



**PROJECT 107**

**SEXUAL OFFENCES: PORNOGRAPHY AND CHILDREN**

**DISCUSSION PAPER 149**

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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.

The members of the Commission are —

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Dr J van Niekerk, Child Rights and Child Protection (Chairperson)

Mr I Chetty, KINSA (South Africa) (until 25 January 2016)

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Brigadier (Ret) A Pienaar, FCS South African Police Service

Ad hoc members:

Mr S Risiba, CEO of the Film and Publication Board (from 6 March 2015)

Ms P Linders of the Department of Telecommunications & Postal Services (from 31 March 2015)

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## GLOSSARY

**'App'** means computer software, or a program, most commonly a small, specific one used for mobile devices but can be used for non-mobile devices as well.<sup>1</sup> Originally software that was installed on a computer as a program was labelled an application and abbreviated as "app".

**'Child'** means a person below the age of 18 years.

**'Data streaming'** means the transfer of data at a steady high-speed rate sufficient to support such applications as high-definition television (HDTV) or the continuous backup copying to a storage medium of the data flow within a computer. Data streaming requires some combination of bandwidth sufficiency and, for real-time human perception of the data, the ability to make sure that enough data is being continuously received without any noticeable time lag.<sup>2</sup>

**'Domain name'** means an alphanumeric designation that is registered or assigned in respect of an electronic address or other resource on the internet (as defined in the Electronic Communications and Transactions Act, 2002 (Act No 25 of 2002).

**'Domain name system' (DNS)** means the mapping of internet domain names to the internet protocol network addresses they represent and allows websites to use names, rather than difficult-to-remember IP addresses.<sup>3</sup>

**'Electronic Communications Service Provider (ECSP)'** means any person who provides an electronic communications service under and in accordance with an electronic communications service licence issued to such person under Chapter 3 of the Electronic Communications Act, 2005 (Act no 36 of 2005), or who is deemed to be licensed or exempted from being licensed as such in terms of the Electronic Communications Act, 2005.<sup>4</sup>

**'Internet'** means the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions thereof.

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<sup>1</sup> Techopedia dictionary 'App'. Available on [www.techopedia.com](http://www.techopedia.com). Accessed on 10 January 2019.

<sup>2</sup> Techtarget definitions 'definition data-streaming'. Available on <https://searchnetworking.techtarget.com/definition/data-streaming>. Accessed on 12 September 2018.

<sup>3</sup> Techtarget definitions 'definition domain name streaming'. Available on <https://www.techtarget.com/search/query?q=accessing&type=definition&pageNo=1&sortField=>. Accessed on 12 September 2018.

<sup>4</sup> As defined in the Cybercrimes Bill [B6 – 2017].

**‘Internet Access Provider’** means any organisation that arranges for an individual or an organization to have access to the internet.<sup>5</sup> For example Web Africa. These organisations operate within a regulated environment.

**‘Internet Protocol Television’ (IP TV)** means a service that provides television programming and other video content using the TCP/IP protocol suite as opposed to traditional cable or satellite signals.

**‘Internet Service Provider’<sup>6</sup> (ISP)** means a company that provides individuals and other companies access to the internet and other related services such as Web site building and virtual hosting. An ISP has the equipment and the telecommunication line access required to have a point-of-presence on the internet for the geographic area served. The larger ISPs have their own high-speed leased lines so that they are less dependent on the telecommunication providers and can provide better service to their customers. National ISPs Axxess, Vox Telecom, Web Africa, Afrihost, MWEB and Telkom Internet.

**‘Lifecasting’** means the 24/7 broadcasting of events in a person’s life through digital media.<sup>7</sup>

**‘Source code’** means the combination of text and other characters comprising the content, both viewable and non-viewable, of a web page, including any website publishing language, programming language, protocol or functional content, as well as any successor languages or protocols.

**‘sexting’** means the ‘self-production of sexual images’, or as the ‘exchange of sexual messages or images’ and ‘the creating, sharing and forwarding of sexually suggestive nude or nearly nude images through mobile phones and/or the internet’. Sexting is a form of self-generated sexually explicit content, and the practice is ‘remarkably varied in terms of context, meaning, and intention’.<sup>8</sup>

**‘streaming’** means a method of transmitting or receiving data (especially video and audio material) over a computer network as a steady, continuous flow, allowing playback to

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<sup>5</sup> Techtarger definitions ‘Internet Access Provider’. Available on <https://www.techtarget.com/search/query?q=accessing&type=definition&pageNo=1&sortField=>. Accessed on 12 September 2018.

<sup>6</sup> Techtarger definitions ‘definition Internet Service Provider. Available on <https://searchwindevelopment.techtarget.com/definition/ISP>. Accessed on 12 September 2018.

<sup>7</sup> Techtarger definitions ‘Lifecasting’. Available on <https://searchtelecom.techtarget.com/definition>. Accessed on 12 September 2018.

<sup>8</sup> Interagency Working Group on Sexual Exploitation of Children Terminology and Semantics *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* 28 January 2016 44.

start while the rest of the data is still being received,<sup>9</sup> e.g. live performers or TV broadcast like Netflix.

**‘Transmission Control Protocol’ (TCP)** means the standard that defines how to establish and maintain a network conversation via which application programs can exchange data. TCP works with the Internet Protocol (IP), which defines how computers send packets of data to each other. Together, TCP and IP are the basic rules defining the Internet.

**‘Video on Demand’ (VoD)** means an interactive TV technology that allows subscribers to view programming in real time or download programs and view them later. A VoD system at the consumer level can consist of a standard TV receiver along with a set-top box. Alternatively, the service can be delivered over the internet to home computers, portable computers, high-end cellular telephone sets and advanced digital media devices.<sup>10</sup>

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<sup>9</sup> Google dictionary ‘definition of streaming’. Accessed 2 March 2019.

<sup>10</sup> Techtargget definitions ‘Video on Demand’. Available on <https://searchtelecom.techtarget.com/definition/video-on-demand> Accessed on 12 September 2018.

# ABBREVIATIONS AND ACRONYMS

<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>BCCSA</b>	Broadcasting Complaints Commission of South Africa
<b>CPA</b>	Criminal Procedure Act
<b>CSEA</b>	Child sexual exploitation and abuse
<b>DBE</b>	Department of Basic Education
<b>DHA</b>	Department of Home Affairs
<b>DIRCO</b>	Department of International Affairs and Cooperation
<b>DOC</b>	Department of Communications
<b>DOH</b>	Department of Health
<b>DoJ&amp;CD</b>	Department of Justice and Constitutional Development
<b>DSD</b>	Department of Social Development
<b>ECSP</b>	Electronic Communications Service Provider
<b>FPA</b>	Films and Publications Act 65 of 1996
<b>ICASA</b>	Independent Communications Authority of South Africa
<b>ICTs</b>	Information and Communication Technologies
<b>ISPs</b>	Internet Service Providers
<b>ISPA</b>	Internet Service Provider's Association
<b>MMA</b>	Media Monitoring Africa
<b>NAB</b>	National Association of Broadcasters
<b>NCPR</b>	National Child Protection Register
<b>NGO</b>	Non-Governmental Organisation
<b>NPA</b>	National Prosecuting Authority
<b>NPAC</b>	National Plan of Action for Children
<b>NPO</b>	Non-profit organisation
<b>OPSC</b>	Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
<b>PCSA</b>	Press Council of South Africa
<b>SA Cellular Code</b>	South African Cellular Operators Association Code of Good Practice
<b>SACA</b>	South African Central Authority
<b>SADC</b>	Southern African Development Community
<b>SAPS</b>	South African Police Service
<b>SOA</b>	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
<b>TIPA</b>	Prevention and Combating of Trafficking in Persons Act 7 of 2013
<b>UNCRC</b>	United Nations Convention on the Rights of the Child

**UNCRC Committee** United Nations Convention on the Rights of the Child Committee

**UNICEF** United Nations Children's Fund

**VoD** Video on Demand

**WASPA Code** Wireless Application Service Providers' Association Code of Conduct



# EXECUTIVE SUMMARY

1. As part of the overarching investigation into the review of all sexual offences, this discussion paper seeks to review the legislative framework that currently applies to children in respect of pornography and child sexual 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 and where necessary to make preliminary recommendations in this regard.

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 pornography or child pornography (described as child sexual abuse material in this discussion paper). This material may be illegal or may only be legal for adults.

3. For the purpose of this paper, five areas of concern have been identified:

- Access to or exposure of a child to pornography;
- Creation and distribution of child sexual abuse material;
- Explicit self-images created and distributed by a child;
- Grooming of a child and other sexual contact crimes associated with or which are facilitated by child sexual abuse material; and
- Investigation, procedural matters and sentencing

4. This discussion paper aims to identify gaps in the manner in which the law currently regulates and protects children from being exposed to pornography or from being used to create child sexual abuse material. It reflects the submissions made to the Commission in response to its issue paper, discusses identified gaps and makes preliminary legislative and non-legislative recommendations. Its purpose is to serve as a basis for in-depth deliberation on the law reform needed to protect children and to test public opinion on the solutions identified by the Commission. It also discusses concerns relating to implementation. This approach aligns with the expanded mandate of the South African Law Reform Commission's (Commission) Project 107: Sexual Offences umbrella project on sexual offences i.e. to encourage action by the appropriate government structures and to galvanise communities to participate in the fight against sexual violence.

5. The discussion paper has six chapters. Chapter one provides an overview of the investigation and includes reference to the legislative developments in a number of government departments in South Africa. Chapter two focuses on the access to or exposure of a child to pornography (legal adult sexual material). Chapter three looks at the phenomenon of children creating and distributing self-generated sexual material (commonly referred to as 'sexting'). It seeks to make proposals for law reform that acknowledge the immaturity of some children whilst recognising the seriousness of this material falling into the hands of sexual exploiters or into the hands of a variety of third parties who may use the material for nefarious purposes. Chapter four investigates the creation and distribution of child sexual abuse material and addresses the need for uniform definitions and a central repository of crimes to deal with these sexual offences. Chapter five addresses the act of grooming a child and the use of pornography and child sexual abuse material in this process. Chapter 6 provides insight into some aspects of the investigation, procedures and sentencing in matters where children have been exposed to pornography or child sexual abuse material; have engaged in the creation or distribution of self-generated sexual material; or have been groomed through the use of pornography or child sexual abuse material to produce child sexual abuse material or to engage in sexual acts. The discussion paper contains provisional legislative and non-legislative recommendations (some in the form of options). The Commission requests comment on the discussion paper, particularly the provisional recommendations made in it and the draft Bill which accompanies it.

