

**SOUTH AFRICAN LAW REFORM COMMISSION**

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**Project 107**

**SEXUAL OFFENCES: PORNOGRAPHY AND CHILDREN**

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## Introduction

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

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The project leader for the investigation is Professor AW Oguttu. The researcher assigned to this investigation, who may be contacted for assistance, is Ms D Clark.

## Preface

The aim of this issue paper is to serve as a basis for Commission deliberations on the topic of pornography and children, particularly the exposure of children to pornography through the mass media and the use of technology to groom and exploit children. The creation and distribution of pornography, sexually explicit material of themselves and child pornography (child abuse material) by children has also been flagged as an area warranting attention. This paper was preceded by an in-house pre-investigation paper compiled by the Commission into pornography and the mass media, to assess the need for this investigation. In addition, Mr Chetty compiled research papers in his capacity as an advisory committee member to this project in preparation for this issue paper.<sup>1</sup>

The issues presented in this issue paper are raised to identify and delineate issues which need further debate. The comment of any person on an issue contained in the issue paper or in respect of a related issue which may need inclusion in the debate is sought. Such comment is of vital importance to the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked “confidential”. Respondents should be aware that the Commission may be required to release information contained in representations under the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

Respondents are requested to submit written comment, representations or requests to the Commission by no later than **30 November 2015**. Respondents are not restricted to the questions posed and issues raised in this paper, and are welcome to draw other matters to the Commission’s attention as long as they are related to this topic. The allocated researcher will endeavour to assist with any difficulties and/or questions related to making submissions. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher assigned to this project, Ms DM Clark.

This document is available on the Commission’s website at: <http://salawreform.justice.gov.za>.

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<sup>1</sup> Mr Chetty is the former Head of the Film and Publications Board’s Legal Services and the current coordinator of the Canadian-based Kids Internet Safety Alliance (KINSA) special projects in Africa.

# Summary of the Issue Paper

1. As part of the overarching investigation into the review of all sexual offences, this issue paper seeks to review the legislative framework that currently applies to children in respect of pornography and child pornography (child abuse material) within the larger framework of all statutory and common law sexual offences. The secondary aim is to consider the need for law reform in relation to the legislative framework governing children and pornography.

2. The opportunities offered by the mass media to access a varied and vast amount of information, educational material and entertainment and to actively engage in remote communication using electronic tools do not come without risks. One of the risks that children face when engaging with the mass media and using electronic tools in South Africa is that they may intentionally seek or unintentionally be exposed to sexually-explicit material. This material may be illegal or may only be legal for adults.

For the purpose of this paper, four areas of concern have been identified:

- Access to or exposure of a child to pornography and child pornography (child abuse material);
- Creation and distribution of child pornography (child abuse material);
- Explicit self-images created and distributed by a child; and
- Grooming of a child and other sexual contact crimes associated with or which are facilitated by pornography.

4. This issue paper introduces the topic of pornography and children for legal debate. It aims to identify the manner in which the law currently regulates and protects children from being exposed to pornography or from being used or abused to create pornography, and whether there is a need for law reform. Its purpose is to initiate and stimulate debate, to explore proposals for law reform and to serve as a basis for further in-depth deliberation.

5. The issue paper has four chapters. Chapter 2 provides an overview of the concerns relating to child pornography (child abuse material); grooming of children to generate child pornography (child abuse material); and the exposure of children to pornography and child pornography (child abuse material). The context is explored at various levels, namely local, African and global viewpoints. Chapter 3 looks at the international imperative to protect children and the legislative response in South Africa to protect children from pornography

and child pornography (child abuse material). The legislative exposition differentiates between the criminal law response and the regulatory response. The aim of the exposition is to identify possible weaknesses in the law which may require reform in order to better protect children from exposure to illegal or age-inappropriate pornographic content. Chapter 4 provides a brief look at pending legal developments relevant to this investigation, and mentions examples from foreign law and practice, which will be elaborated on in the discussion paper to follow. This chapter includes two focal questions, namely whether there is a need to enhance the criminal law and response to the creation, possession and distribution of child pornography (child abuse material); and whether there is a need to provide greater protection for children from exposure to pornography and child pornography (child abuse material). The issue paper contains questions aimed at discovering the issues at hand and the extent of the need for law reform. The Commission specifically requests comment on the issue paper, particularly the questions which are posed in it.

6. Following the issue paper, the Commission will publish a discussion paper setting out preliminary recommendations and draft legislation, if necessary. The discussion paper will take the public response to the issue paper into account, and will test public opinion on the solutions identified by the Commission. On the strength of these responses a report will be prepared containing the Commission's final recommendations. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration.

7. For ease of reference the questions found in the text of the issue paper are arranged below according to the four identified areas of concern.

## **Questions**

### **Access to or exposure of a child to pornography and child pornography (child abuse material)**

1. What is your understanding of the terms "pornography" and "child pornography"?
2. Suggest how pornography and child pornography (child abuse material) could be defined to address any of your concerns.
3. In your view is exposure of children to pornography and or child pornography (child abuse material) a problem in South Africa? If so in what respect?

4. Is the material children are exposed to illegal content i.e. child pornography (child abuse material); age-inappropriate content i.e. pornography which is legal for adults; or is it explicit self-images sent between peers?
5. Are children inadvertently exposed to pornography, or are they exposed after seeking it for example by way of a specific Internet search?
6. In your view, what are the effects of exposing children to pornography?
7. Does the law adequately address concerns around children's exposure to pornography and child pornography (child abuse material)?
8. What is the appropriate legal response to children at risk of exposure to pornography or child pornography (child abuse material)?
9. Is it, or should it be, an offence to expose children to any material of a sexual nature, even if that material does not fall within the definition of "pornography" in the Sexual Offences Act but is "contemplated in the Films and Publications Act, 1996"?
10. Are broadcasters allowed (or should they be allowed) to screen films which cinemas may not exhibit and which distributors may not sell or hire out?
11. Do broadcasters and publishers who are exempt from the regulatory authority of the FPA meet the objectives of the FPA as required?
12. Should legislation provide that the abovementioned broadcasters and publishers are obliged to provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care and to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences?
13. Comment on whether service providers provide adequate protection to children who use child-oriented services?
14. What is the position in respect of content service providers who are Internet service

providers?

15. Are the blocking possibilities for parental control adequate?
16. Are the instructions for parental control available in multiple languages?
17. Do discussants think that they are adequately promoted?
18. Is law reform necessary to protect children from exposure to pornography or is the existing legal framework adequate?
19. Would a change in policy or improved implementation of existing legislation be sufficient to address the problem?
20. Is it necessary to investigate existing structures and policies that govern classification, enforcing and monitoring of the productions, distribution and exhibition of pornography?
21. Is there a lack of synergy between the FPB and ICASA, and if so does this warrant investigation?
22. Would a uniform classification system for content exhibited or distributed through the mass media in South Africa be a move in the right direction?
23. If advertisers and consumers of pornography are still free to publish and distribute their opinions, would restrictions on the public display of pornography amount to censorship?
24. Would filtering pornography at tier one level be seen as an unjustifiable limitation of adult consumers' rights to privacy and freedom of expression, or would it pass constitutional muster?
25. Would a mere change in policy or improved implementation of existing legislation be sufficient to address the problem of children being exposed to pornography through the mass media, especially through the Internet, media and mobile phones?

26. What responsibility and accountability do, or should, parents and caregivers have towards their children to protect them from exposure to child pornography and other adult material?
27. If pornography is made available to adults in an “adults only” licensed shop, would the limitation actually constitute more of an inconvenience than a true limitation of the right?

**Creation and distribution of child pornography (child abuse material)**

29. Are the definitions of “child pornography” and “pornography” in the Sexual Offences Act adequate, or should they be amended? If so how?
30. Should the law reflect through its definitions that child pornography (child abuse material) or explicit images of children are not victimless crimes?
31. Does the existence of different legal definitions complicate law enforcement responses to crimes involving children and pornography?
32. Should it be a consideration that the purpose of an image or description of a child was artistic or aesthetic, where that image or description could be used as child pornography (child abuse material)?
33. Should photographs or images in family photo albums which are capable of being used as child pornography be treated differently from those available on or through an electronic device?
34. Could part (iii) of the definition of “child pornography” in the Sexual Offences Act be interpreted to mean that “sexting” of self-produced nude or semi-nude images will also amount to the distribution, but not the creation or production, of child pornography?
35. Please comment on whether sections 24A(2)(c) and 24(3) of the Films and Publications Act (FPA) should be amended by inserting the words:  
  
“or would.....have been so classified had it been submitted for classification”.

36. If the purpose of prohibiting the distribution or exhibition of films in the categories of “Refused Classification”, “XX” or “X18”, *whether classified or not*, is to protect children, why should broadcasters be allowed to screen such films? This question is asked because it is known that children watch more films on TV than in cinemas.
37. To what extent is the FPA applicable to regulatory authorities of broadcasters and publishers?
38. Are the offences relating to child pornography (child abuse material) correctly placed in the FPA?
39. International examples exist of laws which provide that downloading any image from a digital device is “creation” thereof. Should South African law be amended to reflect this?
40. Provide your view on whether foreign-based services used by children such as Whatsapp fall under the obligations found in section 24C. If not, should they?
41. Is the provision on extra-territorial jurisdiction in the FPA sufficient to cater for the international reach of the Internet and for anomalies such as different ages of consent in different countries?
42. If the purpose of the FPA is to classify and not to create crimes, should the crimes created in the Sexual Offences Act be given preference?
43. Section 27 of the FPA allows a service provider to suspend access. However this is not helpful to the police as they need to trace the person and cannot do this if access is suspended. There is a fine line between “finding” child pornography (child abuse material) and “viewing” it. How should this problem be remedied?
44. Comment on whether in your view a child used to create child pornography (child abuse material) is adequately protected by Criminal Justice role-players.
45. In your view is the management of child pornography (child abuse material) adequately governed in the Criminal Justice system; if not, is legislative change needed to assist these role-players to protect children?

46. Should defence attorneys be provided with copies of child pornography forming the subject matter of a prosecution?
47. Explain whether in your view the law allows for appropriate searches and seizures.
48. The offences in the FPA do not all include prescribed sentences. Explain if and why it would be necessary to include penalty clauses for these offences and what the appropriate sentence should be.
49. Should a sentencing clause be added to the FPA?
50. In your view is it sufficient for the Children's Act to make reference to "pornography" without defining it?
51. Is there a need to enhance the criminal law response to the creation, possession and distribution of child pornography (child abuse material)?
52. Would the consolidating of all offences relating to child pornography (child abuse material) in one piece of legislation enhance the criminal law response to these crimes?

#### **Explicit self-images created and distributed by a child**

53. When do or should explicit self-images or sexting amount to child pornography (child abuse material)?
54. How should the taking and distributing of explicit self-images by children be dealt with?

#### **Grooming of a child and other sexual contact crimes associated with or which are facilitated by pornography**

55. Does section 18 in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 sufficiently define the crime of sexual grooming of children?

56. Is “grooming”, by way of exposure to pornography or for the purposes of creating pornography, clear and adequately criminalised?

# CHAPTER 1: OVERVIEW OF THE INVESTIGATION

## A Introduction

1.1 As part of the overarching investigation into the review of all sexual offences, this issue paper seeks to review the legislative framework that currently applies to children in respect of pornography within the larger framework of all statutory and common law sexual offences. The secondary aim is to consider the need for law reform in relation to the legislative framework governing children and pornography. In accordance with the Constitution of the Republic of South Africa, 1996 (the “Constitution”), the Children’s Act 38 of 2005 and the Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007 (the “Sexual Offences Act”) a “child” is defined as a person under the age of 18 years. This distinction in age between a child and adult will be used for purposes of this investigation.

1.2 The issue paper inter alia focuses on the concern raised in a letter to the South African Law Reform Commission (“the Commission”) by the (then) Deputy Minister of Home Affairs, in his capacity as Chair of the Inter-Ministerial Committee on Pornography. The letter highlighted concerns around the ease with which a child is able to access and view pornography through technology and the mass media and the attendant risks thereof.

1.3 The opportunities offered by the mass media to access a varied and vast amount of information, educational material and entertainment and to actively engage in remote communication using electronic tools is not without risks. One of the risks that children face when engaging with the mass media and using electronic tools in South Africa is that they may intentionally seek or unintentionally be exposed to, sexually-explicit material which may be illegal or may be legal only for adults. In recent months and years, voices in government and more specifically the (then) chairperson of the Inter-Ministerial Task Team on Pornography, the Deputy Minister of the Department of Home Affairs,<sup>2</sup> the Film and Publication Board (the FPB), parents' groups, feminists<sup>3</sup> and other child protection groups<sup>4</sup>

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<sup>2</sup> IOL News 5 “Join hands for porn battle, urges Gigaba” 5 November 2009 available at <http://www.iol.co.za/news>. Accessed on 12 May 2015; South African Government webpage “Deputy Minister to launch the Anti-Child Pornography Campaign” 3 June 2010 available at <http://www.gov.za>. Accessed on 12 May 2015; Cunningham Julie “Gigaba wants porn law fast-tracked” *The Good News* 29 July 2010 available at <http://www.sagoodnews.co.za>. Accessed on 12 May 2015.

<sup>3</sup> Fedler, J A *feminist critique on pornography* available at

have become more audible in raising their concerns regarding the pervasiveness of pornography in the mass media as well as society in general, and the negative impact this has on children.

1.4 Many children who surf on the crest of the technology wave have parents, caregivers, educators and even peers who have a very basic or no understanding of this technology. Hence they have no ability to engage with, contextualise, guide or restrict access to material available through this technology which may be harmful to them. Although these children are technologically and information wise often beyond their years, they do not possess the equivalent levels of emotional maturity (the term kids growing older younger (“KGOY”) has been coined to describe this niche of the market).<sup>5</sup> It has been found that young people tend to be aware of the dangers and risks that are attached to the use of information and communications technology (“ICT”),<sup>6</sup> the Internet, and social media, but that young people are also acutely aware of the risk of social exclusion.<sup>7</sup> The assumption then is that young people may expose themselves to a known risk for the sake of social inclusion.

1.5 It is argued that pornography is ubiquitous as never before. According to Fagan<sup>8</sup> the introduction of pornography to the information highway has increased its accessibility. With the click of a mouse, without a credit card, anyone using the Internet can access vast numbers of images of people having sex in a variety of ways, many of them unusual and cruel.<sup>9</sup>

1.6 The capacity, willingness and acceptance of responsibility of the media-, ICT and entertainment industries to protect children from exposure to potentially harmful, disturbing and age-inappropriate materials is fundamental to the welfare of children.

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<http://www.fxj.org.za/pages/Publications/Between%20Speech%20n%20Silence/chapters/chapter%202.html>. Accessed on 16 September 2010.

<sup>4</sup> “Childline does believe that the management of pornography – or lack thereof – does need further investigation in SA – casual exposure to children does occur and our research with young (sex) offenders did indicate an association.” Email Joan van Niekerk, Manager, Training and Advocacy, Childline South Africa, dated 14 April 2010.

<sup>5</sup> Discussion with a marketer from Youth Dynamix during a Lawyers for Human Rights focus group meeting on 29 March 2007.

<sup>6</sup> This is a term used to describe the convergence of information technology and communications.

<sup>7</sup> Connected Dot Com *Young People’s Navigation of Online Risks Social Media, ICTs & Online Safety*. available at [http://www.unicef.org/southafrica/resources\\_14002.html](http://www.unicef.org/southafrica/resources_14002.html). Accessed on 12 May 2015 at 6.

<sup>8</sup> Fagan Patrick F “The Effects of Pornography on Individuals, Marriage, Family, and Community” *Marriage & Religion Research Institute* December 2009 available at [www.frc.org](http://www.frc.org) at 19.

<sup>9</sup> *Legalbrief eLaw & Management* “CyberAnalysis” Issue No: 1343 (7 July 2010) Web.

1.7 The practice of children using technology to create and distribute explicit self-images (essentially creating child pornography (child abuse material)) is also of concern.<sup>1011</sup> A child may create or distribute explicit self-images out of free will or as a result of grooming.<sup>12</sup>

1.8 For the purpose of this paper, four areas of concern have been identified, namely:

- Access to or exposure of a child to pornography (child abuse material);
- Creation and distribution of child pornography (child abuse material);
- Explicit self-images created and distributed by a child; and
- Grooming of a child and other sexual contact crimes associated with pornography or which are facilitated by pornography.

## B A note on terminology

1.9 From the outset the Commission takes the stance that “child pornography” is not pornography but rather the memorialisation of child abuse increasingly in digital form. Interpol reports that most law enforcement agencies working with child sexual abuse material believe that the term “child pornography” is misleading when describing images of the sexual abuse of children.<sup>13</sup> Interpol is of the view that “a sexual image of a child is ‘abuse’ or ‘exploitation’ and should never be described as pornography”.<sup>14</sup> It is further of the view that child abuse materials are documented evidence of a crime in progress, namely a child being sexually abused.<sup>15</sup> Interpol views the terms “child pornography” or “kiddy porn” as trivialising

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<sup>10</sup> Although the Bloemfontein High Court recently set the criminal conviction of a young mother convicted of creating and distributing child pornography aside, the court did not give guidance on how to deal with sexting. The teen girl was charged after explicit photographs, messages and a video she had sent to an older man and two teenage boys at school were found on her phone. Wagner L “Sexting teen girl cleared” 17 March 2015 *Times Live* available at <http://www.timeslive.co.za/thetimes/2015/03/17/sexting-teen-girl-cleared?service=print>. Accessed on 18 March 2015.

<sup>11</sup> Hosken G “Boys’ naked pictures cause stir on Twitter - Pretoria’s top schools in a state of panic after naked pictures of at least 20 teenage boys were posted on Twitter in the country’s biggest sexting scandal” *TimesLive* (2 Oct 2014) available at <http://www.timeslive.co.za/thetimes/2014/10/02/boys-naked-pictures-cause-stir-on-twitter> (last accessed 23 March 2015); and Hosken G “Sexting snares kids” *Times Live* (3 Oct 2014) available at <http://www.timeslive.co.za/thetimes/2014/10/03/sexting-snares-kids> (last accessed 23 March 2015). Accessed on 3 October 2014 as reported by *Legalbrief Today* Issue 3610 (3 Friday October 2014).

<sup>12</sup> Comins L “SA teen sexting warning” *IOL news* (18 August 2014) available at <http://www.iol.co.za/news/crime-courts/sa-teen-sexting-warning-1.1737205>. Accessed on 15 May 2015.

<sup>13</sup> Interpol “Crimes Against Children” Appropriate terminology available at <http://www.interpol.int/Crime-areas/Crimes-against-children/Appropriate-terminology>. Accessed on 15 May 2015.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

the seriousness of the abuse perpetrated on children. Interpol suggests that such terms legitimise this form of abuse by including it with other types of pornography which are used for and by adults for their sexual pleasure.<sup>16</sup>

1.10 To ensure an adequate description of the sexual abuse, degradation and exploitation of children, the Commission has considered replacing the term “child pornography” with the term “child abuse material”. The latter term, in the words of Professors Max Taylor and Ethel Quayle,<sup>17</sup> “unambiguously expresses the nature of child pornography, and places it firmly outside the range of acceptable innuendo and smutty jokes.” The term “child abuse material” also describes such materials from within a victim-centred perspective, confirming that these are materials which *will* abuse, degrade and exploit children portrayed as sexual objects and are not simply images of children who have *been* abused.

1.11 Interpol suggests several alternative definitions which could be used in place of “child pornography”.<sup>18</sup> These include:

- Documented child sexual abuse;
- Child sexual abuse material;
- Child abuse material (CAM);
- Depicted child sexual abuse;
- Child abuse images (CAI); and
- Child Exploitation Material (CEM).

1.12 The Commission is alive to the fact that the terminology used in the debate on children and pornography is integral to the larger debate on harm, rights and the legality of pornography. For this reason the Commission elects to use the term “child abuse material” instead of “child pornography” unless a direct quote, legislation or case law uses the term “child pornography”. This aligns with the stance taken by Interpol on this matter.

1.13 However, having made this decision, the Commission also flags the anomaly where a child seemingly of his or her own volition, or as a result of grooming, produces such images. Such images would also constitute “child abuse material” and once published could be used for illegal purposes by child exploiters even though ostensibly no abuse is present. In uncontested instances of voluntary peer-to-peer sharing of material it may be apposite to

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<sup>16</sup> Ibid.

<sup>17</sup> Max Taylor, Ethel Quayle, Brunner-Routledge, Hove “Child Pornography: An Internet Crime” (2003) *Journal of Sexual Aggression*, 11(2) 227-228.

<sup>18</sup> Ibid.

refer to the material as “images of inappropriate behaviour” or “explicit self-images” instead of “child abuse material”.

1.14 The Commission has also, as advised by its advisory committee, elected to refer to the consumers of child abuse materials as “child exploiters”. The term “paedophile” is deliberately not used in this paper as this is a clinical diagnosis of a person who is sexually attracted to children. The term preferred by law enforcement officials is “child exploiter”.

## **C Background and scope**

1.15 This investigation on pornography and children resulted from an extension of the investigation originally called “Sexual Offences By and Against Children”. At the request of the (then) Deputy Minister of Justice and the (then) Justice Parliamentary Portfolio Committee to also consider the position of adults who are affected by sexual violence, the Commission decided to expand the scope of the investigation to include all sexual crimes by and against adults. The investigation was renamed “Sexual Offences”. Owing to the vast nature of this investigation, the Commission decided to publish four separate sexual offence papers, with draft legislation where necessary. These dealt with the following areas: i) substantive law; ii) the procedural law pertaining to statutory and common law sexual offences, excluding both adult prostitution and pornography in respect of children; iii) adult prostitution; and iv) children and pornography.

1.16 In brief, the scope of Project 107<sup>19</sup> was reframed to

- codify the substantive law on sexual offences into an easily accessible and workable Act;
- develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, this would protect the rights of victims while ensuring the fair management and trial of persons who are suspected, accused and convicted of committing a sexual offence;
- provide workable legal solutions for the problems surrounding adult prostitution; and
- improve the regulation of pornography, including on the Internet.

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<sup>19</sup> South African Law Commission *Sexual Offences: Adult Prostitution* (Project 107) Issue Paper 19 (2002) at 3.

1.17 The first discussion paper was published in September 1999. It addressed the substantive law relating to sexual offences, and contained a draft Sexual Offences Bill.<sup>20</sup> It had both a child and adult focus, but excluded adult prostitution and pornography. The second discussion paper was published in December 2001. It dealt with matters concerning process and procedure and it too focused on both adults and children, excluding adult prostitution and pornography.<sup>21</sup> The content and recommendations of these discussion papers were drawn together to form the Report on Sexual Offences, which was published in December 2002, together with a consolidated draft Sexual Offences Bill. The Sexual Offences Act is the outcome of Parliamentary deliberations on the draft Bill. With regard to the third leg of this investigation, an issue paper on adult prostitution was published in July 2002 and a discussion paper was published in May 2009. The Report on Sexual Offences: Adult Prostitution was approved for submission to the Minister of Justice and Constitutional Development for his consideration on 16 August 2014.

1.18 This issue paper constitutes the fourth leg of the investigation. It deals with pornography its impact and effect on children. Following the promulgation of an amendment to the Films and Publications Act 65 of 1996 (the “FPA”) in 2007, the Commission decided to remove this leg of the investigation from Project 107, as all concerns that had been raised during advisory committee meetings had been addressed. However, this leg of the investigation is receiving renewed attention following a pre-investigation into pornography and the mass media.

1.19 In September 2009, the (then) Deputy Minister of Home Affairs, Honourable Malusi Gigaba, sent a letter to the Chairperson of the Commission asking the Commission to give advice on the possibility of placing an absolute ban on the dissemination and circulation of pornography through electronic and printed media, and mobile technology. Deputy Minister Gigaba wrote that the Deputy Ministers of Home Affairs, Justice and Constitutional Development, Social Development and Basic Education had met on 1 September 2009, and that the Deputy Ministers had been briefed by the FPB on the pervasiveness of pornography in the mass media as well as society in general, and the negative impact this has on children. At the meeting the FPB had stated that “paedophiles use pornography to groom children for sexual exploitation for child pornography purposes, and thus there is a linkage between the rise in pornography, sexual abuse, exploitation and child pornography”. Deputy

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<sup>20</sup> South African Law Commission *Sexual Offences: Substantive Law* (Project 107) Discussion Paper 85 (1999).

<sup>21</sup> South African Law Commission *Sexual Offences: Process and Procedure* (Project 107) Discussion Paper 102 (2001).

Minister Gigaba explained that what was envisaged is not a total ban, as adult shops would still be available for adults who wish to view pornographic films and publications. The proposed prohibition was directed at the mass media and service providers that disseminate pornographic material. The Deputy Minister submitted that the extraordinary ease of access and the counter-weighting of risk to children caused by such exposure were, in his view, a reasonable and justifiable limitation of Section 33 of the Constitution. The aim of the proposed ban was to protect children from viewing harmful and unsuitable content in both the electronic and print media.

1.20 The Commission considered this request at its meeting held on 13 March 2010. The Commission decided to conduct a pre-investigation into the matter to determine if the topic should be included on the Commission's programme. At a meeting held on 17 November 2010 the Commission determined that the existing legislative framework to protect children from exposure to pornography is inadequate, and that ways of regulating and filtering pornography need to be explored in a holistic manner. It was decided that this would be a focused part of the Project 107 investigation into pornography and children, thereby reviving this leg of the project. On 15 November 2011 the (then) Minister of Justice and Constitutional Development approved the appointment of an advisory committee member, Mr Chetty.

1.21 Work on this paper was held in abeyance pending the completion of the Report on Sexual Offences: Adult Prostitution, and the appointment of the new Commission. The Commissioners were appointed in the latter half of 2013. In February 2014 the Commission appointed Madam Justice Maya as the project leader of this investigation. Professor Oguttu took over the role of project leader in February 2015 following her appointment to the Commission. Additional advisory committee members were appointed on 15 September 2014, as follows: Mr Cull, Adv Meintjes (SC), Ms van Niekerk, Colonel Pienaar and Ms Sedumedi. Mr Risiba, CEO of the FPB, replaced Ms Sedumedi on 6 March following her resignation. Ms Linders of the Department of Telecommunications and Postal Services was nominated to assist the committee on 31 March 2015.

## **D Methodology and purpose of the Issue Paper**

1.22 This issue paper introduces the topic of pornography and children for legal debate. It aims to identify the manner in which the law currently regulates and protects children from being exposed to pornography or from being used or abused to create pornography and

whether there is a need for law reform. Its purpose is to initiate and stimulate debate, to explore proposals for law reform and to serve as a basis for further in-depth deliberation.

1.23 Following the issue paper, the Commission will publish a discussion paper setting out its preliminary recommendations, and draft legislation, if necessary. The discussion paper will take into account the public response to the issue paper, and will test public opinion on possible solutions identified by the Commission. On the strength of these responses a report will be prepared containing the Commission's final recommendations. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration.

## E Legislative and regulatory context

1.24 International agreements on cooperation to combat child abuse material and to restrict pornographic material<sup>22</sup> include the following: the International Agreement for the Suppression of the Circulation of Obscene Publications 1910,<sup>23</sup> the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1923,<sup>24</sup> the Protocol to the Agreement for the Suppression of the Circulation of Obscene Publications 1949,<sup>25</sup> the United Nations Convention on the Rights of the Child (1989); the 65<sup>th</sup> General Assembly of Interpol (Antalya, Turkey) specific resolution (AGN/65/RES/9) on child pornography adopted in 1996<sup>26</sup> and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).<sup>27</sup>

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<sup>22</sup> The topic of restricting pornographic material is mentioned in this paper but is not addressed in detail.

<sup>23</sup> United Nations Treaty Series No.11 (1911) available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VIII-3&chapter=8&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VIII-3&chapter=8&lang=en).

<sup>24</sup> United Nations Treaties. League of Nations Treaty Series, vol. 27, p 214 available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VIII-3&chapter=8&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VIII-3&chapter=8&lang=en).

<sup>25</sup> Censorship and Free Speech: Global Frameworks available at <http://www.caslon.com.au/censorshipguide3.htm>. Accessed on 15 September 2010 and United Nations Treaties available at <https://treaties.un.org/pages/CTCTreaties.aspx?id=8&subid=A&lang=en>. Accessed on 15 May 2015.

<sup>26</sup> The 65th General Assembly of Interpol (Antalya, Turkey) Available at <http://www.interpol.int/About-INTERPOL/Structure-and-governance/General-Assembly-Resolutions/Resolutions-1990-to-1999/1996-AGN65>

<sup>27</sup> The Council of Europe Convention on the Protection of Children against Sexual Exploitation

1.25 Locally, the existing legislative framework governing pornography and the creation, circulation, exhibition, distribution, and possession of child abuse material includes the following Acts: the FPA, the Sexual Offences Act and the Electronic Communications and Transactions Act 25 of 2002. These Acts are undergirded and informed by specific rights and freedoms found in the Constitution of the Republic of South Africa 1996. This legislative framework is augmented by the following regulations or laws:

- codes of conduct for Internet Service Providers
- regulation by the Independent Communications Authority of South Africa (ICASA) established in terms of the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act)
- the Protection of Personal Information Act 4 of 2013
- the Children's Act
- the Prevention and Combatting of Trafficking in Persons Act 7 of 2013
- the Criminal Procedure Act 51 of 1977, and
- remedies available through the Protection from Harassment Act 17 of 2011.

## **F Outline of the Issue Paper**

1.26 The following chapter (Chapter 2) provides an overview of the concerns relating to child abuse material; grooming of children to generate child abuse material; and the exposure of children to pornography and child abuse material. The context is explored from a local, African and global viewpoint. Chapter 3 looks at the international imperative to protect children, and the legislative response in South Africa towards protecting children from pornography and child abuse material. The legislative exposition differentiates between the criminal law response and the regulatory response. The aim of the exposition is to identify possible weaknesses in the law which may require reform in order to better protect children from exposure to illegal or age-inappropriate pornographic content. Chapter 4 provides a brief look at pending legal developments relevant to this investigation, and briefly mentions some examples of foreign law and practice (which will be elaborated on in the discussion paper to follow). The chapter includes two focal questions: i) whether there is a need to enhance the criminal law and response to the creation, possession and distribution of child abuse material; and ii) whether there is a need to provide greater protection for

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and Sexual Abuse CETS No. 201. United Nations Treaty Office available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=201> (last accessed 23 March 2015).

children from exposure to pornography and child abuse material. The chapter concludes with questions aimed at discovering the issues at hand and the extent of the need for law reform.

# CHAPTER 2: CONTEXTUALISING PORNOGRAPHY, CHILD ABUSE MATERIAL AND GROOMING AS THEY RELATE TO AND AFFECT CHILDREN

## A. Introduction and background

2.1 This chapter provides an overview of the concerns relating to child abuse material; grooming of children to generate child abuse material; and the exposure of children to pornography and child abuse material. The context is explored from a local, African and global viewpoint.

## B. Why the concern about children and pornography and child abuse material?

2.2 The answer to the question “Why the concern about children and pornography and child abuse material?” as well as the rationale for using the term “child abuse material” rather than “child pornography” is that as the preferred terminology indicates most child abuse materials require that a child be physically abused to produce that material; or it may cause psychological or physical harm following exposure to it. According to Professor Taylor and Dr Quayle,<sup>28</sup> the process of child abuse material production

“requires the photographer to create a situation where a child is either directly abused, or posed in sexualized ways, and as such it is a product of an illegal and inappropriate act. The viewer is in some sense aiding and abetting that process, by providing a market for the material and for making evident (through Internet activity, private contact or through payment for commercial material) a demand. . . A photographic record in whatever media preserves the pictures of that abuse. At worst, therefore, it is a permanent record of a crime, and serves to perpetuate the images and memory of that abuse for as long as it exists. Distributing and viewing child pornography, therefore, ensures the continued and even increased availability of the pictures. The implications of this for the family of the child and the child itself may be very severe and traumatic; it also represents a violation of the child and its family’s privacy, and generally a visible demonstration of abuse of position or relationship. This becomes of greater significance in the context of the Internet. Once a photograph is digitized and distributed on the Internet, it can be perfectly reproduced endlessly by anyone in possession of it. In the case of a normal photograph, destruction of the negative severely limits the likelihood of that photograph being reproduced; in the case of Internet images, the only way to control

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<sup>28</sup> Max Taylor, Ethel Quayle, Brunner-Routledge, Hove “Child Pornography: An Internet Crime” (2003) *Journal of Sexual Aggression*, 11(2) 227-228.

reproduction of a photograph is to destroy all copies – an impossible task once a picture has been posted to an Internet source.”

2.3 Mr Ron O’Grady was quoted during a meeting of the Interpol Specialised Group on Crimes Against children, attended by Colonel Pienaar (advisory committee member), as follows:<sup>29</sup>

“Sexual offences against children are worse than murder, for in the case of a murder the suffering of the victim was ended. In the case of a crime against a child, the person will suffer for the rest of his/her life.”

2.4 In *R v Sharpe*<sup>30</sup> it was found that:

“Children are used and abused in the making of much of the child pornography caught by the law... Production of child pornography is fuelled by the market for it, and the market in turn is fuelled by those who seek to possess it.... the link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child is traumatised, by being used as a sexual object in the course of making the pornography. The child is sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.”

2.5 The harm to children is extremely grave and is not restricted to the obvious harm imposed on victims in the creation of child abuse material. The original abuse of a child-victim is both compounded and aggravated by the creation and distribution of child abuse material.

2.6 Generally, child abuse material is both a crime in and of itself – its creation, distribution and possession is the *actus reus* of a criminal offence and is also a crime scene, providing evidence of the crime of exploiting a child. Child abuse material can consist of a child or children engaged in sexual behaviour alone or with one or more adults, or it could involve two or more children performing sexual acts, with or without adults being involved or being visible. Such imagery can range from sexualised photographs of a single child or children, or sexualised images of their genitals, through to brutal pictures of anal or vaginal rape, bondage, oral sex, bestiality or other forms of degradation, sometimes involving very

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<sup>29</sup> This sentiment is re-iterated on the webpage Zoom Info where he states that child sex abuse is a more serious crime than murder and the ultimate sin against humanity available at <http://www.zoominfo.com/p/Ron-O'Grady/18765165>. Accessed on 15 May 2015.

<sup>30</sup> *R v Sharpe*, 2001 SCC.2.

young children or babies. Child abuse material amplifies and broadcasts the original act of abuse that it depicts. In so doing, it substantially aggravates the original offence.

