

EMBARGO: FOR IMMEDIATE RELEASE

**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
PROJECT 107: SEXUAL OFFENCES: PORNOGRAPHY AND CHILDREN**

On 5 August 2015 the Commission approved the publication of its issue paper on sexual offences (pornography and children) for comment.

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.

Four areas of concern have been identified, namely:

- 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 (sexting); and
- Grooming of a child and other sexual contact crimes associated with or facilitated by pornography.

The Commission invites comment on the issue paper and the questions contained in it. Comment may also be made on related issues of concern which have not been raised in the issue paper. The closing date for comment is 30 November 2015.

ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, CENTURION

DATE: 6 August 2015

A copy of the summary of the issue paper and questions posed therein is attached. The contact person for enquiries in respect of the media statement is Ms D Clark: email dclark@justice.gov.za. The report is freely available on <http://salawreform.justice.gov.za>

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?