6. Following the discussion paper, the Commission will publish a report containing the Commission's final recommendations and proposal for law reform by way of draft legislation, if necessary. The report will take the public response to and input gleaned from public and expert workshops on the discussion paper into account in arriving at its final recommendations. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration.

7. In summary, in addition to the proposed amendments to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA) and the Films and Publications Act 65 of 1996 (FPA) contained in the proposed draft Bill the Commission provisionally recommends, and seeks comment on, the following:

#### 7.1. **'Child pornography' or 'child sexual abuse material'**

The Commission provisionally recommends that the term 'child pornography' be substituted with the term 'child sexual abuse material' in the SOA and in related legislation. This

recommendation accords with the international recognition of this term. In line with this recommendation the revised terminology is used consistently throughout this discussion paper.

## **7.2 Revision of the SOA definition of ‘child pornography’ (child sexual abuse material)**

The Commission is of the view that for the purposes of this investigation a child should continue to be defined as a person under the age of 18 and not be revised downward to align with the age of sexual consent. The Commission recommends the revision of the definition of ‘child pornography’ in the SOA to include live displays, sequences of images and any of the listed conduct that could be used to advocate, advertise or promote a child for sexual purposes. In line with this amendment the Commission recommends the repeal of the definition of ‘child pornography’ in the FPA and the substitution thereof by reference to the proposed definition of ‘child sexual abuse material’ in the SOA.

## **7.3 Child sexual abuse material and related offences to continue to be criminalised in both the FPA and SOA or rather in a single statute, the SOA**

The Commission provisionally recommends that all offences relating to child sexual abuse material and children’s exposure to pornography be criminalised in the SOA. This means that all pertinent offences in the FPA are to be deleted and re-enacted (with the necessary changes) in the SOA.

## **7.4 Alignment of the definitions of ‘child sexual abuse material’ and ‘pornography’**

The Commission is of the provisional view that the intention of the creator of child sexual abuse material or pornography is irrelevant. The Commission has aligned both definitions in the SOA to reflect this. Some smaller amendments are also proposed for purposes of alignment, such as the inclusion of live performances.

## **7.5 Providing for all technologies**

The Commission is mindful that all existing and newly created offences in the SOA should sufficiently provide for criminal acts committed through the use of present-day technologies such as the internet, webcams, USB`s and mobile phones and technology yet to be

developed. The aim is not to draft legislative proposals in such a way that the crimes are technology dependent or specific.

#### **7.6. Protecting children from exposure to pornography and child sexual abuse material**

The Commission provisionally recommends that legislation should comprehensively criminalise all acts of exposing children to pornography and content not suitable for children, in whatever manner, including through advertisement and enticement or by making use of misleading techniques. The Commission endorses the continued criminalisation of child sexual abuse material and its classification as illegal. Consequently the provisional recommendation is to ensure that all devices (new and second hand) be issued or returned to a default setting that blocks inappropriate content, with an opt-in possibility depending on proof of age of the buyer/user as being 18 and older. Giving effect to this recommendation will serve to protect both the child and the provider, though regulations will be required to provide for effective implementation.

#### **7.7. Consensual self-generated child sexual abuse material by and of certain children**

The Commission is mindful of the need to differentiate between creating or distributing consensual self-generated child sexual abuse images (material) in certain circumstances, either by providing for a non-offence (decriminalising); by providing defences to certain children or by providing for a lesser offence. The Commission is of the view that very limited decriminalisation should be provided for, as proposed in clause 56(9), but that, given the very nuanced scenarios that come into play, the provisions of the Child Justice Act 75 of 2008 will sufficiently cater for those instances where a diversion, rather than a full prosecution, would be the preferred manner to deal with the child in conflict with the law.

#### **7.8. Live performances involving child sexual abuse material**

The Commission provisionally recommends that all aspects of live performances involving child sexual abuse material, including the attendance or viewing thereof and the procurement of children to participate therein should be criminalised. The Commission is of the view that the definition of 'child sexual abuse material' has been sufficiently amended in its proposal to include any presentation of a live performance. However the provisional recommendation is that the acts of attending, viewing or procuring are to be specifically

included as part of a standalone offence criminalising the recruiting, coercion or deception of a child to participate in a live performance involving child sexual abuse material; or to provide child sexual abuse material.

## **7.9 Obligation to report commission of offences**

The Commission provisionally recommends the inclusion of an obligation to report the commission of offences pertaining to child sexual abuse material or exposure of children to pornography in the SOA. This obligation extends to electronic communication service providers and financial institutions that are aware that their systems or facilities are being used in the commission of an offence involving child sexual abuse material.

## **7.10. Evidential and procedural matters and sentencing**

The Commission is of the view that recommendations need to be made on the administrative process to be followed when dealing with these matters and especially with regard to the initial and subsequent contact with the child. These measures could be included in non-legislative recommendations aimed at specific role-players. The Commission however specifically proposes the inclusion of the following provisions in the SOA:

- a no-defence clause regards age or entity in the event of under-cover police operations, in clause 56(10);
- an evidentiary clause to aid courts in the determination of the age of the child in or depicted in the child sexual abuse material, in clause 59A;
- a sentencing clause for clause 19C- offences, previously criminalised in the FPA, and for a range of ancillary orders that courts may deem appropriate to make for purposes of protecting children from a sexual offence committed against them, in addition to any sentence imposed, in clause 56A;
- a clause on the management of child sexual abuse material and pornography, in clause 61A. In terms of this recommendation court officials and the police may not reproduce any such material without a reproduction order granted by a court and must take all reasonable steps to prevent access to this material; and
- for court-orders regarding the seizure, forfeiture, disposal or destruction of evidence relating to child sexual abuse material or pornography, in clause 61B.

### **7.11. Inter-sectoral management of child sexual abuse material and the exposure of children to pornography**

Although the law currently regulating child sexual abuse material has been lauded internationally and meets the five criteria listed by the International Centre for Missing and Exploited Children (ICMEC) for model legislation, specific areas have been highlighted by the United Nations Convention on the Rights of the Child Committee (UNCRC Committee) for attention and some problems have been identified with implementation. South Africa has been enjoined by the UNCRC Committee to take specific measures to prevent and tackle online CSEA. These measures include the adoption of a national response for preventing and addressing online child sexual exploitation and abuse (CSEA), in close collaboration with relevant industry and organizations.

The Commission recommends that a multi-disciplinary approach should be followed and that directives and national instructions or standing operating procedures should either be developed or updated with a specific focus on the policing and prosecution of case relating to child sexual abuse material. The Commission recommends the inclusion of the Department of Education in the Inter-sectoral Committee for the Management of Sexual Offence Matters as provided for in the SOA. The Commission further recommends that the following aspects should be addressed or should receive renewed attention in the national instructions and any directives in respect of all role players:

- 1 All role players must develop suitability or psychometric screening programmes to screen persons applying to be involved in the investigation and management of cases involving child sexual abuse material.
- 2 All role players must develop and provide training for first responders and follow-up investigation and management of cases involving child sexual abuse material. Although section 66 of the SOA provides for training (including social context training) and it forms part of the NPA training curriculum it would seem that this aspect needs renewed attention.
- 3 A multi-disciplinary committee must provide for uniformity of data obtained from SAPS and the NPA Sexual Offences and Community Affairs (SOCA). The Commission recommends that record keeping should be standardized and that statistics should be segregated i.e. data on different crimes, according to the section and the Act should be kept separately.

- 4 All role players must develop debriefing programs and provide the service to persons responsible for the investigation and management of cases involving child sexual abuse material. The Commission particularly recommends mandatory support programmes or debriefing for the police and prosecutors dealing with sexual offences. The directives or national instructions should cause any official to engage in debriefing or a support programme at least twice a year and additionally for specific incidences. The Commission recommends that the roleplayers themselves should develop programmes focusing specifically on support/debriefing of members dealing with sexual offences and for members dealing with victims and child sexual abuse material.

The Commission further recommends that SAPS fast track the establishment of their Victim identification Data Base and that this data base should be linked to Interpol's International Child Sexual Exploitation Image Database.

#### **7.12 Data retention and preservation orders**

Data retention and preservation provisions have increasingly become a point of discussion in the sphere of child protection online. The Commission recommends the repeal of section 27A of the FPA and in its place recommends the enactment of clause 54A(2) which places similar obligations on electronic communication service providers with the addition of allowing SAPS reasonable time to investigate the matter before access is restricted. These provisions seek to ensure that digital evidence will be available to law enforcement when needed for the investigation and prosecution of illicit online activity.

#### **7.13. Miscellaneous matters**

As some of the proposed amendments to existing legislative provisions applicable to children in the SOA are almost identical in content to those applicable to people with mental disabilities, the Commission recommends that those sections should be similarly amended.

# DRAFT AMENDMENT BILL

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT  
AMENDMENT BILL

(MINISTER FOR JUSTICE AND CORRECTIONAL SERVICES)

## GENERAL EXPLANATORY NOTE:

[            ]            Words in bold type in square brackets indicate omissions from existing enactments.  
\_\_\_\_\_            Words underlined with a solid line indicate insertions in existing enactments.