2.7 Victims of the creation of child abuse materials remain vulnerable to (at risk of) a range of physical, emotional, psychological, behavioural and sexual harm for their entire lives after the abuse, brutalisation and torture in the creation of these images.<sup>31</sup> It also possibly has a strong influence on the emerging/developing sexuality of the child. Children have even been killed in the creation of child abuse material.<sup>3233</sup> Child abuse material not only aggravates the original abuse, brutalisation and torture suffered by victims but also degrades and objectifies all children as acceptable sexual commodities, making all children vulnerable to sexual abuse and exploitation. Landmark cases of child abuse material offenders provide sufficient anecdotal evidence of the link between child abuse material and the actual sexual abuse and molestation of children.

## Questions

- 1. What is your understanding of the terms “pornography” and “child pornography”?**
- 2. Suggest how “pornography” and “child pornography” or child abuse material could be defined to address any of your concerns.**
- 3. Does section 18 in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 sufficiently define the crime of sexual grooming of children?**

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<sup>31</sup> This is the view of some of the experts serving on the advisory committee to this project.

<sup>32</sup> Malone Michael S, “The Murder of Innocents: Plunging the dark depths of child pornography websites”, (2002) *ABCNews.com*

<sup>33</sup> In August 1984, Thea Pumbroek was found dead in a hotel room in Amsterdam. She had been used in the production of several child pornographic videos and was killed by an overdose of cocaine while being filmed in yet another child pornographic video. Thea Pumbroek was 6-years-old. Gemeentepolitie Eindhoven De Geschiedenis van een korps 1920 – 1994 available at <http://www.gemeentepolitieeindhoven.nl/de-recherche?showall>. Accessed on 19 May 2015. In 2002, Michael S Malone of *ABC News* reported the arrest of an Italian pederast ring that was taking orders from customers to produce child pornography by kidnapping Russian orphans according to pre-specified characteristics, like hair colour, then torture and kill them on camera for posting on the Web Citations required *ABC News* “Silicon Insider: Dark World of Child Porn” available at <http://abcnews.go.com/Business/story?id=>. Accessed on 19 May 2015.

## C. Prevalence of child abuse material

2.8 The prevalence of child abuse material is difficult to estimate in any country. It is even more difficult to estimate in countries where the lack of any laws specifically targeting child abuse material is aggravated by inadequate human and financial resources for child protection to give one the impression that the online sexual abuse and exploitation of children is not a problem, when in fact it is.<sup>34</sup>

2.9 Some indication of the prevalence of child pornography internationally is shown by a number of high profile cases that have made media headlines. Examples of such cases include the following:

- In 2010 a man in Vancouver Island was at the centre of an "unprecedented" child pornography raid that netted more than 840 000 images of child pornography, 27 000 of which featured children younger than five.<sup>35</sup>
- Police in Exeter, NH, USA arrested Thomas Rogers for possession of 247 000 images and more than 1 400 videos of child pornography.<sup>36</sup>
- An online global porn ring may have been the vehicle for the distribution of up to 123 terabytes of child pornography, which is roughly equivalent to nearly 16,000 DVDs. Additional media recovered from the targets arrested in the United States alone has been found to contain over one million images of child pornography. The ring, based in the United States, reached across five continents and 14 countries.<sup>37</sup>

2.10 The number of images of child pornography which form the subject matter of these reported cases seems to provide support for the UNICEF estimate that the Internet harbours more than 4 million websites featuring sexually exploited minors and that more than 200 new

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<sup>34</sup> As revealed by the International Centre for Missing & Exploited Children "Child Pornography: Global Review and Model Legislation" survey in 2006, 2008, 2010 and 2012 available at [www.icmec.org](http://www.icmec.org).

<sup>35</sup> Bethany Lindsay ctvbc.ca "Ex-cop gets 3 years for child porn, sex assault of teen" (13 February 2012) available at <http://bc.ctvnews.ca/ex-cop-gets-3-years-for-child-porn-sex-assault-of-teen-1.767920>. Accessed on 29 May 2015.

<sup>36</sup> The Lawyers Chronicle "Child Pornography in Africa" available at <http://thelawyerschronicle.com/child-pornography-in-africa/>. Accessed on 6 October 2014.

<sup>37</sup> Terry Frieden, CNN Justice Producer "72 charged in online global child porn ring"(3 August 2011) CNN available at <http://edition.cnn.com/2011/CRIME/08/03/us.child.porn.ring/>. Accessed on 29 May 2015.

images are circulated daily. UNICEF also estimates that the production and distribution of child pornography generates between \$3 billion and \$20 billion a year globally.<sup>38</sup>

2.11 The crime being discussed here respects neither national boundaries nor national cultures; all that a child exploiter needs is access to a computer that allows a link to the Internet. A child exploiter needs no passport and passes through no checkpoints while carrying out the crime. He or she can engage in the non-contact abuse and exploitation of children from all parts of the world, unrestricted by the legal and social constraints that govern such actions in the “real” world. Given the global nature of the Internet, any increase in the trade of child abuse material trade in one country will lead to an increase in every other country in which any person has access to the Internet. A number of studies and landmark cases confirm the exponential growth of the trade in child abuse material across the world.

2.12 In May 2011 the US Attorney General Eric Holder Jr, said at the National Strategy Conference on Combating Child Exploitation that

“Unfortunately, we’ve also seen a historic rise in the distribution of child pornography, in the number of images being shared online, and in the level of violence associated with child exploitation and sexual abuse crimes. Tragically, the only place we’ve seen a decrease is in the age of victims. This is – quite simply – unacceptable.”<sup>39</sup>

2.13 BT, one of the United Kingdom’s Internet service providers, reported that it blocks an average of 35 000 attempted child pornography website “hits per day”. This figure supports the findings by Jerry Ropelato in his 2006 survey of Internet pornography statistics.<sup>40</sup> Ropelato stated that the number of daily Gnutella<sup>41</sup> requests for child abuse material numbered 116 000, and that more than 100 000 websites were “offering illegal child pornography”.

2.14 The head of the Australian Federal Police's serious organised crime unit, Assistant Commissioner Kevin Zuccato, described child abuse material as an epidemic, saying –

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<sup>38</sup> Swiss Info “Anti child pornography campaign scores success” 29 January 2007 available at <http://www.swissinfo.ch/eng/anti-child-pornography-campaign-scores-success/5694864> Accessed on 8 June 2015.

<sup>39</sup> The United States Department of Justice Child Exploitation & Obscenity Section available at <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html>. Accessed on 29 May 2015.

<sup>40</sup> Top TenREVIEWS “Press Releases” available at <http://www.toptenreviews.com/3-12-07.html> Accessed on 29 May 2015.

<sup>41</sup> A peer-to-peer information and communication technology that allows for the sharing of data without the use of service providers.

“that where federal police would once have been overwhelmed by finding hundreds of images on a suspect's computer, they were now finding hundreds of thousands and even millions.”<sup>42</sup>

2.15 On 6 February 2009, police in Ontario, Canada celebrated “the results of a province-wide child abuse material bust, the largest in Ontario’s history – yet officers acknowledge they have only scratched the surface of the massive underworld of child sexual abuse in North America. . .which officials estimate at a staggering 600,000 in the U.S. and 65,000 in Canada. The child pornography unit of the Ontario Provincial Police (OPP) believes the 65,000 figure is very low, as 40,000 computers in Ontario alone are known to be used to access child porn.”<sup>43</sup>

#### **D. Prevalence of child abuse material on the African continent<sup>44</sup>**

2.16 The creation, possession and distribution of child abuse material is a global problem; Africa is not immune to the “dark side” of the Internet.<sup>45</sup>The fact that fewer cases relating to child abuse material are under investigation in African countries is not because it is not happening in Africa. The lower figures can be ascribed to the lack of laws specific to child abuse material, the lack of harmonisation of sentencing policies related to the sexual abuse and exploitation of children and the lack of the harmonisation of law enforcement.<sup>46</sup> Child exploiters and child abusers do not make public their perverse interest in children and Africa certainly attracts its share of online child sexual exploiters.

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<sup>42</sup> Oakes Dan “Growing alarm over child porn epidemic” (7 Feb 2012) Gannawarra Times available at <http://www.gannawarratimes.com.au/story/945318/growing-alarm-over-child-porn-epidemic/>. Accessed on 29 May 2015.

<sup>43</sup> Gilbert Kathleen “Child Porn Pandemic as Police Estimate 600,000 Americans, 65,000 Canadians Trading Child Porn Online” (6 Feb 2009) LifeSiteNews.Com available at <https://www.lifesitenews.com/news/child-porn-pandemic-as-police-estimate-600000-ameri...> Accessed on 29 May 2015.

<sup>44</sup> Some of the information in this section of the issue paper was contained in a report by Iyavar Chetty called *Internet Usage and the Exposure of Pornography to Learners in South African Schools*, (co-authored by Antoinette Basson), which was published by the Department of Home Affairs in 2006.

<sup>45</sup> The Lawyers Chronicle “Child Pornography in Africa” 6 Oct 2014. Available at <http://thelawyerschronicle.com/child-pornography-in-africa/>. Accessed on 6 October 2014.

<sup>46</sup> The Lawyers Chronicle “Child Pornography in Africa” 6 Oct 2014. Available at <http://thelawyerschronicle.com/child-pornography-in-africa/>. Accessed on 6 October 2014.

2.17 Indeed, African countries are reported to be safe-havens for child sex tourism, child pornography and “chicken hawking”.<sup>47</sup> “Chicken hawking” is a term coined by child exploiters to refer to the online targeting and grooming of children through social networking sites and chat rooms for offline sexual abuse and exploitation.

2.18 The International Centre for Missing and Exploited Children (ICMEC) updated its survey of legislative responses to the problem of child abuse material among all Member States of INTERPOL in 2012.<sup>48</sup> The results were shocking, a chilling reminder that children in most of Africa do not enjoy minimum protection and the assurance of emotional, psychological and physical well-being from their governments – with few exceptions. In fact, South Africa was the only African State that the study identified as meeting all the requirements for an appropriate and effective response to the sexual abuse and exploitation of children with regard to the creation, distribution and possession of child abuse material. In the summer of 2009, ICMEC conducted a thorough update<sup>49</sup> of the earlier research on existing child pornography legislation, expanding the review beyond the 187 Interpol member countries to include 196 countries. Sadly, the results of such research continue to shock. Of the 196 countries reviewed only 45 had adequate laws to combat child pornography offenses. In 2012 the ICMEC<sup>50</sup> found that the number of countries with adequate law had climbed from 27 in 2006 to 69 in 2012. However 53 countries still had no relevant laws at all.

2.19 Data from even limited studies confirm that the sexual abuse and exploitation of children is a growing problem in Africa. For instance, at the 1999 Regional Office consultative meeting,<sup>51</sup> entitled “*Prevention and Management of Child Sexual Abuse,*” participants from 28 countries representing all the African sub-regions reported that child sexual abuse is a serious concern in their countries. It further reported that there is an

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<sup>47</sup> The Lawyers Chronicle “Child Pornography in Africa” 6 Oct 2014. Available at <http://thelawyerschronicle.com/child-pornography-in-africa/>. Accessed on 6 October 2014.

<sup>48</sup> International Centre for Missing & Exploited Children (ICMEC) *Child Pornography: Model Legislation & Global Review 2012 7<sup>th</sup> Edition p15 to 40*; the report “Child Pornography: Model Legislation & Global Review, 7th Edition”(2012) can be viewed via the following link: [http://www.icmec.org/en\\_X1/pdf/Child\\_Pornography\\_Model\\_Law\\_English\\_7th\\_Edition\\_2012.pdf](http://www.icmec.org/en_X1/pdf/Child_Pornography_Model_Law_English_7th_Edition_2012.pdf).

<sup>49</sup> International Centre for Missing & Exploited Children “Child Pornography: Model legislation & Global Review” 2010 6<sup>th</sup> Edition. Available at [http://icmec.org/en\\_X1/icmec\\_publications/English\\_6th\\_Edition\\_F.](http://icmec.org/en_X1/icmec_publications/English_6th_Edition_F.) Accessed on 19 May 2015.

<sup>50</sup> ICMEC 2012 Highlights “Making the World a safer place for Children” Available at <http://www.icmec.org>. Accessed on 19 May 2015.

<sup>51</sup> World Health Organization Regional Office for Africa “Child Sexual Abuse: a Silent Health Emergency” (18 June 2004) AFR/RC54/15 Rev.1 available at [www.afro.who.int/index.php?option=com\\_docman&task](http://www.afro.who.int/index.php?option=com_docman&task) .... Accessed on 29 May 2015.

enormous burden of sexual violence and harassment in secondary schools, with both boys and girls experiencing some form of sexual abuse.

2.20 The globalisation of the trade in child abuse material by the creators and distributors of such material stands in chilling contrast to the lack of harmonised laws by governments against the online abuse and exploitation of children. For example, in South Africa, for purposes of laws specific to child abuse material (currently referred to as child pornography), a “child” is any person under the age of 18 years. In neighbouring Zimbabwe and Namibia and in the Congo there are no laws specific to child abuse material.<sup>52</sup>

2.21 Almost all cases related to the downloading of child abuse material from the Internet involve more than one country. Children are sexually abused and exploited internationally for purposes of these images. Thomas Rogers, for instance (mentioned in paragraph 2.9 above) was arrested in the US, for possession of “nearly 247,000 photos and nearly 1,400 videos featuring images of child sex abuse” – none of whom were local children.<sup>53</sup>

2.22 The global nature of crimes involving the sexual abuse and exploitation of children requires an internationally coordinated approach. The main concern should be that of protecting children worldwide. As mentioned earlier, given the nature of the Internet, any increase in the creation, distribution and availability of child abuse material in one country means an increase in every other country too. Given that child abuse material is a global problem, the fight against the online sexual abuse and exploitation of children requires a response that thinks globally but acts locally and cooperatively across borders. It is therefore important to understand the problem within the context of Africa, in particular, and the world in general.

2.23 It should come as no surprise, therefore, to learn that law enforcement agencies have consistently complained about the frustrations they have to endure when investigating cases of child abuse material. This is because of either the lack of any legislation specific to child abuse material in many countries or the lack of the harmonisation of legislation dealing with child abuse material, as well as sentencing policies, for offences which are of a global nature. The lack of harmonised law on child abuse material among international jurisdictions

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<sup>52</sup> International Centre for Missing & Exploited Children (ICMEC) *Child Pornography: Model Legislation & Global Review* 2012 7<sup>th</sup> Edition available at [http://www.icmec.org/en\\_X1/pdf/Child\\_Pornography\\_Model\\_Law\\_English\\_7th\\_Edition\\_2012.pdf](http://www.icmec.org/en_X1/pdf/Child_Pornography_Model_Law_English_7th_Edition_2012.pdf).

<sup>53</sup> WMUR “Police:Computer Contained 247,000 Child Porn Images” (26 January 2012). Available at WMUR.com.

creates challenges in addressing the globalisation of the trade. This is facilitated by a globalised advancement and convergence in information and communication technology (ICT), including technology that facilitates financial transactions via the Internet to any part of the world.

2.24 It is noteworthy that according to the International Telecommunication Union's (ITU) key 2005-2014 ICT data for the world<sup>54</sup>:

- active mobile broadband subscriptions in Africa grew from 1.8 people per 100 people in 2010 to 19 per 100 people in 2014;
- households with Internet access increased from 1% to 11.1% between 2005 and 2014; and
- individuals using the Internet increased from 2.4 people per 100 people in 2007 to 19 people per 100 people in 2014.

2.25 The Internet is actively being used in Africa to obtain child abuse material. For instance, in January 2012, a keyword search for "baby sex" was used on *Google.com* 65 times in Botswana, 60 times in Kenya, 78 times in Mauritius, 57 times in Nigeria, 73 times in South Africa, 70 times in Tanzania and 52 times in Zimbabwe. This data was gathered by KINSA Africa, a South African-based non-profit organisation associated with Canadian-based KINSA. KINSA conducted a survey of the use of obvious child exploitation keywords to access child abuse material through *Google.com* in South Africa between January 2011 and December 2012. The result of the search using five obvious keywords used by child sexual exploiters related to child abuse material – out of the hundreds of words that exist and are shared among perpetrators – totalled 8 116 searches in this period. The data showed how many times these words to access and download child abuse material, but not the number of people who were doing those searches. On average, these five keywords were used more than 11 times every day in 2011 and 2012. Bearing in mind that South Africans have been identified as members of international child abuse material syndicates,<sup>55</sup>

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<sup>54</sup> International Telecommunication Union ICT Statistics 2015 available at <http://www.itu.int/en/ITU-D/statistics/Pages/default.aspx> (last accessed 10 April 2015)).

<sup>55</sup> Ispas Mara "International Child Porn Syndicate Kingpin Bust in Grahamstown" (12 March 2015) SA Breaking News available at <http://www.sabreakingnews.co.za/2015/03/12/international-child-porn-syndicate-kingpin-bust-in-grahamstown/>. Accessed on 29 May 2015. See, also, The Telegraph Sean O'Neill "Internet Child Sex Perverts Escape Justice" (3 Aug 2011) available at <http://www.telegraph.co.uk/news/uknews/1336247>; *Operation Starbust* and report of the Austrian Federal Criminal Investigation Bureau Computer Crime Research Center Margaret A Healy (2 August 2004) Child Pornography: an international perspective United States Embassy Stockholm.

the number of keywords used in South Africa (shared among such members) must be far higher than just the five obvious keywords used in the survey. This was confirmed by a January 2012 survey to determine whether or not keywords identified by international law enforcement are used in South Africa.

2.26 The above facts suggest that the creation, possession and distribution of child abuse material is “rife in SA”. Indeed South Africa, leads the world with the number of searches on “baby sex”: 91 searches in January 2012, higher than the United Kingdom’s 74 searches, the United States’ 86 searches, Australia’s 85 searches and Canada’s 89 searches.

2.27 On 16 August 2012, Jill Craig reported that Kenya’s coastal region has become a “haven for child-porn producers”, confirming the findings by UNICEF in 2006 that “between 2,000 and 3,000 Kenyan girls and boys are involved in a full-time, year-round commercial sex trade.”<sup>56</sup> According to Craig, Grace a Mombasa-based rights advocate for women and children confirmed that people come to Kenya specifically to create and produce child pornography images and movies, with most of them “going for younger children”.<sup>57</sup>

2.28 It is concerning to note that parental neglect not only enhances the vulnerability of children to exploitation but that there are documented accounts of parents in Africa who may actually encourage their children to participate in sexual exploitation for material gain.<sup>58</sup> This happens, especially when parents are unable to meet their child’s material needs and demands, or when the exploitation of the child brings income into the family.

2.29 A recent report by the Canadian-based KINSA exposed a number of African countries that use peer-to-peer technology to trade images of pre-pubescent children being sexually assaulted. The type of assault was categorised by police globally. The report revealed that, in just ten African countries, more than 154 437 child abuse images were being shared online, involving 9 902 IP addresses. Of these 137 373 child abuse images were being traded in South Africa, involving 7 802 IP addresses.<sup>59</sup>

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<sup>56</sup> Craig Jill “Kenyan Coast a Haven for Child-Porn Producers” (16 August 2012) available at [www.voanews.com](http://www.voanews.com).

<sup>57</sup> Craig Jill “Kenyan Coast a Haven for Child-Porn Producers” (16 August 2012) available at [www.voanews.com](http://www.voanews.com)

<sup>58</sup> ECPAT The Commercial Sexual Exploitation of Children in the Commonwealth of Independent States November 2014 at p9. available at [http://ecpat.net/sites/default/files/Regional%20CSEC%20Overview\\_CIS%20\(English\).pdf](http://ecpat.net/sites/default/files/Regional%20CSEC%20Overview_CIS%20(English).pdf) Accessed on 19 May 2015.

<sup>59</sup> Other countries involved included Mauritius (9 117 images involving 1 416 IP addresses), Angola (3 831 images involving 742 IP addresses) and Tanzania (2 194 images involving 163 IP addresses). Information provided by Mr Iyavar Chetty, KINSA.

2.30 KINSA's data are shown in Table 1 below:<sup>60</sup>

| <b>COUNTRY</b>      | <b>NOTABLES</b><br>(number of individual child abuse images traded in 2011) | <b>INCEST</b><br>(number of incest materials – a strong indicator of abusers) | <b>SPECIALS</b><br>(referring to unique images of child abuse) | <b>IP ADDRESSES</b><br>Number of IP addresses trading child abuse images in 2011) |
|---------------------|---|---|--|---|
| Angola              | 3,831   | 12  | 0  | 742   |
| Botswana            | 59  | 0   | 0  | 9   |
| Lesotho             | 14  | 0   | 0  | 6   |
| Mauritius           | 9,117   | 0   | 0  | 1,416   |
| Mozambique          | 616   | 0   | 0  | 118   |
| Namibia             | 679   | 0   | 0  | 121   |
| <b>South Africa</b> | <b>137,373</b>  | <b>1,020</b>  | <b>3</b>   | <b>7,802</b>  |
| Tanzania            | 2,194   | 20  | 0  | 163   |
| Zambia              | 229   | 0   | 0  | 12  |
| Zimbabwe            | 325   | 0   | 0  | 13  |

**Table 1: Online child abuse material in Africa (source:KINSA)**

2.31 The report by KINSA was probably what prompted the publication of a headline article titled “Child pornography rife in SA”. This media report described South Africa as “not a very good place for children in general” and commented that “South Africa has become one of the world’s largest distributors of child pornography.....”<sup>61</sup>

2.32 Given that not all African countries have laws specific to child abuse material, and also given the lack of harmonisation of laws to allow for international law enforcement, a Convention on preventing the sexual abuse and exploitation of children and combating the creation, distribution and possession of child abuse material may ensure appropriate law enforcement within Africa. The African Convention on Cyber Security and Personal Data Protection is discussed below in paragraph 3.19.

<sup>60</sup> A trade of 154 437 child abuse images, involving 9 902 IP addresses, in just 10 African countries, with South Africa in the lead and small island Mauritius following.

<sup>61</sup> Hosken Graeme “Child Porn Rife in SA” (28 October 2013) Times Live available at [http://www.timeslive.co.za/the\\_times/2013/10/28/child-porn-rife-in-sa](http://www.timeslive.co.za/the_times/2013/10/28/child-porn-rife-in-sa). Accessed on 29 May 2015.

## E. Exposure of children to pornography

2.33 Given the increased access by children to ICT, it is highly likely that children's exposure to pornography has similarly increased too. According to the Human Sciences Research Council (HSRC),<sup>62</sup> the more Internet access becomes available in schools and connection costs drop, the number of children accessing this technology will increase. This assumption is supported by the targets set out in South Africa Connect: The HSRC report provided no actual figures for children's Internet access. Nonetheless, the overall assumption is relevant to the targets set out in *South Africa Connect: The National Broadband Policy for South Africa*.<sup>63</sup> as shown in Table 2 below.

| Target  | Penetration measure     | Baseline (2013)       | By 2016        | By 2020                          | By 2030                          |
|---|-------------------------|-----------------------|----------------|----------------------------------|----------------------------------|
| <b>Broadband access in Mbps user Experience</b> | % of population         | 33.7% Internet access | 50% at 5Mbps   | 90% at 5Mbps<br>50% at 100Mbps   | 100% at 10Mbps<br>80% at 100Mbps |
| <b>Schools</b>                                  | % of schools            | 25% connected         | 50% at 10 Mbps | 100% at 10Mbps<br>80% at 100Mbps | 100% at 1Gbps                    |
| <b>Health Facilities</b>                        | % of health facilities  | 13% connected         | 50% at 10Mbps  | 100% at 10Mbps<br>80% at 100Mbps | 100% at 1Gbps                    |
| <b>Public sector Facilities</b>                 | % of government offices |                       | 50% at 5Mbps   | 100% at 10Mbps                   | 100% at 100Mbps                  |

**Table 2: South Africa Broadband Targets to 2030**

2.34 In South Africa in 2007 Youth Dynamix<sup>64</sup> reported that access to mobile communications by children varies with the age of the child, but has increased markedly. Youth Dynamix reported that 47 percent of children aged 7 to 9 had access to a mobile phone, as did 50 percent of children aged 10 to 12, and 58 percent of children aged 13 to

<sup>62</sup> Child, Youth, Family & Social Development, *The use of children in pornography in South Africa* (2 August 2007) HSRC.

<sup>63</sup> South Africa Connect: The National Broadband Policy for South Africa available at <http://www.ellipsis.co.za/national-broadband-policy/>. Accessed on 29 May 2015.

<sup>64</sup> This is according to a study by Youth Dynamix (7 March 2007) as quoted in a paper by Lisa Thornton Inc presented at a Lawyers for Human Rights focus group meeting on 29 March 2007.

15. Eight years later access by children to mobile phones has increased dramatically. According to a study released on 28 November 2013 by the Centre for Justice and Crime Prevention<sup>65</sup> on young people's navigation of online risks, four in five children in South Africa have access to a mobile phone, and almost half of them use mobile phones to access the Internet. It also reports that "the majority of school-going South Africans, between the ages of 14 and 19 years, have access to, or own, a mobile phone, and have access to the Internet."<sup>66</sup>

2.35 Findings of research<sup>67</sup> in 2006 on the exposure of children to pornography in South African schools, as represented by randomly-selected schools in Cape Town, Durban and Johannesburg" are that:

- 65 percent of learners have seen pornographic movies, mostly on DVDs, with 45 percent of them reporting to watching pornographic movies regularly;
- 64 percent reported of having been exposed to pornographic images on the Internet;
- 81 percent reported "knowledge" of pornographic images on mobile phones; and
- 43 percent reported accessing pornography in magazines.

2.36 A report by TopTenREVIEWS' "*Children Internet Pornography Statistics*"<sup>68</sup> revealed that:

- the average age of children's first exposure to Internet pornography is 11 years;
- 80 percent of 15 to 17 year-olds have had hard-core pornography exposure;
- 90 percent of 8 to 16 year-olds have viewed online pornography, mostly while using the Internet for homework;
- children's character names are linked to thousands of pornography website links; and

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<sup>65</sup> UNICEF Media Home "South African children resilient in their mitigation of online risks" available at [http://www.unicef.org/southafrica/media\\_14003.html](http://www.unicef.org/southafrica/media_14003.html). Accessed on 12 May 2015. The study Connected Dot Com Young People's Navigation of Online Risks Social Media, ICTs & Online Safety is available at [http://www.unicef.org/southafrica/resources\\_14002.html](http://www.unicef.org/southafrica/resources_14002.html). Accessed on 12 May 2015.

<sup>66</sup> Connected Dot Com Young People's Navigation of Online Risks Social Media, ICTs & Online Safety at 5. available at [http://www.unicef.org/southafrica/resources\\_14002.html](http://www.unicef.org/southafrica/resources_14002.html). Accessed on 12 May 2015.

<sup>67</sup> Chetty Iyavar and Basson Antoinette *Report on Internet Usage and the Exposure of Pornography to Learners in South African Schools*, Film and Publication Board (2006).

<sup>68</sup> Family Safe Media, Pornography Statistics. Available at [http://www.familysafemedia.com/pornography\\_statistics.html](http://www.familysafemedia.com/pornography_statistics.html). Accessed on 25 May 2015.

- by the end of 2006, there were 4.2 million pornographic websites, 420 million pornographic pages on the Internet, and daily pornographic e-mails exceeded 2.5 billion.

2.37 Internet pornography statistics are truly staggering. According to compiled numbers from respected news and research organizations by TopTenREVIEWS Inc. (2003–2007),<sup>69</sup> during each second of every day:

- \$3,075.64 is spent on pornography, making revenue from the pornography industry larger than the combined revenues of the eight top technology companies (Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix and EarthLink);<sup>70</sup>
- 28,258 Internet users are viewing pornography; this is big business.

2.38 According to the electronic legal newsletter Legalbrief the worldwide interest in the approval of the new .xxx Web domain and the sale of the most financially valuable Internet domain name, sex.com, underscores the significance of the Internet for the sex industry.<sup>71</sup> Sex.com was sold for \$12m in 2006. La Rue states that profit driven practices are used to attract new customers and to eroticise people’s attitudes thereby ensuring an ever expanding client base.<sup>72</sup> Among pornographic websites 75 percent display visual teasers or clips on mainstream sites before asking the viewers’ agreement to continue. Only 3 percent of these sites require proof of age. By contrast, however, Human is of the view that two thirds of all pornographic websites do not include any type of adult content warning, this includes gonzo<sup>73</sup> pornography.<sup>74</sup>

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<sup>69</sup> Family Safe Media, Pornography Statistics. Available at [http://www.family-safemedia.com/pornography\\_statistics.html](http://www.family-safemedia.com/pornography_statistics.html). Accessed on 25 May 2015.

<sup>70</sup> According to the U.S. Pornography Industry Revenue Statistics, worldwide pornography “ballooned to \$97.06 billion” in 2006: TopTenREVIEWS available at [www.toptenreviews.com](http://www.toptenreviews.com).

<sup>71</sup> Legalbrief eLaw & Management “Cyberfocus” Issue No: 1343 (7 July 2010).

<sup>72</sup> La Rue, Jan, Chief Counsel, Senate Subcommittee Hears Experts on Pornography Toxicity (2 December 2004) available at <http://www.drjudithreisman.com/archives/2005/12/senate-subc>.

<sup>73</sup> “Gonzo” films have no pretensions about following the conventions of a Hollywood movie. They are simply a recorded series of sex acts, including oral, vaginal and anal penetration, often performed while the men call the women demeaning and degrading names, in addition, expecting the women to say, repeatedly, how much they enjoy what is being done to them. This genre of pornography has become increasingly normalised and mainstream pornography and pornographers are still pushing the limits of what is acceptable. It seems that the most popular form of pornography today – the gonzo variety – is far removed from the definitions of pornography as given by language dictionaries, or by judicial pronouncements on the subject.

<sup>74</sup> Clive Human, STOP, presentation delivered at the Symposium on effects of children’s exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

## F. What are children being exposed to?

2.39 Legalbrief<sup>75</sup> reports that, what once was taboo, hidden inside a suitcase or wardrobe in an older male relative's "girlie magazines", has moved into all of our homes. The influx has been facilitated by the mass media and more specifically the Internet, mobile phones and television. However, it is no longer just a centrefold model but a deluge of online and increasingly bizarre or violent content.<sup>76</sup>

2.40 Some of the images children are exposed to are stills (single-frame photographs), whereas others portray real-time or live pornography via webcam. Some pornographic images and videos are downloaded, created and or distributed through mobile phone technology. Adult content is available on South African free-to-air television within the watershed period subject to age restrictions.<sup>77</sup> Advances in technology, however, make it possible to record these programmes for viewing at the viewer's discretion. Attempts to make overt pornographic films i.e. XX and X18 available for viewing on subscription television channels have thus far been met with opposition. This includes Starsat's (also called On Digital Media) proposal for three pay-to-view television channels, which would contain pornographic programmes, between 8pm and 5am daily. The decision of the ICASA to grant this proposal was recently taken on review in the High Court of South Africa by three voluntary associations, namely Doctors for Life, Cause for Justice and the Justice Alliance of South Africa.<sup>78</sup> On 4 November 2014, Judge Bozalek ordered that the decision taken by ICASA in terms of which it authorized On Digital Media to broadcast three pornographic channels (Playboy TV, Desire TV and Private Spice) be reviewed and set aside, and that the matter be remitted back to ICASA for reconsideration.

2.41 A recent report in Legalbrief states that a new generation growing up on the Internet will be routinely exposed to extreme sexual violence before they have so much as removed

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<sup>75</sup> Legalbrief eLaw & Management "Cyberfocus" Issue No: 1343, 7 July 2010.

<sup>76</sup> Tanzer Dr Fiona, FPB, Pornography exposure and the developing mind, paper delivered at the Symposium on effects of children's exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

<sup>77</sup> Le Roux E *Pornography: Human right of human rights violation?* HTS Theologiese Studies/Theological Studies Vol 66 No 2 (2010) at p7 available at <http://www.hts.org.za>. Accessed on 13 May 2015.

<sup>78</sup> Justice Alliance of South Africa et al v ICASA et al Case no:18519/2013 . <http://www.saflii.org/za/cases/ZAWCHC/2014/162.pdf> (last accessed 22 March 2015)

their shirts in front of a real-life boyfriend or girlfriend.<sup>79</sup> This reality should be seen from the viewpoint that the media ranks as a “super peer” compared with influences from other contexts.<sup>80</sup> Children are naturally curious and sometimes particularly so about sex and sexual behaviour. If they discover pornography, they may become curious and interested in what they are viewing and so continue to visit these sites.<sup>81</sup> A study by Fagan<sup>82</sup> found that any negative emotion, such as shame, experienced by adolescents is quickly overcome through regular viewing.

2.42 Although the ‘girlie magazine’ content referred to above is still available, according to Robert Jensen,<sup>83</sup> Professor of Journalism at the University of Texas, the pornography industry now produces two major types of films: “features” and “gonzo”, with preference being given to the latter which is described as “low budget and over the top” pornography. This genre of mainstream Internet pornography is filled with close-up shots, more sex, less storyline and “one of the more unfortunate twists of gonzo porn is that it has become particularly disrespectful and increasingly violent toward the female actors”.<sup>84</sup> Author Gail Dines<sup>85</sup> comments that these movies have become increasingly cruel, violent and degrading.

2.43 There is ample evidence of this in the thousands of pornographic movies available in South Africa and on the Internet. The titles of films listed in the Government Gazettes<sup>86</sup> make no pretensions as to the content for example “Tortures”. If this is an accurate description of the content available and to which children may be exposed, it is of particular concern.

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Ibid.

80 Journal of Adolescent Health available at <http://teenmedia.unc.edu> accessed on 29 May 2015.

81 Childline, Pornography, child pornography & your child information pamphlet, undated.

82 Family Research Council Issue Brief Patrick F.Fagan,Ph.D. March 2011 IF11C04 at 2.

83 Joannides P Psychology Today available at <https://www.psychologytoday.com/blog/you-it/200806/pauls-sex-term-the-day-gonzo-porn>. (last accessed 23 March 2015).

83 Ibid.

84 Ibid.

85 Dines Gail So You Think You Know What Porn is: Q & A with Gail Dines for the Mars Society available at <http://gaildines.com>. Accessed on 24 11 2014

86 Film and Publication Board No.911, 21 November 2014, GG No. 38215: 21 November 2014.

## Questions

4. In your view is exposure of children to pornography and or child abuse material a problem in South Africa? If so in what respect?
5. Is the material children are exposed to illegal content i.e. child abuse material; age inappropriate content i.e. pornography which is legal for adults or is it explicit self-images sent between peers?
6. Are children inadvertently exposed to pornography or are they exposed after seeking it for example by way of a specific Internet search?

