Code proposed to govern reporting on children" Available at <http://www.legalbrief.co.za/secure/archives/mediacodeSA.htm> 16/05/01

⁴⁶ This should be done in a similar manner in which s 4 of the Prevention of Family Violence Act, 133 of 1993, provides for the reporting of ill-treatment of children. The scope however should be extended to all users of the Internet.

mutual support and humanity.⁴⁷ A person who fails to report the detection of child pornography on the Internet should be fined no less than R1 000.

The Amendment Bill makes provision for the mandatory reporting of child pornography by the substitution of section 27(2) of the principal Act. This section will in future make it an offence to have knowledge of the availability or production of child pornography but neglecting to report it to the South African Police Services.⁴⁸ Such a person is also under the obligation to provide as much information as possible to the Police in assisting them with the investigation.⁴⁹

The protection of children against material deemed harmful to them however, is a different matter. The use of filtering software, which will allow parents to control the content of websites that their children may visit, has been suggested as a possible solution to combat this form of exploitation. Programmes with parental control features such as "Surf Watch", "Net Nanny"⁵⁰ and "Cyber Sitter" have been made available and give parents the chance to block certain material from being accessed on their computers. Although these software programmes have proved to be effective in some situations, it can also be over inclusive and filter out potentially educational materials regarding AIDS and drug prevention.⁵¹ Matching image software in Europe has also proved to be ineffective.⁵² The responsibility of parents in protecting their children should however still be emphasised. Parents should always have knowledge of the material that their children are accessing on the Internet as well as the topics of their discussions in chat rooms. Once again it should be stressed that public awareness of the possible danger of the Internet should be raised.

⁴⁷ This was also the view expressed by Constitutional Court Justice Kate O'Regan, speaking at a conference on sex education held in Johannesburg in August 2001. Richard, C. "Adults have duty to protect all kids" Available at <http://www.suntimes.co.za/2001/08/26/politics/pol04.htm> 29/08/01

⁴⁸ S 27(2)(a) and 27(2)(a)(i)

⁴⁹ S 27(2)(a)(ii)

⁵⁰ Net Nanny prevents children from accessing areas on the Internet that a parent deems inappropriate, giving details such as a name, address, telephone number or credit card information to another person via e-mail or chat rooms. See also Akdeniz "Governance of Pornography and Child Pornography on the Internet" 1997 in Edwards and Waelde (ed) *Law and the Internet* 223 238

⁵¹ Akdeniz 1997 *Law and the Internet* 239

6 5 THE CONSTITUTIONALITY OF PROHIBITING VIRTUAL CHILD PORNOGRAPHY

One of the issues concerned with child pornography that have been the source of much controversy and debate is that of the prohibition of virtual child pornography. Some of the arguments forwarded by civil libertarians are based on the absence of children in the production of virtual child pornography. It thus follows that laws protecting child victims would no longer apply and proscription would result in an unjustifiable violation of freedom of expression.⁵³ Virtual child pornography that is not obscene, is nothing more than an imaginative idea.⁵⁴ The law cannot be allowed to control private fantasies.

Child advocates, in contrast, argue that the harm of child pornography extends far beyond the individual victim when child pornography is used to seduce other children. Children as a group are the victims of computer-generated pornography which displays child victims as sexual objects. Allowing virtual child pornography could re-establish the commercial trade, as bookstores will be filled with these images, de-sensitising children and society while fuelling demand for the material. Since the advances of technology have made it practically impossible to distinguish between “real” and computer-generated child pornography, paedophiles will be equipped with another avenue of defence.⁵⁵

Ideas are protected under the Constitution unless they are transformed into speech that incites imminent lawless activity.⁵⁶ This truism is reflected in the limitation to the right to freedom of expression as provided for in section 16 (2)(b)

⁵² See for example the difficulties experienced in Germany as discussed on p 91. This type of software is often rather used to scan through images seized by the Police during their investigations. Brooks *Video Conference* US Consulate, Cape Town, 27/07/01

⁵³ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

⁵⁴ Burke “The Criminalisation of Virtual Child Pornography” 1997 *Harvard Journal on Legislation* 439 460

⁵⁵ <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01 Prosecutors in the United States have discovered just how difficult it can be to prove that a real child was used in the production of the pornography. In Virginia, the prosecutor did not have the time or resources to identify any of the victims. As a result, the defendant pleaded guilty to five counts instead of the full 91-count indictment. “The difficulty in prosecuting virtual child pornography” Available at <http://www.nandotimes.com/noframes/story/0%202107%2C500307380%2D50049328%2D503447230%2D0%2C00.html>

⁵⁶ Burke 1997 *Harvard Journal on Legislation* 461

and (c). These sections place a limitation on expression when the expression incites imminent violence or advocates hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. The Constitutional Court will have to interpret and give content to these phrases if it is ever asked to decide on the constitutionality of section 27 (1)(a)⁵⁷ of the Films and Publications Act. The Court would have to consider that pornography is at the centre of the sexual exploitation of children. It is used for enticement, seduction, instruction, blackmail, trade, and sale of children and child pornography.⁵⁸ A morphed picture depicting a child's face onto a pornographic image may be used to blackmail this child into silence or sexual activity. In such cases there is a victim⁵⁹ and even though the child never participated in sexual conduct, the effect of distribution of this image may be similar. The Supreme Court of the US has noted that paedophiles use child pornography to seduce other children into sexual activity.⁶⁰ The US Congress has expressed a warning that child pornography whets the sexual appetites of paedophiles, creating their fantasies and stimulating them to victimise real children⁶¹, it inflames the desires of child molesters, paedophiles, and child pornographers and encourages a societal perception of children as sexual objects.⁶² However no causal relationship between the consumption of pornography and sexual crimes against children has ever been proved⁶³ and it has been argued that the viewing of virtual

⁵⁷ This section makes it an offence to knowingly create, produce, import or possess a publication that contains a visual presentation of real or simulated child pornography.