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## B I L L

**To amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by inserting offences relating to child sexual abuse material; and to provide for matters connected therewith.**

**P**arliament of the Republic of South Africa enacts, as follows:—

### **1. Amendment of Act 65 of 1996**

**(a)** The amendment of section 1 of the Films and Publications Act, 1996 by the substitution for the definition of ‘child pornography’ of the following definition:

‘child pornography’ means ‘child pornography’ as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).<sup>11</sup>

**(b)** The amendment of section 1 of the Films and Publications Act, 1996 by the substitution for paragraph (b) of the definition of ‘publication’:

‘(b) any writing or typescript **[which has in any manner been duplicated]**’

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The FPA Amendment Bill has adopted this definition (see clause (1)(b) of the Bill). However as there are two conflicting amendments it is not clear which is the preferred option.



(c) The deletion of sections 24B, 27A<sup>12</sup> and 30B(1)(b) of the Films and Publications Act, 1996.

## 2. Amendment of the long title of Act 32 of 2007

(a) The amendment of the long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by the substitution for the term 'child pornography' by the term 'child sexual abuse material' wherever it appears;

(b) The amendment of the long title of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by the substitution of the sixth bullet of the following bullet:

- enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, **[exposure to or display of pornography and the creation of child sexual abuse material] to provide for the further protection of children by providing comprehensively for all offences relating to child sexual abuse material as well as the exposure of children to inappropriate adult sexual content**, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation.

## 3. Amendment of the Index of Act 32 of 2007

(a) The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading to Part 3 of Chapter 2 of the following heading:

'Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts ("flashing"), child **[pornography] sexual abuse material** to persons 18 years or older, harmful disclosure of pornography or engaging sexual services of persons 18 years or older';

(ii) the substitution for item 10 for the following item:

'Exposure or display of or causing exposure or display of child **[pornography] sexual abuse material** to persons 18 years or older';

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<sup>12</sup> The Commission is cognisant of the development of a number of Bills (including the Cybercrimes Bill and the FPA Amendment Bill) aiming to regulate the interaction between ISPs and government. As these Bills are yet to be enacted the Commission would be remiss to point out that sections 27A and 30B(1)(b) need to be repealed.

**(b)** The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading to Part 2 of Chapter 3 of the following heading:

‘Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material to children, offences relating to child sexual abuse material and using children for pornographic purposes or benefiting from child **[pornography]** sexual abuse material’;

(ii) the substitution for item 19 for the following item:

‘Exposure or display of, or causing exposure or display of child **[pornography]** sexual abuse material to children’;

(iii) the insertion after item 19 of the following items:

‘19A. Enticement to view or making child sexual abuse material or pornography accessible to children’;

‘19B. Misleading techniques on the internet’;

‘19C. Offences relating to child sexual abuse material’;

(iv) the substitution for item 20 for the following item:

‘Using, coercing and recruiting children for or benefiting from child **[pornography]** sexual abuse material’;

**(c)** The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading of Chapter 4 of the following heading:

‘Sexual exploitation and sexual grooming of, exposure or display of or causing exposure or display of child **[pornography]** sexual abuse material or pornography to persons who are mentally disabled and using persons who are mentally disabled for pornographic purposes or benefiting therefrom’;

(ii) the substitution for item 25 for the following item:

‘Exposure or display of or causing exposure or display of **child [pornography]** sexual abuse material’ to person who are mentally disabled’;

**(d)** The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by—

(i) the substitution for the heading to Part 1 of Chapter 7 of the following heading:

‘Miscellaneous offences: Obligation to report commission of sexual offences against children or persons who are mentally disabled or offences involving child sexual abuse material and attempt, conspiracy, incitement or inducing another person to commit sexual offence’;

#### 4. Amendment of Act 32 of 2007

(a) The amendment of section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 by the

(i) substitution for the definition of ‘child pornography’ of the following definition:

“child **[pornography]** sexual abuse material” means any live display,<sup>13</sup> image or sequence of images,<sup>14</sup> however created<sup>15</sup> or portrayed,<sup>16</sup> or any description or presentation of a person, real or simulated, who is, or who is<sup>17</sup> depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such live display, image, sequence of images, **[or]** description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such live display, image, sequence of images, or description or presentation<sup>18</sup> of such person –

- (a) engaged in an act that constitutes a sexual offence;<sup>19</sup>
- (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 or breasts of such person;<sup>20</sup>
- (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,

<sup>13</sup> A shortcoming reflected in the EU Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. This is included in the Cybercrimes Bill amendment to section 20 of the SOA as a standalone offence.

<sup>14</sup> FPI note that it is not clear that video footage is included.

<sup>15</sup> The use of the word ‘created’ could be problematic. If encryption technology is used of streaming then the material is never ‘created’ in a format that can be accessed because it is not necessarily downloaded or saved anywhere. This question should be asked in conjunction with the insertion of section 19C which expressly includes reference to ‘accessing’ and ‘viewing’.

<sup>16</sup> To cover the ‘real time’ portrayal via webcam or live-streaming as there is no record of it thereafter, it is not ‘created’.

<sup>17</sup> The Cybercrimes Bill inserts the word ‘realistically’ but the Commission is of the view that the word ‘is’ refers to real. An option would be to incorporate the word ‘virtual’ which is not in the OPSC. It is unclear whether comics (anime) would be covered under the word ‘is’ as well.

<sup>18</sup> Insertion as in the Cybercrimes Bill for consistency.

<sup>19</sup> The definition of ‘sexual conduct’ in the FPA includes bestiality but as this is a sexual offence in the SOA it is not necessary to include reference to it in the definition.

<sup>20</sup> SAPS request that the words ‘or breasts’ be included. The words are only included in the definition of ‘child sexual abuse material’ and not ‘pornography’ and are kept gender neutral on purpose. The Commission has made this proposal with the understanding that a defence is provided for in section 56(8) in the interest of a legitimate cultural practice for the exposure or display of the female breasts in terms of section 9 and 22.

- (l) any act contemplated in paragraphs (a) to (j); or showing or describing the body, or parts of the body,<sup>21</sup> 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, that could be used to advocate, advertise or promote a child for sexual purposes<sup>22</sup> or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons’;

- (ii) insertion of the following definition of ‘police official’:

“police official” means a member of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No.68 of 1995);

- (iii) substitution for the definition of ‘pornography’ of the following definition:

“pornography” means any live display, image or sequence of images[,] however created or portrayed, or any description or presentation of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature whether such image, live display, image, sequence of images description or presentation is intended to stimulate erotic feelings or not [that is intended to stimulate erotic feelings], including any such image or description or presentation 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;’

- (b) Chapter 2 is hereby amended by—

- (i) the substitution for the heading to Part 3 of Chapter 2 of the following heading:

‘Persons 18 years or older: Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”), child

<sup>21</sup> This could already include ‘erotic’ posing. Is it necessary to specify it?

<sup>22</sup> Gap highlighted by Mr Chetty and by ICMEC e.g. advertising where to find a website. This phrase is included in the Cybercrimes Bill as part of clause 19A(6) where it is incorporated as an offence.

**[pornography] sexual abuse material** to persons 18 years or older, or engaging sexual services of persons 18 years or older’;

(ii) the substitution for the heading of section 10 of the following heading:

‘Exposure or display of or causing exposure or display of child **[pornography] sexual abuse material** to persons 18 years or older’;

(c) Chapter 2 is hereby amended by—

(i) the substitution for the heading to Part 2 of Chapter 3 of the following heading:

‘Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child **[pornography] sexual abuse material** to children, offences relating to child sexual abuse material and using children for pornographic purposes or benefiting from child **[pornography] sexual abuse material**’;

(ii) the substitution for subsection 18(1)(c) of the following subsection:

- (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] sexual abuse material** 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’

(iii) the substitution for section 19 of the following section:

**‘Exposure or display of, or causing exposure or display of child **[pornography] sexual abuse material** or pornography to children**

**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] sexual abuse material** 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,

through any means 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] sexual abuse material or pornography to a child.'

(iv) the insertion after section 19 of the following items:

**19A. Enticement to view or making child sexual abuse material or pornography accessible to children**

- (1) A person ('A') who unlawfully and intentionally advertises, provides access to or distributes to a child ('B'), or entices B to view any of the items or categories listed in section 19 through any means, with or without the consent of B, is guilty of the offence of enticing a child to view child sexual abuse material or pornography.
- (2) A person ('A'), including a manufacturer or distributor of any technology or device or electronic communications service provider –
  - (a) who unlawfully and intentionally provides a child ('B') with or allows B to engage with any form of technology or device including a mobile phone, that is capable of accessing the internet, social media or other digital content, without ensuring that the default setting blocks access to child sexual abuse material or pornography, is guilty of the offence of making child sexual abuse material or pornography accessible to a child;
  - (b) who uninstalls the default setting blocking access to child sexual abuse material is guilty of the offence of making child sexual abuse material accessible;
  - (c) who uninstalls the default setting blocking access to pornography without valid identification proving that the requester is a user over the age of 18, is guilty of the offence of making pornography accessible to a child;
  - (d) who, when uninstalling the default setting blocking access to pornography fails to keep a register as prescribed is guilty of an offence;
  - (e) who fails to take reasonable steps to ensure that any of the items or categories listed in section 19 through any means is not made accessible, exposed or displayed to a child ('B'), is guilty of the offence of negligently making accessible, exposing or displaying child sexual abuse material or pornography to a child.
- (3) The Minister must make regulations pertaining to the register provided for in subclause 2(d) and pertaining to the minimum requirements on the steps to be taken as required in subclause 2(e).

**19B. Misleading techniques on the internet**

- (1) Whoever unlawfully and intentionally creates or uses any technique including embedding words, or digital images into the source code of a website, an advertisement or domain name, to deceive a child into viewing or being exposed to child sexual abuse material or pornography is guilty of the offence of creating and using a technique to expose a child to child sexual abuse material or pornography.

- (2) For purposes of this section the term
- (a) 'domain name' has the meaning assigned to it in section 1 of the Electronic Communications and Transactions Act 2002 (Act No. 25 of 2002); and
- (b) 'source code' means the combination of text and other characters comprising the content, both viewable and non-viewable, of a webpage, including any website publishing language, programming language, protocol or functional content, as well as any successor languages or protocols.