## G. The effect of exposure to pornography on children?

2.44 La Rue<sup>87</sup> states that neurologists have found that emotionally arousing images imprint on and alter the brain, and can, trigger an instant, involuntary and, lasting, biochemical memory trail. He comments that

“children and others who cannot read can instantly decode and experience images ... in fact, erotic (any highly arousing) images commonly subvert left hemisphere cognition.”<sup>88</sup>

2.45 Professor Zabow<sup>89</sup> is of the opinion that, through viewing pornography a child's brain is negatively programmed at crucial periods in respect of sexuality. He believes that if a child views carefree and consequence free sex when they are developmentally not prepared, a message is received of sexuality without responsibility. In turn this leads to increased sexual callousness and being less affected by sexual violence. Burgess states that pornography often introduces children prematurely to sexual sensations that they are

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<sup>87</sup> La Rue, Jan, Chief Counsel, Senate Subcommittee Hears Experts on Pornography Toxicity (2 December 2004) available at <http://www.drjudithreisman.com/archives/2005/12/senate-subc.> ; Gouws Amanda “Porn bad for the brain, bad for women” (8 April 2013) Mail & Guardian available at <http://www.thoughtleader.co.za/amandagouws/2013/04/08/pornography-is-not-only-speech>. Accessed on 29 May 2015.

<sup>88</sup> Ibid.

<sup>89</sup> Zabow, Professor Tuviah, “Pornography detrimental sequelae of children's exposure” paper delivered by a forensic psychiatrist, at the Symposium on effects of children's exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

developmentally unprepared to contend with.<sup>90</sup> This awareness of sexual sensation can be confusing and over stimulating for children.

2.46 Fagan<sup>91</sup> similarly believes that pornography, as a visual (mis)representation of sexuality, distorts an individual's concept of sexual relations by objectifying them; in turn this alters both sexual attitudes and behaviour. Exposure to pornography is said to directly contribute to the development of sexually dysfunctional attitudes and behaviours.

2.47 According to Childline, studies suggest that exposure to pornography can prompt children to act out sexually against younger, smaller or more vulnerable children.<sup>92</sup> Children are notorious for imitating what they have seen, read or heard. Childline endorses the opinions of experts in the field of childhood sexual abuse who report that premature sexual activity in children points to a variety of stimulants which may include experience or exposure.<sup>93</sup> This means that a child displaying inappropriate sexual behaviour may have been sexually abused or simply prematurely exposed to sexuality through pornography.<sup>94</sup>

2.48 However a clearer risk lies in exposure to child abuse material becoming the norm for early childhood and adolescent sexual behaviour; this would encourage viewers to take and generate photographs of children themselves.<sup>95</sup>

2.49 It is safe to conclude that researchers, child therapists and clinical psychologists have produced enough proof that early exposure to pornography is harmful. As Dr Victor Cline, a professor of psychology and a respected researcher and counsellor on the effects of pornography stated:<sup>96</sup>

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<sup>90</sup> Burgess A "Pornography – Victims and Perpetrators" Symposium Media Violence & Pornography: Proceedings Resource Book and Resource Guide, ed. D. Scott (1984) (pp173 - 183) Toronto: Media Action Group.

<sup>91</sup> Key Findings on the Effects of Pornography, Patrick F. Fagan, Ph.D p3.

<sup>92</sup> Childline representative, FPB, Pornography exposure and the developing mind, paper delivered at the Symposium on effects of children's exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> McGuire Dr Mike & Dowling Samantha Cybercrime: A review of the evidence Home Office Research Report 75 (October 2013) available at <http://www.gov.uk>. Accessed on 29 May 2015. The Oppidan Press reported that a Grahamstown man allegedly posed as a teenager on social media where he convinced young girls to perform sexual acts on camera which he recorded and distributed on the Internet Stout Liam "Child porn accused out on bail" 12 March 2015 available at <http://oppidanpress.com/child-porn-accused-out-on-bail/>. Accessed on 19 May 2015.

<sup>96</sup> American Family Association *Pornography: A Report – An In-depth Look At The Effects of Pornography*, American Family Association (p.11) as referred to by Hamilton JH Protecting Our Children "Is there Proof that Pornography is Harmful? Yes!" available at

“In the scientific world the question of pornography effects is no longer a hot issue. It’s really not debated any more. The scientists and professionals are no longer ‘pretending not to know’...Everybody knows that pornography can cause harm, it can also change people’s behaviour...It’s a powerful form of education. It can also condition people into deviancy. It can also addict...”

## Questions

7. In your view, what are the effects of exposing children to pornography?

## H. The use of pornography to groom children?

2.50 The Human Science and Research Council (HSRC) has found that the Internet and mobile phones can and are being abused to groom children through online sexual talk and display of sexual images and adult content.<sup>97</sup> The HSRC study showed that children living in poverty seem to be at most risk. It reports that after being desensitised through exposure to pornography many children are lured into exchanging explicit pictures of themselves in exchange for airtime, money and material possessions or in other cases for drugs and alcohol. Some children even become victims of adults looking for sexual relationships with underage partners.<sup>98</sup> Groomers may develop online relationships with children, possibly even posing as a child, to obtain such images from the child. In turn the groomer may be part of a network with other offenders who use the images for a purpose other than what they were created for.<sup>99</sup> Child exploiters<sup>100</sup> also deliberately use pornography to groom

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<sup>97</sup> <http://www.strengthenfamily.net/archives/hibbert9/php>. Accessed on 29 May 2015. Children who use the Internet and visit “chatrooms” are more vulnerable to online predators. Some adults engage children in conversations that are inappropriate for their age and/or sexual maturity and often expose them to adult or child pornography, or both. These pictures, to begin with, are innocent enough but, as a relationship of trust is built up, the perpetrator requests more explicit sexual imagery, encouraging the children to perform sexual acts on themselves or their friends. These activities are all part of the grooming process, with the aim of making more direct contact e.g. telephone conversations and, ultimately, face-to-face meetings, where the offender intends to engage the child in sexual relations. Child, Youth, Family & Social Development, “The use of children in pornography in South Africa” HSRC 2007/08/02 p 33; IOL, Williams Bianca, Accused MXit paedophile faces the law, dated 15 April 2010, available at [www.iol.co.za](http://www.iol.co.za); IOL, James Natalie, Game helps kids dodge online paedophiles, dated 15 June 2010, available at [www.iol.co.za](http://www.iol.co.za).

<sup>98</sup> Child, Youth, Family & Social Development, *The use of children in pornography in South Africa* HSRC 2007/08/02 p31.

<sup>99</sup> Wartley Richard and Smallbone Stephen Center for Problem-Oriented Policing University at Albany State of New York *Child Pornography on the Internet* Guide No.41 (2006) Available at [http://www.popcenter.org/problems;child\\_pornography/print/](http://www.popcenter.org/problems;child_pornography/print/) Accessed on 15 May 2015.

children to sexually exploit or abuse them and or for the purpose of generating more child pornography.<sup>101</sup>

2.51 Child abuse material is sometimes also used as a learning instrument in the “grooming process” where a child is de-sensitised to sexual demands and is encouraged to accept as normal their own sexual conduct with adults, or humiliating and harmful sexual practices between children. According to Burgess and Hartman,<sup>102</sup>

“child pornography is produced at the psychological expense of the child because the use of such images binds the child-victim by normalizing the acts and ultimately by acting as a source of blackmail for the child”.<sup>103</sup>

2.52 Similarly according to Svedin and Back,<sup>104</sup> the child is bound by the offender into a silent conspiracy and filled with shame, they feel a sense of degradation, blame and fear of the possible consequences of exposure.

## **I. The commission of “real time” abuse following exposure to pornography and child abuse material**

2.53 Generating inappropriate sexual fantasy in an individual opens the risk of that fantasy becoming a reality. Watching a sexual assault may normalize that activity and encourage the viewer subsequently to commit such assault.<sup>105</sup> Bard et al examined the reported use of and exposure to pornographic materials by two groups: convicted rapists and child exploiters.<sup>106</sup> While both groups indicated similar prior exposure, child exploiters were more likely than rapists to use such materials prior to and during the commission of an offence.<sup>107</sup> A similar

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<sup>100</sup> For an explanation on the use of terminology see Paragraph 1.14 above..

<sup>101</sup> *S v SM* 2013(2) SACR 111 (SCA). In this case the court found that although the offences had been committed before grooming was made an independent crime the behavior of the 14 year old girl’s father which included the viewing of pornography together was “sexual grooming”.

<sup>102</sup> Burgess AW and Hartman CR, Child abuse aspects of child pornography *Psychiatric Annals* 248 – 253 (1987).

<sup>103</sup> Ibid.

<sup>104</sup> Svedin CG and Back C “Why Didn’t they tell us?” On Sexual Abuse in Child Pornography Save the Children (2011) available at <http://resourcecentre.savethechildren.se/library> (last updated 22 May 2015).

<sup>105</sup> An example was provided by the tragic cases of Holly Jones and Tia Rigg and the confession of Jesse Osmun, convicted of the sexual abuse of 5 little girls under the age of 6 years, that child pornography was his “gateway drug” – see paragraph 2.57.

<sup>106</sup> Bard, L.A., Carter, D.L., Cerce, D.D., Knight, R.A., Rosenberg, R. and Schneider, B. (1987), A descriptive study of rapists and child molesters: Developmental, clinical, and criminal characteristics. *Behav. Sci. Law*, 5:203-220. Doi: 10.1002/bsl.2370050211.

<sup>107</sup> See, for instance, Freeze C & Peritz I “Big Items moved out of Brier’s apartment” *The Globe*

study by Marshall also found that slightly more than a third of child exploiters had been incited to commit the offence because they had been exposed to pornography.<sup>108109</sup>

2.54 According to the *Stanford Encyclopedia of Philosophy, Pornography and Censorship*<sup>110</sup> a number of studies have found a positive correlation between exposure to pornographic images whether non-violent or violent (for example, rape, bondage, molestation involving weapons and mutilation) and positive reactions to rape and other forms of violence against women. The *Encyclopedia* states that these findings suggest, among other things, that exposure to violent pornography can significantly enhance a subject's arousal in response to the portrayal of rape; that exposure to films that depict sexual violence against women can act as a stimulus for aggressive acts against women; and that prolonged exposure to degrading pornography (whether violent or non-violent) leads to increased callousness towards victims of sexual violence, a greater acceptance of rape myths (for example, that women enjoy rape and do not mean “no” when they say it), a greater likelihood of having rape fantasies, and a greater likelihood of reporting that one would rape women or force women into unwanted sex acts if there was no chance of being caught.<sup>111</sup>

2.55 Dolf Zillman and Jennings Bryant<sup>112</sup> found the effects of repeated exposure to standard, non-violent, and commonly available pornography included:

- Increased callousness toward women;
- Trivialization of rape as a criminal offence;

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and Mail (28 June 2003) available at <http://www.theglobeandmail.com/news/national/big-items-moved-out-of-briers-apartment/article1018128/>. Briere admitted to being an “avid consumer of child pornography” both at home and at work... “it’s easy...you don’t need a degree...With time, and I don’t know how it is for other people, but for myself, I would say that, yes; viewing the material does motivate you to do other things. In my case, for sure, the more I saw, the more I longed for it in my heart. The more I wanted it...” During the trial, several senior Toronto police officers testified to the existence of a direct causal link between viewing child abuse images and committing contact offences.

<sup>108</sup> Marshall, WL “The use of sexually explicit stimuli by rapists, child molesters and nonoffenders” *Journal of Sex Research*, Vol 25 No 2 pp267 – 288 (May 1988).

<sup>109</sup> The United States of America National Criminal Justice Reference Service found in “Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study 2005 that 40% of arrested child pornography offenders were dual offenders who “sexually victimised children and possessed child pornography, with both crimes discovered in the same investigation.” available at <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=21071>. Accessed on 29 May 2015.

<sup>110</sup> *Stanford Encyclopedia of Philosophy, Pornography and Censorship* May 5, 2004

<sup>111</sup> Ibid.

<sup>112</sup> Quoted by Gilkerson Luke “Is Porn Raising your Kids?” (16 June 2011) Covenant Eyes Internet Accountability and Filtering available at <http://www.covenanteyes.com/2011/06/16>. Accessed on 29 May 2015.

- Distorted perceptions about sexuality; and
- Increased appetite for more “deviant and bizarre types of pornography” (escalation and addiction).<sup>113</sup>

2.56 DeAngelis states that the link between pornography use and child abuse may be greater than we think.<sup>114</sup> Funk believes that “The demand creates a market, which in turn motivates the unscrupulous to provide a supply...it has become a multi-million dollar industry and the mere act of looking at this material online directly enables the victimisation of more children.”<sup>115116</sup> For some people<sup>117</sup> pornography provides the stimulus (when other circumstances allow) to cross the boundary from viewing to abusing. Whether child abuse material per se creates that stimulus, whether the social context in which child abuse material is traded (especially on the Internet) is the critical factor, or whether it facilitates and gives expression to an intention already formed is not clear. However it is clear that there is a relationship of some kind for some individuals.<sup>118</sup> The following interview quotation makes this association apparent: “When I made this video tape I was copying these er movie clips...that I’d downloaded er...I wanted to be ... doing what they were doing”.<sup>119</sup>

<sup>113</sup> Key Findings on the Effects of Pornography, Patrick F. Fagan, Ph.D p6; Film and Publication Board FAQs 2006 p5.

<sup>114</sup> DeAngelis Tori “Porn use and child abuse” American Psychological Association December 2009, Vol 40, No.11. Available at <http://www.apa.org/monitor/2009/12/child-abuse.aspx>. Accessed on 15 May 2015.

<sup>115</sup> Funk John *Child Pornography Leads to Abuse of the Innocent*, January 2012.

<sup>116</sup> As Melissa Hamilton reported in *The Efficacy of Severe Child Pornography Sentencing*, [Stanford Law & Policy Review (2010)], child pornography is “a causative or correlative factor for contact sex offending against children”. According to Professors Liz Kelly and Linsa Regan [*Rhetorics and Realities: Sexual Exploitation of Children in Europe* [EU STOP Report (2000)], pornography is “one practice within a repertoire of child sexual abuse”.

<sup>117</sup> On 6 March 2000, the *Ottawa Sun* published a story entitled *Cyber porn alert* about an 18-year old charged with the possession and distribution of child pornography. He was arrested after an undercover officer met him online while the accused was looking for a partner in a plot to kidnap, rape and kill a child; and on 12 March 2015 The Oppidan Press reported that a Grahamstown man allegedly posed as a teenager on social media where he convinced young girls to perform sexual acts on camera which he recorded and distributed on the Internet. Stout Liam “Child porn accused out on bail” 12 March 2015 Available at <http://oppidanpress.com/child-porn-accused-out-on-bail/>. Accessed on 19 May 2015.

<sup>118</sup> Ibid.

<sup>119</sup> Taylor and Quayle, op.cit. According to a report from the Attorney General of New Jersey, 70% of convicted child molesters also collect child pornography (*Computer Crime*, June 2000). *Innocence Exploited: Child Pornography in the Electronic Age*, Canadian Police College, May 1998, reports that about half of the 700 paedophiles arrested in Los Angeles had child pornography in their possession; and that a study in England showed nearly all child molesters arrested had child pornography in their possession. Mawson Nicola “ISPs powerless against porn” IT Web 20 March 2015 reports that South Africa is one of the countries with the highest “appetite” for child porn. Available on <http://www.itweb.co.za/index.php?option=com-content&view=article&id=142045>. Accessed on 19 May 2015.

2.57 The *Independent Online News* reported similar sentiments from a man in the Peace Corp who had abused young orphans. He said that “when I could not get my fix from pornography, I moved on to hands-on offending. . . child pornography was my ‘gateway drug’.”<sup>120</sup>

2.58 The effects of exposure of people to child pornography cannot be the subject of empirical research for obvious legal, ethical and moral reasons. But one cannot ignore anecdotal evidence. A number of law enforcement agents in the United States of America, the United Kingdom, Canada and Australia, have reported that a high percentage of those who have been charged and convicted for sexual offences against children have also been found to be in possession of pornography and child abuse material.<sup>121</sup> Clinical psychologists Bourke and Hernadendz suggest that men charged with Internet child pornography offences and those who commit real life child sex offences are, in many cases, the same people.<sup>122</sup>

2.59 International law enforcement agents<sup>123</sup> have found that child abuse material does not only constitute a scene of a crime: it also fuels the sexual abuse, brutalisation, torture, and even murder, of vulnerable children. The secretive, complex and sinister nature of sexual exploiters who abuse the Internet for the sexual abuse and exploitation of children is summed up by what police found when they infiltrated the “Shadowz Brotherhood”<sup>124</sup> network. Members of the group had not only posted images of the sexual abuse of children,

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<sup>120</sup> Sheik Umar Rizwana “Why I did it – Peace Corps paedophile” 5 October 2012 IOL News available at <http://www.iol.co.za/news/crime-courts/why-i-did-it-peace-corps-paedophile-1.1397353> Accessed on 24 June 2015.

<sup>121</sup> See, for instance, Margaret Healey, *Child Pornography: an International Perspective*, ECPAT (1996); Australian Parliament Report (1995)]; Bourke, ML & Hernandez, AE: “A report of the incidence of hands-on child victimization by child pornography offenders”, *Journal of Family Violence* (2009) and Long, ML, Alison, LA & McManus, MA: *Child Pornography and Likelihood of Contact Abuse: A Comparison Between Contact Child Sexual Offenders and Noncontact Offenders*, accessible at <http://sax.sagepub.com/content/early/2012/11/15>

<sup>122</sup> DeAngelis Tori “Porn use and child abuse” American Psychological Association December 2009, Vol 40, No.11. Available at <http://www.apa.org/monitor/2009/12/child-abuse.aspx>. Accessed on 15 May 2015.

<sup>123</sup> The “Shadowz Brotherhood” was an international child pornography ring with members in Belgium, the United Kingdom, Italy, Netherlands, Spain, Sweden, Denmark, Romania, Switzerland and the United States. Joint police action in 7 different countries resulted in the arrests of 50 members and the seizure of hundreds of computers, CD-ROMS and videos with thousands of images of children being sexually abused. *Associated Press* report, 11 February 2009 and Leyden John “Police bust global Net pedo ring” 2 July 2002 *The Register* available at [http://www.theregister.co.uk/2002/07/02/police\\_bust\\_global\\_net\\_pedo/](http://www.theregister.co.uk/2002/07/02/police_bust_global_net_pedo/) Accessed on 22 June 2015.

<sup>124</sup> Ibid.

including babies,<sup>125</sup> on their website, but also provided advice on how to use Internet chatrooms to target, groom and lure children for offline sexual abuse.

2.60 Although several studies have shown a link between the non-contact and contact abuse of children, the debate about the link between child abuse material and the actual abuse of children has not ended.<sup>126</sup> In fact, some studies have suggested that there is no link between viewing child abuse material and actually committing sexual abuse against children.<sup>127</sup>

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<sup>125</sup> In May 2010, *WUSA9.com* reported the case of Daniel Woolverton, a former US Army Major, who was jailed after being found guilty of raping, and videotaping, an infant boy of only 3 months

<sup>126</sup> The most recent US government study of convicted Internet child pornography offenders revealed that 85 percent of the offenders said that they had committed acts of sexual abuse against minors, from inappropriate touching to rape. *Debate on Child Pornography's Link to Molesting*, Julian Sher and Benedict Carey (2007)

<sup>127</sup> "Consuming child pornography alone is not a risk factor for committing hands-on sex offenses – at least not for those subjects who had never committed a hands-on sex offense. The majority of the investigated consumers had no previous convictions for hands-on sex offenses." The consumption of Internet child pornography and violent and sex offending – Department of Justice, Psychiatric/Psychological Service, Canton of Zurich, Feldstrasse 42, 8004 Zurich, Switzerland. See, also, *Legalising Child Pornography Will Reduce the Sexual Abuse and Exploitation of Children – right, in the same that legalising rape will reduce violence against women?* Iyavar Chetty (2011)

# CHAPTER 3: LEGISLATIVE FRAMEWORK

## A. Introduction

3.1 The protection of children from all forms of sexual exploitation and sexual abuse is a matter of international importance and is subject to universal jurisdiction.<sup>128</sup> South Africa has enacted legislation to comply with obligations in terms of the European Union Convention on Cybercrime, to which it is a signatory (but has not yet ratified). The existing legislative framework governing pornography and the creation, circulation, exhibition, distribution, and possession of child abuse material includes the FPA, the Sexual Offences Act and the Electronic Communications and Transactions Act 25 of 2002. These three Acts are undergirded and informed by specific rights and freedoms described in the Constitution. This legislative framework is augmented by the content of codes of conduct for Internet Service Providers; regulation by ICASA, established in terms of the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act); the Protection of Personal Information Act 4 of 2013; the Children's Act; the Prevention and Combatting of Trafficking in Persons Act 7 of 2013; the Criminal Procedure Act 51 of 1977; and remedies available through the Protection from Harassment Act 17 of 2011. This chapter will look at the international imperative to protect children. In terms of South African law, the legislative exposition which follows will differentiate between the criminal law response and the regulatory response. The aim of this chapter is to identify possible weaknesses in the law, which may require reform in order to better protect children from exposure to illegal or age-inappropriate pornographic content.

## B. International imperative to protect children

3.2 The United Nations Convention on the Rights of the Child (1989), which has been ratified by South Africa, clearly places an obligation on all States Parties to protect children from exploitation, including exploitation relating to pornography. Section 34 of the Convention reads as follows:

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<sup>128</sup> Terblance SS & Mollema N Child pornography in South Africa SACJ (2011) 3 at p285.

“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 exploitation use of children in prostitution or other unlawful sexual practices;
- (c) The exploitation use of children in pornographic performances and materials.”

3.3 The obligation to protect children from exploitation relating to pornography and related harms is clearly spelled out in this Article. The colloquial term “child pornography” is not used, presumably because the behaviour sought to be addressed is not as immediately obvious when using this collective term.

3.4 Furthermore the United Nations Convention on the Rights of the Child entrenches the right of children to be protected against involvement in child pornography. Article 4 of the Convention explicitly requires countries to take,

all appropriate national, bilateral, and multilateral measures to prevent . . . the inducement or coercion of a child to engage in any unlawful sexual activity . . . [and] the exploitative use of children in pornographic performances and materials.

3.5 In 1996 the 65<sup>th</sup> General Assembly of Interpol (Antalya, Turkey) adopted a specific resolution (AGN/65/RES/9) on child pornography.<sup>129</sup> It was recommended that countries should

- Enact legislation (if they have not already done so) to make the production, distribution, importation or possession of child pornography, criminal offences, and also to make assistance and incitement punishable offences; and
- Consider enacting legislation to allow the seizures of assets derived from such offences.

3.6 This resolution states that legislation in member countries should take account of support currently used to transmit child pornography but should also ensure that new technology is not excluded.<sup>130</sup> Further, maximum priority should be given to child pornography investigations and particular attention should be given to protecting the interests of the child when combating this form of crime.

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<sup>129</sup> Available at <http://www.interpol.int/About-INTERPOL/Structure-and-governance/General-Assembly-Resolutions/Resolutions-1990-to-1999/1996-AGN65>

<sup>130</sup> Available at <http://www.interpol.int/About-INTERPOL/Structure-and-governance/General-Assembly-Resolutions/Resolutions-1990-to-1999/1996-AGN65>

3.7 ECPAT International (a global network of civil society organisations working for the elimination of child prostitution, child pornography and the trafficking of children for sexual purposes) states that in Europe, one of the most important regional legal agreements is the Council of Europe Convention on Cybercrime (Budapest Convention).<sup>131</sup> The 2001 Convention on Cybercrime seeks to foster international co-operation to protect society from cybercrime by criminalising certain conduct and providing for powers to combat such crimes<sup>132</sup> Although the Budapest Convention has been signed by South Africa, it has not been ratified by South Africa or any other country in Africa, Asia or South America.<sup>133</sup> Amongst other things, it provides for expedited preservation of stored computer data,<sup>134</sup> expedited preservation and partial disclosure of traffic data,<sup>135</sup> a production order,<sup>136</sup> search and seizure of stored computer data,<sup>137</sup> interception of content data,<sup>138</sup> and articles on international co-operation.<sup>139</sup> Article 35 provides that a 24 hour, 7 day-a-week point of contact must be designated to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence. Article 9 of the Convention provides for offences related to child pornography. It reads as follows:

**“Article 9 – Offences related to child pornography**

- 1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:
  - a producing child pornography for the purpose of its distribution through a computer system;
  - b offering or making available child pornography through a computer system;
  - c distributing or transmitting child pornography through a computer system;
  - d procuring child pornography through a computer system for oneself or for another person;
  - e possessing child pornography in a computer system or on a computer-data storage medium.

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<sup>131</sup> Ibid.  
<sup>132</sup> European Treaty Series –No.185 Budapest,23.XI.2001 Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>  
<sup>133</sup> Vatis M.A *The Council of Europe Convention on Cybercrime* Proceedings of a Workshop on Deterring CyberAttacks: Informing Strategies and Developing Options for U.S. Policy <http://www.nap.edu/catalog/12997.html> at 220  
<sup>134</sup> Article 16.  
<sup>135</sup> Article 17.  
<sup>136</sup> Article 18.  
<sup>137</sup> Article 19.  
<sup>138</sup> Article 21.  
<sup>139</sup> Chapter III.

- 2 For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:
  - a a minor engaged in sexually explicit conduct;
  - b a person appearing to be a minor engaged in sexually explicit conduct;
  - c realistic images representing a minor engaged in sexually explicit conduct.
- 3 For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.
- 4 Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c.”

3.8 The other important regional agreements identified by ECPAT International are the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention);<sup>140141</sup> and the European Union Directive on combating the sexual abuse and sexual exploitation of children and child pornography. The aim of the Lanzarote Convention is to protect children against sexual exploitation and sexual abuse, whoever the perpetrators are, to provide assistance to victims; and to fight against sexual exploitation and sexual abuse of children because of the increase in these phenomena.<sup>142</sup>

3.9 The Budapest Convention provides for child pornography offences committed by means of computer systems, the provision of procedural law powers to investigate and secure electronic evidence for law enforcement authorities, and engagement in efficient international cooperation. By contrast, the Lanzarote Convention provides for a holistic approach comprising criminal law measures, preventive and protective measures to deal with all forms of sexual violence against children, and for setting up a specific monitoring mechanism. The Lanzarote Convention is not limited to the online or ICT environment, although the Internet is increasingly being used as the primary medium to trade child abuse material (child pornography).

3.10 Article 20 criminalises the production, offering or making available, distribution or transmission, procuring for oneself or for another and the possession of child abuse material. A new element introduced by the Convention is aimed at catching people who view child images online by accessing child abuse material sites, but without downloading those

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<sup>140</sup> Ibid.

<sup>141</sup> This Convention was opened for signature in 2007 and entered into force on 1 July 2010. South Africa is not a signatory to this Convention. Email correspondence from Department of Justice State Law Advisor dated 10 June 2015.

<sup>142</sup> Explanatory Report Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS. 201) 12 July 2007 1002<sup>nd</sup> meeting of Deputies of The Committee of Ministers of the Council of Europe.

images and who therefore cannot be caught under the offence of procuring or possession in some jurisdictions. The Convention provides a defence for authorities and viewers who access these materials for artistic, medical, scientific or similar reasons. The Convention also includes offences concerning the participation of a child in pornographic performances,<sup>143</sup> corruption of children,<sup>144</sup> and solicitation of children for sexual purposes.<sup>145</sup> The European Union Directive on combating the sexual abuse and sexual exploitation of children and child pornography<sup>146</sup> includes provisions aimed at combating child pornography online, and sex tourism. It also aims to prevent child sexual exploiters already convicted of an offence from exercising professional activities involving regular contact with children. South Africa is not party to the Directive.

3.11 According to ECPAT International the most important international agreement regarding child sexual exploitation online is the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC).<sup>147</sup> South Africa ratified this Protocol in 2003.<sup>148</sup><sup>149</sup> Article 3(1)(c) of the OPSC provides that children should be protected from all kinds of sexual exploitation, including the production, distribution, dissemination, importing, exporting, offering, selling or possessing of child pornography.<sup>150</sup>

3.12 *The African Charter on the Rights and Welfare of the Child* similarly contains an imperative to protect children from sexual exploitation and sexual abuse, which includes use of, or exposure to, pornography and child abuse material.

3.13 From an African perspective it is important to note that *The African Charter on the Rights and Welfare of the Child* entered into force on 29 November 1999. According to the Preamble, the Charter was based on consideration of

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<sup>143</sup> Article 21.

<sup>144</sup> Article 22.

<sup>145</sup> Article 23.

<sup>146</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework-Decision 2004/68/JHA available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_trafficking...](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking...) Accessed on 10 June 2015.

<sup>147</sup> Op cit 20.

<sup>148</sup> ECPAT International and Youth Participation Programme *Stay safe from online sexual exploitation: a guide for young people* September 2014

<sup>149</sup> Department: Women, Children and People with Disabilities *The UN Convention on the Rights of the Child* South Africa's Combined Second, Third and Forth Periodic State Party Report to the Committee on the Rights of the Child (Reporting period: 1998 – June 2012) available at <http://children.pan.org.za/sites/default/files/attachments/Final%20>. Accessed on 10 June 2015.

<sup>150</sup> Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

“ . . . the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child. . . .”

and

“ . . . concern that the situation of most African children, remains critical due to the unique factors of their socio- economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child’s physical and mental immaturity he/she needs special safeguards and care”.

The Charter goes on to recognised that

. . . “the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security...”

3.14 Article 1 of the Charter imposes an obligation on Member States Parties to the Charter to “. . . recognize the rights, freedoms and duties enshrined in this Charter. . . .” and to

“undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter and to discourage any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter”.

3.15 Article 4 makes it clear that “in all actions concerning the child undertaken by any person or authority”, the best interests of the child shall be not just of “paramount importance” as provided for in the Constitution of the Republic of South Africa<sup>151</sup> but “the primary consideration”.

3.16 Article 16(1) of the Charter requires State Parties to

“take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.....”

3.17 Article 27 is specific to the protection of children from sexual exploitation. It provides that State Parties

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<sup>151</sup> Section 28(2), Act 108 of 1996

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

3.18 There is no discretion on the part of the State parties to the present Charter – they are obliged to do what is required of them in Articles 16(1) and 27. It is important to note that Article 16 requires State Parties to take specific measures to protect children. For instance, a law that prohibits pornography in general, regardless of the age of the persons depicted, will not meet the requirements of Article 16, because such a law is not specific to child abuse material even if it includes a provision prohibiting the distribution of pornography to children or criminalises the use of children in the creation of pornography. The reality is that child abuse material requires *specific* anti-child abuse material legislation, because child abuse material is recognised not merely as being pornography but also the actual abuse, brutalisation, torture and even murder of children.

3.19 The African Convention on Cyber Security and Personal Data Protection was adopted in Malabo on 27<sup>th</sup> June 2014. The goal of the Convention is to primarily “address the need for harmonised legislation in the area of cyber security in Member States of the African Union”. The Convention defines “child pornography” as follows:

. . . “means any visual depiction, including any photography, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

- a) the production of such visual depiction involves a minor;
- b) such visual depiction is a digital image, computer image, or computer-generated image where a minor is engaging in sexually explicit conduct or when images of their sexual organs are produced or used for primarily sexual purposes and exploited with or without the child’s knowledge;
- c) such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexually explicit conduct.”

3.20 A child or minor is defined as “a human being below the age of eighteen (18) years”. Article 29(3) provides for what is termed “content related offences” and calls upon State Parties to (among others) criminalise the production, procuring, possessing and facilitating of access to child pornography. South Africa however has not signed or ratified this Convention.

## **C. Legislative framework in South Africa**

3.21 The paragraphs below provide, to the extent possible, a description of the criminal law response and the administrative classification and regulation of pornography as it relates to children. However, particularly in respect of the discussion on the Constitution and the FPA, the criminal law and regulatory framework overlap. To avoid repetition under both headings, the discussion is dealt with under the criminal law response. The relevant sections of the abovementioned laws are dealt with below. In certain (but not all) instances, the exposition of the factual law is accompanied by an observation where a concern has been identified.

### **1 The applicable criminal law response**

#### ***a. The Constitution of the Republic of South African***

3.22 The following fundamental rights set out in Chapter 2 of the South African Constitution – the Bill of Rights – are directly relevant to this issue paper.

3.23 Section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”, and that no one may be discriminated against by reason of age and a number of other grounds. Children have the same constitutional fundamental rights as adults. These include the right to have their dignity respected (section 10); the right to life (section 11); the right to freedom and security of the person, which includes the right not be deprived of freedom arbitrarily or without just cause, the right to be free from all forms of violence, not to be tortured in any way, and not to be treated or punished in a cruel, inhuman or degrading way (section 12).

3.24 However, all persons also have the right to privacy. Section 14 of the Constitution provides that:

Everyone has the right to privacy, which includes the right not to have—  
(a) their person or home searched;  
(b) their property searched;  
(c) their possessions seized; or  
(d) the privacy of their communications infringed.

3.25 Section 15(1), which deals with freedom of religion, belief and opinion, states that:

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

3.26 Section 16 of the Constitution, which deals with freedom of expression, states that:

(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.

3.27 Section 22 of the Constitution provides for the freedom of trade, occupation and profession, which is relevant to the business of trading in pornography:

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

3.28 Section 28 of the Constitution specifically contains rights relevant to children. Of particular relevance to this discussion are sections 28(1)(d) and 28(1)(f). Section 28(1)(d) provides for the right to be protected from maltreatment, neglect, abuse and degradation. Section 28(1)(f) provides that a child may not be required or permitted to perform work or provide services that are inappropriate for a person of that child's age; or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development. The rights contained in section 28 are 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;
- (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.

3.29 Section 36 of the Constitution provides for the limitation of rights, which establishes the principle that no right is absolute and may be limited in certain circumstances:

(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; and
- (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.

3.30 A number of constitutional freedoms and rights intersect when one discusses pornography. The most prominent freedoms and rights are the freedom of expression,<sup>152</sup> the right to privacy,<sup>153</sup> the right to dignity<sup>154</sup> and the right of the child in terms of section 28 of the Constitution to have his or her best interests accorded paramount importance in every matter concerning the child.

3.31 Child abuse material consists of content that abuses and degrades children. As mentioned earlier, this affects not just the real-life victims but potentially all children. The reference to "maltreatment, neglect, abuse or degradation" in section 28(1)(d) of the

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<sup>152</sup> Section 16.