⁵⁸ As stated by the President and Chief Counsel of the National Law Center for Children and Families during the hearing on the CPPA before the Committee of the Judiciary United States Senate. See also Adler "The Perverse Law of Child Pornography" 2001 *Columbia Law Review* 209 215 fn 28

⁵⁹ Burke 1997 *Harvard Journal on Legislation* 464

⁶⁰ *Osborne v Ohio* 495 US 103 (1990) This was the first time that speech could be banned on account of the possibility that someone might use it for abominable purposes. See also Adler 2001 *Columbia Law Review* 244

⁶¹ Adler 2001 *Columbia Law Review* 216

⁶² Adler 2001 *Columbia Law Review* 244; Burke 1997 *Harvard Journal on Legislation* 464

⁶³ It is virtually impossible to conduct research in the laboratory using standard scientific methods that yield statistically reliable results. In 1995, during hearings on paedophilic activity in Australia, several law enforcement agencies testified that there was a significant likelihood that a person in possession of child pornography was also involved in sexually abusing children. A detective in the Los Angeles Police Department estimated that out of 700 child molesters arrested over 10 years for extra-familial child sex crimes, more than half had child pornography in their possession and about 80% owned either child or adult pornography. From 1986 to 1988, an organisation called Childwatch in England found that of the 27 child molesters convicted, 23% were using their child victims to make pornography and nearly all of

child pornography may even produce the opposite effect by alleviating the desire to pursue actual children.⁶⁴

It is consequently submitted that virtual child pornography should still be prohibited. It should still be an offence to knowingly produce, advertise, import, distribute, or possess with the intent to distribute computer-generated child pornography but exceptions for certain instances of possession should be permitted. In this regard it is submitted that the Canadian judgement of *R v Sharpe*⁶⁵ should be used as an example of balancing the rights of freedom of expression and privacy against the child's right to be protected against sexual exploitation. Possession of child pornography which was created by the possessor alone, which does not depict any unlawful sexual activity⁶⁶, and which is being held by such a person alone and exclusively for his or her own personal use, should be allowed. It is however still the State's business to tell a man (or a woman) sitting alone in his house in front of his computer that he cannot transmit child pornography or receive such material from others on the Internet.

6 6 CONCLUSION

Acknowledgment of the fact that the sexual abuse of children is an extremely serious and harmful problem in South Africa, is the first step in tackling this vicious circle. South Africans however, also need to realise and admit that child pornography is a form of sexual abuse that continues to harm society. With the increasing availability of pornography on the Internet, the damage has been multiplying. This form of sexual exploitation, which destroys the child's right to human dignity and protection from maltreatment, abuse or degradation, should be actively combated. The first battles in this war should be initiated by the

the child molesters had child pornography in their possession. However, not all paedophiles who collect or view pornography sexually molest children and not all of those who collect child pornography can be characterised as paedophiles. Healy "Child Pornography: An International Perspective", delivered at the World Congress against Commercial Sexual Exploitation of Children in August 1996 found on <http://www.usis.usemb.se/children/csec/215e.htm> 20/03/01

⁶⁴ Burke 1997 *Harvard Journal on Legislation* 464 - 465

⁶⁵ (2001) Available at <http://www.gov.ab.ca/just/upload/CrimPros/sharpe.htm>

⁶⁶ It is submitted that no real child's image should be recognisable in this material.

enactment of all encompassing and effective legislation. Definitions of terms such as sexual conduct, sexual exploitation, possession, distribution and child pornography itself, need to be simple but comprehensive. Heavy penalties should be inflicted upon anyone committing any offence regarding child pornography and a serious attempt at the rehabilitation of these offenders should be made. Although the effect of poverty and a lack of resources in South Africa should not be ignored, it can under no circumstances be used as an excuse for this form of abuse.

The Internet industry needs to become actively involved in this war. Working in close co-operation with a monitoring body, directly reporting to the Child Protection Unit, this industry will be instrumental in fighting the battle. The technical skills and information held by the ISP, will in most cases be essential in the prosecution of paedophiles using the Internet. ISPs have to realise that a system of self-governance, rather than that of strict policing, will be much more productive and effective, both in combating sexual exploitation of children and in raising their profile to attract more customers. Once an ISP, as a member of the community, realises how big a role it can play in the protection of the members of society, it may also not use the lack of human or financial resources as a defense.

The role of parents in the protection and education of their children should nevertheless never be ignored. Parents should become aware of the possible dangers of the Internet and inform their children accordingly. Parents still remain the principal guardians of their children and should always be aware of the content of their children's communications during use of the Internet.

The government in South Africa also needs an urgent reminder of the promises contained within the United Nations Convention on the Rights of the Child⁶⁷ and the African Charter on the Rights and Welfare of the Child⁶⁸. Upon ratification of these documents, and again with the adoption of the Constitution, 108 of 1996, South Africa has promised to always and in all circumstances uphold the best

⁶⁷ 1989. Hereafter the CRC

interest of the child as the most important consideration.⁶⁹ It has promised to enforce the right of the child not to be sexually exploited or maltreated.⁷⁰ The protection of the rights to privacy or freedom of expression can therefore not be used to justify paedophilic activity such as child pornography. The government of this country, members of the community and especially advocates of freedom of expression need to realise that child pornography is not merely a couple of innocent pictures of naked children. Child pornography is a picture or a description of a crime scene. Although paedophiles may use any type of picture of a child to achieve sexual stimulation, the majority of child pornography on the Internet depicts children in unnatural and inhuman poses. Child pornography is proof that a child has been sexually abused. It can, and in most cases is, used to sexually exploit more children. Child pornography is a form of expression which incites harm and cannot be protected. The right of the child to be protected against maltreatment and abuse weighs much more than the right of paedophiles to mask their sexual preferences as exercising their rights to privacy and freedom of expression.

It is thus submitted that through an active awareness campaign involving all sectors of the community as well as the Internet industry, this new form of criminal activity can be combated. This campaign, however, may not only remain that of empty words. The leaders of the society need act with regard to promises made when ratifying international documents. In South Africa the time has come for children to be seen and to be very clearly heard. The cries of abused and exploited children may no longer fall on deaf ears or closed minds.⁷¹

⁶⁸ Hereafter the African Charter

⁶⁹ A 3 of the CRC: see p 45, A 4 of the African Charter: see p 48 and s 28(2) of the Constitution: see p 97.

⁷⁰ A 34 of the CRC: see p 46, A 27 of the African Charter: see p 48 – 49, s 28(1)(d) of the Constitution: see p 96

⁷¹ See also the message delivered by former president, Mr Nelson Mandela, addressing the World Congress Against Sexual Exploitation of Children on August 28, 1996. Available at <http://www.polity.org.za/govdocs/pr/1996/pr0903b.html>.

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APPENDIX A

APPENDIX A

REPUBLIC OF SOUTH AFRICA

FILMS AND PUBLICATIONS AMENDMENT BILL, 2001

.....
(To be introduced by the Deputy Minister of Home Affairs)

[B-2001]

GENERAL EXPLANATORY NOTE :

[] Words in bold square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To amend the *Films and Publications Act, 1996*, and the *Films and Publications Amendment Act, 1999*, so as to further provide for the prohibition of child pornography through the use of the Internet, and for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:-

Amendment of section 1 of Act 65 of 1996

1 Section 1 of the *Films and Publications Act, 1996* (hereinafter referred to as the "principal Act") is amended –

(a) by the substitution for the definition of "child pornography" of the following definition:

"Child pornography" includes any image, however created, or any description, of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years -

(i) engaged in sexual conduct; or

(ii) participating in, or assisting another person to participate in, sexual conduct; or

(iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation; or

(iv) in such a manner that it is capable of being used for the purposes of sexual exploitation."