**19C. Offences relating to child sexual abuse material**

- (1) A person who unlawfully and intentionally creates, makes or produces child sexual abuse material, is guilty of the offence of creating, making or producing child sexual abuse material.
  - (2) A person who unlawfully and intentionally downloads, possesses, accesses or views child sexual abuse material, is guilty of the offence of downloading, possessing, accessing or viewing child sexual abuse material.
  - (3) A person who unlawfully and intentionally in any manner distributes, makes available, transmits, offers for sale, sells, offers to procure or procures child sexual abuse material, or allows child sexual abuse material to be distributed, made available, transmitted, offered for sale, sold, offered to procure or procured, is guilty of the offence of making child sexual abuse material available.
  - (4) A person who unlawfully and intentionally arranges, attends or participates in a live performance involving child sexual abuse material is guilty of the offence of arranging, attending or participating in a live performance involving child sexual abuse material.
  - (5) A person who unlawfully and intentionally advocates, advertises, encourages or promotes child sexual abuse material is guilty of the offence of promoting child sexual abuse material.
  - (6) A person who unlawfully and intentionally processes or facilitates a financial transaction that will facilitate a contravention of subsections (1) to (5) is guilty of an offence.'
- (v) the substitution of section 20 for the following section:
- '(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] sexual abuse material**, is guilty of the offence of using a child for child **[pornography] sexual abuse material**.

- (2) A [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] sexual abuse material.
- (3) A person ('A') who unlawfully and intentionally recruits, coerces or deceives a child complainant ('B'), with or without the consent of B, whether for financial or other reward, favour or compensation to B or a third person ('C') or not, for purposes of –
- (a) being used as described in subsection(1); or  
 (b) participating in a live performance involving child sexual abuse material  
is guilty of the offence of recruiting a child for child sexual abuse material.
- (4) A person ('A') who unlawfully and intentionally coerces or deceives a child ('B') through whatever means to provide child sexual abuse material of him or herself in any manner whatsoever is guilty of the offence of coercing or deceiving a child to provide child sexual abuse material.'

(vi) the insertion after section 54 of the following item:

**'54A. Obligation to report commission of offences under sections 19A, B and C**

- (1) Any person who, having knowledge of the commission of any offence referred to in section 19A, B and C, or having reason to suspect that such offence has been or is being committed and unlawfully and intentionally fails to-
- a) Immediately report such knowledge or suspicion to a police official; or  
 b) furnish, at the written request of a police official, all particulars of such knowledge or suspicion,  
is guilty of an offence.
- (2) An electronic communications service provider or financial institution that is aware or becomes aware that its electronic communications system or facilities have or are being used or are involved in the commission of any offence involving child sexual abuse material referred to in sections 19A, B or C and fails to-
- a) immediately report the offence to a police official;  
 b) preserve any information which may be of assistance to a police official investigating the offence;  
 c) comply with all lawful written requests by a police official relating to the investigation and prosecution of such offence;  
 d) take all reasonable steps to prevent access to the child sexual abuse material by any person, unless otherwise instructed by a police official in writing not to take such steps;  
is guilty of an offence.
- (3) A person referred to in subsections (1) and (2)—
- (a) must provide reasons for that knowledge or suspicion to a police official; and  
 (b) who makes the report in good faith, is not liable to civil or criminal proceedings by reason of making such report.'



(vii) the amendment of section 56, by the addition of the following subsections:

'(9) A child ('A') may not be convicted of an offence and the prosecutor must refer A to the probation officer who must deal with A in accordance with the provisions of section 9 of the Child Justice Act, 75 of 2008, with the necessary changes, in the following circumstances –

- (a) A may not be convicted of an offence in terms of sections 19C(1) or 19C(2) if A is the child in the child sexual abuse material;
- (b) A may not be convicted of an offence in terms of section 19 if A is the child in the child sexual abuse material,<sup>23</sup> and the exposure or display is made to a child B, who is 12 years or older and not more than 2 years younger than A, who consented to the exposure or display;
- (c) A may not be convicted of an offence in terms of sections 19, 19C(1), 19C(2) or 20(1) if the child sexual abuse material is of another child with or without A, where the other child depicted consented to the creation of the child sexual abuse material and the exposure or display is only to the other child, and the other child is 12 years or older and not more than 2 years younger than A.
- (d) A may not be convicted of an offence in terms of section 10 if A is also the child in the image and the exposure or display is made to an adult person B.

(10) It is not a valid defence to a charge under section 18 –

- (a) that the accused person ('A') believed that the person with whom A agreed or made an arrangement was a police official or a person acting under the written direction of a police official; or
- (b) that if the person with whom the accused agreed or made an arrangement was a police official or a person acting under the written direction of a police official, the person referred to did not exist.'

(viii) the amendment of section 56A, by the addition of the following subclauses:

'(3) A person convicted of any offence in terms of section 19C is liable upon conviction to a fine or 15 years' imprisonment;

(4) In addition to any sentence imposed on the accused for an offence in terms of section 19C or an order that the name of the accused be placed on the National Register for Sex Offenders, punishment may include any order that the court, subject to a pre-sentence report by a probation officer, may deem appropriate to protect children from a sexual offence being committed against them, to be complied with for such period as may be determined by the court, including any or all of the following orders-

- (a) that the accused shall not visit, frequent, or reside in close proximity to any school, premises or places frequented by children;
- (b) that the accused shall not access the internet, or that the accused shall have such qualified access as may be determined by the court;
- (c) that the accused shall not have access to any device that is able to provide access to the internet, or that the accused may have such qualified access to such device as may be determined by the court;
- (d) that the accused shall not employ any child;

<sup>23</sup>

The Commission would like to flag these clauses as it is concerned that children may, despite the element of consent, display or expose another child to material in which the child is self-harming or of the child engaging in harmful conduct such as sado-masochism or criminal conduct such as bestiality. The child consenting to receive child sexual abuse material may not fully understand what he or she will be exposed to.

- (e) that the accused may only be in the presence of any specified child, or in the presence of any child or children in general, when accompanied by another adult person;
- (f) that the accused shall submit to supervision and monitoring by a probation officer who may apply any technique to limit access to the internet for purposes of preventing access to children and/or child sexual abuse material;
- (g) that the accused shall accede to any reasonable request by a probation officer for purposes of monitoring compliance with any order made; and
- (h) that the accused shall undergo such therapeutic interventions as the court may determine appropriate.'

(ix) the insertion after section 59 of the following clause:

**'59A Evidence of age of child depicted in child sexual abuse material**

(1) In criminal proceedings involving child sexual abuse material, the court may take judicial cognisance of the fact that the child in the child sexual abuse material is, or is depicted as being, under the age of 18.

(2) Where it is disputed that the child in the child sexual abuse material is, or is depicted as being, under the age of 18, an affidavit or certificate issued pursuant to section 212 (4)(a) of the Criminal Procedure Act, 51 of 1977, shall serve as prima facie proof of such fact and the provisions of section 212 (12) shall find application.'

(x) the insertion after section 61 of the following clauses:

**'61A Management of Child Sexual Abuse Material and Pornography**

(1) Police and court officials having access to images or sequences of images, descriptions, or portrayals of child sexual abuse material or pornography may not reproduce any such material without a court having made a reproduction order.<sup>24</sup>

(2) Police and court officials having access to images or sequences of images, descriptions, or portrayals of child sexual abuse material or pornography, shall take all reasonable steps to prevent access thereto by anyone not having a right of access.

(3) A reproduction order referred to in subsection (1) shall only be made in the presence of substantial and compelling circumstances and shall be accompanied by directives regarding the manner in which the material is to be managed including the period for which it may be held and the date upon which it shall be returned to the investigating officer.

(4) Any person who fails to comply with the provisions of subclauses (1) or (2) or the directives of a reproduction order shall be guilty of an offence and liable upon conviction to a fine or 2 years' imprisonment or to both such fine and imprisonment'; and

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<sup>24</sup> Commission is concerned that this proviso may hamper the effective investigation and prosecution of offences involving child sexual abuse material.

**'61B Orders to seize, forfeit, dispose and destroy**

(1) The court that convicts or acquits a person of any offence in terms of this Act that involves child sexual abuse material must order the seizure of all such material and any device that may allow access to child sexual abuse material if not yet seized, and the confiscation and forfeiture of all such material or devices and, to the extent necessary, the future handling, seizure, forfeiture, disposal and or destruction thereof.

(2) Where, following an investigation for any offence in terms of this Act that involves child sexual abuse material, no prosecution is instituted a court may, upon application by a prosecutor, order the confiscation, forfeiture, disposal and destruction of all such material and of any device that may allow access to child sexual abuse material.'

(xi) the substitution of subsection 63(2), by the following subsection:

'(2) The Committee shall consist of –  
(a) the Director-General: Justice and Constitutional Development, who shall be the chairperson of the Committee;  
(b) the National Commissioner of the South African Police Service;  
(c) the National Commissioner of Correctional Services;  
(d) the Director-General: Social Development;  
(e) the Director-General: Health; **[and]**  
(f) the National Director of Public Prosecutions[.] and  
(g) the Director-General: Department of Basic Education.'

(xii) the insertion after subparagraph 65(1)(d) of the following subparagraph:

'(e) ensuring the different organs of state provide for, where relevant, appropriate screening policies and debriefing programs.'

(xiii) the substitution of subparagraph 66(1)(a), by the following subparagraph:

'(a) The National Commissioner of the South African Police Service must, in consultation with the Minister of Safety and Security and after consultation with the Minister, the National Director of Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health [and], Social Development and Basic Education, issue and publish in the *Gazette* national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following: . . .'

(xiv) the insertion after subparagraph 66(1)(a)(vi), by the following subparagraph:

'(vii) the manner in which and the expediency with which police officials are to react to the reporting of sexual offences involving child sexual abuse material; the circumstances under which and the manner in which an electronic communications service provider is to be instructed not to take steps to prevent access to the child sexual abuse material by any person; the manner in which these offences are to be investigated including the manner of search and seizure and undercover operations; the steps to be taken to have any

child in the child sexual abuse material identified and the manner in which the victim is to be provided protection, whether identified or not; the steps to be taken to protect the child sexual abuse material from unauthorised access including final disposal thereof.'