<sup>153</sup> Section 14.

<sup>154</sup> Section 10.

Constitution could be seen as reference to acts or conduct which include child abuse material.

3.32 According to the *Stanford Encyclopedia of Philosophy, Pornography and Censorship* the right to pornography (i.e. the right of consenting adults not to be prevented from making, publishing, exhibiting, distributing and consuming pornography) seems to be defended on three main grounds.<sup>155</sup> The first is the grounds of freedom of expression, which protects the freedom of individuals (pornographers) to express their opinions and communicate them to others, however mistaken or, disagreeable or offensive others may find those opinions. In the *De Reuck v DPP*<sup>156</sup> case the court held that the constitutionally protected freedom of expression is content-neutral and encompasses pornography. The court held that the right to expression “does not warrant a narrow reading. Any restriction upon artistic creativity must satisfy the rigours of the limitation analysis.” This means that a limitation to freedom of expression can survive only if it is justifiable as a reasonable and proportional measure to achieve a legitimate purpose.<sup>157</sup> However, the Constitutional Court also held that pornography cannot be said to assist much with the achievement of the goals of this right and does not implicate the core values thereof. It further held that expression that is restricted is, for the most part, of little value and found at the periphery of the right in question.<sup>158</sup>

3.33 The second ground identified by the *Stanford Encyclopedia of Philosophy, Pornography and Censorship*<sup>159</sup> is the right to privacy. This right protects a sphere of private activity in which individuals can explore and indulge their own personal tastes and convictions, free from the threat of coercive pressure or interference by the state and other individuals. The spectre of state intrusion into the private lives of individuals underpins much of the liberal discomfort about limiting access to pornography. However, like the right to freedom of expression, the commitment to privacy is not absolute. Currie and De Waal quote Judge Ackermann where he held in *Bernstein v Bester*<sup>160</sup> that

“ . . . 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.”

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<sup>155</sup> Stanford Encyclopedia of Philosophy Pornography and Censorship May 5, 2004

<sup>156</sup> *De Reuck v DPP (WLD)* 2004 (1) SA 406 (CC).

<sup>157</sup> Currie I & De Waal J *The Bill of Rights Handbook* Fifth Edition Juta & Co, Ltd 2005 p381.

<sup>158</sup> *De Reuck* as quoted in Currie I & De Waal J *The Bill of Rights Handbook* Fifth Edition Juta & Co, Ltd 2005 p382.

<sup>159</sup> *Stanford Encyclopedia of Philosophy Pornography and Censorship* May 5, 2004.

<sup>160</sup> *Bernstein v Bester* NO 1996 (2) SA 751 (CC) as quoted in Currie I & De Waal J *The Bill of Rights Handbook* Fifth Edition Juta & Co, Ltd 2005 p316.

3.34 The *State v Jordan*<sup>161</sup> case makes it clear that the spatial metaphors for example “inner sanctum” or “personal sphere” in the *Bernstein* and other cases are misleading in that they suggest that privacy is a space or a place. The fact that conduct takes place in someone’s home does not decisively answer the question of whether that action merits the protection of the privacy right. What is decisive is whether that conduct is dignity-affirming, and that it therefore conforms to the principal purpose of the privacy right.<sup>162</sup>

3.35 Where reliable evidence exists that the voluntary private consumption of pornography causes sufficiently great harm to other people, then as long as such harm is sufficiently great and state prohibitions are the only effective way of preventing it the state would have a legitimate interest in prohibiting that behaviour. For example in the *De Reuck*<sup>163</sup> case, the Constitutional Court held that an absolute prohibition on possession of child pornography is a justifiable limitation of the right to privacy, because consumption of child pornography is not at the core of what the privacy right seeks to protect. This makes limitation relatively easy to justify.

3.36 The third ground identified by the *Stanford Encyclopedia of Philosophy, Pornography and Censorship*<sup>164</sup> is that pornography is comparatively harmless. Some proponents argue that neither the expression of pornographic opinions, nor the indulging of a private taste for pornography, causes significant harm to others, in the relevant sense of “harm” (i.e. crimes of physical violence or other significant wrongful violations of rights). Hence the publication and voluntary private consumption of pornography is none of the state’s business.<sup>165</sup> The “harm principle” protects the freedom of all mentally competent individuals to live and shape their own lives in accordance with their own preferences and beliefs, so long as they do not harm others in the process. According to John Stuart Mill, however, this principle applies only to human beings who have mature faculties.<sup>166</sup> This principle permits authoritative intervention where people are not competent to make an informed decision about what is in their own best interests, and who therefore “must be protected against their own actions as well as external injury”.<sup>167</sup>

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<sup>161</sup> *The State v Jordan* (2002) 6 SA 642 (CC).

<sup>162</sup> Currie I & De Waal J *The Bill of Rights Handbook Fifth Edition* Juta & Co, Ltd 2005 p323.

<sup>163</sup> *De Reuck v Director of Public Prosecutions (WLD)* 2004 (1) SA 406 (CC) paras 59, 90, 91.

<sup>164</sup> *Stanford Encyclopedia of Philosophy Pornography and Censorship* May 5, 2004.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

3.37 Currie and De Waal<sup>168</sup> mention the case of *Christian Education South Africa v Minister of Education*.<sup>169</sup> In that case the Constitutional Court found that the state is under a constitutional duty to diminish public and private violence in society, and to protect particularly children from maltreatment, abuse and degradation.

3.38 Currie and De Waal<sup>170</sup> note that section 28 of the Constitution sets out a range of rights that provide protection for children, in addition to the protection which children are given by the remainder of the Bill of Rights. Section 28 also constitutionally entrenches the “best interest of the child” principle. Useful content is given to the best interests requirement by the United Nations Convention on the Rights of the Child: in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and States Parties must ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end the States Parties shall take all appropriate legislative and administrative measures.

3.39 In *Sonderup v Tondelli and Another*<sup>171</sup> the Constitutional Court referred to the High Court judgment in the same matter. The view was expressed that persons who possess materials that create a reasonable risk of harm to children shall forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution “trumps” other provisions of the Bill of Rights. However, the Constitutional Court held that this would be alien to the approach adopted by the Court, as constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. The Court held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.<sup>172</sup>

3.40 Furthermore, in *Bannatyne v Bannatyne*<sup>173</sup> the Constitutional Court held that:

“while the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the state to create the necessary environment for parents to do so”.

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<sup>168</sup> Currie I & De Waal J The Bill of Rights Handbook Fifth Edition Juta & Co, Ltd 2005 p180.

<sup>169</sup> 2002 (2) SA 794 (CC).

<sup>170</sup> Ibid at p600.

<sup>171</sup> *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) paras 27-30

<sup>172</sup> Ibid.

<sup>173</sup> 2003 (2) SA 363 (CC).

3.41 The Court held that the state

“ . . . must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28.”

**b. The Sexual Offences Act**

3.42 The Sexual Offences Act differentiates between adult and child pornography. In this Act a “child” is defined as a person under the age of 18.

**Definitions of “pornography” and “child pornography”**

The definition of “pornography” is as follows:

“any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person –

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in conduct or activity characteristically associated with sexual intercourse; or
- (k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person;”.

3.43 The definition of “child pornography” found in the Sexual Offences Act has been enhanced in this paragraph to reflect the differences between the general definition of “pornography” (shown above) and “child pornography”. Bold highlights show the additions found in the definition of “child pornography”, and strikethroughs indicate omissions. The enhanced definition reads as follows:

any image, however created, or any description **or presentation** of a person, real or simulated, who is, **or who is depicted or described or presented as being, under the age of 18 years** ~~or older~~, of an explicit or sexual nature, **whether such image or**

**description or presentation is intended to stimulate erotic or aesthetic feelings or not** ~~that is intended to stimulate erotic feelings~~, including any such image or description of such person –

- (a) engaged in an act that constitutes a sexual offence;
- (b) engaged in an act of sexual penetration;
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation;
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in conduct or activity characteristically associated with sexual intercourse; ~~or~~
- (k) **showing or describing such person –**
  - (i) **participating in, or assisting or facilitating another person to participate in; or**
  - (ii) **being in the presence of another person who commits or in any other manner being involved in,**
- (kl) **any act contemplated in paragraphs (a) to (j); or**
- (kl) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person **or any category of persons under 18** ~~or any person~~ or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person ~~or any other person~~ **or group or categories of persons;**.

3.44 Sections 10 and 19 of the Sexual Offences Act prohibit the exposure or display of, or causing exposure or display of, child pornography. These sections provide as follows:

**10** A person ('A') who unlawfully and intentionally, whether for the sexual gratification of 'A' or of a third person ('C') or not, exposes or displays or causes the exposure or display of child pornography to a complainant 18 years or older ('B'), with or without the consent of 'B', is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography to a person 18 years or older;

**19** A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of—

- (a) any image, publication, depiction, description or sequence of child pornography or pornography;
- (b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or
- (c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law,

to a child ('B'), with or without the consent of 'B', is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

3.45 The Sexual Offences Act specifically criminalises the exposure to or display of child pornography to adults<sup>174</sup> and the exposure to or display of pornography or child pornography to children, irrespective of how this display is done.<sup>175</sup>

3.46 In terms of section 19 of the Sexual Offences Act, it is an offence to unlawfully and intentionally expose or display, or to cause the exposure or display of child pornography, pornography or any material of a "sexual nature", regardless of the age of the person(s) depicted in that material, to a child. It could therefore be argued that it is an offence to unlawfully and intentionally expose children to any material of a sexual nature, even if that material does not fall within the definition of "pornography" in the Sexual Offences Act but is "contemplated in the Films and Publications Act, 1996".<sup>176</sup>

3.47 If interpreted as such, the reference to the FPA in section 19 of the Sexual Offences Act means that the FPA is critical to understanding which types of material will amount to an offence if they are shown to a child.

3.48 Section 19(b) of the Sexual Offences Act deals with the offence of the display or exposure of

"any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation."

3.49 However, the definition of "child pornography" in the Sexual Offences Act means any image or description "of an explicit or sexual nature" of any person under the age of 18 years. By referring to images or descriptions "of a sexual nature of a child", section 19(b) is dealing with child pornography; therefore, section 19(b) is no different from section 19(a). This point might require attention in the discussion paper.

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<sup>174</sup> Section 10 of the Sexual Offences Amendment Act.

<sup>175</sup> Section 19 of the Sexual Offences Amendment Act.

<sup>176</sup> Mr Chetty (KINSA South Africa) is of the opinion that section 19 was included in the Sexual Offences Amendment Act for the reason that prohibitions against the exposure or display of materials of a sexual nature to children in the Films and Publications Act applies only to distributors, as defined in the Act, and not the general public. It was necessary to ensure that no person, whether a distributor or not, was allowed to unlawfully and intentionally expose children to risks of harm from materials of a sexual nature.

3.50 Section 10 of the Sexual Offences Act deals with the prohibition of the display or exposure of child pornography to adults, while section 19 deals with the prohibition of such materials to children. Bearing in mind that the possession of child pornography is a criminal offence under section 24B(1)(a) of the FPA, the proper application of sections 10 and 19 requires any person who displays or exposes child abuse materials to an adult or a child to be charged with:

- violation of section 10 or 19(a) of the Sexual Offences Act, depending on the age of the viewer; or
- violation of section 24B(1)(a) of the FPA; and
- violation of section 24B(2) of the FPA by the viewer if the viewer fails to report the possession of child pornography to the police.

3.51 However, unless the investigating officer is clearly aware of all the offences related to child pornography, the perpetrator will be charged (and sentenced, if convicted) only with a section 10 or 19(a) of the Sexual Offences Act offence, despite having also violated section 24B(1)(a) of the FPA. The viewer may not be charged with any offence.

### ***Sexual grooming***

3.52 In the process of grooming, children may be exposed to pornography or child abuse material. To illustrate the harm caused by exposure to pornography it is instructive to note the nature of the material shown to children.<sup>177</sup> The material may include images of innocent nudity or images of child sexual abuse or exploitation which form part of the sexual exploiter's collection of child abuse material. The nature of the material provides insight into the "intent" of the sexual exploiter. The intention may be to display the abuse he or she has engaged in, or to present a substitution for the abuse he or she wishes to engage in; he or she may even display his or her own collection of child abuse material to the child. This is done:

- as a means of personal sexual stimulation;
- as a substitute for actual abuse;
- to justify and re-enforce to him/herself that sex with children is natural, although he/she knows that it is not;
- to validate his/her behaviour and distorted thinking processes;

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<sup>177</sup> SAPS FCS Detective Learning Programme lecture on "investigation of electronic media facilitated crime".

- to assist in lowering the inhibition of children to sexual abuse;
- to normalize the concept of sex between children and children;
- to normalize the concept of sex between children and adults;
- to blackmail the child (ensure secrecy) to use it as an exchange medium; or for financial gain.

3.53 Section 18(1) of the Sexual Offences Act criminalises the supply, exposure or display of child pornography or pornography to a third person with the intention to encourage, enable, instruct or persuade such third person to perform a sexual act with a child; this offence is “promoting the sexual grooming of a child”. Section 18(2) of the Sexual Offences Act criminalises the supply, exposure or display of child pornography or pornography to a child with the intention to encourage, enable, instruct or persuade the child to perform a sexual act; or to commit any act with or in the presence of a child, or describes the commission of any act to or in the presence of a child with the intention to encourage or persuade the child or to diminish or reduce any resistance or unwillingness on the part of the child to be exposed to child pornography or pornography; this offence is “sexual grooming of a child”. Section 20 makes it a crime to use children for, or to benefit from, child pornography. The relevant sections in the Sexual Offences Act are as follows:

#### **Sexual grooming of children**

**18. (1)** A person (“A”) who—

- (a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child (“B”);
  - (b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by “B”;
  - (c) supplies, exposes or displays to a third person (“C”)—
    - (i) an article which is intended to be used in the performance of a sexual act;
    - (ii) child pornography or pornography; or
    - (iii) a publication or film,
 with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or
  - (d) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B,
- is guilty of the offence of promoting the sexual grooming of a child.

**(2)** A person (“A”) who—

- (a) supplies, exposes or displays to a child complainant (“B”)—
  - (i) an article which is intended to be used in the performance of a sexual act;
  - (ii) child pornography or pornography; or
  - (iii) a publication or film,
 with the intention to encourage, enable, instruct or persuade B to perform a sexual act;

- (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to—
- (i) perform a sexual act with A or a third person (“C”);
  - (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;
  - (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
  - (iv) be exposed to child pornography or pornography;
  - (v) be used for pornographic purposes as contemplated in section 20(1); or
  - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;
- (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;
- (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B—
- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
  - (ii) during such meeting or communication or any subsequent meeting or communication to—
    - (aa) commit a sexual act with A;
    - (bb) discuss, explain or describe the commission of a sexual act; or
    - (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person; or
- (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B,  
is guilty of the offence of sexual grooming of a child.

### **Using children for or benefiting from child pornography**

**20.** (1) A person (“A”) who unlawfully and intentionally uses a child complainant (“B”), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person (“C”) or not—

- (a) for purposes of creating, making or producing;
- (b) by creating, making or producing; or
- (c) in any manner assisting to create, make or produce, any image, publication, depiction, description or sequence in any manner whatsoever of child pornography,

is guilty of the offence of using a child for child pornography.

(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child pornography.

## Trafficking

3.54 The Sexual Offences Act contains a transitional provision which criminalises the trafficking in persons for sexual purposes. Such trafficking would include, for example, children who have been groomed and trafficked for purposes of committing a sexual offence, which may include the creation of child abuse material. This offence will however be removed from the Sexual Offences Act once the Prevention and Combating of Trafficking in Persons Act becomes operational. Section 71 provides as follows:

### Trafficking in persons for sexual purposes

**71.** (1) A person (“A”) who trafficks any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.

(2) A person who—

- (a) orders, commands, organises, supervises, controls or directs trafficking;
- (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or
- (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking,

is guilty of an offence of involvement in trafficking in persons for sexual purposes.

(3) For the purpose of subsection (1), “consent” means voluntary or uncoerced agreement.

(4) Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following—

- (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (i) to (vii) of the definition of trafficking having been used or being present; or
- (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act—
  - (i) asleep;
  - (ii) unconscious;
  - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
  - (iv) a child below the age of 12 years; or
  - (v) a person who is mentally disabled.

(5) A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.

(6) (a) A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic.

(b) A commercial carrier is not guilty of an offence under paragraph (a) if—

- (i) the carrier had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry into or departure from the Republic by that person;
- (ii) the person possessed the travel documents required for lawful entry into or

departure from the Republic when that person boarded, or last boarded, the means of transport to travel to or from the Republic; or

(iii) entry into the Republic occurred only because of illness of or injury to a child or adult on board, stress of weather or other circumstances beyond the control of the commercial carrier.

(c) A commercial carrier is, in addition to any offence under this section, liable to pay the costs of the trafficked person's care and safekeeping and return from, the Republic.

(d) A court must, when convicting a commercial carrier of an offence under this section, in addition order the commercial carrier concerned to pay the costs contemplated in paragraph (c).

3.55 The legal definition of “pornography” in the Sexual Offences Act, though slightly more appropriate than the definitions generally found in dictionaries, still presents a few problems. As stated above:

“pornography” means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings. . . ”

3.56 The points to note are-

- firstly, the persons involved must be 18 years or older;<sup>178</sup>
- secondly, the image or description must be “*of an explicit or sexual nature*”, meaning that even an image that does not involve any act or conduct of a sexual nature but is sufficiently “*explicit*” to stimulate erotic feelings is “legal pornography”; and
- thirdly, reference is made to the intention behind the creation of such images and descriptions. The words “that is intended to stimulate erotic feelings” suggest that the intention of the person who creates an image of “an explicit sexual or sexual nature” is what determines whether or not the image is legal pornography. However, this is a subjective rather than objective criterion – an image may stimulate erotic feelings in some people but merely aesthetic feelings in others.

3.57 Perhaps the “intention” should be deduced from the quality of the image, regardless of its nature, and not from the intention of its creator. Exposing children to pornography should be seen as a crime against children and a violation of relevant sections of the Sexual Offences Act and the FPA.

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<sup>178</sup> This, in fact, is a reaction to the Constitutional Court's definition of “child pornography” in the *Tascoe Luc de Reuck* case (CCT 5/03) – a definition which does not see “child pornography” as either a single concept or as child abuse images but as a combination of the meanings of “child” and “pornography”. This reference to the age of the person(s) involved in such images or descriptions is something which should be included in all definitions of “pornography”.

3.58 The Constitutional Court’s definition of “child pornography” in the *De Reuck* case was expressly rejected by Parliament in passing the Sexual Offences Act.

3.59 There are two fundamental differences between the definitions of “child pornography” in the FPA and the Sexual Offences Act respectively. The obvious difference is the inclusion in the Sexual Offences Act of the phrase “whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not” (see paragraph 3.43 above). This phrase clearly agrees with the judgment of the Supreme Court of Canada that the danger associated with child abuse material does not depend on what was in the mind of the maker or possessor but in the capacity of the child abuse material to be used for purposes like seduction.<sup>179</sup>

3.60 Another important difference in the Sexual Offences Act is the phrase “of an explicit or sexual nature”. This means that “child pornography” includes not only an image or description of a sexual nature involving a child, but is also an *explicit* image or description of a child. That part of the definition of “child pornography” should be interpreted, with reference to subsection (l) of the definition:

showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity<sup>180</sup> or dignity of that person, any person or group or categories of persons”.

3.61 The part of the definition referring to the body or parts of a child has raised questions about why an image of a child that does not involve any act or conduct of a sexual nature can amount to “child pornography”. What about the proverbial “baby-in-the-bathtub” photograph which is taken for a family album? The real question is when does a picture of a child taken with innocent intent become an illegal image?

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<sup>179</sup> *R v Sharpe* [2001] 1 S.C.R.45, 2001 SCC 2, is a Canadian civil rights decision of the Supreme Court of Canada. The Court upheld the child pornography provisions of the Criminal Code of Canada as a valid limitation of the right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms. In doing so, it reversed a ruling by the British Columbia Supreme Court. That opinion, issued by Justice Duncan Shaw, held that the law was what he called a “profound invasion” of rights of privacy and freedom of expression found in the Charter of Rights and Freedoms. Prior to its reversal by the higher court, the ruling sparked extensive public complaints, and more than half of the Members of Parliament called for action by the Prime Minister to override the ruling.

<sup>180</sup> “Sexual integrity” generally means that every person has a right to decide whether or not to engage in any act of a sexual nature.

3.62 Parts (i) and (ii) of the definition of “child pornography” make no reference to “within context” for the reason that parts (i) and (ii) deal with images or descriptions of acts or conduct of a sexual nature. Part (iii) of the definition, however, does deal with the *context* within which the body, or parts of the body of a child is shown or described, since there is no act or conduct of a sexual nature involved. Parliament must therefore have had a particular objective in including part (iii) in the definition of “child pornography”.

3.63 Any reasonable viewer looking at photographs of naked children in a family album would not see such photographs as having any sexual purpose. The context would hardly be interpreted as intended to cause sexual stimulation in any reasonable person. However, extracting a photograph of a naked child from a family album and placing it in an album of sexual photographs, or on an Internet website would change the context such that the purpose of that picture becomes unmistakably sexual in the view of a reasonable person. The *context* gives the photograph a new meaning. In the new context, the same photograph would now, become a form of sexual exploitation and capable of being used for the purpose of sexual exploitation.<sup>181</sup> Sexual exploitation in this context means obtaining any benefit or advantage from the image including sexual gratification or sexual stimulation.

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<sup>181</sup> ***Raising the Bar***, a legal show on TNT in the USA, recently aired an episode which centered on a father accused of endangering his child and promoting child pornography. He had taken a picture of his son in the bathtub, showing the child’s penis, and *posted it on the Internet*. That picture soon appeared on a child pornography website – posted to the site by a person who copied it from the father’s personal website. Had the picture remained in the family album, there would have been no problems. But the context changed when it was posted to the Internet, even if only on the father’s personal website, because it was then *capable of being used for the purpose of sexual exploitation* – as, in fact, happened. See, also, the Arizona, USA case of the Demarees. See *The Baby-In-The-Bathtub Controversy*, Iyavar Chetty, September 2009 and Hill Kashmir In defense of Wal-Mart in the bath tub photos (a.k.a. child pornography) controversy.

## **Questions**

- 8. Are the definitions of “child pornography” and “pornography” in the Sexual Offences Act adequate, or should they be amended? If so how?**
- 9. Is “grooming” by way of exposure to pornography or for the purposes of creating pornography, clear and adequately criminalised?**
- 10. Does the law adequately address concerns around children’s exposure to pornography and child abuse material?**
- 11. Should the law reflect through its definitions that child abuse material or explicit images of children are not victimless crimes?**
- 12. Does the existence of different legal definitions complicate law enforcements responses to crimes involving children and pornography?**
- 13. Should it be a consideration that the purpose of an image or description of a child was artistic or aesthetic where that image or description could be used as child pornography (child abuse material)n?**
- 14. Should photos or images in family photo albums which are capable of being used as child pornography be treated differently from those available on or through an electronic device?**
- 15. Could part (iii) of the definition of “child pornography” in the Sexual Offences Act be interpreted to mean that “sexting” of self-produced nude or semi-nude images will also amount to the distribution, but not the creation or production, of child pornography?**
- 16. When do or should explicit self-images or “sexting” amount to child pornography? How should taking and distributing of explicit self-images by children be dealt with?**

**c. The Films and Publications Act**

3.64 The FPA creates a comprehensive regulatory framework for the classification of films and publications. It has been confirmed in Parliament that legislative amendments are to be made to the FPA in 2015 in order, among other things, to facilitate classification of online content.<sup>182</sup>

3.65 For the purposes of this issue paper, the following definitions set out in section 1 of the FPA are relevant (emphasis is added):

**“child pornography”** includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years-

- (a) engaged in sexual conduct;
- (b) participating in, or assisting another person to participate in, sexual conduct; or
- (c) 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 in such a manner that it is capable of being used for the purposes of sexual exploitation;<sup>183</sup>

**“explicit sexual conduct”** means graphic and detailed visual presentations or descriptions of any conduct contemplated in the definition of “sexual conduct” in this Act;<sup>184</sup>

**“film”** means any sequence of visual images recorded in such a manner that by using such recording such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition through any medium or device;<sup>185</sup>

**“Internet address”** means a website, a bulletin board service, an Internet chat-room or newsgroup or any other Internet or shared network protocol address;

**“Internet service provider”** means any person who carries on the business of providing access to the Internet by any means;

**“possession”**, in relation to a film or publication, without derogating from its ordinary meaning, includes keeping or storing in or on a computer or computer system or

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<sup>182</sup> Presentation by Mr Chetty to Portfolio Committee of Communications 9 September 2014.

<sup>183</sup> Definition of “child pornography” inserted by s. 1 of Act 34/99, substituted by s. 1 of Act 18/2004 and s. 1 of Act 3/2009.

<sup>184</sup> Definition of “explicit sexual conduct” inserted by s. 1 of Act 3/2009.

<sup>185</sup> Definition of “film” substituted by s. 1 of Act 3/2009.

computer data storage medium and also having custody, control or supervision on behalf of another person;<sup>186</sup>

**“publication”** 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;
- (e) any record, magnetic tape, soundtrack 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;

**“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, including 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;<sup>187</sup>

**“sexual violence”** means conduct or acts contemplated in the definitions of “sexual conduct” and “explicit sexual conduct” that are accompanied either by force or coercion, actual or threatened, or that induces fear or psychological trauma in a victim;<sup>188</sup>

**“visual 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.<sup>189</sup>

3.66 The objects of the FPA are unambiguously set out in section 2 of the Act:

[the] objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to

- (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;

<sup>186</sup> Definition of “possession” inserted by s. 1 of Act 18/2004.

<sup>187</sup> Definition of “sexual conduct” inserted by s. 1 of Act 18/2004.

<sup>188</sup> Definition of “sexual violence” inserted by s. 1 of Act 13/2009.

<sup>189</sup> Definition of “visual presentation” substituted by s. 1 of Act 34/99.

- (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and
- (c) make use of children in and the exposure of children to pornography punishable.

3.67 A primary objective of the FPA is to provide for the protection of children through regulating the distribution and public exhibition of media and entertainment materials which pose a risk of harm to children. This aim is achieved by the classification, as contemplated in the Act by the

1. FPB with regard to films, games and publications not under the control of any authority;
2. regulatory authority responsible for the regulation of the Code of Conduct of broadcasters; and
3. authority responsible for the regulation of the Code of Conduct of all publications under its control.

3.68 The FPA provides for the establishment of a FPB,<sup>190</sup> a state-owned body placed within the Department of Communications.<sup>191</sup> The FPB is responsible for the classification of both films<sup>192</sup> and publications<sup>193</sup> in South Africa. It classifies all film material distributed in South Africa, except that which is broadcast. Broadcasters have their own regulatory body.<sup>194</sup>

3.69 The FPB is required to publish guidelines to determine what is disturbing, harmful and threatening to children and to advise the viewing public about such images and scenes. Although the FPB was established as the regulatory authority for films, games and publications that were not covered under any existing regulatory organisations or under a code of conduct, the scope of the FPA extends well beyond the FPB. The FPA is broadly aimed at the protecting children from exposure to potentially disturbing, harmful and age-inappropriate materials in films and publications that fall under the regulatory function of the FPB, and from films and publications that fall under the regulatory authority of bodies that cover broadcasters and publishers.

3.70 The FPA provides for the exemption of broadcasters and publishers from provisions related to the protection of children. Sections 16(1) and 18(6) of the Act provide exemption of broadcasters and publishers from the regulatory authority of the FPB. Exemption is not

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<sup>190</sup> Section 3 of the Act.

<sup>191</sup> Proclamation 47 of 2014, GG 37839, 15 July 2014.

<sup>192</sup> In Chapter 4.

<sup>193</sup> In Chapter 3.

<sup>194</sup> See section on Industry Codes below.

granted from sections of the Act that provide obligations to meet the objectives of the Act. These obligations are to provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care and to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

### **Complaints and Applications relating to Publications**

3.71 Section 16 of the FPA deals with complaints and applications relating to publications.<sup>195</sup> It reads as follows (our emphasis added):

#### **“16. Classification of publications**

(1) Any person may request, in the prescribed manner, that a publication, other than a bona fide newspaper that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.

(2) Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that-

(a) contains sexual conduct which-

(i) violates or shows disrespect for the right to human dignity of any person;

(ii) degrades a person; or

(iii) constitutes incitement to cause harm;

(b) advocates propaganda for war;

(c) incites violence; or

(d) advocates hatred based on any identifiable group characteristic and

that constitutes incitement to cause harm,

shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.

(3) The Board shall refer any publication submitted to the Board in terms of subsection (1) or (2) to a classification committee for examination and classification of such publication.

(4) The classification committee shall, in the prescribed manner, examine a publication referred to it and shall-

(a) classify that publication as a “refused classification” if the publication contains-

(i) child pornography, propaganda for war or incitement of imminent violence; or

(ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is, except with respect to child pornography, a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;

(b) classify the publication as “XX” if it contains-

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<sup>195</sup> Section 16 substituted by s. 19 of Act 3/2009.

- (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
  - (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;
  - (iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
  - (iv) explicit infliction of sexual or domestic violence; or
  - (v) explicit visual presentations of extreme violence, unless, judged within context, the publication is, except with respect to child pornography, a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified "X18" or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;
  - (c) classify the publication as X18 if it contains explicit sexual conduct, unless, judged within context, the publication is, except with respect to child pornography, a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials; or
  - (d) if the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age-restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.
- (5) Where a publication has been classified as a "refused classification" or has been classified "XX" or "X18", the chief executive officer shall cause that classification decision to be published by notice in the Gazette, together with the reasons for the decision.
- (6) Where a publication submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that publication to a police official of the South African Police Service for investigation and prosecution."

### **Applications for and classification of films**

3.72 Section 18 of the FPA sets out similar provisions in respect of applications for and classification of films.<sup>196</sup> This section reads as follows (our emphasis):

#### **18. Classification of films and games**

- (1) Any person who distributes, broadcasts or exhibits any film or game in the Republic shall in the prescribed manner on payment of the prescribed fee-
  - (a) register with the Board as a distributor or exhibitor of films or games; and
  - (b) submit for examination and classification any film or game that has not been classified, exempted or approved in terms of this Act or the Publications Act, 1974 (Act No. 42 of 1974).
- (2) The Board shall refer any film or game submitted under subsection (1)(b) to a classification committee for examination and classification.
- (3) The classification committee shall in the prescribed manner, examine the film or game referred to it and shall-

<sup>196</sup> S. 18 amended by s. 7 of Act 18/2004 and substituted by s. 21 of Act 3/2009.

- (a) classify the film or game as a “refused classification” if the film or game-
    - (i) contains child pornography, propaganda for war or incites imminent violence; or
    - (ii) . . .advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary, is of scientific, dramatic or artistic merit or is on a matter of public interest;
  - (b) classify the film or game as “XX” if it depicts
    - (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
    - (ii) bestiality, incest, rape, conduct or an act which is degrading of human beings;
    - (iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
    - (iv) explicit infliction of sexual or domestic violence; or
    - (v) explicit visual presentations of extreme violence, unless, in respect of the film or game, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified “X18” or classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;
  - (c) classify the film or game as “X18” if it contains explicit sexual conduct, unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials; or
  - (d) if the film or game contains a scene which may be disturbing or harmful to, or age-inappropriate for children, classify that film or game with reference to the relevant guidelines issued by the Board by the imposition of appropriate age restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.
- (4) Where a film or game has been classified as a “refused classification” or has been classified as “XX” or “X18”, the chief executive officer shall cause that classification decision to be published by notice in the Gazette, together with the reasons for the decision.
- (5) Where a film or game submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that film or game to a police official of the South African Police Service for investigation and prosecution.
- (6) A broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall, for the purposes of broadcasting, be exempt from the duty to apply for classification of a film or game and, subject to section 24A (2) and (3), shall, in relation to a film or game, not be subject to any classification or condition made by the Board in relation to that film or game.

### **Adult premises**

3.73 Section 24 of the FPA sets out an exemption in respect of distribution of certain publications and films for a duly-licensed adult premises. This section provides as follows:

(1) Any person may exhibit in public or distribute any film, game or publication classified as “X18” in terms of this Act if such person is the holder of a licence to conduct the business of adult premises, issued by a licensing authority in terms of relevant national, provincial or local government laws: Provided that such exhibition or distribution takes place on or from within premises forming part of a building.<sup>197</sup>

(2) Any exemption granted in terms of subsection (1) may be suspended by the Board for a period not exceeding one year, if the Board, after the holding of an inquiry, is satisfied that-

(a) notices stating that no person under the age of 18 years may enter or be within such premises were not displayed, in the manner prescribed by the Board, at all entrances to the premises concerned;

(b) a film, game or publication was displayed or exhibited within such premises, or in a display window or door forming part thereof, in such a manner or in such a position that the film, game or publication could be seen from any point outside the premises concerned;

(c) any person under the age of 18 years was allowed to enter or be within the premises concerned; or

(d) any film, game or publication classified as “X18” in terms of a decision of the Board, published in the Gazette, was delivered by the person licensed in terms of subsection (1) to conduct such premises

(i) to a person who is not the holder of a similar licence; or

(ii) in a manner which was not in accordance with regulations made under this Act with the aim of preventing the delivery of such films, games or publications to persons under the age of 18 years.<sup>198</sup>

### Offences and Penalties

3.74 Section 24A<sup>199</sup> of the FPA provides for prohibitions, offences and penalties related to the distribution and exhibition of films, games and publications. In section 24A the following offences and penalties are set out:

| Subsection & Offence  | Penalties  |
|---|--|
| (1) Any person who knowingly distributes or exhibits in public a film or game without first having been registered with the Board as a distributor or exhibitor of films or games.  | Fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment. |
| (2) Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication referred to in section 16(1) of this Act which has-<br>(a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper contemplated in section 16(1), not been classified by the Board; | Fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. |

<sup>197</sup> Subs. (1) substituted by s. 28 of Act 3/2009.

<sup>198</sup> Subs. (2) substituted by s. 28 of Act 3/2009.