Amendment of section 1 of the principal Act

2 Section 1 of the *Films and Publications Act, 1996* is amended-

(a) by the deletion of the definition of "degrade"

(b) by the substitution for the definition of "distribute" of the following definition :

"distribute' in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections 25(a), (b) and (c), 26(1)(a), (a1), and (b), and 28(1) and (2) includes to hand or exhibit a film or a publication to a person under the age of 18 years, or the failure to take reasonable steps to prevent access thereto by such a person;"

(c) by the insertion of the definitions of "Internet address" and "Internet service providers" after the definition of "film":

"Internet address' means a web-site, a bulletin board service, an Internet chat-room or news-group or any other Internet or shared network protocol address;"

"Internet service provider' means any person who provides access to the Internet by any means;"

(d) by the insertion of the definition of "sexual conduct" after the definition of "Review Board" :

"Sexual conduct' includes :-

- (i) male genitals in a state of arousal or stimulation;
- (ii) the undue display of genitals or of the anal region;
- (iii) masturbation;
- (iv) bestiality;
- (v) sexual intercourse, whether real or simulated, which includes anal sexual intercourse;
- (vi) sexual contact, involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
- (vii) the penetration of a vagina or anus with any object;
- (viii) oral genital contact; or
- (ix) oral anal contact;"

(e) by the insertion of the following definition after "Minister" :

"possession", in relation to a film or a publication, without derogating from its ordinary meaning, shall include keeping or storing in or on a computer or computer system or computer-data storage medium or having custody or control or supervision whether for one's own or another person's behalf";

Amendment of subsection (2) of section 5 of the principal Act

- 3 Subsection (2) of section 5 of the principal Act is amended by the deletion of ["President"] and the substitution therefor of "Minister"

Amendment of section 17 of the principal Act

- 4 Section 17 of the principal Act is amended by its deletion and substitution therefor of the following :

"17 (1) A classification committee shall examine a publication referred to it and shall, with reference to Schedules 1 and 2 read with Schedule 5, or with reference to Schedule 10 :

(a) classify the publication as :

- (i) XX, if it falls within either Schedules 1 or 10, or
- (ii) X18, if it falls within Schedule 2, or

(b) where it is necessary to protect children from disturbing or harmful material, determine that the publication shall only be distributed to persons of, or above, a specified age and may impose the condition that it shall only be distributed in a sealed and opaque wrapper which shall bear a distinct notice of the specified age restriction; and

(c) shall inform the chief executive officer of its decision and the reasons therefor and of the classification, if any, and, in the case of an XX classification based on Schedule 1, of the particular clause of Schedule 1 upon which that decision is based, and, in the case of an age restriction, of the conditions imposed.

2 The chief executive officer shall :

(a) where a publication submitted in terms of section 16(1) has been classified X18 or XX in terms of a decision of the Board, cause that decision to be published in the Gazette;

(b) where a publication submitted in terms of section 16(2) has been :

- (i) reclassified X18 or XX, or
- (ii) freed from all restrictive conditions, including an X18 or XX classification, which had been published in the Gazette

cause the latest classification to be published in the Gazette and, with reference to the previous classification, indicate that it has been substituted or withdrawn, as the case may be.

- (3) Where a particular issue of a periodical publication has been classified X18 and subsequent issues are likely to contain material which would, upon submission, cause such issues to be classified X18, the chief executive officer shall, with the consent of the publisher, classify such subsequent issues as X18.
- (4) Any person who intends distributing or exhibiting in public in the Republic of South Africa any publication containing a visual presentation or description referred to in Schedules 1 or 2, may submit such publication for classification, in the manner prescribed by regulations made under section 31(2) of this Act, prior to its distribution or exhibition."

Amendment of section 18 of the principal Act

5 Section 18 of the principal Act is amended as follows-

- (a) by the insertion of 18(1A) :

"18(1)(A) Any person who intends to distribute or exhibit any film in the Republic of South Africa-

(i) must register with the Board as a distributor and/or exhibitor of films; and

(ii) shall submit for classification any film intended for distribution and/or exhibition in the Republic of South Africa, which has either not been classified in terms of this Act or not approved in terms of the *Publications Act, No. 42 of 1974*

in the manner prescribed by regulations made in terms of section 31(2) of this Act."

- (b) by the deletion of subsection (4)(a) and the substitution therefor of the following-

"(4) (a) The classification committee shall examine a film referred to it in terms of subsection (2), and shall classify that film with reference to Schedules 6, 7 and 8, read with Schedule 9, and Schedule 10-

(i) XX, if it falls under Schedules 6 or 10;

(ii) X18, if it falls under Schedule 7;

(iii) by imposing any restriction in accordance with Schedule 8;

(iv) as a film which may be distributed or exhibited only after the prescribed consumer information has been given to viewers; or

(v) as a film without any restrictions if suitable for all ages."

Amendment of section 20 of the principal Act

- 6 Section 20 of the principal Act is amended by the deletion of the following words in subsection (3) :

[Provided that the classification, as so amended, and the conditions so imposed, shall not be more restrictive than the classification or conditions appealed against.]

Amendment of section 25 of the principal Act

- 7 Section 25 of the principal Act is amended by the substitution for subsection (c) of the following subsection :

“(c) distributes any publication contrary to any condition imposed in terms of section 17;”

Amendment of section 26 of the principal Act

- 8 Section 26 of the principal Act is amended :

- (a) by the deletion of the following words in subsection 1(a) :

[or which has been classified XX in terms of a decision of the Board which has been published in the Gazette;]

- (b) by the addition of the following subsection after subsection 1(a) :

“(a1) exhibits in public or distributes or broadcasts any film which has been classified XX in accordance with Schedules 6 or 10;”

- (c) by the substitution of the following for subsection 1(b) :

“(b) exhibits in public or distributes or broadcasts any film which has been classified X18 contrary to the provisions of section 24”

- (d) by the substitution of the following for subsection 1(e) :

“(e) without the approval of the chief executive officer, exhibits in public during the same screening session or distributes on the same film, an advertisement or trailer of a film with a more restrictive classification than the featured film”

Amendment of section 27 of the principal Act

9 Section 27 of the principal Act is amended by :

(a) the substitution for subsections (1) (a) and (b) of the following :

"(1) (a) Any person who :-

- (i) is in possession of, or
- (ii) creates, or produces, or in any way contributes to, or assists in, the creation or production of, or
- (iii) imports, or in any way takes steps to procure, or
- (iv) exports, broadcasts, or in any distributes, or causes to be exported, broadcast or distributed,

a film or publication which contains child pornography, shall be guilty of an offence.