(xv) the substitution of subparagraph 66(2)(a), by the following subparagraph:

'(a) The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of Safety and Security and Correctional Services and the Directors-General: Health [and], Social Development and Basic Education, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following: . . .'

(xvi) the insertion after subparagraph 66(2)(a)(ix), by the following subparagraph:

'(x) the manner in which sexual offences involving child sexual abuse material should be dealt with, the manner in which the victim is to be provided protection, whether identified or not; the steps to be taken to protect the child sexual abuse material from unauthorised access including final disposal thereof; the manner in which a child is to be referred to a probation officer in terms of section 56(9); the criteria to be used and circumstances in which the diversion of a child accused of a sexual offence involving child sexual abuse material or pornography should be considered and the appropriate conditions of diversion.'

(xvii) the substitution of subparagraph 66(3)(a), by the following subparagraph:

'(a) The Director-General: Health must, in consultation with the Minister of Health and after consultation with the Directors-General: Justice and Constitutional Development [and], Social Development and Basic Education and the National Commissioners of the South African Police Service and Correctional Services, publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all medical practitioners and any other relevant persons when dealing with sexual offences cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following: . . .'

(xviii) the insertion after subparagraph 66(3)(a)(v), by the following subparagraph:

'(vi) the manner in which assistance in the investigation and prosecution of sexual offences involving child sexual abuse material must be provided, including the determination of age where the material involves unidentified victims or depictions.'

(xvii) the insertion after subparagraph 66(3), by the following subparagraphs:

'(3)(A) The Director-General Basic Education must, in consultation with the Inter-sectoral Committee develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which

are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of offences, with particular reference, among others to –

- (i) equipping educators and learners with knowledge on preventative measures;
- (ii) the manner in which reports of sexual offences should be dealt with in general;
- (iii) the manner and time limit within which sexual offences are to be reported to the SAPS;
- (iv) the manner the child victim should be protected and referred for other services if necessary;
- (v) the manner in which the child in conflict with the law should be dealt with;
- (vi) the manner in which assistance in the investigation and prosecution of sexual offences generally must be provided; and
- (vii) the manner in which child sexual abuse material must be dealt with.’;

‘(3)(B) The Director-General Justice and Constitutional Development must, in consultation with the Inter-sectoral Committee develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of offences, with particular reference, among others to –

- (i) the manner court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be dealt with including any copying and distribution thereof at all courts; and
- (ii) the manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be disposed of and destroyed.’;

‘(3)(C) The Director-General Social Development must, in consultation with the Inter-sectoral Committee develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of offences, with particular reference, among others to –

- (i) the manner in which probation officers are to deal with children referred in terms of section 56(9) and any other child in conflict with the law for having committed a sexual offence involving child sexual abuse material;
- (ii) the manner in which they are to be assessed; and
- (iii) the interventions to be recommended for purposes of determining appropriate conditions of diversion.’

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Canadian Criminal Code

Child Online Protection Act 1998 (USA)

Combating of Rape Act, No.8 of 2000 (Namibia)



Combating of Immoral Practices Amendment Act 7 of 2000 (Namibia)

Crimes Act 1900 (NSW) S91H(5)(2) (New South Wales: Australia)

Criminal Justice and Courts Act 2015 (United Kingdom)

Films and Publications Act 65 of 1996

Films and Publications Amendment Act 34 of 1999

Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act)

Judicial Matters Amendment Act 8 of 2017

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 539 U.S. 194 (2003)

Restricting the Distribution of Erotic and Pornographic Products Bill (Russia)

Sexual Offences Act 23 of 1957

The Children's Act 38 of 2005

The Children's Amendment Bill [PMB2-2015] dated 18 February 2015

The Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Victoria Australia)

The Constitution of the Republic of South Africa, 1996

The Crimes Act (Victoria Australia)

The Criminal Justice Act 1988 (United Kingdom)

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 5 of 2015

The Criminal Procedure Act 51 of 1977

The Electronic Communications and Transactions Act 25 of 2002

The Films, Videos and Publications Classification Act 1993 (New Zealand)

The Prevention and Combatting of Trafficking in Persons Act 7 of 2013

The Protection of Children Act 1978 (United Kingdom)

The Protection from Harassment Act 17 of 2011

The Protection of Personal Information Act 4 of 2013

The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002

JASA draft Internet and Cell Phone Pornography Bill  
Films and Publications Bill (B37-2015) available at <https://pmg.org.za>. Accessed on 18  
February 2019

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

Proclamation 47 of 2014, GG 37839, 15 July 2014.

Cryptography Regulation 216, Government Gazette 28594, 10 March 2006, available from  
<http://Internet.org.za/CryptoRegsLatest.pdf>

The Film and Publication Regulations 2014 Notice 207 of 2010, GG 33026, 15 March 2010

The Film and Publication Board draft Online Content Regulation Policy Available at  
<http://www.scribd.com/doc/2508141625/draft-online-regulation-policy>

United States Criminal Code

## **LIST OF CODES**

Broadcasting Code of Conduct

Code of Conduct for Subscription Broadcasting Service Licensees

Interactive Advertising Bureau of South Africa Code of Conduct available at  
<http://iabsa.net/about-iab/code-of-conduct/>

Internet Service Provider Association Code of Conduct (ISPA Code) available at  
<http://ispa.org.za/code-of-conduct/>

Mobile UK Codes of Practice available at <http://www.mobileuk.org/codes-of-practice.html>  
Accessed on 31 January 2018

NAB Code of Conduct for Free-to-Air Broadcasting Services 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)

UK Code of practice for the self-regulation of content on mobiles. Version 3, published 1st  
July 2013 (UK Code of practice 2013)

UK Code of Practice 2016 (Fourteenth Edition) PhonepayPlus

The South African Cellular Operators Association Code of Good Practice (SA Cellular Code)

The Wireless Application Service Providers' Association Code of Conduct (WASPA Code).  
available at <http://waspa.org.za/coc/>

Wireless Access Providers' Association Code of Conduct (WAPA Code) available at  
<http://www.wapa.org.za/code-of-conduct/>

## LIST OF CASES

*Bannatyne v Bannatyne* 2003 (2) SA 363 (CC)

*Baptiste v Multichoice Channel* 304 Case no: 46/2014

*Bernstein v Bester* NO 1996 (2) SA 751 (CC)

*Case v Minister of Safety and Security and others* 1996 (3) SA 617 (CC)

*Centre for Child Law and others v Media 24 Limited and others*, Case no 23871/15

*Christian Education South Africa v Minister of Education* 2002 (2) SA 794 (CC).

*Crown Prosecution Service v LR* [2010] EWCA Crim 924

*De Reuck v DPP & Others* [2003] JOL 11909 (CC); *De Reuck v DPP (WLD)* 2004 (1) SA 406 (CC); *Tascoe Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*, (CCT 03/5)

*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC) 72

*DPP North Gauteng v Alberts* Case No A835/14

*Du Toit v Ntshinghila* (733/2015) [2016] ZASCA 15 (11 March 2016).

*Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others* (3589/2018) [2018] ZAGPPHC 438 (27 June 2018).

*J v NDPP and another* 2014, CCT 114/13

*J v National Director of Public Prosecutions and Others* 2014 (2) SACR 1 (CC).

*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)

*KS v AM* 2018(1)SACR 240 (GJ) 250

*Le Roux and Others v Dey* (CCT 45/10)[2011]ZACC 4 [208]

*Levenstein and seven others and Estate of the late Sidney Lewis Frankel and others* 2017  
CCT 170/17

*Marx v S* (2005) 4 All SA 267 (SCA)

*Miller v. California*, 413 U.S. 15,24 (1973)

*Mlungwana and Others v The State and Another* [2018] ZACC 45

*Osborne v. Ohio*, 495 U.S. 103, 111 (1990)

*Paroline v. United States* 134 S.Ct.1710 (2014) [Case No. 12-8561] 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)

*Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T)

*R v Land* [1998] 1 Cr. App. R. 301

*R v M* [2011] EWCA Crim 2752

*R v Sharpe* [2001] 1 S.C.R.45, 2001 SCC 2

*R v Smith (Steven)* [2011] EWCA Crim 1772

*R v Smith (Wallace Duncan)* (No.4) [2004] EWCA Crim 631 [2004] QB 1418

*S v Dos Santos* 2018 (1) SACR 20(GP)

*S v F* 2018 (1) SACR 377 (WCC)

*S v Ferreira* Case number: CC 193/2015

*S v Fourie* RC 14/1218/2014

*S v Knoop* Case number SS/90/2016 DPP Ref Number 10/2/11/1-81/2016

*S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC)

*S v Mugridge* 2013 JDR 0658 (SA)

*S v Pierre Booyesen* Case No SHV 88/13

*S v SM* 2013(2) SACR 111 (SCA)

*Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC)

*Spier Films SA and Another v Film and Publication Board* [2013] JOL 30932 (FPAT)

*Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC).

*The State v Jordan* 2002 6 SA 642 (CC).

*United States v Holm*, 326 F.3d 872,878 (7th Cir.2003)

*United States v Rearden*, 349 F 3d at 621

*United States of America v. Randy A. Albertson*, Appellant No. 09 – 1049. Decided: May 04, 2001

*United States v Sullivan*, 451 F.3d 884, 895 – 96 (D.C. Cir.2006)

## **INTERNATIONAL DOCUMENTS, CONVENTIONS AND TREATIES**

Directive 2011/93/EU of the European Parliament

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\\_traffic\\_king...](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_traffic_king...) Accessed on 10 June 2015.

International Agreement for the Suppression of the Circulation of Obscene Publications 1910  
International Agreement for the Suppression of the Circulation of Obscene Publications 1910 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).