<sup>199</sup> Section 24A inserted by s. 29 of Act 3/2009.

|   |   |
|---|---|
| <p>(b) been classified as a “refused classification”; or<br/> (c) been classified as “XX”.</p>  |   |
| <p>(3) Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the Board as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or a publication which has been classified “X18”.</p> | <p>Fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.</p> |
| <p>(4) Any person who knowingly distributes or exhibits any film, game or publication-</p> <p>(a) classified as “X18”; or<br/> (b) which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film, game or publication is a bona fide documentary or is of scientific, literary or artistic merit or is on a matter of public interest,<br/> to a person under the age of 18 years</p>          | <p>Fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.</p>    |
| <p>(5) Any person who knowingly distributes a film, game or publication which has been classified by the Board without displaying, clearly and conspicuously and in the prescribed manner, the classification reference number, the age restriction, consumer advice and any other condition imposed on the distribution of that film, game or publication</p>  | <p>Fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.</p> |
| <p>(6) Any person who knowingly advertises a film or game in any medium without indicating, clearly and conspicuously so as to be plainly visible to the public, the age restriction, consumer advice and any other condition imposed on the film or game being advertised</p>  | <p>Fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.</p> |
| <p>(7) Any person who knowingly and without the prior written approval of the Board exhibits in public during the same screening session, or distributes on the same cassette or disc of a film or game, a trailer advertising a film or a game with a more restrictive classification than the featured film or game</p>   | <p>Fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.</p> |

3.75 Section 24B<sup>200</sup> of the FPA provides for prohibitions, offences and penalties on distribution and possession of films, games and publications. In this section, the following offences and penalties are set out:

|  |  |
|--|--|
| <p>(1) Any person who-</p> <p>(a) unlawfully possesses;</p> <p>(b) creates, produces or in any way contributes to, or assists in the creation or production of;</p> <p>(c) imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or</p> <p>(d) knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children.</p> | <p>Within the penal jurisdiction of the court.</p> |
| <p>(2) Any person who, having knowledge of the commission of any offence under subsection (1) or having reason to suspect that such an offence has been or is being committed and fails to-</p> <p>(a) report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; and</p> <p>(b) furnish, at the request of the South African Police Service, all particulars of such knowledge or suspicion.</p>  | <p>Within the penal jurisdiction of the court.</p> |
| <p>(3) Any person who processes, facilitates or attempts to process or facilitate a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of, child pornography.</p>   | <p>Within the penal jurisdiction of the court.</p> |

3.76 The criminal offences set out in section 24B(1) and (3) are clear and unambiguous, provided of course that the evidence is of an image or description that falls within the definition of “child pornography” or, where it does not fall within the definition, that it

<sup>200</sup> S. 24B inserted by s. 29 of Act 3/2009.

advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children.

### **Enforcement**

3.77 Under section 15A<sup>201</sup> of the FPA compliance officers are empowered to enter any premises, with the consent of the person in charge of such premises, on or in which the business of the sale, hire or exhibition of films or games is being conducted. Such entry shall be for the purpose of achieving the objects of the FPA or to:

- Advise distributors and exhibitors of films and games of the requirements of the FPA with regard to the distribution or exhibition of films and games; and
- Ensure that all films and games offered for sale or hire by a distributor have been classified in terms of this Act and that all such films and games display, in the prescribed manner, the classification reference number, the age restriction, consumer advice and such other conditions as may have been imposed on the distribution of such films and games by the Board.

### **Obligations of Internet access and service providers**

3.78 Section 24C of the FPA sets out certain obligations in respect of Internet access and service providers where they provide “child-oriented services” and/or “contact services”. Section 24C provides as follows (added emphasis):

#### **24C. Obligations of Internet access and service providers**

- (1) For the purposes of this section, unless the context otherwise indicates-
- (a) “child-oriented service” means a contact service and includes a content service which is specifically targeted at children;
  - (b) “contact service” means any service intended to enable people previously unacquainted with each other to make initial contact and to communicate with each other;
  - (c) “content” means any sound, text, still picture, moving picture, other audio visual representation or sensory representation and includes any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated but excludes content contained in private communications between consumers;
  - (d) “content service” means-
    - (i) the provision of content; or

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<sup>201</sup> Section 15 A inserted by section 18 of Act 3/2009.

- (ii) the exercise of editorial control over the content conveyed via a communications network, as defined in the Electronic Communications Act, 2005 (Act No. 35 of 2005), to the public or sections of the public; and
- (e) “operator” means any person who provides a child-oriented contact service or content service, including Internet chat-rooms.
- (2) Any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the Internet, shall-
- (a) moderate such services and take such reasonable steps as are necessary to ensure that such services are not being used by any person for the purpose of the commission of any offence against children;
  - (b) prominently display reasonable safety messages in a language that will be clearly understood by children, on all advertisements for a child-oriented service, as well as in the medium used to access such child-oriented service including, where appropriate, chat-room safety messages for chat-rooms or similar contact services;
  - (c) provide a mechanism to enable children to report suspicious behaviour by any person in a chat-room to the service or access provider;
  - (d) report details of any information regarding behaviour which is indicative of the commission of any offence by any person against any child to a police official of the South African Police Service; and
  - (e) where technically feasible, provide children and their parents or primary care-givers with information concerning software or other tools which can be used to filter or block access to content services and contact services, where allowing a child to access such content service or contact service would constitute an offence under this Act or which may be considered unsuitable for children, as well as information concerning the use of such software or other tools.
- (3) Any person who fails to comply with subsection (2) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.<sup>202</sup>

### **Registration and other obligations of Internet service providers**

3.79 Section 27A<sup>203</sup> of the FPA sets out the obligation for Internet Service Providers (ISPs) to register with the FPB, and obligations in respect of child pornography. Section 27A reads as follows:

#### **27A. Registration and other obligations of Internet service providers**

- (1) Every Internet service provider 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) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall –
  - (a) take all reasonable steps to prevent access to the child pornography by any person;

<sup>202</sup> S. 24C inserted by s. 29 of Act 3/2009.

<sup>203</sup> S. 27A inserted by s. 12 of Act 18/2004.

- (b) 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 Service; and
- (c) 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 Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.

(4) Any person who-

- (a) fails to comply with subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; or
- (b) fails to comply with subsection (2) or (3) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.<sup>204</sup>

### **Extra-territorial jurisdiction**

3.80 Section 30A of the FPA provides that:

any citizen or permanent resident of the Republic who commits any act outside the Republic which would have constituted an offence under this Act had it been committed within the Republic, shall be guilty of the offence which would have been so constituted and liable to the penalty prescribed for such offence in this Act.

### **Film and Publication Regulations 2014**

3.81 The Film and Publication Regulations 2014 (the 2014 Regulations) provide for various matters under the FPA, and repeal the prior regulations published on 15 March 2010<sup>205</sup> (the 2010 Regulations). Whereas there was only a single mention of the Internet in the 2010 regulations which served to prohibit the distribution of films and publications classified X18 “on the Internet” Part 7 of the 2014 Regulations provides for a more detailed handling of ISPs. The relevant part provides as follows:

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<sup>204</sup> Subs. (4) substituted by s. 31 of Act 3/2009.

<sup>205</sup> Notice 207 of 2010, GG 33026, 15 March 2010. The 2010 Regulations came into force one day after the last amendment to the FPA in the form of the Film and Publications Amendment Act, 3 of 2009, and as such there has been no change to the FPA for the period between the 2010 and the 2014 Regulations.

## “PART 7: OBLIGATIONS OF INTERNET SERVICE PROVIDERS IN RELATION TO DUTY TO REGISTER WITH BOARD AND ONLINE SUBMISSION OF FILMS, GAMES AND PUBLICATIONS FOR CLASSIFICATION

### **Internet service providers**

21.(1) An application for registration as an Internet service provider in terms of section 27A of the Act shall be made on Form BOARD/E, attached as Annexure "A"(2) An application contemplated in subregulation (1) shall be accompanied by the following documents:

- (a) Proof of payment of the prescribed fee;
- (b) an original valid tax clearance certificate issued by the South African Revenue Service; and
- (c) the registration number of the business in terms of the applicable South African laws.

(3) Every Internet service provider shall, when making an application for registration as Internet service provider, indicate in the application form all measures or steps taken or put in place to ensure that children are not exposed to child pornography and pornography.

(4) The Board may, in terms of section 27A of the Act, require an Internet service provider to demonstrate that the measures contemplated in subregulation (3) are still effective.

(5) No person may host any website or provide access to the Internet as an Internet service provider, unless such person is registered with the Board in terms of section 27A of the Act.

### **Display of registration certificate**

22. The registration certificate as Internet service provider shall be conspicuously displayed in the premises at which the business of the Internet service provider is being conducted.”

### **Film and Publications Tariff Regulations 2014**

3.82 As mentioned above, the FPB has published regulations updating the fees and tariffs applicable to activities it undertakes (the Tariff Regulations). The Tariff Regulations make provision for, among others, the following registration fees:

- Distributor or exhibitor of films or interactive computer games, and mobile cellular and Internet content providers<sup>206</sup>;
- Internet Service Provider; and
- Annual Renewal of distribution certificate.

3.83 The Tariff Regulations further seek to introduce a “licensing fee” of “up to R750 000 at the discretion of the executive committee” for “online distribution”. The term “online

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<sup>206</sup> These terms have not been defined in the Regulations and are not defined in the FPA.

distribution” is not defined in the Film and Publications Act although “distribute” is widely defined, so it is not clear what this activity covers.

### **FPB Draft Online Content Regulations Strategy**

3.84 The FPB has launched a public consultation process relating to its draft Online Content Regulation Policy.<sup>207</sup> The policy states that its objective is to:

create a regulatory classification and compliance monitoring framework, giving effect to sections 18(1) and (2) of the Films and Publications Act 65 of 1996 as amended (“the Act”), by enabling effective regulation and speedy classification of digital content by the Board, and to create an opportunity for co-regulation between the Board and the industry for the classification of digital content distributed on mobile and digital platforms.

3.85 It further states that it applies to:

**any person** who distributes or exhibits online any film, game, or certain publication in the Republic of South Africa. This shall include online distributors of digital films, games, and certain publications, whether locally or internationally. Upon approval this policy shall have the full effect and force of law, as stipulated in section 4A of the Act.

3.86 Against the background of eight guiding principles the policy seeks to “create and enhance cooperation between the Board and the industry to ensure uniform classification, labeling and compliance monitoring of digitally distributed content.” The intended benefit of co-regulation between the Board and the industry is that classification information will be brought to South African consumers under the scope of the FPA.

3.87 The policy provides, among others, for checks and safeguards (clause 9); complaints (clause 11); reviews of classification decisions (clause 12); sanctions for industry classifiers (clause 14); and for policy review (clause 16). The core provisions of the policy are as follows:

#### **5. POLICY ON ONLINE DISTRIBUTION OF DIGITAL FILMS, GAMES, AND CERTAIN PUBLICATIONS**

5.1. In order to ensure the uniform classification of content and the effective regulation of digital content distribution by the Board in the Republic of South Africa, the following policy is hereby enacted:

5.1.1 Any person who intends to distribute any film, game, or certain publication in the

<sup>207</sup> See <http://www.scribd.com/doc/2508141625/draft-online-regulation-policy>.

Republic of South Africa shall first comply with section 18(1) of the Act by applying, in the prescribed manner, for registration as film or game and publications distributor.

5.1.2. In the event that such film, game or publication is in a digital form or format intended for distribution online using the Internet or other mobile platforms, the distributor may bring an application to the Board for the conclusion of an online distribution agreement, in terms of which the distributor, upon payment of the fee prescribed from time to time by the Minister of DOC as the Executive Authority, may classify its online content on behalf of the Board, using the Board's classification Guidelines and the Act; or

5.1.3 Upon payment of the prescribed fee for each title submitted, submit electronically each digital game or film by providing the Board with a link from which the Board will access the online game or film for classification.

5.1.4 Where it is convenient and practical to do so, the Board may dispatch classifiers to the distributors' premises for the purposes of classifying digital content. In such an event the classification shall be deemed to be the classification process of the Board, and the distributors shall ensure that the work of classifiers takes place unhindered and without interference.

5.1.5 In the event that an online distributor arranges to have online content classified by the Board's classifiers in terms of clause 5.

## **5.2. Classification pursuant to an online distribution agreement**

In the event that a content provider or distributor chooses to classify its own content in terms of 5.1.2 above, the distributor shall first satisfy the Board that the rating system to be used for classification is aligned with the Board's classification system and Classification Guidelines, and that the distributor is capable of generating classification ratings and symbols as indicated in 5.1.9 above.

## **5.3. Labelling of digital content distributed online**

5.3.1. Upon classification of digital content in terms of either clause 5.1.2 or 5.1.3, all registered online distributors of digital content shall ensure that, prior to distributing any film, game or publication online, they submit to the Board an application, in the prescribed form, for permission to use the FPB logo. 5.3.2. Upon granting such permission, the Board shall also issue the online distributor with a series of barcodes that will have to be displayed by the content distributor along with the classification decision.

5.3.3. In all classification decisions for digital content, the online distributor must ensure that the

Board's classification decision and logo is conspicuously displayed on the landing page of the website, in the website catalogue of the online distributor's website landing page, at the point of sale, and during the streaming of the digital content.

## **5.4. Transitional arrangements**

5.4.1. It is hereby recorded that the Board has entered into transitional agreements with a number of online distributors who are already distributing digital content in the Republic of South Africa using a classification rating system not aligned with the Board's Classification Guidelines and the Act.

5.4.2. Notwithstanding the duration of each individual contract concluded with online distributors, all online distributors shall ensure that on or before the 31st of March 2016, The ratings systems used for the classification of content intended for distribution in the Republic of South Africa are aligned with the Board's Classification Guidelines and the Act. 5.4.2. As at the 31st of March 2016, no online distributor shall be allowed to distribute digital content in the Republic of South Africa unless such content is classified in terms of the Board's Classification Guidelines, or a system accredited by the Board and aligned with the Board's classification Guidelines and the Act.

5.4.3. All content distributed in the Republic of South Africa at the end of the transitional period shall have been classified in terms of the Board Classification Guidelines and shall display the Film and Publication Board classification decision and logo as illustrated in clause 5.1.9.

## **5.5. Authorisation of distributors' classifiers**

5.5.1. No classification of online media content shall be undertaken by any distributor unless the distributor has been authorised by the Board.

5.5.2 The Board shall not grant authorisation to any distributor unless the distributor satisfies the Board that it has in place a classification and rating system in terms of which the classification process and classification decisions are founded upon the decision-makers consistently applying the Act and the Board's Classification Guidelines, adhering to agreed standards, and employing sound decision-making practices.

5.5.3 The object is that all classification decisions, whether made by the Board or by distributors, will be made in the same way, using the same classification tools for the same classification outcome.

5.5.4 To ensure that all distributor classifiers are classifying content consistently and are properly applying the statutory classification criteria, the distributor's classifiers must have been trained and certified by the Board. The Board will only certify such classifiers if they have completed training approved by the Board and have demonstrated competencies in the application of the Board's Classification Guidelines and the Act.

5.5.5 In granting authorisation, the Board shall retain the power periodically to renew authorisations and to undertake refresher training to ensure that classifiers stay up to date with changes in legislation, including the statutory classification guidelines, and to maintain their classification skills and knowledge at the required level of competence.

5.5.6 Authorised classifiers may be employed full-time by major online content distributors, or they may be engaged by content providers on a classification task basis. Classifiers who are authorised and trained to meet the same minimum requirements and standards may have greater mobility and opportunities to work across media content industries.

## **6. ONLINE DISTRIBUTION OF TELEVISION FILMS AND PROGRAMMES**

6.1. All digital content in the form of television films and programmes streamed online via the Internet shall first be submitted to the Board for pre-distribution classification.

6.2. In relation to online television films and programmes streamed via the Internet, the Board shall in certain circumstances, and for commercial and practical reasons, have the power to determine that such films, television programs and related content that have been classified under an authorised classification system are 'deemed' to have an equivalent Board classification. 6.2. However, to maintain the integrity of the Board's classification scheme, the Board shall only authorise robust and comprehensive classification processes that incorporate the Board's Classification Guidelines and are comparable to those provided for under the Act and the Board Classification Guidelines as reviewed from time to time. Essentially, the Board must be satisfied that authorised classification systems deliver classification decisions comparable to those that might be made if content were classified by the Board's classifiers operating under the Act.

6.3. Where the Board considers that a particular item of media content has generated controversy in another jurisdiction, or is likely to have a high profile on release, it shall have the capacity to call it in for classification by the Board or to request the content provider to classify the product, rather than allow it to be 'deemed. Content providers will be required to make similar judgements of their own volition to minimise the risk of complaints or of an application for review of the classification.

6.4. The Board's determination concerning what content is to be classified by the Board is intended to operate in parallel with the content provider's determination about content that is deemed to be classified.

6.5. For the purposes of this clause 6, the online distributors shall ensure that their websites contain all classification decisions made by the online distributor, along with an explanation to consumers about how their classification systems work, and what content is 'deemed'

## **7. PROHIBITION AGAINST CHILD EXPLOITATIVE MEDIA CONTENT AND CLASSIFICATION BY THE BOARD OF SELF-GENERATED CONTENT**

The rise of user-created content, supported by technological advancements in 'smart phones' and the availability of user distributor tools such as YouTube and other global digital media platforms, has shifted the nature of media users from being audiences to being participants. More and more South Africans, the majority of which are children are using "Contact services 'such as facebook and Twitter. The bulk of this media content is unclassified, and children are therefore left exposed to unclassified content on online platforms. In order to minimise the risk of children's exposure to unclassified content on online platforms, it is hereby recorded that:

7.1 user created content includes any publication as defined in section 1 of the Act to include, inter alia, a drawing, picture, illustration or painting; recording or any other message or communication, including a visual presentation, placed on any distribution network including, but not confined to, the Internet.

7.2 it is a criminal offence in terms of section 24C the Act, for any person to distribute or upload child pornographic images, posts, publications or videos on online distribution networks or social media platforms for the purposes of child exploitation.

7.3 online distributors must ensure that they comply fully with their obligations as set out in section 24C and 27A of the Act by ensuring that they take reasonable steps as are necessary to ensure that their online distribution platforms are not being used for the purposes of committing an offence against children, and report suspicious behaviour by any person using contact services to the Board and South African Police Services.

7.4. With regard to any other content distributed online, the Board shall have the power to order an administrator of any online platform to take down any content that the Board may deem to be potentially harmful and disturbing to children of certain ages.

7.5. In the event that such content is a video clip on YouTube or any other global digital media platform, the Board may of its own accord refer such video clip to the Classification Committee of the Board for classification.

7.6. The decision of the Board's Classification Committee shall be final and binding on the distributors, subject to the online distributor's right to appeal such a decision to the Board's Appeal's Tribunal.

7.7. Upon classification, the Board shall dispatch a copy of the classification decision and an invoice payable by the online distributor within 30 days, in respect of the classification of the content in question.

7.8. The fee payable in respect of the classification of content by the Board in terms of sub-clause 7.7 above shall be the sum equivalent to what the Board charges per title in respect of boxed films or games submitted to it for classification.

7.9. Failure to pay the said classification fee within the stipulated period may result either in the Board withdrawing the online distributor's registration certificate until the fee is paid, or in the online distributor being penalised and legal action being taken against the distributor in terms of section 24A of the Act

7.10. The online distributor shall, from the date of being notified by the Board in writing of the classification decision, take down the unclassified video clip, substitute the same with the one that has been classified by the Board, and display the Film and Publication Board Logo and classification decision as illustrated in clause 5.1.6.

7.11. Where the user-created content is prohibited or illegal content, the Board shall have the power, in addition to ordering the online distributor concerned to take down the content, to refer the offending and illegal content to the South African Police Services for criminal investigation and prosecution.

3.88 The Online Policy has not received wide acceptance. The civil rights group Right2Know (R2K) is of the view that the policy "would leave authorities with far too much

room to infringe on the public's right to freely receive and impart information as enshrined in chapter two of the Constitution" and has launched a petition to "scrap the FPB's draft regulations" under the hashtag #HandsOffOurInternet!.<sup>208209</sup>

3.89 With regards to the FPA, it is of interest to note that there is no reference in the FPA to "pornography". The reason is simple: pornography means different things to different people and there are as many definitions of pornography as there are interest groups. To avoid disputes about whether or not a particular image or scene constituted pornography, even as defined in a dictionary, and poses a risk of harm to the normal development of children, Parliament referred instead to films and publications that contain images or scenes of explicit sexual conduct (i.e. images, scenes or descriptions of acts or conduct characteristically associated with sex and which pose a risk of harm to children). In other words, when dealing with pornography and children, the generally-accepted definition of "pornography" as "depictions or descriptions of acts or conduct characteristically associated with sex involving consenting adults that arouse erotic rather than aesthetic feelings" is not the appropriate concept. In so far as children are concerned, any depiction or description of acts or conduct of a sexual nature, whether or not involving consenting adults and regardless of whether or not it arouses erotic rather than aesthetic feelings, should be seen as posing a risk of harm to the child's normal development. The promulgation of the Sexual Offences Act and the introduction of definitions of "pornography" and "child pornography" in this Act seems to have complicated matters.

3.90 The use of the term "child pornography" also presents some problems. Although this is the most commonly used term and appears in the FPA it invites a comparison with "adult pornography". Hence the SALRC advisory committee decided to refer to "child abuse material" instead.

3.91 Due to international cultural and legal differences there is no universally accepted definition of "pornography". Reference was made by the Constitutional Court in the case *De Reuck v Director of Public Prosecutions*<sup>210</sup> to the definition of "pornography" in The Oxford Dictionary of Current English,<sup>211</sup> namely the

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<sup>208</sup> Right2Know "Stop the Film and Publications Board's attempt to censor the Internet!" (10 March 2015) available at <http://www.r2k.org.za/2015/03/10/statement-stop-the-film-and-publications-board-attempt-...> Accessed on 29 March 2015.

<sup>209</sup> Available at [www.r2k.org.za/HandsOffOurInternet/](http://www.r2k.org.za/HandsOffOurInternet/).

<sup>210</sup> *De Reuck v Director of Public Prosecutions*, Witwatersrand Local Division 2004 (1) SA 406 (CC) at para 20.

<sup>211</sup> Oxford University Press, 1986.

“explicit representation of sexual activity visually or descriptively to stimulate erotic rather than aesthetic feelings”; However,

the definition which was ultimately used by the Constitutional Court in this matter<sup>212</sup> was

“[t]he explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc, in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc containing this.”

3.92 Neither of these definitions include a reference to age or consent of the person(s) involved, or to the nature of the sexual conduct or act. The lack of any reference to age suggests that pornography involving children may be included in the broader definition of pornography. The lack of any reference to the consent of the persons involved in the sexual activity also suggests that consensual or non-consensual sexual activity both constitutes pornography, as long as it stimulates erotic feelings (“causing sexual excitement or desire”) rather than aesthetic ones (“concerned with or sensitive to the beautiful or artistic or tasteful”).

3.93 These definitions do not capture that the response of any person to an explicit image of sexual activity is not an objective but rather a subjective response – what may arouse aesthetic feelings in one person may arouse erotic feelings in another and vice versa. Furthermore what is seen as “legal pornography” in one country may be seen as an illegal<sup>213</sup> depiction of woman or child abuse, disrespect or a violation of a woman or child’s right to have his or her human dignity respected and protected.

3.94 It would seem that the word “pornography” in “child pornography” is what led to a definition that protects the creation, distribution and possession of child sexual abuse materials that stimulate aesthetic and not erotic feelings. The Constitutional’s Court’s twinning of the meanings of “child” and “pornography” in its definition of “child pornography” could be interpreted to provide an “aesthetic” loophole which stands in contrast to the judgments of the Supreme Courts of Canada<sup>214</sup> and the United States of America.<sup>215</sup>

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<sup>212</sup> *De Reuck v Director of Public Prosecutions*, Witwatersrand Local Division 2004 (1) SA 406 (CC) at para 20.

<sup>213</sup> Pornography is illegal in many countries, including China, India and Singapore. In countries where it is legal varying ages of consent inform the legality thereof and what is considered child or adult pornography.

<sup>214</sup> *R v Sharpe* [2001] 1 S.C.R. 45, 2001 SCC 2 and see par 2.4 above.

<sup>215</sup> Max Taylor, Ethel Quayle, Brunner-Routledge, Hove “Child Pornography: An Internet Crime” (2003) *Journal of Sexual Aggression*, 11(2) 227-228. Also see *Paroline v. United States* 134 S.Ct.1710 (2014) [Case No. 12-8561] where knowingly possessing child pornography in contravention of 18 U.S.C §2259 results in liability and has resulted in someone other than the creator of the child pornography being held accountable for the harm and proximate

3.95 The definitions of “film”, “publication”, “computer software” and “visual presentation” cover all forms of expressions, as well as the different formats through which expressions may be created, produced, stored, possessed or distributed. It is important to note that section 24B(1)(d) of the FPA makes it clear that child pornography offences are not restricted only to films and publications with visuals and descriptions of a sexual nature but also include any film or publication “*which advocates, advertises or promotes child pornography or the sexual exploitation of children.*”

3.96 The Act states that no film may be distributed or exhibited in public unless it has been classified by the FPB.<sup>216</sup> Only pornographic publications need to be passed by the FPB before they are released on the market.<sup>217</sup> Criteria for classification of films and publications are contained in sections 16 and 18 of the Act. A film or publication may be classified as a ‘refused classification’, XX, X18, or where the film or publication may be disturbing or harmful to or age-inappropriate for children, it may be classified by the imposition of appropriate age-restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials. Any film classified “XX” may not be distributed but may be possessed for strictly personal and private consumption.<sup>218</sup>

3.97 Child pornography is the only category of materials that is completely prohibited (creation, possession and distribution thereof). The FPA also makes it an offence to expose any person under the age of 18 years to materials with images or descriptions of sexual conduct.<sup>219</sup> Failure to take steps to prevent a child from accessing pornographic materials under a persons’ control is also a criminal offence under the Act. A less serious offence, but an offence nevertheless, is allowing a child to watch a film or video or play a game or read a publication that is classified and rated for children older than the specific child.<sup>220</sup>

3.98 Any person who knowingly distributes a publication containing “banned” content is guilty of an offence.<sup>221</sup> Apart from the usual forms of publication (such as newspapers,

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restitution. There is no justification for possession. Link to full judgment at [http://www.supremecourt.gov/opinions/13pdf/12-8561\\_7758.pdf](http://www.supremecourt.gov/opinions/13pdf/12-8561_7758.pdf).

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Section 16.

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Available at <http://www.fpb.gov.za>.

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Film and Publication Board FAQs 2006 p5.

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Film and Publication Board Internet Safety “A guide to protecting your child from paedophiles and child molesters on the Internet” at p23.

220

Film and Publication Board “child pornography . . . an Internet plague” FAQ's 2006.

221

S24A of Act 65 of 1996. “Banned content” is content classified as XX or X18.

books, posters and so on) the Act's definition of publication includes any record, magnetic tape, soundtrack and computer software which is not a film.<sup>222</sup> A publication also includes "any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet".<sup>223</sup> A visual presentation includes a drawing, picture, illustration, painting, photograph or image, as well as such items produced by means of computer software.<sup>224</sup>

3.99 However, some children voluntarily create their own "pornography" by taking suggestive, lewd or nude photos of themselves and thereafter distribute these images electronically to other people including peers. Although they have not been abused themselves through the making of these images, these images may be considered "child pornography" and used in various ways and by various people including sexual exploiters. Although this may constitute inappropriate sexual behaviour it does not necessarily amount to child abuse material or images. This phenomenon may necessitate attention being given to the broader issue of inappropriate material. It may even be necessary to define an appropriate term perhaps "explicit child self-image".

3.100 Two sections of the FPA have been identified for possible amendment to ensure that distributors, exhibitors, broadcasters and publishers minimise children's access to materials that pose a risk of harm to their normal development and security, especially from peer-to-peer sexual abuse, bearing in mind that a number of cases have been reported of young children sexually abusing younger children as imitations of what they would have seen in movies, on television and in magazines with content of a sexual nature i.e., pornography.

3.101 Section 24 of the FPA provides for the legal distribution and exhibition of materials classified "X18". A film, game or publication would be classified "X18" "if it contains explicit sexual conduct, unless, judged within context, the film or game is, except with respect to child pornography, a *bona fide* documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials." It should be noted that even if such content, within context, is a *bona fide* documentary or is of a scientific, dramatic or artistic nature, it should still be classified according to age-appropriateness.

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<sup>222</sup> S1.

<sup>223</sup> S1. this part of the definition was added by s1(b) of the Films and Publications Amendment Act 34 of 1999. Van der Merwe et al Information and Communications Technology Law Lexis Nexis Durban (2008) at p458.

<sup>224</sup> Ibid.

3.102 Section 24 makes it clear that “only the holder of a licence to conduct the business of adult premises” may exhibit in public or distribute “X18” materials “provided that such distribution or exhibition takes place on or from within premises forming part of a building” One of the conditions for operating an “adult premises” to distribute "adult" films is that the person must display, clearly and prominently, at all entrances to the premises, notices stating that no person under the age of 18 years may enter the premises. This also means that persons under the age of 18 years may not enter even if they wish to buy or rent a general film.<sup>225</sup> A video shop for general movies cannot sell or rent out "adult" films unless the "adult" section is completely separated from the general section and has its own entrance.<sup>226</sup>

3.103 Parliament’s intention with the prohibition against the distribution and exhibition of “X18” materials against any person except the holder of a licence for an adult business premises and only from within which any distribution or exhibition of such materials may take place is based on the premise that one can identify a person over the age of 18 years from face-to-face contact and from requesting production of an Identity document to make sure that the person within an adult premises is an adult and not a person under the age of 18 years. There is no way to prevent a person under the age of 18 years from pretending to be an adult online. And there is no way to ensure that any “X18” materials sent via mail will only be picked up by an adult. Face-to-face contact was deemed the most appropriate way to ensure that any person seeking “X18” materials is not a person under the age of 18 years. Distribution may therefore not be by way of mail-order or via the Internet.

3.104 It is important to note that “distribute”, in relation to a film, game or publication, includes the handing to a person under the age of 18 years, or exhibition of, or failure to take reasonable steps to prevent access to, a film, game or publication which contains-

- *child pornography;*
- explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
- bestiality, incest, rape, conduct or an act which is degrading of human beings;
- conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
- explicit infliction of sexual or domestic violence;

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<sup>225</sup> Film and Publication Board FAQs 2006 p6.  
<sup>226</sup> Ibid.

- explicit visual presentations of extreme violence; and
- explicit sexual conduct.

3.105 The Commission has identified the failure of law enforcement to implement section 24(3) of the FPA to ensure that “X18” materials are not distributed or exhibited through local websites or broadcast as a problematic area.

3.106 This could possibly be remedied by amending section 24(3) of the FPA to include the words **“or would have been so classified had it been submitted to the Board for classification”** between “X18” and “shall” to ensure that there is no difference about what constitutes “X18” materials between different regulatory authorities. Section 24(3) of the FPA could it is suggested, read as follows:

“Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the FPB as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or a publication which has been classified “X18”, **or would have been so classified had it been submitted to the Board for classification**, shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”

3.107 A similar amendment could be made to section 24(2) of the FPA, especially subsection (c) which deals with “XX” classifications<sup>227</sup> of materials with content of:

- explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
- bestiality, incest, rape, conduct or an act which is degrading of human beings;
- conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
- explicit infliction of sexual or domestic violence; or
- explicit visual presentations of extreme violence.

3.108 **Please comment on whether sections 24A(2)(c) and 24(3) of the Films and Publications Act should be amended by inserting the words:**

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It should be noted that “XX” classifications are not violations of any right to freedom of expression but aimed at the protection of the those who do not want to be exposed to materials which offend their sensitivities. Consumers are not prohibited from possession of “XX” materials for personal and private use even though such materials are prohibited from being distributed, exhibited or offered for sale or hire within the Republic

“or would.....have been so classified had it been submitted for classification”.

3.109 Section 24A(2)(c) of the original Films and Publications Amendment Bill, D 27F - 2006, as amended by the National Assembly Portfolio Committee on Home Affairs provided that any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for sale or hire any film, game or a publication which has “*been classified as ‘XX’, or would.....have been so classified had it been submitted for classification.*” However, following representations to the President by advocates lobbying for the recognition of the right to freedom of expression, the Bill was referred back to the Parliament’s Portfolio Committee on Home Affairs for amendment and the words “*or would.....have been so classified had it been submitted for classification*” were deleted due to them being found to be unconstitutional since it requires the public to make classification decisions. It is argued that this would however not be the case, because except for child pornography, the Act does not apply to consumers. The general public is not under any obligation to submit films for classification – or even watch only films which have been classified. The Act regulates the distribution and exhibition, and not the consumption, of films.

3.110 The Films and Publications Amendment Bill, 2006, was proposed in recognition of the need to enhance measures<sup>228</sup> aimed at the protection of children from the increasing dangers to their social, emotional and psychological wellbeing, as well as their cognitive development, from a rapidly advancing and converging ICT, particularly the Internet and television, creating an increasingly psychologically-toxic media environment. Given that research strongly suggests a high correlation between children’s viewing of television and negative impact on the development of children and the concern of parents about “*an excess of sex and violence on TV*”,<sup>229</sup> Government’s compelling interest in the welfare and wellbeing

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<sup>228</sup> Every Government party to the *United Nations Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of Children* should recognise that in this age of rapidly-advancing and converging information and communication technology, *taking all measures to protect children* includes the constant monitoring of changes and developments in information and communication technology to ensure that child-protection laws and initiatives keep pace with changes and developments that pose new risks of harm to children

<sup>229</sup> According to Mr Chetty (advisory committee member): “The FPB receives more complaints about disturbing and harmful content in TV programmes than about films. Most parents interviewed by the FPB were adamant that “water-shed” programming of adult materials on TV does not help since that is based on the assumption that all children are asleep at times E-tv broadcasts its pornographic films. As well, children often tape such films for viewing when parents are not around. It may also be noted that E-tv ignored the FPB’s advice that the broadcasting of advertisements about pornographic materials distributed through mobile cellular phones amounts to the promotion of illegal distributors since the distribution of pornography via mobile cellular phones is a contravention of section 24 of the Act”.

of children required the review of the FPA to ensure that measures aimed at the protection of children keep pace with changes in the media environment. The Department of Home Affairs argued in Parliament that the freedom of expression cannot exist in a vacuum but within the context of fundamental rights and values, including the protection of those fundamental human rights and values as enshrined in the Constitution:

“Freedom of expression does not come from an absence of regulation but from regulation of a certain kind. Freedom of expression can flourish by setting it within the principles and ideals that reach beyond the compromises of ordinary politics – to the end of protecting fundamental values.”