(b) A prosecution under this subsection shall only be instituted in the Regional Court.

(b) the substitution for subsection 27(2) of the following :

"(2) (a) A person shall be guilty of an offence if he or she, having knowledge of an offence under subsection (1) having been committed or being committed or having reason to suspect that such an offence has been or is being committed -

- (i) fails to report such knowledge or suspicion as soon as reasonably possible to a police official of the South African Police Services; or
- (ii) fails to furnish, at the request of an official of the South African Police Services, all particulars of such knowledge or suspicion".
- (iii) No prosecution shall be instituted under this subsection without the written authority of the Director of Public Prosecutions concerned.

(c) by the substitution for subsection 27(3) of the following :

"(3) Any person who has under her or his control any material referred to in Schedules 1, 2, 6 or 7 and who fails to take reasonable steps to prevent access thereto by a person under the age of 18 years shall be guilty of an offence";

(d) by the insertion of the following subsection after subsection 27(3) :

"(4) Any film or publication submitted to the Board in terms of this Act shall, subject to the provisions of Schedules 5 or 9, if such film or publication contains child pornography, be referred to the South African Police Services for purposes of criminal investigation and prosecution";

(e) by the insertion of the following after subsection 27(4) :

"27(A) – Registration of Internet Service Providers with the Board

27(A) (1) All Internet Service Providers shall-

(a) register with the Board in the manner prescribed by regulations made under this Act; and

(b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.

(2) Where Internet Service Providers have knowledge that their services are being used for the hosting or distribution of child pornography, such Internet Service Providers shall-

(i) take all reasonable steps to prevent access thereto by any person, and

(ii) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Services, and

(iii) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.

(3) An Internet Service Provider shall, upon request by the South African Police Services, furnish the particulars of users who gained or attempted to gain access to an Internet address containing child pornography.

(4) Any person who fails to comply with the provisions of this section shall be guilty of an offence".

Amendment of section 28 of the principal Act

10 Section 28 of the principal Act is amended by the deletion of subsection (3).

Amendment of section 30 of the principal Act

11 Section 30 of the principal Act is amended by :

(a) by the substitution for subsection (1) of the following :

“(1) Any person found guilty of a contravention of section 25(a), (b) or (c), 26(1)(a), (a.1), (b), or (f), 26(4), 27(2) or (3), 27A, 28(1) or (2) or 29 may be sentenced to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;”

(b) by the addition of the following after subsection (1) :

“(1A) Any person found guilty of a contravention of section 27(1) may be sentenced to imprisonment for a period not exceeding ten years or to a fine or to both such imprisonment and such fine;”

(c) by the substitution for subsection (3) of the following :

“(3) Any person found guilty of a contravention of any other section of the Act may be sentenced to a fine or to imprisonment for a period not exceeding six months.”

(d) by the insertion of the following after subsection (3) :

“(4) Admission of guilt-

(a) If any person who has contravened, or failed to comply with, section 26(1)(a), (a1), (b), (c), (d), (2), (3) or 27A(1) and-

(i) agrees to abide by a decision of the Executive Committee of the Board; and

(ii) deposits with the Board such sum as the Executive Committee of the Board may impose but not exceeding two thousand rands or twice the prescribed classification costs, on each of any such contravention or failure to comply

the Executive Committee may, after such enquiry as it deems necessary, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited;

(b) There shall be a right of appeal to the Minister from any determination or order of the Executive Committee of the Board under subsection (a), provided such right is exercised within a period of three months from the date of such determination or order;

(c) The imposition of a penalty under subsection (a) shall not be regarded as a conviction in respect of a criminal offence but no prosecution for the relevant offence shall thereafter be competent."

(e) by the insertion of the following after subsection (4)-

"30A Extra-territorial jurisdiction-

(1) Any person who, while being a citizen or permanent resident of the Republic of South Africa, commits any act outside South Africa which would have constituted an offence under this Act had it been committed inside South Africa, is guilty of the offence which would have been so constituted and liable to the same penalty prescribed for such an offence in this Act.

(2) No prosecution shall be instituted under this section without the written consent of the Director of Public Prosecutions.

(3) For the purposes of this section, any court in the Republic of South Africa and any Director of Public Prosecutions shall have jurisdiction.

30B Presumptions and proof-

(1) If in any prosecution in terms of this Act it is proved that-

(a) any message or communication, including a visual presentation, was placed on any distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed that it was so placed by the registered subscriber or user;

(b) access was gained or attempted to be gained to child pornography on a distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed that such access was gained or attempted to be gained by the registered subscriber or user.

(2) If in any prosecution it is necessary to prove that-

- (a) any application for registration or classification in terms of this Act has or has not been made to the Board; or
- (b) any publication or film has or has not been submitted to the Board in terms of this Act; or
- (c) any decision or classification has or has not been made or that any restriction or condition has or has not been imposed by the Board in terms of this Act; or
- (d) a certificate or exemption has or has not been issued, granted, withdrawn, cancelled or suspended by the Board; or
- (e) a decision or classification of the Board has or has not been suspended by the Review Board,

a certificate, issued by the Executive Committee of the Board shall, upon its mere production, be *prima facie* proof of such fact."

Amendment of Schedule 1 of the principal Act

12 Schedule 1 of the principal Act is amended by

- (a) the deletion of clauses (1)(a) and (2);
- (b) the substitution for clause (1)(c) of the following :

"(c) bestiality, incest or rape;"

- (c) by the substitution for clause (1)(d) of the following :

"(d) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or"

Amendment of Schedule 2 of the principal Act

13 Schedule 2 of the principal Act is amended by the substitution for clause (2) of the following :

"(2) it describes predominantly and explicitly any or all of the acts described in Schedule 1 or clause 1."

Amendment of Schedule 3 of the principal Act

- 14 Schedule 3 of the principal Act is amended by the substitution, for the whole Schedule 3, of the following :

“SCHEDULE 3 AGE RESTRICTIONS FOR PUBLICATIONS”

A classification committee or the Review Board may impose any or both of the following conditions on the distribution of a publication if it is of the opinion that, judged within context, it is necessary to protect children in the relevant age group against harmful or disturbing material in the publication-

- (1) that it shall only be distributed to persons older than 18 years of age, or older than a specified younger age, and that the publication shall bear a distinct notice of such restriction;
- (2) that it shall only be distributed in a sealed and, if necessary, opaque wrapper which shall also, if applicable, bear the notice referred to in clause (1).”