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications Geneva 12 September 1923 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)

Resolution on child pornography 1996

The 65th General Assembly of Interpol (Antalya, Turkey) adopted a specific resolution (AGN/65/RES/9) on child pornography in 1996 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>

The African Charter on the Rights and Welfare of Children

The African Convention on Cyber Security and Personal Data Protection

The African Convention on Cyber Security and Personal Data Protection (Malabo 27<sup>th</sup> June 2014)

The Convention on Cybercrime

The Convention on Cybercrime (the Budapest Convention) available at [www.coe.int/cybercrime](http://www.coe.int/cybercrime)

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse  
The Council of Europe Convention on the Protection of Children against Sexual Exploitation 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)

The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1923

The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1923 United Nations Treaties. League of Nations Treaty Series, vol.27, p214 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)

The Protocol to the Agreement for the Suppression of the Circulation of Obscene Publications 1949

The Protocol to the Agreement for the Suppression of the Circulation of Obscene Publications 1949 United Nations Treaties. League of Nations Treaty Series, vol.27, p214 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)

The United Nations Convention on the Rights of the Child (1989)

# CHAPTER 1: OVERVIEW OF THE INVESTIGATION

## A Introduction

1.1 This discussion paper seeks to review the legislative framework that currently applies to children in respect of pornography with a view to reforming the law in this regard. This investigation forms part of the overarching investigation into the review of all sexual offences, either found in statute or in the common law. In accordance with the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Children's Act 38 of 2005 (the Children's Act), and unless otherwise expressly stated, a 'child' is defined as a person under the age of 18 years.

1.2 From the outset it is important to recognize that the correct use of information and communication technologies (ICT's) may serve to expand the opportunities for children to learn, participate and create in the world around them.<sup>25</sup> The subject matter of this investigation is narrowed down to one of the negative outcomes or risks associated with the use of ICT's on the lives of children.

1.3 The focus of the discussion paper is to expand on the issues raised in the issue paper<sup>26</sup> and to introduce new issues raised in response to the calls for submissions and engagement in the workshops held on the issue paper. Although the questions posed in the issue paper were not responded to individually, the SA Law Reform Commission (the Commission) gratefully notes the endorsement of the recommendations contained in the issue paper by the Office of the Chief State Law Adviser (International Law) in the Department International Relations and Cooperation. Pertinent submissions received from respondents<sup>27</sup> to the issue paper and contributions received during workshops<sup>28</sup> on the issue

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<sup>25</sup> Watney M "Regulation of Internet Pornography in South Africa (part 1)" (2006) THRHR 227.228 with reference to Nel in Buys Cyberlaw@South Africa (2004) 210: 'The Internet not only provides convenient access to an almost unlimited and highly diverse library of information resources for educational purposes and facilitates communication, but it is also a source of concern over possible harm that might befall the youth as they use the Internet'.

<sup>26</sup> South African Law Commission *Sexual Offences: Pornography and Children* (Project 107) Issue Paper 30 (2015).

<sup>27</sup> Annexure A contains a comprehensive list of all respondents to SALRC Sexual Offences Issue Paper (2015). 110 substantive submissions were received.

<sup>28</sup> Annexure B contains information relevant to the five workshops, one community briefing and

paper form part of the discussion paper and will be referred to where relevant. The discussion paper includes draft legislative and non-legislative recommendations aimed at addressing 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.

1.4 The issue paper identified four areas of concern, namely:

- Access to or exposure of a child to pornography;
- Creation and distribution of child pornography (child sexual 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 or child sexual abuse material.

1.5 The discussion paper has, as a result of further research and comment received by way of formal submissions and during the workshops held on the issue paper, retained the four areas of concern and expanded on them to include the focal area of investigation and procedure. The five areas are dealt with in separate chapters in the discussion paper. The discussion paper seeks to provide some insight into the latest developments in law both nationally and internationally.

1.6 As noted in the issue paper<sup>29</sup> South Africa ratified the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) in 2003.<sup>30</sup> In order to ensure that South Africa meets its obligations in terms of the OPSC and to ensure that the observations of the United Nations Committee on the Rights of the Child (the UNCRC Committee)<sup>31</sup> are adequately highlighted and integrated into this discussion paper some of its observations are raised here and will be discussed under the pertinent headings in the discussion paper.

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Childline focus group with youth that was held on SALRC Sexual Offences Issue Paper (2015). Annexure C contains a summary of responses received during the Childline focus group.

<sup>29</sup> SALRC Sexual Offences Issue Paper (2015) para 3.11.

<sup>30</sup> Department: Women, Children and People with Disabilities *The UN Convention on the Rights of the Child* South Africa's Combined Second, Third and Fourth 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>31</sup> United Nations Committee on the Rights of the Child: Concluding observations on the report submitted by South Africa under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography CRC/C/OPSC/ZAF/CO/1 30 September 2016.



1.7 During September 2016 the UNCRC Committee made observations on the report submitted by South Africa under article 12, paragraph 1, of the OPSC. Seven observations were made which are pertinent to this discussion. Firstly the UNCRC Committee expressed concern at the **lack of reliable data** covering the offences under the OPSC including the sale of children, child prostitution, child pornography and child trafficking, as well as data on adoption. Likewise, it expressed concern at the lack of data on the general situation of children who are at high risk of exposure to such offences, such as girls who are victims of domestic violence, children in street situations, migrant, refugee and asylum-seeking children, children living in institutions and children adopted through informal customary adoption.<sup>32</sup> In response to these concerns the UNCRC Committee recommended that South Africa:<sup>33</sup>

- (a) Develop and implement a comprehensive, coordinated and effective system of data collection and its analysis on all areas covered by the Optional Protocol, including data concerning the number of prosecutions and convictions for such offences;
- (b) Disaggregate the data, inter alia, by sex, age, nationality and ethnic origin, region and socioeconomic status, with particular attention to children who are at risk of becoming victims of offences under the Optional Protocol;
- (c) Actively utilize the information collected for policy decisions, impact assessments, and the monitoring of progress in the implementation of the Optional Protocol.'

1.8 Secondly the UNCRC Committee expressed concern about the reported **increase of online cases** of child sexual exploitation and abuse (CSEA).<sup>34</sup> In this regard the UNCRC Committee recommended that South Africa<sup>35</sup> should take specific measures to prevent and tackle online CSEA. It further recommended<sup>36</sup> that South Africa should adopt a national response for preventing and addressing online CSEA, in close collaboration with relevant industry and organizations, consisting at a minimum of:

- (a) A national policy to prevent and respond to online CSEA through an appropriate legal framework; dedicated coordination and oversight entity; and specific analysis, research and monitoring capabilities;

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<sup>32</sup> UN Committee on the Rights of the Child OPCS 2016 (2) para 6. The finding that the 'nature of children's ICT use in the global South is less well understood' is confirmed by the Phyfer J, Burton P and Leoschut L *South African Kids Online: Barriers, opportunities and risks. A glimpse into South African children's internet use and online activities. Technical Report 2016*. Cape Town, Centre for Justice and Crime Prevention (Executive Summary).

<sup>33</sup> UN Committee on the Rights of the Child OPCS 2016 (2) para 7.

<sup>34</sup> Opcit para 26.

<sup>35</sup> The recommendation was made with reference to the Human Rights Council resolution on the Rights of the Child: information and communications technologies and child sexual exploitation (A/HRC/31/L.9/Rev.1 adopted on 23 March 2016) and the outcomes of the 2014 London and 2015 Abu Dhabi We Protect Summits.

<sup>36</sup> UN Committee on the Rights of the Child OPCS 2016 (2) para 27.

- (b) A dedicated, proactive, responsive and victim-focused criminal justice system with trained police, prosecution and judiciary; management of offenders to prevent re-offending, nationally and internationally; and a national database, linked to the Interpol database;
- (c) Appropriate support services for children including integrated services during investigation, prosecution and after-care; trained professionals working with and for children; and accessible procedures for complaints, compensation and remedies;
- (d) A strategy for preventing online CSEA including a public education programme to raise awareness, mandatory school education on online behaviour and safety, knowledge and reporting of online CSEA offences; child participation in the development of policies and practices; industry engagement to block and remove online CSEA content, report incidents to law enforcement and develop innovative solutions; close cooperation with organisations working to end child sexual exploitation online; ethical and informed media reporting.<sup>37</sup>

1.9 Thirdly with regard to existing criminal or penal laws and regulation<sup>38</sup> the UNCRC Committee expressed concern that the criminal law in South Africa does not **define and criminalise all forms of offences** covered by the OPSC. The UNCRC Committee recommended that South Africa review its criminal law to:<sup>39</sup>

- (a) Decriminalize consensual sharing of self-generated images by children;
- (b) Differentiate between adult and child offenders of child pornography and ensure that the child offenders are treated in a manner consistent with the promotion of the child's sense of dignity and in full conformity with the provisions of the Convention on the Rights of the Child and the Optional Protocol;
- (c) Review the existing definition of pornography with a view to amending it to also cover the disposal of pornographic materials;
- (d) Develop and strengthen awareness-raising programmes for children on risks related to the use of self-generated content through digital media and information communication technologies.'

These recommendations are considered and dealt with below in chapters 2 and 3.