3.111 In other words freedom of expression stops where the rights and welfare of children begin. Parliament’s intention in providing for restrictions on the distribution and exhibition in public of “X18”, *whether classified or not*, and on prohibitions on the distribution and exhibition in public of “XX” films, *“whether classified or not”*, is: to minimise children’s access and exposure to potentially disturbing and harmful films and to protect the general public from unsolicited exposure to films which may be offensive to certain sensitivities. In order to achieve these two primary objectives, it was argued that the restrictions and prohibitions must apply not only to films which have been classified “X18” or “XX” but also to materials *which would have been so classified had they been submitted for classification*.

3.112 Bearing in mind that child pornography is not a matter for classification, films classified “XX” are prohibited only from broadcast, distribution or exhibition in public. There is no prohibition on the possession, for personal and private use, of any film in South Africa, regardless of its classification or rating. The reasons for prohibitions on the broadcast, distribution or public exhibition of “XX” films are: films classified “XX” contain materials that are beyond the level of generally-accepted social tolerance, is degrading of human beings, violate the right to human dignity or incite, encourage or condone acts or conduct which are harmful to society. Section 24(2)(c) was, therefore, aimed at prohibiting the broadcast, distribution or public exhibition of such films. A person who distributes or exhibits a film or game is a “distributor”. The obligation to submit films for classification is therefore imposed on *distributors*, as defined in the Act, and not on the “public”. Sections 18 and 24A do not apply to members of the public as the *consumers*, but to distributors, of films, games and publication. A decision as to whether or not a film has to be submitted for classification is a matter for a *distributor* and not the general public. A member of the public, *who is not a distributor*, is under no obligation to either submit a film for classification or make classification decisions.

3.113 It is important to remember, *firstly*, that not all films intended for distribution or public exhibition are submitted for classification, despite the legal requirement to do so; *secondly*, that broadcasters have been exempted from the requirement to submit films intended for broadcast for classification; and *thirdly*, that, with the exception of films, games and publications containing child pornography, the Act does not apply to the general public but to *distributors* - and a “distributor”, in terms of the Act, is a person *who conducts business in the selling, hiring out or exhibition of films*. The Act provides for the regulation of the *distribution and exhibition* of films, games and certain publications and not the regulation of *consumption*. Consumers enjoy full freedom of expression, except with respect to child pornography.

3.114 As stated above, films which have not been classified or classified “XX” are prohibited from distribution. Films classified “X18” may only be distributed by holders of licences to conduct the business of adult premises, only to adults and only from within premises in respect of which licences to conduct the business of adult premises have been issued. However, broadcasters are not required to submit films intended for broadcasting for classification but may not broadcast any film already classified “XX” or “X18”. Since broadcasters are not required to submit films for classification, there is no prohibition on broadcasters screening pornographic films which have not been classified even if such films would have been classified “XX” or “18” had they been submitted for classification. A television broadcaster may therefore broadcast a film that a cinema may not exhibit or a distributor may not sell or hire out.

3.115 Finally, an important key to minimising the risk of children’s exposure to potentially harmful and disturbing materials is to raise the general public awareness that those who provide and allow children’s access to the Internet, via computer laptops and mobile phones, as well as television, should realise that this access presents opportunities and risks and should therefore monitor their children’s access to chatrooms and make use of filters to block access to known websites that host potentially harmful content to children, as well as exercise parental control of television. Failure to do so may be seen as falling within the context of “distribute” as contemplated in the FPA and therefore constitutes an offence.

3.116 The legislative provisions with respect to the classification of adult content are repeated in the South African Cellular Operators Association Code of Good Practice (SA Cellular Code) as well as the Wireless Application Service Providers’ Association Code of

Conduct (WASPA Code). Through the operation of the codes the mobile operators and their content providers are bound by these provisions.<sup>230</sup>

3.117 Acknowledging the reach of the FPA by content regulatory authorities, particularly those responsible for the regulation of broadcasters and publishers, would certainly decrease children's access to explicit images and descriptions of a sexual nature that pose a risk of harm to their normal development. As stated earlier, the FPA should be seen as Parliament's response to the risks posed to children by potentially harmful, disturbing and age-inappropriate content in films, games and publications. Therefore, all provisions related to the protection of children should be implemented by all content regulatory authorities and not just the FPB. The only difference between the FPB and content regulatory authorities of broadcastings and publications, including newspapers and magazines, is that the regulatory functions of the FPB do not apply to other content regulatory authorities – but that does not mean that the provisions of the FPA that deals with what materials children should be protected do not apply to broadcasters and publishers. It should also be noted that, except for offences related to child pornography, regulatory provisions of the FPA do not apply to the general public but to distributors (as defined in the Act). Even the offence provisions related to distribution and exhibition of films, games and publications apply to distributors and not the general public.

3.118 The Commission holds the view that the management of child abuse material and the safety (including the protection) of the child used in creating that material should be linked to the management of the child in and through the Criminal Justice System. These children are particularly vulnerable and need extra protection. Currently the handling of child abuse material by relevant role-players in the Criminal Justice System would seem to be problematic. The Commission suggests that legislation and guidelines or standing instructions should be put in place for the appropriate management of child abuse material. This will ensure that all role-players implement appropriate measures to safeguard the privacy of the child in the child abuse material, including enforcement of the fact that an accused and the defence counsel have a right to access the material but not to possession; and an overarching clause that the court needs to be cleared of non-essential people. The Commission is also of the preliminary view that the preservation and safekeeping of this material pending an appeal and the subsequent destruction of the material needs to be captured in legislation.

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<sup>230</sup> Lisa Thornton Inc Protecting Minors from Harmful Content via Mobile Phones, discussion paper presented for Lawyers for Human Rights Child Rights Project Focus Group on 29 March 2007.

3.119 There appears to be a few inconsistencies with the relevant sections of the FPA in section 19 of the Films and Publications Regulations 2014. Subsection 19(1)(a) seems to suggest that a classification process does not have to be stopped if “the classification committee **is satisfied that the image or scene evokes aesthetic rather than erotic feelings . . .**”. The understanding is that it should be stopped irrespective.

3.120 It is also not certain why reference is only made to “the image or scene” (in a film, game or publication) when the definitions of “child pornography” in both the Sexual Offences Act and the FPA refer to an “image, description or presentation”. The Regulations seem to be based on the finding of the Constitutional Court in the *De Reuck* case. However the offence of child pornography was worded in the Sexual Offence Act after the *De Reuck* case with the aim of correcting this understanding.

3.121 The description of what amounts to “child pornography” in section 19(1)(a) does not seem to be consistent with the definitions contained in the Sexual Offences Act and FPA. Section 19(1)(c) of the Regulations provides that the “chief executive officer shall hand a copy of the report – on child pornography by a classification committee – to the National Director of Public Prosecutions”. However sections 16(6) and 18(5) provide that it should be referred to “a police official of the South African Police Service for investigation and prosecution”.

3.122 Section 19(1)(d) only makes reference to section 16(4)(a) where it should include reference to section 18(3)(a) as well. As child pornography should not be seen as a matter of classification but as a crime for the attention of the police the statement that a person has a right to appeal to the Appeal Tribunal within 30 days from the date of such notification is inconsistent with the FPA. The difference between a “refused classification” and a decision to refuse classification should be clarified. There is no obligation in terms of the FPA to notify an applicant of the stopping of the classification process for referral to a police official because of child abuse material content. There should be no delay in reporting the matter to the police.

3.123 Further the definition of “adult content” as films, games and publications classified as “suitable for people of 18 years and above” is not consistent with the FPA.

## Questions

17. Please comment on whether sections 24(2)(c) and 24(3) of the Films and Publications Act (FPA) should be amended by inserting the words:  
  
“or would . . . have been so classified had it been submitted for classification”.
18. If the purpose of prohibiting the distribution or exhibition of films within the categories of “Refused Classification”, “XX” or “X18”, *whether classified or not*, is the protection of children, why should broadcasters be allowed to screen such films? This question must be asked because it is known that children watch more films on TV than in cinemas.
19. To what extent is the FPA applicable to regulatory authorities of broadcasters and publishers?
20. Are the offences relating to child pornography correctly placed in the FPA?
21. What is the appropriate legal response to children at risk of exposure to pornography or child abuse material?
22. International examples exist of law which provide that downloading any image from a digital device is “creation” thereof. Should South African law be amended to reflect this?
23. Provide your view on whether foreign based services used by children such as Whatsapp fall under the obligations found in section 24C and if not should they?
24. Is the provision on extra-territorial jurisdiction in the FPA sufficient to cater for the international reach of the Internet and for anomalies such as different ages of consent in different countries?
25. If the purpose of the FPA is to classify and not to create crimes, should the crimes created in the Sexual Offences Act be given preference?

26. **Comment on whether in your view a child used to create child abuse material is adequately protected by Criminal Justice role-players.**
27. **In your view is the management of child pornography (child abuse material) adequately governed in the Criminal Justice system; if not, whether legislative change is needed to assist these role-players to protect children.**
28. **Explain whether in your view the law allows for appropriate searches and seizures.**
29. **Section 27 of the FPA allows a service provider to suspend access. However this is not helpful to the police as they need to trace the person and cannot do this if access is suspended. There is a fine line between “finding” child pornography and “viewing” it. How should this problem be remedied?**
30. **Is it or should it be an offence to expose children to any material of a sexual nature even if that material does not fall within the definition of “pornography” in the Sexual Offences Act but is “contemplated in the Films and Publications Act, 1996”?**
31. **The offences in the FPA do not all include prescribed sentences. Explain if and why it would be necessary to include penalty clauses for these offences and what the appropriate sentence should be.**
32. **Should a sentencing clause be added to the FPA?**

***d. The Children's Act***

3.124 The Children's Act governs all the laws relating to the care and protection of children. It defines the responsibilities and rights of parents and gives practical effect to certain of the fundamental rights enjoyed by children under section 28 of the Constitution.

3.125 The Children's Act does not define “pornography” or “child pornography”. However it includes the trafficking of or procurement of a child to perform sexual activities for financial or other reward, including pornography under the definition of “commercial sexual exploitation” and the “using a child in or deliberately exposing a child to sexual activities or pornography”

as “sexual abuse”. In turn “sexual abuse” and “exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally” is part of the overarching definition of “abuse”. Such a child may be found to be in need of care in terms of section 150 of the Children’s Act. The relevant definitions are as follows:

“(1) In this Act, unless the context indicates otherwise-

**'abuse'**, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;

**“commercial sexual exploitation”**, in relation to a child, means—

- (a) the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person; or
- (b) trafficking in a child for use in sexual activities, including prostitution or pornography;

**'exploitation'**, in relation to a child, includes-

- (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
- (b) sexual exploitation;
- (c) servitude;
- (d) forced labour or services;
- (e) child labour prohibited in terms of section 141; and
- (f) the removal of body parts;

**'sexual abuse'**, in relation to a child, means-

- (a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
- (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
- (c) using a child in or deliberately exposing a child to sexual activities or pornography; or
- (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child;

**'trafficking'**, in relation to a child-

- (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic-
  - (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

- (ii) due to a position of vulnerability, for the purpose of exploitation; and
- (b) includes the adoption of a child facilitated or secured through illegal means;” and

3.126 Section 305(5) provides that:

A person who is the owner, lessor, manager, tenant or occupier of any premises on which the commercial sexual exploitation of a child has occurred is guilty of an offence if that person, on gaining information of that occurrence, fails to promptly take reasonable steps to report the occurrence to the South African Police Service.

3.127 In addition to the provisions above the Children’s Act is currently undergoing a comprehensive review by the Department of Social Development. The Children’s Amendment Bill [PMB2-2015] dated 18 February 2015 tables the need to include offences against children which are contained in the Sexual Offences Act for the purpose of adding the offences to the list of offences in the Act that constitute a disqualification when it comes to working with children. The Amendment Bill also includes the insertion of a differentiation between adult and child offenders when criminal courts make findings of unsuitability to work with children, so as to bring the Act in line with the recent Constitutional Court finding in *J v NDPP and another*.<sup>231</sup>

3.128 Generally where legislation includes words which are not defined they are accorded their ordinary dictionary meaning. Terblanche and Mollema<sup>232</sup> argue that if this were to be done for the word “pornography” in the Children’s Act it would lead to the introduction of a third definition into our criminal law, thereby creating further uncertainty. As shown above the Sexual Offences Act and the FPA already contain different definitions.

## Questions

- 33. In your view is it sufficient for the Children’s Act to make reference to “pornography” without defining it?**

<sup>231</sup> 2014, CCT 114/13.

<sup>232</sup> Terblanche SS & Mollema N Child pornography in South Africa SACJ (2011) 3, 283 – 308 at 296.

**e. *The Regulation of Interception of Communications and Provision of Communication-related Information Act***

3.129 The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (“RICA”) governs the interception and monitoring of electronic communications in South Africa. The central feature of RICA is a prohibition against the interception of monitoring of communications outside of the authorised exceptions: in this sense it is a law of general application which specifies limitations on the right to confidentiality of communications set out in section 14(d) of the South African Constitution.

3.130 RICA is important for interception and a powerful law enforcement tool. No person may intercept any communication unless such actions fall within an exception provided for. Communications include direct (oral) and indirect (electronic) communications. Indirect communications include downloading content from the Internet, SMS and e-mail, amongst others. Although not specifically provided for, where the criteria of the Act are met, interception may occur where children are for example shown child abuse material over mobile phones in order to groom them or to persuade them to reveal personal information. According to a discussion paper presented for Lawyers for Human Rights the criteria for interception are however very strict, for example only where there is an interception direction from a court, where authority is granted by a party of the communication; to prevent serious bodily harm (which must be immediate) or to determine location in case of emergency.<sup>233</sup>

3.131 RICA regulates the interception of communications, the monitoring of radio signals and radio frequency spectrums and the provision of communication-related information – information relating to indirect communication in the records of telecommunication service providers such as found in traffic headers. It also regulates applications for interception of communications and provision of communication-related information under certain circumstances – referred to as interception directions.

3.132 It further regulates law enforcement where interception of communications is involved and prohibits the provision of telecommunication services which do not have the capability to be intercepted. It provides for the establishment of an Office for Interception Centres which can effect interception and monitoring on behalf of law enforcement agencies.

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<sup>233</sup> Lisa Thornton Inc Protecting Minors from Harmful Content via Mobile Phones, discussion paper presented for Lawyers for Human Rights Child Rights Project Focus Group on 29 March 2007 at p13.

3.133 The best-known aspect of RICA is the customer registration requirements set out in sections 39 and 40 of the Act. There is also a requirement for telecommunication service providers to store communication-related information (CRI), although it does not appear that this has been implemented.

3.134 Service providers are obliged to obtain and retain detailed information of persons who enter into a contract with a mobile cellular telecommunications service provider, as well as consumers who only buy a cellular telephone or a SIM-card. This is aimed at ensuring that a person using a mobile phone is traceable and can be held accountable for his or her usage and or abuse of the mobile service.

2.135 The Commission has noted that aspects of this Act – including those relating to the retention of traffic information – remain unimplemented although these could potentially bolster law enforcement's efforts in respect of the investigation and prosecution of child abuse image offences.

***f. The Cybercrimes and Related Matters Bill***

3.136 In 2015 The Department of Justice and Constitutional Development consulted with various stakeholders on the Cybercrimes and Related Matters Bill. Cabinet was thereafter requested to approve that the Department may engage on a broad consultation process on the Bill. The Bill will be published for general comment once Cabinet approval is granted. The Bill seeks to create offences for cybercrimes and to impose penalties; to regulate jurisdiction in respect of cyber matters; to regulate the powers to investigate, search and access or seize data; to further regulate aspects of international cooperation in respect of the investigation of cybercrime; to provide for the establishment of a 24/7 point of contact; to provide for the establishment of various structures to deal with cyber security; to regulate the identification and declaration of National Critical Information Infrastructures and measures to protect National Critical Information Infrastructures; to further regulate aspects relating to evidence; to impose obligations on electronic communication service providers regarding aspects which may impact on cyber security; to provide that the President may enter into agreements with foreign States or territories to promote cyber security; to repeal and amend certain provisions of the Electronic Communications and Transactions Act, 2002.

3.137 The Bill defines a child as a person under the age of 18. An earlier draft of the Bill presented to the Commission Advisory Committee on 6 March 2015 contained a definition of

“child pornography” which mirrors that of the Sexual Offences Act. Clause 20 criminalised a number of offences facilitated through a computer network or electronic communications network under the broader heading child pornography. The offences committed by persons included:

- procuring, obtaining, accessing, knowingly assisting, facilitating the procurement obtaining or accessing of child pornography through a computer network or electronic communications network (clause 20(1));
- possessing child pornography on a computer data storage medium, a computer device, a computer network, a database or an electronic communications network (clause 20(2));
- production of child pornography for the purpose of making it available, distributing it or broadcasting it by means of a computer network or an electronic communications network (clause 20(3));
- making, causing or assisting the making available, distributing or broadcasting of child pornography by means of a computer network or an electronic communications network (clause 20(4));
- advocating, advertising, encouraging or promoting child pornography or the sexual exploitation of children by means of a computer network or an electronic communications network (clause 20(5)); and
- processing or facilitating a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of, child pornography, by means of a computer network or an electronic communications network (clause 20(8)).

3.138 The offences committed by an electronic communications service provider included:

- making, causing or assisting in making available, distributing or broadcasting of child pornography through a computer network or an electronic communications network (clause 20(6));
- advocating, advertising, encouraging or promoting child pornography or the sexual exploitation of children by means of a computer network or an electronic communications network (clause 20(7));

3.139 Clause 20(9) placed a reporting obligation on all persons or electronic communications service providers who have knowledge of the commission of offences in sub clauses (1) to (8). The knowledge or suspicion must be reported as soon as possible to a police official, failing which a conviction for contravention of this obligation may be met with

a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment. In respect of sub-clauses (1) to (8) the fact that the crime is committed by electronic means is seen as an aggravating factor.

3.140 The definition of pornography used in the Bill made reference to the irrelevance of “aesthetic feelings” as is the case in the Sexual Offences Act.

3.141 The Bill included the definitions “sexual exploitation”, “sexual offence”, “sexual penetration” and “sexual violation”. The first two definitions referred back to the Sexual Offences Act, but the latter definitions were full definitions which mirror the Sexual Offences Act. The reader would have to refer back to this Act to understand what is meant by the first two definitions, for example sexual exploitation as contemplated in section 17 is a narrow interpretation of the wider understanding of sexual exploitation and is actually restricted to child prostitution. The term “sexual offence” is however only found in the definitions section and nowhere else in the Bill.

3.142 The provisions included in the Bill including clause 20 are the minimum requirements for compliance with the European Union Convention on Cybercrime (Budapest Convention).<sup>234</sup> Grooming and the visual depiction of other sexual offences such as pre-recorded rapes as has become more prevalent or live webcam sexual abuse irrespective of age were not addressed in this Bill. The production of child abuse material by children, particularly where the images are produced as a result of grooming also did not seem to be included in this version of the Bill. It was not clear if the Bill intends for there to be strict liability for offences involving child pornography. A later draft of the Bill no longer contains substantive provisions on child pornography. In the schedule to the Bill a proposed amendment is made to the Sexual Offences Act. The Bill proposes the insertions of definitions of “computer data storage medium”; “computer device”; “computer network”; “database”; “electronic communications network”; and “electronic communications service provider”. It further proposes the insertion of section 20A dealing with cybercrimes involving child pornography. As stated above, it is instructive to note that although South Africa has signed the European Union Convention on Cybercrime it has neither ratified it, nor the African Union Convention on Cybercrime and is not party to any other international agreement dealing specifically with cybercrime.<sup>235</sup>

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<sup>234</sup> The Budapest Convention is also known as the Convention on Cybercrime. It is the first treaty seeking to address Internet and computer crime by harmonizing national laws, improving investigative techniques and increasing cooperation among nations. It is available at [www.coe.int/cybercrime](http://www.coe.int/cybercrime).

<sup>235</sup> Email confirming signatory status obtained from the Department of Justice and Constitutional

**g. The Prevention and Combating of Trafficking in Persons Act**

3.143 The Prevention and Combating of Trafficking in Persons Act includes a child under the definition of “abuse of vulnerability”. The Act aims to inter alia amend the Children’s Act by substituting the definition of “commercial sexual exploitation” with the following definition.

**commercial sexual exploitation**”, in relation to a child means  
[(a)]the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person [;or  
(b) trafficking in a child for use in sexual activities, including prostitution or pornography];

3.144 The definition of exploitation includes sexual exploitation.

“**sexual exploitation**” means the commission of –  
(a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or  
(b) any offence of a sexual nature in any other law;

3.145 Trafficking in persons is criminalised in terms of section 4 of the Act. Which inter alia provides that any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic by means of the abuse of vulnerability or the abuse of power aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation is guilty of the offence of trafficking in persons. This definition also includes the offence of adopting a child, facilitated or secured through legal or illegal means within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner.

3.146 The facilitating of trafficking in persons is criminalised under section 8 of the Act. The offence reads as follows:

**Conduct facilitating trafficking in persons**

8.(1) Any person who – . . .  
(c) intentionally advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast, or distribution of information that facilitates or promotes trafficking in persons by any means, including the use of the Internet or other information technology; . . .

Is guilty of an offence.

(2)(a) An electronic communications service provider operating in the Republic must take all reasonable steps to prevent the use of its service for the hosting of information referred to in subsection (1)(c).

(b) An electronic communications service provider that is aware or becomes aware of any electronic communications which contain information referred to in subsection (1)(c) and which is stored upon or transmitted over its electronic communications system must –

(i) without delay report the electronic communications identity number from which those electronic communications originated any other particulars available to such electronic communications service provider which can be used to identify the person or electronic communications service provider (including an electronic communications service provider operating outside the Republic) from who or from which those electronic communications originated, to the South African Police Service;

(ii) take such reasonable steps as are necessary to preserve evidence as may be required by the relevant investigation and prosecuting authorities, for purposes of investigation and prosecution by the relevant authorities; and

(iii) without delay take such reasonable steps as are necessary to prevent continued access to those electronic communications –

(aa) by any of the customers of that electronic communications service provider; or

(bb) by any person if they are stored on the system of the electronic communications service provider.

(3) An electronic communications service provider which fails to comply with the provisions of subsection (2)(a) or (b) is guilty of an offence.

(4) Nothing in this section places a general obligation on an electronic communications service provider to –

(a) monitor the data which it transmits or stores; or

(b) actively seek facts or circumstances indicating an unlawful activity.

(5) An electronic communications service provider is not liable for any loss sustained by or damage caused to any person as a result of any action taken in good faith in terms of subsection (2)(b)(iii).

3.147 The President assented to the Act on 28 July 2013, which was published in the *Government Gazette* on 29 July 2013. Section 50 of the Act provides that the Act takes effect on a date fixed by the President by proclamation in the *Gazette*. Different dates may be fixed in respect of different provisions of the Act. The reason for this provision is to allow for the finalisation of regulations, national instructions and directives to be issued in terms of the Act, so as to ensure the smooth implementation of the Act.

3.148 The Ministers of Justice and Correctional Services, Home Affairs and Social Development must, in terms of section 43 of the Act, make regulations to give effect to various provisions in the Act that have a bearing on the duties of their respective departments. In terms of section 44 of the Act, the Directors-General: Justice and Constitutional Development, Home Affairs and Social Development, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service

must issue directives and national instructions with which officials must comply in the execution of their duties imposed on them in terms of the Act.

3.149 The Act moreover requires all regulations which have financial implications for the State to be approved by the Minister of Finance. The Minister of Finance has approved the regulations to be made by the Minister of Justice and Constitutional Development. The Act also requires all regulations to be submitted to Parliament for approval 60 days prior to publication thereof in the *Gazette*.

3.150 With the above as background, it is anticipated that the Act will be implemented in the second half of 2015, subject to the Departments of Home Affairs and Social Development submitting their regulations to Parliament within the next month.

## **2 The applicable administrative classification regulation response**

### ***a. The Electronic Communications and Transactions Act***

3.151 The Electronic Communications and Transactions Act is enabling legislation of general application which seeks to entrench into South African law the doctrine of functional equivalence, i.e. that – for the purposes of the law – there is no distinction between traditional writing and writing in data format.<sup>236</sup>

3.152 The ECT Act also deals with a number of issues relevant to this Issue Paper, including:

1. Limited liability for Information System Service Providers;
2. The Take-down notification procedure;
3. Cryptography;
4. Cybercrime;
5. Domain name administration; and
6. Enforcement.

Limited liability for Information System Service Providers

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Mr Dumisani Rorwana, Acting Manager: Legal and Regulatory Affairs July at the Symposium on effects of children's exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

3.153 Chapter XII sets out a framework for limited liability in respect of specific services provided by information system service providers<sup>237</sup> (ISSPs). This Chapter in essence creates a “safe-harbour” for ISSPs in the sense that they will be protected from legal liability for certain conduct undertaken in the normal course of the provision of information system services where they comply with the requirements set out in sections 71 and 72 of the ECT Act.

3.154 Section 71 introduces the concept of an Industry Representative Body (IRB), which is a body representing a significant portion of an industry and which has been officially recognised by the Department of Communications as such. The Department of Communications will only recognise an IRB where it has received an application for such recognition and where it is satisfied that:

- its members are subject to a code of conduct;
- membership is subject to adequate criteria;
- the code of conduct requires continued adherence to adequate standards of conduct<sup>238</sup>; and
- the representative body is capable of monitoring and enforcing its code of conduct adequately.

3.155 Under section 72 an ISSP will only be entitled to claim the limitations on liability set out in Chapter 11 where:

- the service provider is a member of the representative body referred to in section 71; and
- the service provider has adopted and implemented the official code of conduct of that representative body.

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<sup>237</sup> Under section 70 a ‘service provider’ for the purposes of Chapter XII means any person providing information system services. “Information system services” is defined in section 1 as follows:

*‘information system services’ includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service;*

An “information system” is further defined as follows:

*‘information system’ means a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet;*

<sup>238</sup> The specific standards of conduct required are set out in the Guidelines for the Recognition of Industry Representative Bodies of Information System Service Providers (“the IRB Guidelines”), GG29474, 14 December 2006, <http://www.gov.za/documents/electronic-communications-and-transactions-act-guidelines-recognition-industry-1> .

3.156 The protections or limitations of liability offered by Chapter XI relate to different services offered by ISPs in the ordinary course of their business:

- Carrying content from one point to another / acting as a “mere conduit”;
- Hosting;
- Caching; and
- Providing search or information location tools.

3.157 An ISSP which is a member of an IRB and which is compliant with its Code of Conduct will receive statutory indemnification in respect of any unlawful or illegal activity carried out over the facilities and services which the ISSP provides in the normal course of business as an ISSP.

3.158 ISP’s are not required to actively seek facts or circumstances indicating an unlawful activity.

### **No general obligation to monitor**

3.159 In terms of section 78 of the ECT Act there is no general obligation on a service provider to monitor. Section 78 reads as follows:

“78.(1) When providing the services contemplated in this Chapter there is no general obligation on a service provider to—  
(a) monitor the data which it transmits or stores; or  
(b) actively seek facts or circumstances indicating an unlawful activity.  
(2) The Minister may, subject to section 14 of the Constitution, prescribe procedures for service providers to—  
(a) inform the competent public authorities of alleged illegal activities under taken or information provided by recipients of their service; and  
(b) to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service.”<sup>239</sup>

3.160 It is important to note that as soon as an ISSP becomes aware of conduct or content which it knows to be illegal or unlawful it can no longer rely on the Chapter 11 limitations of liability.

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<sup>239</sup> These powers have not to date been exercised.

1. While an ISSP is under no obligation to monitor the data which it transmits or stores or to seek out facts or circumstances which indicate an unlawful activity, once it becomes aware of such facts or circumstances it is obligated to respond thereto with reasonable expediency.
2. This obligation to act may take a number of forms but will generally involve reporting a matter to the SAPS or Film & Publications Board or the disabling of access or taking down of content.

3.161 Chapter 11 also provides for takedown notices. These are formal notices which can be sent by someone who believes that there is unlawful activity or activity infringing his, her or its rights taking place over or through the information system services provided by the ISP, requiring that the ISP take steps to curtail such activity or remove content which is alleged to be an infringement of the complainant's rights.

3.162 Under the ECT Act an ISP – where it acts with reasonable expediency to take down material which is specified in a valid take down notice which complies with the requirements of Chapter 11 – cannot be held liable for implementing a takedown notice. In other words the party who is responsible for the content which is removed cannot subsequently sue the ISP should it turn out that the takedown notice was issued in bad faith or was otherwise ill-founded.

### **Take-down notification procedure**

3.163 Section 77 of the ECT Act sets out the procedure to be followed in order to request that an information system service provider remove or suspend access to unlawful content from a website or other platform for the display of content. The Take Down Notice in terms of section 77 provides that anybody who becomes aware of unlawful activity taking place may notify the ISP in writing. The ISP then sends a notice to remove such unlawful material or put a stop to such unlawful activity. Section 77 provides as follows:

“77.(1) For the purposes of this Chapter, a notification of unlawful activity must be in writing, must be addressed by the complainant to the service provider or its designated agent and must include—

- (a) the full names and address of the complainant;
- (b) the written or electronic signature of the complainant;
- (c) identification of the right that has allegedly been infringed;
- (d) identification of the material or activity that is claimed to be the subject of unlawful activity;
- (e) the remedial action required to be taken by the service provider in respect of the complaint;

- (f) telephonic and electronic contact details, if any, of the complainant;
  - (g) a statement that the complainant is acting in good faith;
  - (h) a statement by the complainant that the information in the take-down notification is to his or her knowledge true and correct; and
- (2) Any person who lodges a notification of unlawful activity with a service provider knowing that it materially misrepresents the facts is liable for damages for wrongful take-down.
- (3) A service provider is not liable for wrongful take-down in response to a notification”

3.164 Useful information on this process is available from the website of the Internet Service Providers’ Association (ISPA)<sup>240</sup>, which acts as an agent for its members in respect of the receipt of Take-down Notices.

3.165 The unlawful activity may be child abuse images, illegal distribution of films classified X18 or uploading of documents advocating hatred or inciting violence. This provision does not seem to cover the distribution of legal adult pornography. 3.158 ISPA as an Industry Representative Body recognised by the Minister of Communications under Chapter 11 of the ECT Act is required to submit a report to the Minister annually setting out details of take down notices received by it and how these were handled.

### **Cyber Inspectors**

3.166 Chapter XII of the ECT Act provides for the appointment of Cyber Inspectors with wide-ranging powers to investigate online offences in terms of any law<sup>241</sup>, including powers of search and seizure and authorisation to monitor and inspect any web site or activity on an information system in the public domain and report any unlawful activity to the appropriate authority. Cyber Inspectors can investigate the commission of offences in terms of this or any other law. It appears, however, that these provisions remain largely unimplemented<sup>242</sup> and that they may be revisited through a process to review the ECT Act.

### **Cryptography<sup>243</sup>**

3.167 Chapter V of the ECT Act regulates the provision of cryptography products<sup>244</sup> and services<sup>245</sup> by cryptography providers<sup>246</sup>.

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<sup>240</sup> See <http://ispa.org.za/code-of-conduct/take-down-guide/>, <http://ispa.org.za/code-of-conduct/take-down-procedure/> and <http://ispa.org.za/code-of-conduct/request-a-take-down/>

<sup>241</sup> Set out in full in sections 81 and 82 of the ECT Act.

<sup>242</sup> See for example <http://www.bdlive.co.za/business/2014/01/14/south-africa-neglects-alarming-effect-of-cybercrime>

<sup>243</sup> Relevance – see for example <http://www.ibtimes.com/child-porn-generates-most-traffic-hidden-sites-tor-network-study-finds-1770540>

3.168 Chapter V read with the Cryptography Regulations published under it on 10 March 2006<sup>247</sup>, requires that providers of cryptography products register with the Department of Communications through submission of the prescribed form and payment of the prescribed fee. The Department of Communications is required to keep a register of all providers of cryptography products in South Africa<sup>248249</sup> which reflects:

- the name, address and contact details of the cryptography provider;
- a description of the type of cryptography service or cryptography product being provided; and
- such other particulars as may be prescribed to identify and locate the cryptography provider or its products or services adequately<sup>250</sup>.

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<sup>244</sup> "cryptography product" means any product that makes use of cryptographic techniques and is used by a sender or recipient of data messages for the purposes of ensuring—

(a) that such data can be accessed only by relevant persons;

(b) the authenticity of the data;

(c) the integrity of the data; or

(d) that the source of the data can be correctly ascertained; (section 1 ECT Act)

<sup>245</sup> "cryptography service" means any service which is provided to a sender or a recipient of a data message or to anyone storing a data message, and which is designed to facilitate the use of cryptographic techniques for the purpose of ensuring—

(a) that such data or data message can be accessed or can be put into an intelligible form only by certain persons;

(b) that the authenticity or integrity of such data or data message is capable of being ascertained;

(c) the integrity of the data or data message; or

(d) that the source of the data or data message can be correctly ascertained; (section 1 ECT Act)

<sup>246</sup> "cryptography provider" means any person who provides or who proposes to provide cryptography services or products in the Republic; (section 1 ECT Act)

<sup>247</sup> Regulation 216, Government Gazette 28594, 10 March 2006, available from <http://Internet.org.za/CryptoRegsLatest.pdf>

<sup>248</sup> S29(1)

<sup>249</sup> S30(3) *A cryptography service or cryptography product is regarded as being provided in the Republic if it is provided—*

*(a) from premises in the Republic;*

*(b) to a person who is present in the Republic when that person makes use of the service or product; or*

*(c) to a person who uses the service or product for the purposes of a business carried on in the Republic or from premises in the Republic.*

<sup>250</sup> S29(2). These include contact information, detailed profiles of trusted personnel of the provider that have supervisory or managerial responsibilities as well as the physical location for production and sale. The full list of requirements is set out in Regulation 2 of the Cryptography Regulations. Under Regulation 3 a cryptography provider is required to notify the Department of any change to the recorded particulars within 30 days of the change occurring.

3.169 The Department of Communications is expressly authorised to release information recorded in the register:

- to a relevant authority investigating a criminal offence or for the purposes of any criminal proceedings;
- to government agencies responsible for safety and security in the Republic, pursuant to an official request;
- to a cyber inspector;
- pursuant to a request section under the Promotion of Access to Information Act 2 of 2000); or
- for the purposes of any civil proceedings which relate to the provision of cryptography services or cryptography products and to which a cryptography provider is a party<sup>251</sup>.

3.170 Provision of cryptography services without registration as prescribed is prohibited<sup>252</sup> and a person who contravenes or fails to comply with a provision of Chapter V is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years<sup>253</sup>.

#### ***b. The Electronic Communications Act***

3.171 The Electronic Communications Act (“the ECA”) is the primary legislation governing the provision of telecommunications and broadcasting services in South Africa.