Amendment of Schedule 6 of the principal Act

- 15 Schedule 6 of the principal Act is amended by -

- (a) the deletion of clause 1;
- (b) the substitution for clause (2) of the following :
- “(2) bestiality, incest or rape;”
- (c) by the substitution for clause (3) of the following :

“(3) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm;”

Amendment of Schedule 11 of the principal Act

- 16 Schedule 11 of the principal Act is deleted.

Amendment of Schedule 12 of the principal Act

- 17 Schedule 12 of the principal Act is amended to read “Schedule 11”.

Short Title

- 18 This Act shall be called the Films and Publications Amendment Act 2001

MEMORANDUM ON PROPOSED AMENDMENTS TO THE FILMS AND PUBLICATIONS ACT, 1996

This memorandum sets out the most important amendments to the Act, as articulated by two national workshops on child pornography and translated into draft form by the task team¹ appointed by the first workshop. The criticisms and recommendations represent the collective experience and wisdom of the two workshops in which all relevant stakeholders and role-players participated².

The memorandum sets out the *status quo*, the problems identified and the proposals made to address the problems.

It should be kept in mind that the Act distinguishes between films and publications and categories thereof, between visual images and descriptions and between possession and distribution, and is, therefore, a somewhat confusing Act.

The Act is a radical departure from its predecessors, which allowed the individual little or no freedom. (For a useful legislative history of "censorship", see the Film and Publication Board's Annual Report for 1998.) As the first Act to regulate films and publications in a new dispensation, where the right to privacy, freedom of expression and other constitutional rights are given full recognition, "teething" problems are to be expected, requiring revisions, from time to time, on the basis of experience and international trends.

The protection of children is the focus of the Act. Of about 48 000 cases on the Regional Court rolls, over 30% are cases involving rape and indecent assault. A significant portion are crimes against children. And cases involving children are increasing, indicative of a breakdown of core values in our society which leaves more and more of our children at considerable risk. Child pornography is anti-social behaviour which harms not only the child-victim but society itself.

This problem is not unique to South Africa. Like South Africa, more and more countries are beginning to recognise the imperatives for firm legislation in the area of child pornography, especially in the light of the ease of distribution provided by the Internet. For instance, in the United States, the *Child Pornography Prevention Act, 18 USCS 2252* criminalises knowingly possessing, selling, receiving, sending or transmitting child pornography. In the United Kingdom, section 160 of the *Criminal Justice Act, 1988*, as amended by section 84(4) of the

¹ The task team appointed by the workshop consisted of Advocate Hennings (National Directorate of Public Prosecutions), Advocate Rita Meintjies (Public Prosecutor), Senior Supt Anneke Pienaar (Head, Family Violence, Child Protection and Sexual Offences Unit, SAPS) and Iyavar Chetty (FPB and convenor)

² The first workshop – Combating Child Pornography Through Effective Law Enforcement – was held in Cape Town in May 2000. Participants included Judges, Magistrates, Prosecutors, Police, Internet Service Providers and NGOs, as well as experts from the United States and the United Kingdom. The second workshop – The Investigation and Prosecution of Child Pornography – was held in Pretoria in May 2001. Organised by the National Directorate of Public Prosecutions, it was funded by the Canadian International Development Agency and sponsored by the US Department of Justice's International Criminal Investigative Training Assistance Program and the US Embassy. The facilitators and resource persons included Iyavar Chetty (FPB), Ms Joan van Niekerk (Childline Family Centre), Blaine McIlwaine (former FBI Special Agent and consultant to the FBI), Supt Grobbelaar (SAPS Technical Support Services), Sen Supt Anneke Pienaar (Family Violence, Child Protection and Sexual Offences Unit, SAPS), Adv Jan Henning (National Directorate of Public Prosecutions), The Hon Justice A de Vos, Myron Zlotnick (ISPA and M-Web) and N Ntuli (Tourism). The draft amendments were submitted for scrutiny to The Hon Justice Traverso (Deputy Judge President, Western Cape) and the Hon Justice Belinda van Heerden (Western Cape), both of whom approved of the spirit and substance of the proposed amendments.

Criminal Justice and Public Order Act, 1994 makes the possession of an “*indecent photograph or pseudo-photograph of a child*” an arrestable criminal offence and has been successfully used in a number of recent cases involving the possession of child pornography. In Canada, section 163(1) of the *Criminal Code* makes the possession of child pornography a criminal offence. See also section 207a(3) of the Austrian *Criminal Code*, Article 383 *bis* of the Belgium *Penal Code* and section 184(5) of the German *Criminal Code* for European countries which have criminalised the possession of child pornography. Additionally, the Council of Europe’s draft convention on cyber-crime, which is to be presented to the European Council of Ministers later this year, and in the drafting of which Canada, Japan, the United States and South Africa, in addition to all member-states of the Council of Europe, participated, requires signatory States to adopt legislative measures to establish the possession of child pornography “*in a computer system or on a computer-data storage medium*” as a criminal offence.

PROPOSED AMENDMENTS

Amendment of section 1 of the Act

Definitions

1 “**Child pornography**” is defined in section 1 of the Act.

(i) **Introduction**

Defining child pornography is no easy task. In the interests of children, any definition should not be so narrow as to be too limiting, thus providing child pornographers with loopholes to escape criminal sanctions. On the other hand, too broad a definition might be so vague as to make it difficult to know just what material is prohibited.

The Act can be circumvented by creating images which, although falling outside the present definition, would nevertheless amount to the sexual exploitation of children, or would be capable of being used for the purpose of the sexual exploitation of children. However, it is not possible to formulate an exhaustive list of possible images that would meet that test. Experience has shown just how deviously imaginative the mind of child pornographers are and therefore some flexibility is called for in the definition.

There are many ways in which the sexuality of children may be exploited. Often the context would determine whether or not an image which may otherwise be innocent would amount to sexual exploitation.

(ii) **Definition excludes description**

In terms of sections 25 and 27 of the Act, read with the definition of “child pornography” and Schedule 1, descriptions of acts with children constituting child pornography (narratives) may be possessed but not distributed, whilst visual images (pictures) may be neither possessed nor distributed. This distinction cannot be justified when the *ratio* for the prohibition of child pornography includes the use of child pornography to seduce children into

sexual activities by lowering their inhibitions and being shown pictures or read stories about other children involved in such activities. There is no good reason to prohibit visual images, including images of persons older, but depicted as younger, than 18 years and not to prohibit descriptions of child pornography. Descriptions of child pornography may be just as harmful as visual images. There is certainly no doubt that descriptions are capable of exactly the same use, and for the same reasons and anticipated results, as visual images – to seduce children into believing that sexual activities are normal, harmless and fun for children. Children should be protected to the fullest extent possible and the definition of “child pornography” should be extended to reflect such full protection by including descriptions of children in sexual activities. This also explains the proposed amendment to section 27 *infra*.