1.10 Fourthly the UNCRC Committee recognized that internationally criminals seem to portray a sense of impunity around these crimes.<sup>40</sup> The UNCRC Committee expressed deep concern that the **rate of prosecution and conviction** of perpetrators for offences under the OPSC remains very low. The UNCRC Committee urged South Africa to take all measures necessary to ensure that all cases of the sale of children, child prostitution and child

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<sup>37</sup> Opcit para 6.  
<sup>38</sup> Opcit para 7.  
<sup>39</sup> Opcit para 31.  
<sup>40</sup> Opcit para 32.

pornography are investigated effectively and that those perpetrators are prosecuted and punished with appropriate sanctions commensurate with the gravity of their crimes.<sup>41</sup>

1.11 Fifthly the UNCRC Committee recognized the provision for **extraterritorial jurisdiction** in respect of certain offences contained in domestic law.<sup>42</sup> However, the UNCRC Committee expressed concern that such provisions do not allow South Africa to establish its jurisdiction over all the offences referred to in article 3, paragraph 1 of the OPSC and in a manner consistent with the provisions of Article 4(2) of the OPSC. The UNCRC Committee recommended<sup>43</sup> that South Africa take appropriate measures to explicitly establish its jurisdiction over the offences referred to in article 3, paragraph 1, of the OPSC and in all the cases defined in article 4, paragraph 2, of the OPSC, namely when the alleged offender is a national of that State or a person who has his habitual residence in its territory and when the victim is a national of that State. The Commission notes that for the purpose of all sexual offences, which include child prostitution (criminalised in South Africa as sexual exploitation of children) and pornography offences, section 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the SOA); section 30A of the Films and Publications Act 65 of 1996 (the FPA); and section 12 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the TIPPA), establishes South Africa's reach over these offences when committed extra-territorially. Other conduct listed in article 3 of the OPSC relating to the sale of children, transfer of organs for sale and forced labour which fall outside of the scope of this investigation may however need closer inspection.

1.12 The sixth pertinent observation relates to **extradition**.<sup>44</sup> The UNCRC Committee noted that South Africa makes extradition conditional on the existence of an extradition treaty. The UNCRC Committee encouraged South Africa to:

‘withdraw the condition allowing extradition on the existence of an extradition treaty, and to consider using the Optional Protocol as a legal basis for extradition in respect of all offences against children as defined therein.’<sup>45</sup>

1.13 In respect of this observation it is necessary to clarify that the absence of an extradition treaty does not prevent South African authorities from still requesting an extradition and it being granted.

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<sup>41</sup> Opcit para 32 (7).

<sup>42</sup> Opcit para 34 (8).

<sup>43</sup> UN Committee on the Rights of the Child OPCS 2016 (2) para 35.

<sup>44</sup> Opcit para 36.

<sup>45</sup> Opcit para 37.

1.14 The seventh pertinent observation relates to the **criminal justice system protection measures**.<sup>46</sup> The UNCRC Committee expressed its concern that children in conflict with the law may be registered on the National Sex Offenders Register. In this regard the UNCRC Committee recommended that South Africa reconsider the placement of child sex offenders on the National Sex Offenders Register and ensure that the procedures for child sex offenders fully respect the right of the child to have his or her best interests taken into account as a primary consideration.<sup>47</sup>

1.15 In respect of this last observation it should be noted that South Africa has already considered and enacted amendments to the SOA to ensure that the rights of children in conflict with the law are adequately protected. As a result of the judgement in the Constitutional Court matter of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*<sup>48</sup> sections 15 and 16 of the SOA (dealing with statutory rape and statutory sexual assault) were amended to legalise consensual sexual acts by certain children between the ages of 12 and 17 where there is no more than a two year age difference.<sup>49</sup> The Constitutional Court also held that the names of children under the age of 16 years who have been convicted of an offence referred to in sections 15 or 16, or issued a diversion order following a charge under those provisions, are not to appear on the National Register of Sex Offenders, and are to be issued certificates of expungement where they have been convicted of such an offence. Further as a result of *J v National Director of Public Prosecutions and Others*<sup>50</sup> section 50 of the SOA was amended to give presiding officers a discretion to decide in individual cases whether the particulars of children convicted of sexual offences should be included in the National Register for Sex Offenders or not and to provide for a procedure to consider the removal of particulars of child offenders whose names do appear on the Register. Also the Children's Act was amended to provide for the discretionary placement of particulars of certain children on Part B of the Child Protection Register. It is also noteworthy in respect of criminal justice matters that in the recent case of *Levenstein and seven others and Estate of the late Sidney Lewis Frankel and others*<sup>51</sup> the Constitutional court agreed that 'sexual offences may differ in form but the psychological harm they all produce may be similar.' It consequently held that section 18 of

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<sup>46</sup> Opcit para 40 (8).

<sup>47</sup> Opcit para 41 (9).

<sup>48</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC).

<sup>49</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 5 of 2015 Government Gazette No 38977 7 July 2015.

<sup>50</sup> *J v National Director of Public Prosecutions and Others* 2014 (2) SACR 1 (CC).

<sup>51</sup> *Levenstein and seven others and Estate of the late Sidney Lewis Frankel and others* 2017 CCT 170/17 [59].

the Criminal Procedure Act 51 of 1977 (the CPA) is constitutionally invalid insofar as it provides that, with the exception of rape and compelled rape, the right to prosecute all other forms of sexual offences lapses after 20 years.<sup>52</sup> This would apply to offences committed by children as well. It is however pertinent to note that through an amendment effected by the SOA in 2007 the crime of using a child for pornographic purposes as contemplated in section 20 of the SOA does not prescribe in terms of section 18 of the CPA. In conclusion, where necessary, the UNCRC Committee's observations will receive further attention in the chapters that follow..

## B A note on terminology

1.16 In the issue paper the Commission took the stance that material or behaviour referred to as 'child pornography' is in the most part the memorialisation of child abuse increasingly in digital form.<sup>53</sup> In order not to trivialize this form of abuse and to distinguish it from other types of pornography which are used for and by adults for their sexual pleasure the Commission recommended that the term 'child abuse material' should replace the term 'child pornography'.<sup>54</sup> The Commission argued that the term 'child abuse material' describes such materials from within a victim-centered 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.<sup>55</sup> The word 'material' is deliberately used as it is deemed to be more inclusive than the word 'image'. The meaning of the word 'material' is broad enough to cover everything listed in the definition of 'publication'<sup>56</sup>, 'film'<sup>57</sup> or 'game'<sup>58</sup> in

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<sup>52</sup> Ibid.

<sup>53</sup> SALRC Sexual Offences Issue Paper (2015) 16.

<sup>54</sup> Opcit 17.

<sup>55</sup> Ibid.

<sup>56</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."

<sup>57</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>58</sup> "Game' means a computer game, video game or other interactive computer software for interactive game playing, where the results achieved at various stages of the game are

the FPA. The majority of the respondents submitted that the preferred terminology should rather be ‘child sexual abuse material’ or ‘content’ as opposed to ‘child pornography’.

1.17 Following receipt of this comment the Commission elects to use the term ‘child sexual abuse material’ instead of ‘child pornography’ in this discussion paper. This term will be used unless a direct quote, legislation or case law uses the term ‘child pornography’ or the context necessitates the use of another term.<sup>59</sup> This shift in terminology is consistent with what the ICMEC refers to as the evolution of the global discussion surrounding these issues and more accurately reflects the true nature of the crime that is committed against the child.<sup>60</sup>

1.18 In so doing the Commission has taken particular note of comment by Advocate Robbertse that although the term ‘child pornography’ is used in international instruments and the definition thereof in international instruments share common elements, the description ‘child sexual abuse material’ better describes the material in question. In this regard the Commission recognises the use of the term ‘child sexual abuse imagery’ by the Internet Watch Foundation in its 2016 Annual Report.<sup>61</sup> The Commission has also taken note of the view expressed by John Blacklaw that the phrase ‘child pornography’ is widely understood to mean a depiction of child sexual abuse or nudity.

1.19 The Commission has however flagged the anomaly where a child of his or her own volition produces such material (not as a result of grooming). Such material falls within the definition of ‘child sexual abuse material’ and could be used for illegal purposes by child exploiters even though no abuse is present. The Commission suggested that in uncontested instances of voluntary creation and consensual peer-to-peer sharing of material it may be apposite to refer to the material as ‘images of inappropriate behaviour’ or ‘explicit self-images’ instead of ‘child abuse material’.<sup>62</sup>

1.20 After considering comment in this regard the Commission recognises the need to differentiate between the initial image and the use of that image in certain circumstances. For the purpose of this discussion paper the Commission elects to refer to this material as ‘self-generated child sexual abuse material’. This matter will be dealt with and clarified in more

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determined in response to the decisions, inputs and direct involvement of the game player of players.”

<sup>59</sup> See chapter two for the comment received and a discussion in this regard.

<sup>60</sup> International Centre for Missing & Exploited Children (ICMEC) *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017* 1st Edition ii.

<sup>61</sup> Internet Watch Foundation (IWF) *Annual Report 2016* 2. Available at [www.iwf.org.uk](http://www.iwf.org.uk).

<sup>62</sup> SALRC Sexual Offences Issue Paper (2015)18.

detail under Chapters 3 and 4 below.

1.21 The term 'paedophile' is deliberately not used in this paper as this is a clinical diagnosis of a person who is exclusively sexually attracted to children. The term preferred by law enforcement officials is 'child exploiter'. For these reasons the Commission elects to retain the proposed reference to the producers and consumers of 'child sexual abuse material' as 'child exploiters'.

## **C Background and scope**

1.22 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.

1.23 In brief, the scope of Project 107<sup>63</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>63</sup> South African Law Commission *Sexual Offences: Adult Prostitution* (Project 107) Issue Paper 19 (2002) 3.

1.24 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>64</sup> It had both a child and adult focus, but excluded adult prostitution; and children 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 children and pornography.<sup>65</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 by the Commission for submission to the Minister of Justice and Correctional Services for his consideration on 16 August 2014. Following engagement with the Commission and further consideration it was released for publication by the Minister on 26 May 2017.

1.25 This discussion paper forms part of the fourth leg of the investigation. It deals with pornography and its impact and effect on children. Following the promulgation of an amendment to 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 at that time had been addressed. However, this leg of the investigation is receiving renewed attention following a pre-investigation into pornography and the mass media. An issue paper was published for comment on 6 August 2015 followed by five workshops on the issue paper, namely: Pretoria (9 November 2015); Cape Town (11 November 2015); Kimberly (16 November 2015); Durban (20 November 2015); Nelspruit (25 November 2015) and a community briefing in Cape Town (4 November 2015) and a Kwa-Zulu Natal Childline focus group with youth (18 November 2015). Work on the discussion paper was held in abeyance pending the publication of the Report on Sexual Offences: Adult Prostitution and consequent engagement thereon.