3.172 The ECA deals with the carriage of content from one point to another but does not seek to regulate content itself. This appears from the definition of “electronic communications” set out in section 1 (own emphasis added):

**“electronic communications”** means the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electro-magnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service;

3.173 Nevertheless the ECA is the primary vehicle for control of the activities and services which it licenses and for the placing of obligations on licensees.<sup>254</sup>

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<sup>251</sup> S31(2).

<sup>252</sup> S30(1).

<sup>253</sup> S32(2).

<sup>254</sup> Look at Broadcasting framework to convergence process.

3.174 ICASA also administers certain content-related obligations placed on holders of broadcasting services licences, such as those relating to local content quotas and political advertising<sup>255</sup>. Section 54(1) of the ECA provides that all broadcasting licensees must adhere to the prescribed Code of Conduct for Broadcasting Services. However, section 54(3) will not apply to a broadcasting licensee if that broadcasting licensee is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, and provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.

3.175 In recent litigation<sup>256</sup> On Digital Media (operating as Top TV and later StarSat) decided to file an application for leave to appeal a Western Cape High Court decision in November 2014 that StarSat could not broadcast pornography. It had broadcasted two of its porn pay channels for nearly a month without authorisation to do so. The court was requested to fine StarSat for its breach of the organisation's Subscription Service Licensees' code of conduct. Section 8 of the code states that a licensee may not broadcast a channel on its service unless the authority has authorised the channel to do so in terms of broadcasting regulations.

### ***c. The South African Broadcasting Corporation***

3.176 According to the South African Broadcasting Corporation (SABC) website the SABC was established in terms of the Broadcasting Act (1936) as a government enterprise to provide radio and television broadcasting services to South Africa. The SABC is South Africa's national public service broadcaster and operates 17 radio stations and four television stations. Its operations are based on the broadcasting charter, which guarantees independence and freedom of expression in creative, journalistic and programming terms. The SABC as a public broadcaster is fully subject to the regulatory framework of the broadcasting industry and, in this regard, is answerable to ICASA. It is also answerable to the Broadcasting Complaints Commission of South Africa (BCCSA) with regards to complaints on content and the Advertising Standards Authority (ASA) with regard to complaints on advertisements aired. The Policy and Regulatory Department in the SABC inter alia liaises on behalf of the SABC with the industry and regulators regarding content,

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<sup>255</sup> ECA Chapter 9.

<sup>256</sup> Raborife Mpho "StarSat broadcasted porn channels illegally, BCCSA hears" (15 April 2015) M.News 24 available at <http://m.news24.com/channel24/tv/news/starsat-broadcasted-porn-channels-illegally-bccsa-hears-20150415>.

technical and other related matters to its broadcasting services and deals with complaints relating to content.<sup>257</sup>

**d. The Independent Communications Authority of South Africa**

3.177 ICASA is an independent regulatory body established in 2000 by the ICASA Act to regulate both the telecommunications and broadcasting sectors in the public interest. ICASA, like the FPB, functions under the Department of Communications.

3.178 Some of the functions of ICASA include the licensing of broadcasters, signal distributors, providers of telecommunication services and postal services; imposing license conditions; to plan, assign, control, enforce and manage the frequency spectrum and to decide on complaints. The ICASA Complaints and Compliance Committee ("CCC") of ICASA has jurisdiction to hear complaints about content against broadcasters which are not members of the National Association of Broadcasters (NAB)<sup>258</sup>. Complaints other than those which relate to content of broadcasts, all fall under the jurisdiction of the CCC.

3.179 There is no regulatory mechanism in the ICASA Act which directly empowers ICASA to classify material or otherwise deal with the provision of content over electronic communications networks. Nevertheless the ICT Policy Review Process – which will ultimately result in new ICT legislation and further amendments to the ICASA Act – has raised issues relating to the institutional structures for content regulation and the possibility that ICASA may in future play a role in such regulation.<sup>259</sup> Under the current regulatory framework The Scene Internal Newsletter of the FPB notes that due to there not being an obligation on ICASA to enforce or classify material<sup>260</sup> and despite a prohibition against the airing of adult material on public television, it is common knowledge that one public television channel broadcasts “softporn” late at night.<sup>261</sup>

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<sup>257</sup> Information available at [Http://www.sabc.co.za](http://www.sabc.co.za) .

<sup>258</sup> Complaints against NAB members go through the Broadcasting Complaints Commission of South Africa (see under Industry Codes below).

<sup>259</sup> See the section on the ICT Policy Review Process below.

<sup>260</sup> Ms Petronella Landers of the Department of Communications at the Symposium on effects of children’s exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

<sup>261</sup> The Scene Internal Newsletter of the Film and Publication Board 2<sup>nd</sup> Edition 09 “Xploratory Research Study on Sexually Explicit Material and Regulation in South Africa” on p5 available at <http://www.fpb.org.za/research>.

**e. Industry Codes of Conduct**

3.180 The Broadcasting Complaints Commission of South Africa ("BCCSA")<sup>262</sup> was established by the National Association of Broadcasters ("NAB")<sup>263</sup> in 1993. The BCCSA is an independent judicial tribunal which must reach its decisions on the Broadcasting Code independently and in line with the precepts of administrative justice, as required by the Constitution of the Republic and legislation that governs fair administrative justice. Although initially set up by the Broadcasting industry, it is entirely independent from that industry.

3.181 The NAB has adopted a Code of Conduct for Free-to-Air Broadcasting Services<sup>264</sup> and a Code of Conduct for Subscription Broadcasting Service Licensees<sup>265</sup>, and an enforcement mechanism that binds its members. Complaints lodged against NAB members through these Codes are adjudicated by the BCCSA.

3.182 The BCCSA has no jurisdiction as to election complaints. Such jurisdiction resides with the Complaints and Compliance Committee ("CCC") of ICASA, The CCC also has jurisdiction to hear complaints about content against broadcasters which are not members of the NAB. Complaints other than those which relate to content of broadcasts, all fall under the jurisdiction of the CCC.<sup>266</sup>

3.183 The two Codes contain numerous provisions relevant to this Issue Paper. These are set out in the table below:

| Free-to-Air Broadcasting Services  | Subscription Broadcasting Service Licensees   |
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| <p><b>"child pornography"</b> means any description or visual image, real or simulated, however created, explicitly depicting a person who is or who is depicted as being under the age of 18 years<br/>           (a) engaged in or participating in sexual conduct;<br/>           (b) engaged in an explicit display of genitals;<br/>           or</p> | <p>4.4 <b>"child pornography"</b> means any image –<br/>           (a) explicitly depicting a person, real or simulated, who is shown as being under the age of 18 years' –<br/>           (i) engaged in sexual conduct;<br/>           (ii) engaged in a display of genitals;<br/>           (iii) participating in sexual conduct; or<br/>           (iv) assisting another person to engage</p> |

<sup>262</sup> Available at <http://www.bccsa.co.za/>.

<sup>263</sup> Available at <http://www.nab.org.za/>.

<sup>264</sup> Available at [http://www.bccsa.co.za/index.php?option=com\\_content&task=view&id=616&Itemid=35](http://www.bccsa.co.za/index.php?option=com_content&task=view&id=616&Itemid=35). at

<sup>265</sup> Available at [http://www.bccsa.co.za/index.php?option=com\\_content&task=view&id=536&Itemid=35](http://www.bccsa.co.za/index.php?option=com_content&task=view&id=536&Itemid=35). at

<sup>266</sup> Available at [http://www.bccsa.co.za/index.php?option=com\\_content&view=article&id=18&Itemid=32](http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32). at

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| <p>(c) assisting another person to engage in sexual conduct which, judged within context, has as its predominant objective purpose, the stimulation of sexual arousal in its target audience;</p>  | <p>in sexual conduct; and<br/>(b) which viewed in context and objectively by a reasonable viewer has as its purpose to stimulate sexual arousal in the target audience;</p>  |
| <p>“<b>child</b>” means a person under the age of 18 years;</p>  | <p>“<b>child</b>” means a person below eighteen years of age;</p>  |
| <p>“<b>sexual conduct</b>” means:<br/>(i) the display of genitals or of the anus;<br/>(ii) masturbation;<br/>(iii) sexual intercourse including anal sexual intercourse,<br/>(iv) in the case of child pornography, the fondling or touching of breasts, genitalia or the anus;<br/>(v) the penetration of a vagina or anus with any object;<br/>(vi) oral genital contact; or<br/>(vii) oral anal contact;</p>  | <p>4.11 “<b>sexual conduct</b>” includes –<br/>(i) male genitals in a state of arousal or stimulation;<br/>(ii) the undue display of genitals or of the anal region;<br/>(iii) masturbation;<br/>(iv) sexual intercourse, whether real or simulated, including anal sexual intercourse;<br/>(v) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any objects;<br/>(vi) the penetration of a vagina or anus with any object;<br/>(vii) oral genital contact, or<br/>(viii) oral anal contact;</p>   |
| <p><b>6. Children</b><br/>(1) Broadcasting services licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children are likely to be part of the audience.<br/>(2) Broadcasting service licensees must exercise particular caution, as provided below, in the depiction of violence in children’s programming.<br/>(3) In children’s programming portrayed by real-life characters, violence may, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.<br/>(4) Animated programming for children, while accepted as a stylised form of story-telling which may contain non-realistic violence, must not have violence as its central theme, and must not incite dangerous imitation.<br/>(5) Programming for children must with reasonable care deal with themes that could threaten their sense of security when portraying, for example, domestic conflict, death, crime or the use of drugs or alcohol.<br/>(6) Programming for children must with reasonable care deal with themes which could influence children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, the use of matches or the use of dangerous household</p> | <p><b>Content which may not be broadcast</b><br/><b>Child pornography, bestiality, incest, rape, sexual conduct and violence</b><br/>9. A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following –<br/>9.1 child pornography;<br/>9.2 bestiality, incest or rape;<br/>9.3 explicit violent sexual conduct;<br/>9.4 explicit sexual conduct which violates the right to human dignity of any person or which degrades a person and which constitutes incitement to cause harm; or<br/>9.5 the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm.<br/><b>Advocating war, violence or hatred</b><br/>10. A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context –<br/>10.1 amounts to propaganda for war;<br/>10.2 incites imminent violence; or<br/>10.3 advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm.<br/><b>Exemptions</b><br/>11 Clauses 9 and 10 do not apply to -</p> |

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| <p>object as toys.</p> <p>(7) Programming for children must not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve conflict between individuals.</p> <p>(8) Programming for children must not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depictions of violence must portray, in human terms, the consequences of that violence to its victims and its perpetrators.</p> <p>(9) Programming for children must not contain frightening or otherwise excessive special effects not required by the story line.</p> <p>(10) Offensive language, including profanity and other religiously insensitive material, must not be broadcast in programmes specially designed for children.</p> <p>(11) No excessively or grossly offensive language should be used before the watershed period on television or at times when a large number of children is likely to be part of the audience on television or radio.</p>                                  | <p>11.1 broadcasts of bona fide scientific, documentary, artistic, dramatic, literary or religious programming material, which, judged within context, is of such nature;</p> <p>11.2 broadcasts which amount to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or</p> <p>11.3 broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest.<sup>267</sup></p>   |
| <p><b>7. Watershed Period</b></p> <p>(1) Programming on television which contains scenes of explicit violence and/or sexual conduct and/or nudity and/or grossly offensive language intended for adult audiences must not be broadcast before the watershed period.</p> <p>(2) Promotional material and music videos which contain scenes of explicit violence and/or explicit threatening violence and/or sexual conduct and/or the fondling or touching of breasts and/or genitalia or the anus and/or nudity and/or offensive language intended for adult audiences must not be broadcast before the watershed period.</p> <p>(3) Some programmes broadcast outside the watershed period may not be suitable for very young children. Licensees must provide sufficient information, in terms of regular scheduling patterns or audience advisories, to assist parents and de facto or legal guardians to make appropriate viewing choices.</p> <p>(4) Television broadcasting service licensees may, with the advance of the watershed period, progressively broadcast more adult</p> | <p><b>Watershed Period</b></p> <p>12. A television or composite subscription broadcasting service licensee, wherever practicable, must avoid broadcasting programming material, including promotional material, which is unsuitable for children and/or contains nudity, explicit sexual conduct, violence or offensive language before the watershed period.</p> <p>13. A television or composite subscription broadcasting service licensee, wherever practicable, must attempt to ensure that the more the broadcasting of programming material is unsuitable for children, the later that programming material must be broadcast after the commencement of the watershed period.</p> |

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Note that this appears to be incorrectly formulated insofar as it exempts the forms of content set out in clause 9, including child pornography. Under the Film and Publications Act there cannot be such an exemption.

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| <p>material.</p> <p>(5) Broadcasting service licensees must be particularly sensitive to the likelihood that programmes which commence during the watershed period and which run beyond it may then be viewed by children.</p>   |   |
| <p><b>8. Sexual Conduct</b></p> <p>1) Broadcasting service licensees must not broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following:</p> <p>(a) child pornography;</p> <p>(b) bestiality;</p> <p>(c) sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender and which constitutes incitement to cause harm;</p> <p>(d) explicit sexual conduct;</p> <p>(e) explicit extreme violence or the explicit effects thereof; or</p> <p>(f) explicit infliction of domestic violence.</p> <p>(2) Sub-clause 8(1) shall not be applicable to bona fide scientific, documentary, dramatic or artistic material which, judged within context, is of such a nature; provided that it is broadcast with due audience advisory after the watershed on a sliding scale according to its content.</p>   |   |
| <p><b>9. Audience Advisories</b></p> <p>(1) To assist audience in choosing programmes, television broadcasting service licensees must provide advisory assistance which, when applicable, must include guidelines as to age, where such broadcasts contain violence, sex, nudity an/or offensive language. The advisory must be visible on the screen for a minimum of 90 seconds at the commencement of the programme and for a minimum of 30 seconds after each advertisement or other break. Where the frequency of the said subject matters, or any one or some of them, is high, a continuous advisory will be necessary, whether it is broadcast before or after the watershed.</p> <p>(2) The following visual advisory age system must be used: 10, 13, 16 and 18. The following symbols must be used in accordance with the relevant content: V(violence), L(language), N(nudity), S(sex), PG(Parental Guidance).</p> <p>(3) An audio advisory before the commencement of the programme must also accompany the broadcast of a film with an</p> | <p><b>Information to be provided about programming</b></p> <p>18 A subscription broadcasting service licensee must provide clear and consistent information to its audience about the classification thereof, so that its audience may select the programming –</p> <p>18.1 they do not wish to view or listen to;</p> <p>18.2 they do not wish their children to view or listen to.</p> <p>19. A subscription broadcasting service licensee must therefore clearly and consistently indicate in relation to all its programming, other than programming which it would classify as "family viewing" -</p> <p>19.1 the classification thereof in its hard copy programme guide and its EPG; and</p> <p>19.2 the classification thereof in any material advertising or promoting programming to be broadcast.</p> <p>20. If a programme to be broadcast is classified as anything other than "family viewing", a subscription broadcasting service licensee, wherever practicable, must clearly indicate, immediately prior to the</p> |

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| age restriction of 18.  | commencement of that programme, the classification thereof.   |
| <p><b>10. Classification by Films and Publications Board</b></p> <p>(1) Where a Films and Publications Board classification for a film exists in terms of the Films and Publication Act No. 65 of 1996, such classification may be used as a guideline for an advisory to the broadcast of the film.</p> <p>(2) No film which carries an XX classification in terms of the Films and Publications Act may be broadcast.</p> | <p><b>Programme Classification</b></p> <p>14. As subscription broadcasting service licensee, wherever practicable, and having particular regard to the protection of children, must classify the programming it intends to broadcast.</p> <p>15. The Classification must indicate-</p> <p>15.1 the appropriate age restriction for viewing or listening to a programme; and</p> <p>15.2 whether the programme contains nudity, sexual conduct, violence or offensive language.</p> <p>16. If a Films and Publications Board classification exists in terms of the Films and Publications Act for a film or programme to be broadcast, such classification may be used by a subscription broadcasting service licensee.</p> <p>17. Clauses 14 and 15 of this Code do not apply in relation to channels packaged outside of South Africa. In relation to those channels, a subscription broadcasting service licensee, wherever practicable, must ensure that any programming on those channels, other than programming which would be classified as "family viewing" in the country in which the channel is packaged, is classified. The classification must indicate the appropriate age restriction for viewing or listening to a programme.</p> |
|   | <p><b>Parental Control Mechanism</b></p> <p>21. A subscription broadcasting licensee must, wherever practicable, implement adequate mechanisms to enable a subscriber, using a reasonably secure mechanism, such as a PIN number selected by the subscriber, to block a programme, based on the classification of the programme, or a channel, included in its service.</p> <p>22. In order to enable a subscriber to block a programme, based on the classification of the programme, a subscription broadcasting service licensee must, wherever practicable –</p> <p>22.1 capture the programming classification information electronically ("the classification data"); and</p> <p>22.2 add the classification data to the output signal of the subscription</p>  |

broadcasting service in the transmission broadcast stream received by a subscriber's decoder so that the subscriber's decoder receives a message that the programme being received has a particular classification.

23. A subscription broadcasting service licensee must ensure that any decoders which it promotes or sells are capable of allowing a subscriber to block any programme, based on the classification of the programme, or channel included in its service.

24. A subscription broadcasting service licensee must inform all its subscribers of the parental control mechanism available and provide the subscriber with a step-by-step guide on how to use it ("parental control guide").

25. A subscription broadcasting service licensee must –

25.1 provide every subscriber a copy of the parental control guide when a subscriber subscribes to its subscription broadcasting service;

25.2 ensure that the parental control guide may always be accessed by its subscribers through the EPG;

25.3 post a copy of the parental control guide on its website; and

25.4 provide a call centre facility to assist subscribers in using the parental control mechanism.

26. In addition, a multi-channel subscription broadcasting service licensee must –

26.1 broadcast brief inserts across a variety of channels on the service from time to time informing subscribers of the parental control mechanism and how the parental control guide may be accessed; and

26.2 include the parental control guide on an information channel on the subscription broadcasting service which information channel must be accessible by subscribers at any time.

27. If a programme or channel has been blocked due to a subscriber's use of a parental control mechanism, the licensee must –

27.1 display a message on the subscriber's screen advising the subscriber

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|--|--|
|  | <p>that the content has been blocked by the parental control mechanism; and</p> <p>27.2 enable the subscriber to unblock the programme or channel should the subscriber so wish.</p> |
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**(i). ISPA Code of Conduct**

3.184 ISPA is currently the only recognised Industry Representative Body (IRB) in South Africa, having received formal recognition from the Minister of Communications under Chapter XII of the ECT Act on 22 May 2009<sup>268</sup>. As such its members are afforded the statutory indemnification set out in that Chapter as discussed above in the section on Limited Liability for Information System Service Providers.

3.185 ISPA's current membership can be viewed at <http://www.ispa.org.za/membership/>. It is noteworthy that none of the mobile network operators – Vodacom, MTN, Cell C and Telkom Mobile – are ISPA members.

3.186 As an IRB ISPA's Code of Conduct has been accepted by the Minister, indicating that the Minister has found such Code to require continued adherence to adequate standards of conduct and that ISPA is capable of monitoring and enforcing the Code adequately.<sup>269</sup>

3.187 The ISPA code of Conduct<sup>270</sup> advocates respect for the constitutional right to privacy and freedom of expression. It also provides for the protection of consumers. Regarding the protection of minors, ISPA members must take reasonable steps to ensure that they do not offer paid content subscription services to minors without the written consent of a parent or guardian. ISPA members must provide users with information about procedures and software which can be used to assist in the control and monitoring of minors' access to Internet content.

3.188 ISPA's website details a Code of Conduct Complaints and Disciplinary Procedure<sup>271</sup> and provides for complaints to be logged through an online form.<sup>272</sup>

**(ii). Wireless Application Service Provider Association Code of Conduct**

3.189 The Wireless Application Service Providers' Association (WASPA) was launched on 26 August 2004 with the full support of and funding of the three local network operators: Cell C, MTN and Vodacom. WASPA's membership can be viewed at

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<sup>268</sup> See Government Notice 588, Government Gazette 32252, 22 May 2009 - Available at <http://www.info.gov.za/view/DownloadFileAction?id=108213>

<sup>269</sup> As required by section 71(2) of the ECT Act.

<sup>270</sup> Available at <http://ispa.org.za/code-of-conduct/>.

<sup>271</sup> Available at <http://ispa.org.za/code-of-conduct/procedure/>.

<sup>272</sup> Available at <http://ispa.org.za/code-of-conduct/complaints-form/>.

<http://waspa.org.za/members/list/>. According to its website,<sup>273</sup> as well as representing the interests of its members,

“WASPA plays a key role in regulating the provision of mobile applications and services in South Africa. WASPA has a detailed Code of Conduct which all members of the Association must adhere to, and a well-established formal complaints process. WASPA employs full time staff to monitor the services provided by its members and to handle complaints about WASP services lodged by members of the public”.

3.190 WASPA has a comprehensive Code of Conduct<sup>274</sup> as well as consumer support resources,<sup>275</sup> information for parents<sup>276</sup> and provision for lodging a complaint online.<sup>277</sup>

3.191 Complaints are handled by an independent secretariat which process complaints using a mandated civil procedure scheme. Independent ICT lawyers and a 3-person appeals panel of ICT lawyers adjudicate the complaints lodged with the secretariat. An emergency panel of three WASPA adjudicators may sit to shut down services pending a formal adjudication where there is evidence of immediate and on-going consumer harm.

3.192 WASPA also provides a full archive of adjudications and appeals delivered in response to complaints which are subject to its formal dispute resolution procedure<sup>278</sup>.

3.193 These lawyers may adjudicate on any matter related to the WASPA Code of Conduct where a complaint has been lodged. All completed adjudications are posted publically on the WASPA web site. The adjudicators may sanction any infraction, which may include fines, suspensions, remedies, refunds, expulsion, or any combination thereof. WASPA also has two media monitors who check advertising daily and test all services on a daily basis for compliance with its rules.

3.194 The WASPA Code of Conduct contains provisions specific to the protection of children and the provision of adult services. The relevant provisions read as follows:

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<sup>273</sup> Available at [www.waspa.org.za](http://www.waspa.org.za).

<sup>274</sup> Available at <http://waspa.org.za/coc/>.

<sup>275</sup> Available at <http://waspa.org.za/consumer-support/>.

<sup>276</sup> Available at <http://waspa.org.za/information-for-parents/>.

<sup>277</sup> Available at <http://waspa.org.za/lodge-a-complaint/>.

<sup>278</sup> Available at <http://waspa.org.za/coc/complaint-report-archive/>.

## **22 Adult service**

### **Definition**

22.1. An “adult service” is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature

22.2. An “adult content service” is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified.

### **Required practice**

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words “18+ only”.

22.4. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

22.6. Marketing messages (including commercial messages) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

22.7. A marketing message sent to initiate or re-initiate adult services may not include any graphical or photographic content that:

- (a) includes full frontal images or
- (b) portrayal of intimate parts of the body; or
- (c) include any words or phrases that may be considered profane, including common popular or slang terms for excretory functions, sexual activity and genitalia; or include any links to any content described in (a) or (b).

### **Prohibited practice**

22.8. Adult services must not contain references that suggest or imply the involvement of children.

22.9. Promotions for adult services must not appear in publications or other media specifically targeted at children.

## **23. Children**

### **Definitions**

23.1. A “child” refers to a natural person under 18 years of age.

23.2. “Children’s services” are those which, either wholly or in part, are aimed at, or would reasonably be expected to be particularly attractive to children.

### **Promotional competitions**

23.3. Promotional competitions that are aimed at, or would reasonably be expected to be particularly attractive to children must not offer cash prizes and must not feature long or complex rules.

### **Subscription services**

23.4. Subscription services must not be intentionally targeted at children.

### **Prohibited practices**

23.5. Children's services must not contain anything that is likely to result in harm to children or which exploits their credulity, lack of experience or sense of loyalty.

23.6. Children's services must not include anything that a reasonable parent would not wish their child to hear or learn about in this way.

23.7. Children's services must not involve an invasion of privacy of any child.

23.8. Children's services must not unduly encourage children to ring or procure other premium rate services or the same service again.

23.9. Advertising for children's services must not make use of adult themes or adult material.

3.195 As stated above explicit confirmation of a user's age must be obtained prior to the delivery of an adult service. The FPA is used as a guideline for classification. The content must indicate age restriction e.g. adults only and explicit adverts (even with stars) are restricted to adult media only. Adverts that are explicit but which have reference to adult content require adult verification of the service (AVS) if implemented by the network.<sup>279</sup>

3.196 The discussion paper presented for Lawyers for Human Rights notes that the South Africa's Cellular Operators Association has adopted a Code of Good Practice. The code aims to provide the industry with a self-regulatory framework for the provision of mobile content services. The code applies to all mobile content services provided via the mobile operators' networks. Every mobile operator is bound to this code.

3.197 Further that in terms of the code, mobile operators must refrain from placing advertisements which depict sexual conduct, as defined in the FPA, in media accessible to children. Mobile operators are also required to introduce filtering mechanisms and access controls to control access to age-restricted content. Vodacom and MTN networks both have parental protection facilities available.

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<sup>279</sup>

Ibid

3.198 The discussion paper presentation noted that the code does not provide for a complaints procedure. Non-compliance with the code must be dealt with by means of the mobile operators' internal dispute resolution procedures.<sup>280</sup>

3.199 Mobile Networks provide for the blocking of handsets. For example by using the instruction on MTN “\*10#” all child pornography sites are blocked on a particular handset. MTN also provides a firefly handset designed for minors which will not relay MMS's of nudity. Vodacom's Contract Protector solution allows parents and sensitive viewers to block adult content accessed through a mobile phone on the Vodacom network. Vodacom Parental Control is installed by dialling \*111\*123#. Unblocking the adult content restriction can only be done by visiting the nearest service provider where an identity document has to be provided to prove that the customer is at least 18 years old. Cell C makes reference to Mobiflock which is available to Blackberry users but no information could be found for a Cell C specific parental control.

### **(iii). Wireless Access Providers' Association Code of Conduct**

3.200 The Wireless Access Providers' Association (WAPA),<sup>281</sup> established in 2006, is a non-profit industry representative body representing the wireless industry, comprising the outdoor fixed wireless and Wi-Fi industries. WAPA represents over 190 organisations of which the majority are independent wireless operators in South Africa<sup>282</sup>. A typical WAPA member acts as an ISP or Information System Service Provider (ISSP) as that term is defined in the ECT Act. WAPA is not a recognised Industry Representative Body under Chapter XII of the ECT Act.

3.201 WAPA has a Code of Conduct<sup>283</sup> which is binding on its members and a Complaints and Disciplinary Procedure<sup>284</sup> which allows for consumer complaints. Section 17 of this Code relates to the protection of minors. It reads as follows:

“17. Protection of minors

17.1. Members will take reasonable steps to ensure that they do not offer services to minors without written permission from a parent or guardian.

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<sup>280</sup> Lisa Thornton Inc Protecting Minors from Harmful Content via Mobile Phones, discussion paper presented for Lawyers for Human Rights Child Rights Project Focus Group on 29 March 2007 at p25.

<sup>281</sup> Available at [www.wapa.org.za](http://www.wapa.org.za).

<sup>282</sup> Available at <http://www.wapa.org.za/members/>.

<sup>283</sup> Available at <http://www.wapa.org.za/code-of-conduct/>.

<sup>284</sup> Available at <http://www.wapa.org.za/code-of-conduct/complaints/>.

17.2. Members undertake to provide recipients of Internet access with information about procedures, content labelling systems, filtering and other software applications that can be used to assist in the control and monitoring of minors' access.

17.3. The above provisions do not apply where the Member is offering services to corporate recipients of their services where no minors have Internet access.”

**(iv). Interactive Advertising Bureau of South Africa Code of Conduct**

3.202 The Interactive Advertising Bureau of South Africa (IAB SA) is an independent, voluntary, non-profit association focused on growing and sustaining a vibrant and profitable digital industry within South Africa. The IAB SA currently represents more than 200 members including online publishers, brands and educational institutions, as well as creative, media and digital agencies<sup>285</sup>.

3.203 The IAB SA's Code of Conduct<sup>286</sup> requires adherence by members to all applicable laws and further requires that members not “intentionally or knowingly publish content that contains a visual presentation of explicit violent sexual conduct, bestiality, incest or rape or extreme violence which constitutes incitement to cause harm”.<sup>287</sup>

**f. The ICT Policy Review Process**

3.204 The Minister of Telecommunications and Postal Services published a National Integrated ICT Policy Discussion Paper<sup>288</sup> on 14 November 2014 as part of the comprehensive review of ICT policy for South Africa launched in 2010. The Discussion Paper sets out various policy options for different sectors of the ICT industry and invited interested parties to comment on these by 31 January 2015. According to the Department of Telecommunications and Postal Services (DTPS) this marks the last consultative stage before the submission of final recommendations to government and the tabling of a draft White Paper, which represents government's policy position on ICTs.

3.205 Set out below are excerpts from this Discussion Paper which are relevant to this Issue Paper:

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<sup>285</sup> Available at <http://iabsa.net/about-the-iab/>.

<sup>286</sup> Available at <http://iabsa.net/about-iab/code-of-conduct/>.

<sup>287</sup> See Paragraph 7.1.1.

<sup>288</sup> Available at <http://www.dtps.gov.za/mediaroom/popular-topics/415-ict-policy-review-discussion-paper.html>.

## **“Chapter 4 – Policy Options for the Digital Society**

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### **4.8.11 Protection of children**

Several other Chapters/Policy Options Papers deal with the protection of children from harm and from accessing inappropriate content. The Film and Publications Act further includes specific provisions and outlaws certain content (including the use of children in pornography), while requiring other content (except for broadcasting content) be submitted where necessary for pre-classification. The FPB has stated that provisions are currently under review in order to ensure the Act better deals with online content.

In relation to e-commerce and e-services, however, there is a need to consider whether or not additional specific mechanisms should be introduced to, for example, put in place payment restrictions for under-age children (including mobile payments) and mechanisms and tools to restrict children’s access to harmful goods such as tobacco, alcohol and gambling sites. This includes protection of children from inappropriate marketing of merchandise or services and the introduction of particular provisions on online profiling/tracking of children.

Mechanisms and tools which could be put in place include ensuring that, for example, violent games and inappropriate or adult material should only be made available on a verifiable order from an adult and should require a credit card, rather than automatically being added to the consumer’s phone bill. Rules could also state that mechanisms should be put in place to ensure authentication of credit cards to guard against children using their parents’ credit cards without authorisation. Such rules could also specify that that a personal identification number (PIN) is required online.

### **Policy options – children and inappropriate content**

As noted in the Chapter/Paper dealing with Institutional Frameworks, it is necessary to ensure ongoing cooperation between different regulatory bodies and ICASA. ICASA could also be required to strengthen consumer protection by, for example, facilitating co-regulation with licensees on such issues and/or introducing specific requirements in licence conditions or regulations related to this.

- How could a White Paper on ICT-related policy strengthen provisions to protect children, if at all?
- How can self-regulation and co-regulation assist in this, if at all?
- What other mechanisms might be necessary to protect children – e.g. could ICASA be required to develop specific rules and/or licence conditions related to this?

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## **Chapter 5 – Audio and Visual Content Services**

### **5.1 Introduction**

Convergence, the move to digital terrestrial television, the Internet and the introduction of more devices such as connected TVs will increasingly change how, where and when people in South Africa will access and interact with audio and audio-

visual content. This offers great opportunities for audiences, service providers and content producers but also will require a change in the way “broadcasting” is regulated and the policy framework for the sector so that public interest goals continue to be met. A range of questions will need to be considered in crafting a new White Paper, such as:

- How in a multichannel, multiscreen environment does policy and law ensure that all South Africans, regardless of geography, income, age, gender, home language, ability ... have access to a wide range of creative and compelling content in all languages, from diverse sources (including community, provincial, national and international content)?
- How can Government promote constitutional rights such as equality and freedom of expression and ensure a new information divide is not inadvertently created – with some people able to access a range of content and others only able to view and listen to content provided by a limited number of traditional broadcasters?
- How does policy continue to protect children from harmful and age-inappropriate content and ensure audiences can make informed choices about what to view and listen to?

#### **5.14 Protection of children, classification and content standards**

Under current laws, ICASA has sole responsibility for determining rules on content standards, classification and protection of children for broadcasters. The Film and Publications Board (FPB) is responsible for other content (except for news publications that are members of a self-regulatory body). ICASA can recognise self-regulatory bodies to enforce such codes and has accredited the Broadcasting Complaints Commission of South Africa (BCCSA). The BCCSA in interactions with the ICT Policy Review Panel said that it is guided by the FPB and ICASA codes in place. The FPB has indicated that its founding legislation will be amended to address any gaps regarding online content. In terms of this law, all content providers covered by the Act must submit information prior to publication.

Protecting children from harmful or age inappropriate content, ensuring adults have sufficient information to choose what they want to watch or listen to (within the law) and promoting fairness, accuracy and ethical behaviour in news, current affairs and factual programmes are the three core objectives of current provisions in policy and law. These will continue to underpin future policy, though convergence and digitisation might require new ways to realise these, given that content will be delivered to multiple screens from a range of platforms and sources.

Research conducted in other countries is also important to consider. In the UK, for example, the regulator conducted a study on public attitudes and expectations in the converged world. The 2012 study found, among other things, that audiences have high expectations of television content and may want more assurances for on-demand services, knowledge of content regulation in place for broadcasting is high but lower for other services, audiences expect content over television sets and other devices associated with broadcasting to be regulated closer to the level of broadcast TV than Internet content accessed from the open Internet via computers.

Comments in submissions on these issues focused primarily on the need for awareness campaigns and digital literacy education so that children, parents and viewers/users are aware of any codes or other rules (e.g. watershed rules on scheduling programming so that children can be protected from harmful or age

inappropriate content) and mechanisms that can be used to protect children (e.g. age verification technologies or parental locks on content and search engines). It was also noted that the current co-regulatory system in place for traditional broadcasting has been largely successful.

The FPB has indicated that it is establishing a Regulatory Forum for all related regulators to develop common approaches to this regulation.