(iii) ***Requirement that assistance in sexual conduct should amount to ‘sexual exploitation or degradation’ is unnecessarily limiting***

This is more so, given the definition of “degrade” as advocating a form of hatred based on gender – a definition that is also far too limiting and should be deleted. It is recommended that the word “degrade” be replaced with a phrase prohibiting the violation or disrespect of the right to human dignity. See, for instance, the remarks of Justice O’Reagan in *S v Makwanyane and Mchunu* 1995 SACR 1 (CC) at 111 :

“The importance of dignity as a founding value of the new Constitution cannot be over emphasised. Recognising the right to human dignity is an acknowledgment of the intrinsic worth of human beings : human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3.”

An image or description of a child assisting another person in sexual conduct would always amount to the sexual exploitation of the child. The phrase “*which amounts to sexual exploitation*” is therefore superfluous. The qualification should be deleted.

(iv) ***The limitation in the definition to a ‘display of genitals’ is too narrow***

The definition does not include suggestive and lewd material which might not be an overt display of the genitals but which might serve the same purpose – the sexual exploitation of children. It does not take into account images of children clearly intended for pornographic purposes but which show, not genitals, but other parts of a child’s body.

(v) ***Proposal of task team***

- See definition of “*child pornography*” in amendment
- Definition of “*degrade*” to be deleted and replaced by a phrase protecting the right to human dignity.

2 **“Sexual conduct”** is, in fact, defined in Schedule 11 (See the Act)

(i) **The problem** is that “sexual conduct” is defined for the purposes of the Schedules. Yet the term is already referred to in the definition of “child pornography” – and there is no other definition in the Act. It makes sense to define “sexual conduct” for the purposes of the Act, and not just the Schedules, and to include it in the definitions section of the Act.

(ii) **Present definition is too limiting**

The present definition is too limiting in that it excludes the anal region, which is also involved in sexual activities. As well, the word “lewd” should be substituted with the word “undue”, which points towards that which is intolerable to society.

(iii) A problem that police officers have had to deal with in a few recent instances involved the distribution of pornographic pictures and magazines by school children, including one as young as 8 years. No provisions exist in cases where no person has actually handed or given such materials to children but which were, nevertheless, easily accessible to and by such children. Since the children concerned were too young to be prosecuted, and their parents had not committed any offence, the matters were dropped. The workshop felt very strongly that the meaning of “distribute” should be extended to include the failure by parents, especially, to take reasonable steps to prevent access to their collection of pornographic materials by their children.

(iv) See proposed amendments in (1) and (2).

Amendment of subsection (2) of section (5) of the Act

3 In the light of the 1999 amendment to section 6 of the Act, “the President” should, in fact, read “the Minister”. This is a simple “house-cleaning” proposal.

Amendment of section 17 of the Act

4 (i) **The problem** is with section 17(1)(c) and (d). Schedules 3 and 4 provides for the imposition of appropriate age restrictions. The Board has established the following categories of age groups : 10, 13, 16 and 18. It will be confusing to the public to mark as “R18” or “F18” a publication which has been, in fact, classified as “10”. The proposed amendment will avoid such confusion, without losing the focus and intent of section 17.

- (ii) The task team has also recommended the introduction of a section which will give publishers and/or distributors an opportunity to submit, prior to distribution, any publication which may contain Schedules 1 or 2 materials. At present, if a publication has been classified, say "18", distributors would have to recall all such issues from distribution points, display the "18" age restriction on each issue, and then return them to their distribution points. The proposed amendment will allow publishers and/or distributors an opportunity to voluntarily submit such material before they are distributed for sale. The proposed amendment does not impose any obligation on publishers/distributors to submit publications prior to distribution - but merely provides an opportunity for them to do so if they wished.
- (iii) **The solution** is the substitution of section 17 by the proposed amended section 17.

Amendment of section 18 of the Act

- 5
- (i) Although subsections 26(1)(a) and (d) create the offences of distributing or exhibiting films which have not been classified and distributing/exhibiting films without having been registered with the Board, the Act does not impose a positive duty on a distributor/exhibitor to either submit films for classification or to register with the Board.
 - (ii) Section 18(4) is problematic. Subsection 18(4)(a)(iii) requires a classification committee to classify a film as "R18" if it falls under Schedule 8. However, Schedule 8 provides for the imposition of appropriate age restrictions. The Board uses "10", "13", "16" and "18" age categories. It would be confusing to the public if a classification display on a film reads "R18" when, in fact, it has been classified, say "10". Parents would not be able to decide whether or not a film that displays an "R18" classification is appropriate viewing for their child of 8 years.
 - (iii) The proposed amendment (5) addresses both the problems identified above.

Amendment of section 20 of the Act

- 6
- Section 20 of the Act provides for a review of a classification decision of the Board by the Review Board. However, its subsection (3), dealing with its decision-making powers, is contradictory : while providing that the Review Board "*may refuse the appeal...or allow the appeal*", it goes on to restrict its powers. The last part of subsection (3) states : "*Provided that the classification, as so amended, and the conditions so imposed, shall not be more restrictive than the classification or condition appealed against.*" The effect of this proviso , for example, may be illustrated thus : a publication with sexually explicit visual presentations is classified "16", following a complaint that it be classified by a concerned citizen. Unhappy with that classification and convinced that the publication should have a more restrictive classification, the concerned citizen appeals to the Review Board. But the Act will not allow the Review Board to impose a higher age restriction, even if it agrees with the concerned citizen

that the publication should be restricted to “adults only” and therefore should have been classified “18”. A possible solution, applying principles of Administrative Law, would be for the Review Board to refer that publication back to the Board for it to be re-examined and re-classified. This would be time-consuming and costly.

The better solution is the proposed amendment [6] to delete the proviso entirely.

Amendment of section 25 of the Act

- 7 The proposed amendment (7) follows from amendments to section 17 dealing with the confusion caused by the “R18” and “F18” classifications.

Amendment of section 26 of the Act

- 8 (i) The workshop recommended that the two offences in section 26(1)(a) be separated into two distinct offences.
- (ii) The workshop saw no *bona fide* reason for excluding the broadcasting of films classified “X18” or “XX” as a section 26(1) offence.
- (iii) Subsections 26(1)(b) and (e) have been re-drafted for clarity.
- (iv) The proposed amendment (8) addresses the problems identified in section 26.

Amendment of section 27 of the Act

Offences relating to child pornography

9 Section 27

- (i) **The Problem** is the confusing nature of the Act when having to deal with materials containing child pornography. Child pornography is defined in section 1 with reference to *sexual conduct*, which is defined in Schedule 11. In terms of clause 1 of Schedule 1, the visual presentation of child pornography is to be classified XX, while descriptions of child pornography are to be classified XX in terms of clause 2 of Schedule 1. If a film contains child pornography, it is classified XX in terms of Schedule 6. If classified XX, the possession of only visual images is prohibited. Due to the distinctions between films and publications, visual presentations, scenes and descriptions, possession and distribution, and classified and unclassified materials, and possible offences involving child pornography are spread over sections 25(a), 26(1)(a), 26(4)(c), 27 and 28.

The limitation of child pornography, in section 27, only to visual presentations would be in conflict with the proposed definition of child pornography. The prohibitions in section 27 should extend to both the visual presentations and

descriptions of child pornography. This would be consistent with the finding that paedophiles use both visual presentations and descriptions to seduce children into sexual activities.

- (ii) The requirement of “*knowingly* “ could be interpreted to mean that *dolus eventualis* would not suffice as the requisite form of intention and should be deleted. It should be sufficient to constitute the offence if a person foresaw, and was reconciled, to the possibility that the material contained child pornography. The requirement of positive knowledge that it did indeed contain child pornography puts the test too high : the accepted meaning of *dolus* should apply and, in any event, the onus is on the prosecution to prove *mens rea*.
- (iii) There is no good reason to separate the offences into (a) for publications and (b) for films. The two subsections should be consolidated to create a single offence, regardless of the medium.
- (iv) The offence should include the *broadcasting* of child pornography – there is no valid reason to exclude broadcasters from the ambit of this criminal offence.
- (v) **Section 27(2)**, requiring the State to prove that the Board has not made a decision that the material does not contain child pornography, has caused some confusion. It is for the Court, and not the Board, to determine whether or not the material forming the subject-matter of the charge amounts to child pornography. Apart from granting exemptions on application for *bona fide* purposes, the Board should not perform any function with respect to child pornography other than referring materials to the police. Child pornography, as a serious arrestable offence, should be a matter for the police, the prosecuting authority and the courts.

Section 27(2) is not only unnecessary but is also a costly prescript which only serves to delay prosecutions. Police officers from all over the country have had to travel to Cape Town to deliver, by hand for obvious security reasons, materials to the Board. Further, the relevant Board member must appear in person to testify, since no provision exists that allows the fact to be proven by means other than *viva voce* evidence. The deletion of this subsection would not violate a person's right to a fair trial since it is always open to such person to raise the fact of exemption, etc as a defence – this is knowledge peculiar to the accused which can be raised as a defence even prior to arrest. It is therefore recommended that subsection 27(2) be deleted in its entirety.

- (vi) **Subsection 27(3)** also came in for unanimous criticism by all participants of the workshop with respect to both the requirements :

firstly, the requirement that the written authority of the Director of Public Prosecutions be obtained prior to the institution of a prosecution was severely criticised. The *ratio* for this requirement is probably that a responsible decision should be taken at the highest level and is a remnant from the previous Act on *Indecent and Obscene Photographic Material*, where such a provision was necessary in view of the broad definition of *indecent and obscene*. Since the

definition was so broad, the authority of the Attorney-General was necessary to prevent prosecutions involving trivial, harmless materials. The workshop recommended that it should now be left to the National Prosecuting Authority to issue directives in this regard and that legislative prescripts are not necessary. Prosecutors in lower courts are daily encumbered with having to decide whether or not to prosecute in many serious cases, including rape and the sexual abuse of children. An accused is not without administrative remedy where a decision to prosecute is taken at a lower level of authority : representations may be made to the Director, and even the National Director, of Public Prosecutions and even to the High Court for a review of any such decision. and

secondly, the requirement that the written authorisation of the Director of Public Prosecutions be obtained prior to the issue of search warrants was also severely criticised. Offences regarding child pornography are, primarily, harm-based. The workshop concluded that it made no sense that, while the provision is aimed at the protection of children, police would have to wait until they have written authority from the Director of Public Prosecutions before carrying out a search of a premises. There seems to be no good reason, in law or otherwise, for this special requirement with respect to child pornography – there is no similar requirement with respect to other criminal offences and valid reason exists to depart from the explicit and general provisions contained in the Criminal Procedure Act regarding search and seizure, with or without a search warrant.

Subsection 27(3) should be deleted in its entirety.

- (vii) There is a need to impose a legal duty on those with knowledge to report child pornography to law enforcement authorities. Given the heinous nature of the offence, the anonymity offered by the Internet and the need to act swiftly and effectively where children are concerned, a positive duty as an extraordinary measure is justified. This measure would apply, for instance, to photographic studio/shops which process films or to a computer maintenance/repair shop which discovers child pornography on a computer sent in for repair or maintenance.
- (viii) Children are not properly protected from exposure to harmful materials through access to such materials as a result of the negligence of others. At present, the Act only prohibits the positive act of distributing or displaying such materials to children. Police have reported instances of children, some as young as 8 years, “sharing” pornographic magazines in schools. Almost all of them confessed that they found the magazines “lying” about in their parents’ bedrooms. The police were powerless to act against such parents. It is recommended that a positive duty should be imposed on adults to take all reasonable steps to ensure that their collections of pornographic materials are not so easily accessible to children. This would not only address a central concern of the Act – that of protecting children from disturbing and harmful materials – but would also provide police with a “prosecutable” offence. This provision in no way trenches on the right of an adult to possess pornographic

materials but imposes the reasonable obligation to ensure that such materials do not fall into the hands of children.

- (ix) Child pornography is not a “classifiable” product but an arrestable offence and should be treated as a matter for law enforcement authorities. All references to child pornography in the schedules should be deleted. The exemption provisions of the Act are sufficient to provide for those circumstances where material containing child pornography might be dealt with for *bona fide* lawful purposes. For purposes of clarity and ease of reference, all offences relating to child pornography and the protection of children therefrom should, as far as possible, be dealt with in a single section.
- (x) Although a message placed on the Internet is included in the definition of “publication”, and section 2(b) makes the exploitative use of children in pornography on the Internet punishable, the Act does not contain any further provisions to deal specifically with child pornography on the Internet.
- (xi) **The problem** is that the Internet, now the preferred medium for the distribution of child pornography, presents the biggest challenge in so far as child pornography is concerned. The Internet is an uncontrolled world-wide network of computers and offers paedophiles and child pornographers unprecedented opportunities, and the anonymity, to ply their reprehensible trade.