## **OPTIONS**

This section does not present options but raises issues for stakeholders to comment on. It does not review the current co-regulatory provisions in place as no stakeholders raised concerns about this. Should stakeholders believe this should be reviewed, they are welcome to motivate their position in their response to this Discussion Paper. Issues to be considered include:

- If on-demand providers would be regulated by the FPB as currently, or if the extension of the definition of those that are regulated would mean that they fall under ICASA and/or any approved co-regulatory structure. It is important to consider if audiences/users would view such content as broadcasting or not. It is also important to note that some on-demand services will be provided by traditional broadcasters (catch-up services for example) and audiences might expect to complain to the broadcasting related regulators about these.
- Which body (FPB or ICASA's CCC/the BCCSA) would be responsible for complaints about online content provided by broadcasters on their webpages? Such pages might include additional news information relating to a story which users might have concerns about.
- How to ensure similar criteria are applied by all statutory regulators in approving co-regulatory and self-regulatory mechanisms and institutions? Should ICASA be required to consult the FPB and ensure any criteria it sets are in line with FPB approaches?
- How can policy ensure that complaints procedures are streamlined so that audiences and end-users can easily complain and do not have to first research which regulatory body deals with content it is concerned about? Should the FPB and ICASA be required to set up a portal/complaints office together with other regulatory bodies (statutory, self-regulatory and co-regulatory) to establish a one-stop-shop complaints mechanism?
- The means to protect children and provide adequate audience advisories will depend on the medium and platform. For example, watersheds (where programmes unsuitable for children are only broadcast at times when children are not likely to be part of the audience) are only relevant to scheduled programming. Access controls are also currently in place across many platforms to ensure age verification and/or parental controls. Audience advisories/labels are required across all content either in terms of ICASA or BCCSA provisions or by the FPB. Is there a need to put in place explicit requirements and develop uniform approaches to, for example, classification and labelling? If so, should the FPB and/or ICASA be charged with developing these, together with co-regulatory and self-regulatory bodies?
- Consumer education will become increasingly important to ensure citizens are aware of mechanisms in place to protect children, avoid content and complain about alleged breaches of codes. ICASA requires broadcasters to provide regular information about the code of ethics and how to complain if

they believe standards have been breached. Should the regulator require all relevant licensees to provide similar information about these issues?

- Should ICASA be specifically charged with promoting media literacy, and specific provisions and powers in relation to this added to their mandate?
- Is it necessary for the regulator to require providers to warn audiences if they are moving from a managed platform that adheres to such standards to an unmanaged platform (e.g. the Internet) given that audiences might not necessarily be aware of this when they shift programmes? Some countries have specified that providers include both on screen text messages and audio messages to warn audiences of this.
- Stakeholders are requested to make submissions on these issues as well as other issues they believe need to be addressed

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## **Chapter 7 – Institutional Frameworks**

### **7.11 Protection of children, content standards and classification**

New media and services introduced with convergence, have implications for the approach to the protection of children and the setting of broadcasting related editorial codes and content standards. There is a need for a closer working relationship between the Film and Publications Board and ICASA in order to ensure, for example, a common classification framework across the different sectors and to make it easy for audiences and users to know which body to complain to.

Submissions noted that:

- in view of convergence and the challenges this brings in relation to ensuring common approaches to protection of children and setting of content standards across all platforms, there is a need for organisations such as the FPB, the BCCSA and ICASA to review the way they work collaboratively. Co-regulatory structures in place in broadcasting had worked well over the years. The BCCSA in a supplementary submission said that it does work closely with the FPB.
- it is important that content standards are clear, but that there would be a need for discussion relating to online content. Jurisdiction in relation to online content is currently vested in the DTPS (with the ECT Act and take down powers) and with the FPB, with ICASA having some jurisdiction as ISPs hold service licences. Concurrent jurisdiction issues must be resolved and consideration should be given to developing a specialist content regulation agency similar to those in other jurisdictions.
- ICASA is primarily an economic and technical regulator and should focus on developing capacity in those areas given the crucial role it must play in policy implementation and the implementation of the South Africa Connect Policy.

#### ***g. The Protection from Harassment Act***

3.206 The Protection from Harassment Act provides an inexpensive civil remedy from harassment which may or may not constitute a crime. The Act includes a wide definition of 'harassment' as follows:

"harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know-

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person;”

3.207 A protection order may be applied for in terms of this Act in circumstances where:

- Anyone believes he or she is being harassed by another individual.
- A person who has a material interest in the wellbeing of a person believes that this person is being harassed. Such a person may apply on behalf of the harassed person but only with the complainant’s consent, unless the court is satisfied that he or she is unable to provide such consent.
- A minor under the age of 18, or anyone on behalf of the minor, may make an application to the court for a protection order. It is unnecessary to gain consent or assistance from the minor’s parents or legal guardian(s).
- Anyone who is subject to harassment electronically, via the Internet, social media sites, text messages or e-mail.
- Any individual who has applied for a protection order in terms of the Domestic Violence Act may also apply for protection from harassment under the Act.

3.208 The Act is sensitive to the differing requirements to combat harassment in the digital age. It caters for circumstances in which the complainant is unaware of the harasser’s personal details or where the complainant is being subjected to abuse via anonymous threatening or offensive sms’s, Twitter messages or e-mails. Sections 4(1)(b), 5(1)(b) and 6(1)(b) of the Act empower the magistrate’s court to issue a directive and order electronic communications service providers to provide it with the full name, identity number and address of the harasser sending the text messages, tweets or e-mails. Further, it may order a member of the South African Police Service to carry out an investigation into the harassment, with the aim of obtaining the name and address of a harasser whose personal details are unknown to the complainant.

## **Questions**

- 34. Are broadcasters allowed (or should they be allowed) to screen films which cinemas may not exhibit and which distributors may not sell or hire out?**
- 35. Do broadcasters and publishers who are exempt from the regulatory authority of the Film and Publication Act meet the objectives of the FPA as required?**
- 36. Should legislation provide that the abovementioned broadcasters and publishers are obliged to provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care and to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences?**
- 37. Comment on whether service providers provide adequate protection to children who use child-oriented services.**
- 38. What is the position in respect of content service providers who are Internet service providers?**
- 39. Are the blocking possibilities for parental control adequate?**
- 40. Are the instructions for parental control available in multiple languages?**
- 41. Do discussants think that they are adequately promoted?**

# CHAPTER 4: THE WAY FORWARD

## A Introduction and overview

4.1 This chapter will provide a brief exposition of relevant pending legal developments; examples of comparative law; explore possible solutions in respect of enhancing the criminal law response to the creation, possession and distribution of child abuse material; and the possible options for enhancing the regulatory framework governing the exposure of children to pornography.

## B Developments relevant to this investigation

4.2 A number of imminent and ongoing legislative and policy initiatives have been discussed above, namely the ICT Policy Review Process underway in the Department of Telecommunications and Postal Services; the legislative review of the FPA under the auspices of the Department of Communications and the Cybercrimes and Related Matters Amendment Bill being spearheaded by the Minister of Justice and Correctional Services.

4.3 Mention was also made above to the matter of *Justice Alliance of South Africa et al v ICASA et al*<sup>289</sup> where the decision taken by ICASA in terms of which it authorized On Digital Media to broadcast three pornographic channels, namely, Playboy TV, Desire TV and Private Spice was set aside and remitted back to ICASA for reconsideration.

4.4 The BCCSA would seem to be firmly applying industry Codes of Conduct. For example in the matter of *Baptiste v Multichoice Channel 304*<sup>290</sup> the BCCSA found the broadcaster guilty of contravening clause 12 of the Code of Conduct for Subscription Broadcasting Licensees pertaining to the watershed rule. The broadcaster was fined R15 000 for repeatedly contravening the Code by broadcasting promotional material unsuitable for broadcasting on a children's channel i.e. Disney XD and blaming it on human error.

4.5 In addition to these developments, during 2010 The Justice Alliance of South Africa (JASA)<sup>291</sup> prepared a draft Internet and Cell Phone Pornography Bill for the attention of the (then) Deputy Minister of Home Affairs (at that stage the Film and Publications Act fell under

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<sup>289</sup> (Case no:18519/2013).

<sup>290</sup> (Case no: 46/2014)

<sup>291</sup> A coalition of corporations, individuals and churches committed to upholding and fighting for justice and the highest moral standards in South African society.

the auspices of the Department of Home Affairs).<sup>292</sup> The proposed Bill however does not address the dissemination of pornography through other avenues of the mass media. The Internet and Cell Phone Pornography Bill proposes that pornography be filtered out at the Tier One service providers to avoid it entering the country. The Bill is aimed at the total ban of pornography on Internet and mobile phones. The definition of pornography found in the Sexual Offences Act is used to define pornography in this Bill.

4.6 The Bill proposes using existing local legal definitions of pornography to make any Internet or mobile phone provider who distributes or allows distribution of pornography guilty of an offence and liable for jail terms and, or heavy fines.<sup>293</sup>

4.7 The Bill is modelled on legislation in New Zealand where a tier one level Internet pornography filter has been pioneered in New Zealand schools.<sup>294</sup> The technology filters out 95% of IT pornography early on. Mancer believes that tier one level filters are far more accurate, intelligent and effective than those that rely on keywords and enabled tier two filters at ISP level to receive 'cleaner' information flow.<sup>295</sup> Khoury believes that the rationale behind a tier one filter is that software based filters are easy to circumvent by simply Googling instructions on how to remove them.<sup>296</sup>

4.8 It is also of interest to note that the United Arab Emirates and Yemen have legislation which places a total ban on pornography on the Internet and mobile phones. Australia and New Zealand are currently seeking to do so.<sup>297</sup> Examples of developments in Australia, the United States of America and the United Kingdom follow:

#### **(a) Australia**

4.9 From 1 January 2000 the Australian Communications & Media Authority has the power to regulate Internet service providers and content hosts in censoring prohibited (and potentially prohibited) content.<sup>298</sup>

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<sup>292</sup> JASA Media Release Internet Pornography Bill 26 May 2010.

<sup>293</sup> SAMJ Izindaba, Silver 'porn bullet' for information technology industry? September 2010, Vol. 100, No.9.

<sup>294</sup> Peter Mancer, New Zealand pioneer of the filter in New Zealand as quoted in SAMJ Izindaba, Silver 'porn bullet' for information technology industry? September 2010, Vol. 100, No.9.

<sup>295</sup> Ibid.

<sup>296</sup> Mark Khoury, a local Internet filtering specialist from VirtueNet quoted in SAMJ Izindaba, Silver 'porn bullet' for information technology industry? September 2010, Vol. 100, No.9.

<sup>297</sup> JASA Media Release Internet Pornography Bill 26 May 2010.

<sup>298</sup> Censorship and Free Speech: Australian Law available on <http://caslon.com.au/censorshipguide4.htm>. accessed on 15 September 2010.

4.10 In terms of the Broadcasting Services Amendment (Online Services) Act 1999 (BSA Act) ISPs are required to take “all reasonable steps” in responding to directions to prevent end-users accessing ‘X’ or ‘Refused Classification’ material. They are also required to provide customers with filters from a list of “approved” products.<sup>299</sup>

4.11 The BSA Act is however heralded as a fine example of Internet ‘gesture politics’, where the appearance of action is more important than substantive responses to policy challenges – real or imagined.<sup>300</sup> The government agency responsible for this filtering regime has openly admitted that whether the filters work or not is irrelevant.<sup>301</sup>

4.12 On 15 December 2009, the Australian Federal Labor government announced the third version of their mandatory ISP-level blocking policy. The Government announced that it plans to mandate that ISPs block adults’ access to content that the Government deems unsuitable for adults. Blocking will not be optional for adult Internet users. This material may still be accessible for purchase over the counter. However ISPs will not be required to block any adults-only/unsuitable for children material and children will not be prevented from accessing all content that has been prohibited.<sup>302</sup>

4.13 In 2012 the Australian Law Reform Commission (ALRC) published a Report on Classification – Content Regulation and Convergent Media<sup>303</sup> in which it found that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content available to Australians.<sup>304</sup> The Report states that the current legislation is in the words of the Australian Communications and Media Authority (ACMA) “laws built upon platform-based media regulation, that become less and less effective in a convergent media environment.”<sup>305</sup> The ALRC recommended a new classification scheme for a new convergent media landscape. The key features of the ALRC’s model are:

- Platform-neutral regulation;
- Clear scope of what must be classified;

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<sup>299</sup> Ibid.

<sup>300</sup> Ibid .

<sup>301</sup> Ibid.

<sup>302</sup> Libertus.net ‘AU Gov’t Mandatory ISP Filtering/Censorship Plan’ available at <http://libertus.net/censor/isp-blocking/au-govplan.html> accessed on 15/09/2010.

<sup>303</sup> Australian Law Reform Commission Classification-Content Regulation and Convergent Media (ALRC Report 118) (February 2012).

<sup>304</sup> Australian Law Reform Commission Classification-Content Regulation and Convergent Media (ALRC Summary Report 118) (February 2012) at p 11.

<sup>305</sup> At p 12.

- A shift in regulatory focus to restricting access to adult content;
- Co-regulation and industry classification;
- Classification Board benchmarking and community standards;
- An Australian Government scheme; and
- A single regulator.

4.14 The Report recommends that a new Classification of Media Content Act be enacted incorporating all classification obligations applying to media content. Of particular interest to this investigation is the requirement pertaining to restricting access to adult content. The Report suggests that content providers should be required to take reasonable steps to restrict access to all adult content that is sold, screened, provided online, or otherwise distributed to the Australian public.<sup>306</sup>

4.15 Measures to restrict access to adult content are seen as symbiotic with measures to assist parents and guardians in particular:

- Public education about the use of parental locks and other technical means to protect children from exposure to inappropriate media content;
- Digital literacy and education programs;
- Use of personal computer-based dynamic content filters; and
- User reporting – or ‘flagging’ – of inappropriate content.<sup>307</sup>

4.16 Nettleton stated that the Australian Government's mandatory ISP filtering policy had been on hold since July 2010 pending the release of the ALRC Classification Report and, subsequently, the Convergence Review.<sup>308</sup> The hope was expressed that since both inquiries have now concluded, “it is expected that the Australian Government will now make an announcement concerning its proposed mandatory ISP filtering policy.” However it would seem though that the Australian Governments are not yet in agreement as to how to deal with concerns relating to the Internet and whether or how it should be regulated.<sup>309</sup>

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<sup>306</sup> At p 15.

<sup>307</sup> At p 16.

<sup>308</sup> Nettleton Jamie “Australia: ALRC Report – Classification – Content Regulation and Convergent Media- What should be Australia’s Policy? To Filter or Not to Filter” (21 May 2012) Mondaq available at <http://www.mondaq.com/australia/x/178238/Media+Entertainment+Law/ALRC+Report+Cl...> Accessed on 29 May 2015.

<sup>309</sup> Department of Parliamentary Services “Australian Governments and dilemmas in filtering the Internet: juggling freedoms against potential for harm” Research Paper Series, 2014-15 (8 August 2014) available at <http://parlinfo.aph.gov.au>. Accessed on 29 May 2015.

## **(b) United States of America**

4.17 The Commission on Online Child Protection (COPA Commission), a US federal government agency, was established in 1998 in conjunction with the COPA Act to “identify technological and other methods that will help reduce access by minors to material that is harmful to minors on the Internet”.

4.18 The Act seeks to prohibit sites from knowingly making available to children material that is sexually explicit. Commercial providers of such material may defend themselves by restricting access to the sites, eg by using a credit-card based subscription or an identity service such as AdultCheck.

4.19 The Commission survived initial challenges to the Act. The Commission has identified rating systems, filters, age verification systems and a special ‘X’ domain.

4.20 The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT Act) of 2003<sup>310</sup> criminalises the offering or soliciting of sexually explicit images of children. It applies irrespective of whether or not the material is original, computer-generated, digitally altered or is fraudulent (does not exist at all). The Act also regulates the use of misleading domain names, which may deceive a person into viewing obscene material. This was to address a new concern where spam mails, mistyping of URLs and innocent word searches may cause children to encounter unsought of pornography.<sup>311</sup> The law passed muster in the Supreme Court in *United States v Williams*.<sup>312</sup>

## **(c) United Kingdom**

4.21 In the United Kingdom, it is illegal to take, make, distribute, show or possess an indecent image of a child.<sup>313</sup> Until 2009 the possession of pornographic images for private use has never been an offence in the United Kingdom. In 2009 Government classified the possession of “extreme pornography” as illegal.

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<sup>310</sup> 539 U.S. 194 (2003).

<sup>311</sup> Namburi S, Santhy KVK *Online child Sexual Abuse: A Comparative Study of Laws*, GIGA International Conference, NALSAR University of Law, Hyderabad, 5 – 6 April 2012” [2012] NALSARLRS 5 at 10 available at <http://www.liiofindia.org/cgi-bin/disp.pl/in/journals/NALSARLRS/2012/5.htm?query=chil...> Accessed on 29 May 2015.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

4.22 On 24 May 2013 the Office of the Children’s Commissioner for England published its report “Basically porn is everywhere” – a Rapid Evidence Assessment on the Effects that Access and Exposure to Pornography has on Children and Young People.<sup>314</sup> The report found that “a significant number of children access pornography; it influences their attitudes towards relationships and sex; it is linked to risky behaviour such as having sex at a younger age; and there is a correlation between holding violent attitudes and accessing more violent media.”

4.23 Maggie Atkinson, Children's Commissioner for England is quoted<sup>315</sup> as saying that:

"This report is based on an assessment of the available evidence. It points out the gaps in our knowledge as well as providing compelling evidence that exposure to pornography influences children's attitudes to relationships and sex. We are living at a time when violent and sadistic imagery is readily available to very young children, even if they do not go searching for it, their friends may show it to them or they may stumble on it whilst using the Internet. We all have a duty to protect children from harm - it is one of their rights enshrined in the United Nations Convention on the Rights of the Child - and the time has come for immediate and decisive action to do so.”; and

"For years we have applied age restrictions to films at the cinema but now we are permitting access to far more troubling imagery via the Internet. We do not fully understand the implications of this. It is a risky experiment to allow a generation of young people to be raised on a diet of pornography."

4.24 The report particularly found that:

- Children and young people's exposure and access to pornography occurs both on and offline but in recent years the most common method of access is via Internet enabled technology
- Exposure and access to pornography increases with age
- Accidental exposure to pornography is more prevalent than deliberate access
- There are gender differences in exposure and access to pornography with boys more likely to be exposed to and deliberately access, seek or use pornography than girls.

4.25 It concludes that there are still many unanswered questions about the affect exposure to pornography has on children: “a situation the Office of the Children's

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<sup>314</sup> The Children’s Commissioner for England "Basically... porn is everywhere" - A Rapid Evidence Assessment on the Effects that Access and Exposure to Pornography has on Children and Young People available at [www.childrenscommissioner.gov.uk](http://www.childrenscommissioner.gov.uk) Accessed on 24 May 2013.

<sup>315</sup> Press release by the Office of the Children’s Commissioner 24 May 2013. Available at [www.childrenscommissioner.gov.uk](http://www.childrenscommissioner.gov.uk).

Commissioner considers requires urgent action in an age where extreme violent and sadistic imagery is two clicks away”.

4.26 The report is based on a review of published evidence led by Middlesex University in partnership with the University of Bedfordshire, Canterbury Christ Church University and University of Kent, supplemented by a focus group of young people. The researchers identified 41,000 items of academic literature about pornography undertaking an in-depth analysis of 276 to draw its conclusions.

4.27 The report makes reference to work being done by Claire Perry, MP on Internet controls, in her role as advisor to the Prime Minister. It would seem that the Home Office is currently giving attention to this matter.

4.28 The report makes a series of recommendations in addition to carrying out further research as follows:

“1. **The Department for Education** should ensure that all schools understand the importance of, and deliver, effective relationship and sex education which must include safe use of the Internet. A strong and unambiguous message to this effect should be sent to all education providers including: all state funded schools including academies; maintained schools; independent schools; faith schools; and further education colleges.

2. **The Department for Education** should ensure curriculum content on relationships and sex education covers access and exposure to pornography, and sexual practices that are relevant to young people's lives and experiences, as a means of building young people's resilience. This is sensitive, specialist work that must be undertaken by suitably qualified professionals, for example, specialist teachers, youth workers or sexual health practitioners.

3. **The Department for Education** should rename ‘sex and relationship education’ (SRE) to ‘relationship and sex education’ (RSE) to place emphasis on the importance of developing healthy, positive, respectful relationships.

4. The Government, in partnership with Internet service providers, should embark on a national awareness-raising campaign, underpinned by further research, to better inform parents, professionals and the public at large about the content of pornography and young people's access of, and exposure to such content. This should include a message to parents about their responsibilities affording both children and young people greater protection and generating a wider debate about the nature of pornography in the 21st century and its potential impact.

5. Through the commitments made to better protect girls and young women from gender-based violence in the ending violence against women and girls action plan, the **Home Office** and the **Department for Education** should commission further research into the safeguarding implications of exposure and/or access to

pornography on children and young people, particularly in relation to their experiences of teenage relationship abuse and peer exploitation.

6. **The Home Office** should incorporate the findings of this report into the ongoing teen abuse campaign. Future activity on this workstream should reflect young people's exposure to violent sexualised imagery within their peer groups and relationships.

7. The **Youth Justice Board** should include questions on exposure and access to pornography within the revised ASSET assessment tool, to better inform understanding of possible associations with attitudes and behaviour and improve the targeting of interventions for young people displaying violent, or sexually harmful, behaviours.”

4.29 In December 2014 the depiction of certain sex acts were banned in pornography produced or distributed in the United Kingdom and it was reported that the Prime Minister David Cameron intended to block pornography in every home in the United Kingdom by Internet providers unless the homeowner specifically opted-in to being able to view adult content.<sup>316</sup> It is reported that in January 2015 Sky Broadband “switched on its ‘Shield’ filter for every one of its 5.3 million users, with those wishing to access adult content needing to explicitly “opt-out” of the filter.”<sup>317</sup> However, The Independent newspaper reports that the Council of the European Union is proposing measures that would stop mobile phone and Internet providers from being able to automatically block pornography and adult content.<sup>318</sup>

#### **(d) International Hotlines**

4.30 The European Union, United States of America and other jurisdictions are increasingly underpinning enforcement of online content management legislation by supporting the establishment of hotlines for complaints about illegal material. They are run by a range of organisations – industry, users, child welfare and public bodies – and have varying functions and procedures. International co-operation between hotlines is growing, especially through the work of the EU-based INHOPE organisation.<sup>319</sup> South Africa has become the first African country to join a global umbrella body of Internet hotlines fighting against child pornography. The FPB was granted full membership of the International Association of Internet Hotlines (INHOPE), in Luxemburg on 13 May 2009, making South

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<sup>316</sup> Eleftheriou-Smith L-M “EU to block David Cameron’s plans on Internet porn crackdown” (24 May 2015) The Independent available at <http://www.independent.co.uk/news/world/europe/eu-poses-threat-to-camersons-plans-to-cra...> Accessed on 29 May 2015.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> Censorship and Free Speech: Overseas Law available on <http://www.caslon.com.au/censorshipguide5.htm> Accessed on 15 September 2010.

Africa the 32nd country to gain international recognition in the global fight to combat child pornography.<sup>320</sup>

## **C Is there a need to enhance the criminal law and response to the creation, possession and distribution of child abuse material?**

4.31 There are a number of issues related to relevant sections of both the FPA and the Sexual Offences Act that pose problems. However, rather than dealing with every single issue that may present law enforcement problems, it may be more appropriate to draft a new law dealing with the crimes relating to the creation, possession and distribution of child abuse material. Such a law could include offences of grooming and the failure of service providers to take all necessary steps to prevent the abuse of social networking sites for the targeting of children for sexual abuse and exploitation. The International Centre for Missing & Exploited Children sets out the following minimum requirements for an appropriate and effective criminal law response to the problem of child abuse material – the law must:

- be specific to child abuse material - in some countries, law enforcement agents dealing with child abuse material offences have to depend on general pornography or obscenity laws;
- provide a clear definition of child abuse material - the use of the expression “child pornography” may be convenient but its reference to “pornography” does create a problem;
- criminalise all computer-facilitated acts and conduct related to the sexual abuse and exploitation of children - computer-facilitated offences should include the creation, production, possession and distribution of child abuse materials, as well as the use of computer-facilities for making financial transactions related to child abuse material, the grooming and luring of children for sexual gratification.
- criminalise the possession of child abuse material, regardless of the intent to distribute - this is a response to the fact that there are some countries which prohibit the distribution but not the possession of child abuse material; and
- require Internet Service Providers (ISPs) to report suspected child pornography to law enforcement or to some other mandated agency - the Internet is the preferred

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<sup>320</sup> About Us-film and Publication Board available at <http://www.fpb.org.za>. Accessed on 12 March 2015.

medium for the trade in child abuse material. Given the volume of data-transmission via the Internet, every second of every day, it is impossible for any law enforcement agency, or other mandated authority, to monitor the abuse of the Internet for the distribution and accessing of child abuse material. But there is technology available for ISPs to be able to monitor the abuse of their services, by their clients, for illegal purposes, such as the hosting of child abuse materials, the distribution and accessing of such materials and the use of their services for financial transactions related to child abuse material. In addition to reporting obligations, ISPs which provide social networking and chat room services, which attract children, should also be required to moderate such services to ensure that identifiable child exploiters should be blocked from using such services to target vulnerable children.

## **D Providing greater protection for children from exposure to pornography**

4.32 Although there seems to be a number of laws and codes of good practice aimed at regulating consumption of or exposure to legal pornography with the aim of protecting children from exposure to such material, for various reasons but largely due to the nature of the Internet, implementation is lacking or ineffective. The existing legislation is ineffective to combat the tidal wave of adult pornography and child abuse material now being broadcast over the Internet via computers and mobile phones and readily available to all including children of all ages. It is argued that an attempt to classify content on the Internet would be an exercise in futility due to the fluidity of cyberspace. For example, in respect of the Take Down Notice in terms of section 77 of the ECT Act, not only has the harm of exposure and the abuse already occurred but the removal of one site is superseded by the creation of one or more sites. Distribution of pornography via the Internet and mobile phones undermines current legislation.<sup>321</sup>

4.33 Since the harm of the exhibition or distribution of adult pornography by and through the mass media lies in the harm it may cause to underage and unwitting viewers involuntarily exposed to it, could the solution be to restrict its exhibition and purchase to domains where such involuntary exposure will not occur, such as inside well sign-posted adult premises and cinemas where those who are under the age of 18 years will know not to venture and where

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<sup>321</sup> Dumisani Rorwana, Acting Manager: Legal and Regulatory Affairs at the Symposium on effects of children's exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town. Cape Town.

those older than 18 may either view or purchase it for later private consumption? Although this may prevent adult consumers of pornography from distributing their opinions as widely as they might like, and may also cause some minor inconvenience to consumers (who may have to go further out of their way to find and view pornography), these costs may be relatively small compared with the level of harm that involuntary exposure is likely to cause.<sup>322</sup>

4.34 One of the ways to prevent children from viewing pornography would be to filter it out when it enters South Africa through tier one service providers, before it is distributed throughout the country. Legislation will be needed to do so. The purpose of legislation of this nature would be to restore the status quo pre-Internet as regards access to pornographic media by minors. The rights of adults who wish to access pornography would be curtailed to licensed adult premises as is currently provided for in the FPA. It could be argued that this option would complement and render effective the aims of the FPA.

4.35 Another but seemingly less effective method would be to intervene at tier two level. It would then be necessary to determine whether consumers will be required to opt-out or opt-in. Opt-out is more burdensome for the consumer, requiring users to request that access to particular content not be allowed. Opt-in is where the user has to specifically request access to specific content. With both methods, there is a need for effective age verification systems. Age verification may prove especially difficult or impossible with the existence of pre-paid services and access to public broadcasting.

4.36 Underlying this discourse would be the question of whether the issue under consideration is predominantly legal requiring an in-depth review of existing legislation and a streamlining of policy across departments.<sup>323</sup> From the content of this Issue Paper it would seem to be the case.

4.37 The existence of two regulatory bodies, i.e. the FPB and ICASA housed in different government departments i.e. the Department of Communications and the Department of Telecommunications and Postal Services and an apparent lack of synergy between the two bodies seems to have been identified as contributory to the problem and hence the political decision was taken in 2014 to move the FPB from under the auspices of the Department of

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<sup>322</sup> As quoted in the *Stanford Encyclopedia of Philosophy Pornography and Censorship* May 5, 2004.

<sup>323</sup> SAMJ Izindaba, Silver 'porn bullet' for information technology industry? September 2010, Vol. 100, No.9.

Home Affairs to the Department of Communication. As stated above<sup>324</sup> the FPB classifies all film material distributed in South Africa, except that shown by the broadcasters. However one of the gaps in the reach of ICASA is that there is no regulatory mechanism on content. ICASA does not enforce or classify material.<sup>325</sup> A move towards a uniform classification system for content exhibited or distributed through the mass media in South Africa may be a move in the right direction. This may however also be a matter for further legislative intervention.

4.38 The need for synergy or evaluating of the roles of the aforementioned bodies becomes important when one comes to uniform content rating as content rating requires an entity to be designated to define age categories and rating criteria, one to rate content and one to deal with disputes and complaints.

4.39 Once age categories are adopted, it is important also to specify the rating criteria and ensure that the criteria are applied consistently and fairly. It is also important to ensure that the rating is done by appropriately qualified persons.

4.40 It seems that effective measures to protect children from accessing harmful content via the mass media will have to be employed through a multi-pronged approach. All parties must play their part – children, parents and those tasked with empowering and protecting children such as schools, players in the market place, including mobile operators, service providers, handset manufacturers, as well as public authorities.

4.41 One of the shortcomings in the Internet market segment has been a lack of consumer awareness and knowledge on how to, for example, install appropriate software, if technology is in the case of mobile phones deployed at the handset.<sup>326</sup> Theoretically parents can use screening technology on their home computers, mobile phones and TV (not available on the public broadcasting channels) and can monitor their children's use of home computers and mobile phones. But no screening technology is perfect; some youth know how to circumvent technology; and some parents are for a number of reasons unable to provide needed supervision at home but especially when children are not home. It can also be argued that parents can talk to their children about the dangers of Internet pornography

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<sup>324</sup> See para 3.63 and further.

<sup>325</sup> Ms Petronella Landers of the Department of Communications at the Symposium on effects of children's exposure to pornography, and the impact to society, 26 – 27 July 2010, Cape Town.

<sup>326</sup> Lisa Thornton Inc Protecting Minors from Harmful Content via Mobile Phones, discussion paper presented for Lawyers for Human Rights Child Rights Project Focus Group on 29 March 2007 at p27.

and exploiters. But some parents aren't aware of the dangers and sometimes communication channels between parents/caregivers and their children are not what they should be; and some dangers and their consequences are too severe to be solved by instruction.

4.42 Parents may opt for filtering as a solution but filtering does not work in relation to peer to peer (P2P) networks, where files are shared without accessing a central network. Furthermore children who are actively seeking pornography may already know how to or find out very quickly, how to bypass or circumvent ISP-level blocking.<sup>327</sup>

4.43 Therefore further supplementary mechanisms that could be employed to protect children from being exposed to pornography would be a concerted effort to educating the public about the risks of exposure to pornography and the consumption thereof by children and allocating resources to enforce laws already in place, for example training and appointing Cyber Inspectors in terms of the ECT Act.<sup>328</sup> The unintended consequences and risks of technology should be addressed in the life skills curriculum at all schools. The positive use of technology should however be emphasised as well as responsible access and use of such important tools.

4.44 Although the consumption of pornography through the mass media often takes place in the privacy of a person's home, a television broadcaster or ISP has no control over who is accessing the content it displays or hosts. Where the reasonable risk of harm to children is likely to materialise in private, some intrusion by the law into the private domain would be justified to minimise the risk of such harm. Although it could be argued that parents should not abdicate their parental duties, many children are living in child headed households and the majority of those who have parents have no idea how to protect their children in this technological age. In *Case v Minister of Safety and Security and Others*<sup>329</sup> the Constitutional Court held that although a South African's home may be his or her castle the walls of this castle are not impregnable to the reach of governmental regulation of expressive materials.

4.45 The State is under a constitutional obligation to combat child abuse in order to combat the harm that arises therefrom. The risk of harm from exposing children to

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<sup>327</sup> Libertus.net 'AU Gov't Mandatory ISP Filtering/Censorship Plan' available at <http://libertus.net/censor/isp-blocking/au-govplan.html> accessed on 15/09/2010.

<sup>328</sup> Pornography's Impact on Marriage & The Family, Jill C. Manning, Subcommittee on the Constitution, Civil Rights and Property Rights Committee on Judiciary, United States Senate, November 9, 2005 available at [http://www.heritage.org/Research/Family/upload/85273\\_1.pdf](http://www.heritage.org/Research/Family/upload/85273_1.pdf)

<sup>329</sup> *Case v Minister of Safety and Security and others* 1996 (3) SA 617 (CC) at par 65.

pornography is threefold, firstly, it could result in the "grooming" of children for sexual purposes, creating sexual awareness at an age when they are not emotionally equipped to have such awareness; secondly, depending on the type of pornography it could reinforce cognitive sexual distortions, i.e. the belief that sex with children or violent sex is acceptable; and thirdly could result in the re-enactment of what has been seen, either with peers, younger more vulnerable children or with adults. Although there may not be evidence that this may occur, common sense indicates that these effects will occur in some cases.

## **Questions**

- 42. Is there a need to enhance the criminal law response to the creation, possession and distribution of child abuse material?**
- 43. Would the consolidating of all offences relating to child abuse material in one piece of legislation enhance the criminal law response to these crimes?**
- 44. Is law reform necessary to protect children from exposure to pornography or is the existing legal framework adequate?**
- 45. Would a change in policy or improved implementation of existing legislation be sufficient to address the problem?**
- 46. Is it necessary to investigate existing structures and policies that govern classification, enforcing and monitoring of the productions, distribution and exhibition of pornography?**
- 47. Is there a lack of synergy between the FPB and ICASA and if so does this warrant investigation?**
- 48. Would a uniform classification system for content exhibited or distributed through the mass media in South Africa be a move in the right direction?**
- 49. If advertisers and consumers of pornography are still free to publish and distribute their opinions would restrictions on the public display of pornography amount to censorship?**
- 50. Would filtering pornography at tier one level be seen as an unjustifiable**

**limitation of adult consumers rights to privacy and freedom of expression or would it pass constitutional muster?**

- 51. Would a mere change in policy or improved implementation of existing legislation be sufficient to address the problem of children being exposed to pornography through the mass media, especially through the Internet, media and mobile phones?**
- 52. What responsibility and accountability do, or should, parents and caregivers have towards their children to protect them from exposure to child pornography and other adult material?**
- 53. If pornography is made available to adults in an “adults only” licensed shop, would the limitation actually constitute more of an inconvenience than a true limitation of the right?**

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