Every person who makes available child pornography on the Internet is, by definition, a distributor. A person who knowingly accesses such material is in possession – mere fortuitous access, of course, will not constitute criminal possession.

- (xii) The following measures should be considered:
- the South African Police Services maintain an updated list of Internet addresses that contain child pornography and that service providers be informed of such addresses. This would be done not under specific legislation but as a law enforcement function.
 - a duty should be imposed on service providers to take all reasonable steps to prevent the hosting of or access to such addresses and to any other addresses containing child pornography that come to their knowledge. This is a requirement, for instance, under German, Canadian and United States law and is being considered for adoption by a number of other countries.

in order to assist the police identify and investigate the distributors and possessors of child pornography, a duty be imposed on service providers to furnish, on demand, particulars of users who have gained access to or distributing child pornography. Service providers may, in terms of section 205 of the *Criminal Procedure Act*, be compelled to furnish such

information but the process is lengthy and delays investigations. The protection of children demands swift action. Further, service providers should be under a legal duty to report child pornography to the police, with particulars of the persons involved, as soon as they have knowledge of such activities.

- (xiii) What is therefore required from an Internet service provider is to take all reasonable steps to assist in combating child pornography. What is reasonable will depend on a number of factors, including the nature of the service provided. In the light of the harm inherent in child pornography, it is entirely reasonable that a duty of care is imposed on service providers. The Act should therefore include provisions to deal with child pornography on the Internet.
- (xiv) **Proposal.** See proposed amendments (9) including definitions of Internet service providers and Internet address in proposed amendments (2).

Amendment of section 28 of the Act

- 10 The proposed amendment to delete section 28(3) is for the reasons set out in 9(v) above.

Amendment of section 30 of the Act

- 11 (i) The proposed amendments to section 30(1) follow proposed amendments to sections 25, 26, 27 and 28.
- (ii) The workshop recommended that the Act distinguishes between more serious and less serious offences, and recommended that section 27, which is the prohibition on child pornography, be regarded as the most serious. The current maximum of five years imprisonment was rejected as not sufficiently impressive of the seriousness of the offence and an increase to a maximum of ten years was very strongly recommended and is consistent with international trends.
- (iii) The “*predominantly*” aggravating circumstances requirement is unnecessary, given that presiding officers have a duty to weigh aggravating and mitigating circumstances. There is no need to be prescriptive in this regard.
- (iv) A number of offences in the Act are of a technical nature :
- distributing or exhibiting a film which has not been classified
 - distributing or exhibiting a film that has been classified XX
 - distributing or exhibiting a film classified X18 without a licence
 - distributing or exhibiting a film without having been registered with the Board, and

- distributing or exhibiting a film without displaying classification details.

The workshop recommended that the Board be authorised to impose administrative penalties for these technical offences. Representatives of the police, as well as of prosecutors, were unanimous that these technical infringements of the Act could just as effectively, but more quickly and at less cost, be dealt with by way of administrative penalties. Section 62 of the *Customs and Excise Act* provides a useful model for such a system of administrative penalties.

- (v) The workshop was also concerned that the Act does not provide for the prosecution and punishment of crimes committed by South Africans outside the Republic. Given the borderless nature of the Internet, extra-territorial jurisdiction with respect to South African citizens and permanent residents is necessary to effectively combat child pornography. Such a provision will also facilitate and promote international cooperation in an area of concern where such cooperation is critical. The proposed amendments provides for the prosecution of South Africans who return after committing an offence in terms of this Act, avoiding the costly and time-consuming extradition process. Clearly, not all of the offences in the Act can be committed outside the borders of the Republic. An example of an offence that can be committed abroad is one in which the impugned conduct is that of creating child pornography.
- (vi) An amendment dealing with presumptions and proof was considered necessary to obviate the need for *viva voce* evidence, of a purely formal nature and which will rarely be in dispute, by a member of the Board. Apart from the fact that the executive of the Board consists of only three persons, who would have to make themselves available for appearance in courts anywhere in the country, having to present *viva voce* evidence to prove that a film was not classified, or classified XX, or that the distributor is not registered with the Board, was considered time-consuming and costly. The proposed amendment does not create a reverse onus and will certainly not violate any constitutional right to a fair trial.
- (vii) For the **proposal**, see amendment (11).

Amendment of Schedule 1

- 12 The amendments to Schedule 1 follow as a result of amendments to other sections of the Act, in particular, the recommendation that child pornography be regarded an arrestable offence and not a classifiable product. The workshop also concluded that scenes of incest and rape should be included in Schedule 1, while the re-drafting of clause (1)(d) is intended to bring it more into line with the concept of human dignity.

Amendment of Schedule 2

- 13 This proposed amendment to Schedule 2 also follows amendments to other sections of the Act

Amendment to Schedule 3

- 14 The proposed amendment brings Schedule 3 into line with the proposed amendment to section 17.

Amendment to Schedule 6

- 15 See the comments with respect to the amendments to Schedule 1 above.

Amendment to Schedules 11 and 12

- 16 See comments in (2) above.

CONCLUSIONS

In the light of the problems experienced internationally with respect to child pornography, the Act, even in its present form, can be described as advanced, and appropriately so in the interests of children. For instance, *child pornography* is already defined to include images created or altered electronically. However, the amendments proposed are made as a result of problems that have been either experienced or foreseen by all relevant role-players, including the international experts who participated in the workshop on child pornography. The proposed amendments are not only consistent with anti-child pornography laws of most countries, but is also consistent with international instruments concerning children, as well as with the International association of Prosecutors Best Practice Series No. 1 – Recommendations on Combating the Use of the Internet to Exploit Children.

Section 28(1)(d) of the Constitution provides that every child has the right to be protected from maltreatment, abuse or degradation, while section 28(2) stipulates that a child's best interests are of paramount importance in every matter concerning the child. In so far as the proposed amendments place limitations on the rights of others, the limitations are reasonable and justifiable in a society which makes the best interests of the child of paramount importance.

Child pornography is not a core value protected by any constitutional right or freedom. "When the effects of these provisions to protect children are examined in their overall context, the benefits of the proposed amendments, and of the Act, far outweigh any deleterious effects on the right to freedom of expression and the interests of privacy. The Act, and especially the proposed amendments, are intended to prevent harm to children resulting from the production of child pornography; deters the use of child pornography in the grooming of children; curbs the collection of child pornography by paedophiles; and helps to ensure that an effective law enforcement scheme can be implemented. Anti-child pornography provisions benefit society as a whole as it sends a clear message that deters the development of anti-social attitudes. These provisions do not trench significantly on free speech possessing social values since there is a very tenuous connection between the possession of child pornography and the right to free expression."