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<sup>64</sup> South African Law Commission *Sexual Offences: Substantive Law* (Project 107) Discussion Paper 85 (1999).

<sup>65</sup> South African Law Commission *Sexual Offences: Process and Procedure* (Project 107) Discussion Paper 102 (2001).



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

1.26 This discussion paper represents an analysis of the current thinking and opinions on the law relating to the manner in which the law currently regulates and protects children from being exposed to pornography or from being abused to create child sexual abuse material and whether there is a need for law reform in this area of the law. It is informed by research and consultation at local, national and international levels. It further takes into account compliance obligations under international human rights treaties and the Constitution. It assesses the impact of current law on persons and society and the extent to which current laws assist the country in meeting its human rights obligations. Particular attention is given to the need for protection from exploitation and violence as required by international agreements on cooperation to combat child sexual abuse material and other international instruments aimed at protecting children in general.<sup>66</sup>

1.27 The discussion paper has taken into account the public response to the issue paper, and has tested public opinion against the solutions identified by the Commission. The Commission will consider responses to the discussion paper with a view to compiling a report which will contain the Commission's final recommendations, and draft legislation, if necessary. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration. It remains the prerogative of the Minister to implement the Commission's recommendations.

## **E Public participation in the investigation**

1.28 The Commission invites submissions and engagement in response to this discussion paper from as broad a range of sources as possible for the purpose of this public consultation. Interested parties are invited to avail themselves of the opportunity to participate in this process. The Commission believes that it is essential to involve all stakeholders in the consideration of the appropriate legal response to protecting children from exposure to pornography and from the abuse caused by the creation and distribution of child sexual abuse material. Special efforts will therefore be made to ensure that the debates are as inclusive as possible.

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<sup>66</sup> The need to adhere to international protocols and policies in relation to online child protection was endorsed by the Minister of Communications during the Second Reading debate of the Films and Publications Amendment Bill on 6 March 2018; Unrevised Hansard *Films and Publications Bill (Second Reading debate)* (6 March 2018) National Assembly 5.

1.29 The Commission will assume that respondents agree to the Commission referencing responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa, 1996 and the Promotion of Access to Information Act 2 of 2000, pursuant to the constitutional right to freedom of information.

**Respondents are requested to submit written comments, representations or requests to the Commission by 30 July 2019 using the email or postal address appearing on the first page.**

## **F Legislative developments in South Africa**

1.30 In the past five years a variety of legislative and policy initiatives have focussed on issues falling within the scope of this investigation. These include:

- an Online Regulation Policy originating from the Film and Publications Board as an entity falling under the Department of Communications<sup>67</sup>;
- the National ICT Policy White Paper (Department of Telecommunications and Postal Services);
- the Films and Publications Amendment Bill 2015 [B37B-2015] (Department of Communications);
- the Cybercrimes Bill 2017 [B6 – 2017] (Department of Justice and Correctional Services); and
- the Judicial Matters Amendment Bill (Department of Justice and Correctional Services).

1.31 The Commission agrees with the observation that if a difference is to be made it is incumbent on all government departments and regulatory bodies to harmonise and collaborate all their efforts in the best interests of the child.<sup>68</sup>

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<sup>67</sup> A realignment in Cabinet portfolios in 2014 resulted in the then Department of Communications being split into two separate departments: the Department of Telecommunications and Postal Services and the (new) Department of Communications. The two departments will be reconsolidated in May 2019.

1.32. A brief update on the status of these processes as at the time of drafting of this discussion paper is found below.

## **1 DTPS Integrated ICT Policy White Paper**

1.33 The issue paper<sup>69</sup> provided a short overview of the National Integrated ICT Policy Review Process at date of publication. This included excerpts from the National Integrated ICT Policy Discussion Paper focusing on the protection of children; children and inappropriate content; and protection of children, classification and content standards in respect of audio and visual content services and in respect of institutional frameworks. The ICT Policy Discussion Paper questioned whether in relation to e-commerce and e-services there is a need to consider the introduction of additional specific mechanisms to restrict children's access to harmful goods to protect children from inappropriate marketing of merchandise or services. An example of a mechanism given was that 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. The ICT Policy Discussion Paper noted that the Independent Communications Authority of South Africa (ICASA) could be required to strengthen consumer protection by facilitating co-regulation with licensees on children and inappropriate content and/or introducing specific requirements in licence conditions or regulations related to this. With regard to audio and visual content services the question was posed as to how policy continues to protect children from harmful and age-inappropriate content and ensure audiences can make informed choices about what to view and listen to? It noted that 'under current laws, ICASA has sole responsibility for determining rules on content standards, classification and protection of children for broadcasters.' It recognised that the three core objectives of current policy and law i.e. protecting children from harmful or inappropriate content; ensuring that adults have sufficient choice; and promoting fairness, accuracy and ethical behaviour will continue to underpin future policy.

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<sup>68</sup> Media Monitoring Africa and KAS Media Africa *Report on Online Regulation One Year On: What's changed?* 2017 24; Media Monitoring Africa "Multi-stakeholder workshop session to discuss online regulation" (29 June 2017).

<sup>69</sup> SALRC Sexual Offences Issue Paper (2015)131.

1.34 With this as background, the National Integrated ICT Policy White Paper was approved by Cabinet on 3 October 2016.<sup>70</sup> The ICT Policy White Paper contains policies which cover a broad range of technologies, including fixed and wireless telephony and data communications, broadcasting and the Internet. The White Paper recognises that convergence has meant that these technologies do not operate in isolation from one another and are increasingly accessed from the same device.<sup>71</sup> One of the key objectives of the White Paper is to '[E]nsure South Africans have the same protection online as offline and that all users are secure online.'<sup>72</sup> The White Paper makes reference to specific interventions aimed at promoting trust in ICT platforms and networks by protecting users. These interventions include an undertaking that Government will review all relevant laws to address new issues, contradictions and duplication in laws and policies, including an assessment to determine if there are sufficient mechanisms in place to protect children online from commercial and other exploitation.<sup>73</sup> This review will be coupled with government-lead awareness campaigns on security mechanisms and tools that users can utilise to protect themselves from internet crime, digital identity theft and cyberbullying to ensure that children are protected.<sup>74</sup>

1.35 In a similar vein the DTSPS makes reference under the item Child Online Protection to the Rio de Janeiro Declaration to Prevent and Stop Sexual Exploitation of Children and Adolescents, which contains the Adolescent Declaration to End Sexual Exploitation. These declarations flow from the World Congress III held in Brazil in November 2008. Key messages from children at the World Congress III highlight the threat posed by the Internet to children across the world;<sup>75</sup> the need for governments to pursue strict and punitive legislation with regards to the Internet, especially child pornography, which is seen as a form of abuse; and the need for strong cyber safety rules and the promotion thereof.

1.36 The DTSPS is engaged with the preparation and implementation of the various legislative and other processes required to give effect to the White Paper.

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<sup>70</sup> Michalsons *National Integrated ICT Policy White Paper* 2016 available at <https://michalsons.com/blog/national-integrated-ict-policy/12134>. Accessed on 30 March 2017.

<sup>71</sup> Department of Telecommunications & Postal Services *National Integrated ICT Policy White Paper* 28 September 2016 1.

<sup>72</sup> DTSPS *National Integrated ICT Policy White Paper* 2016 117.

<sup>73</sup> Opcit 124.

<sup>74</sup> Ibid.

<sup>75</sup> These messages were echoed by youth attending the Film and Publication Board, Commission for Gender Equality and United Nations Population Fund *Youth dialogue* Pretoria on 8 December 2017. It was held to identify issues affecting youth in Pretoria.

## **2 Department of Communications and the Film and Publication Board: Legislative review of the Films and Publications Act**

### **a. Draft Online Regulation Policy**

1.37 The Council of the Films and Publications Board approved an Online Content Regulation Policy 2016, referred to in the issue paper<sup>76</sup>, on 22 April 2016 with the recommendation that this be submitted to the Minister of Communications for approval and gazetting. To date this Policy has not been enacted.

### **b. Films and Publications Amendment Bill 2015**

1.38 Cabinet approved the introduction of a Films and Publications Amendment Bill into the Parliamentary process on 13 August 2015. The broad purpose of amending the Film and Publications Act was to extend the authority and focus of the Film and Publications Board to the regulation of online content.

1.39 Express objectives of the Bill are to:

- align the definition of child pornography to the definition in terms of the Constitutional Court judgment in the case of *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 CC;
- give effect to the constitutional amendments of section 16(2)(a) as instructed by the Constitutional Court in *Prime Media v Minister of Home Affairs and another* (CCT 113/11);
- decriminalise the online distribution of adult content on all platforms including digital platforms;
- provide for the establishment of a co-regulation system that will allow for accreditation by the Board of independent classification bodies to classify their own digital films, games and publications; and
- provide for an effective penalty regime in support of, amongst others, the co-regulation approach

1.40 The Bill further seeks to:<sup>77</sup>

- align the definition of 'child pornography' in the FPA to the definition of 'child pornography' in the SOA; and

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<sup>76</sup> SALRC Sexual Offences Issue Paper (2015) 85.

<sup>77</sup> Film and Publication Board, Distributors Engagement Session, Gauteng 13 March 2017.

- regulate harmful user generated content (e.g. ‘revenge porn’ and hate speech on social media).

1.41 The Bill was approved by the National Council of Provinces (NCOP) on 8 December 2018 and thereafter returned to the National Assembly for consideration of the amendments made by the NCOP.<sup>7879</sup> Provisions of the Bill pertinent to chapters dealt with in this discussion paper will be dealt with in the relevant chapter.

1.42 Suspicious local child sexual abuse material is referred by the FPB to the South African Police Service (SAPS) and foreign material is referred via INHOPE reporting processes.<sup>80</sup> The FPB confirms that it has received and reviewed a total of 2008 reports of content containing child sexual abuse material, but that most of the content was found not to be child sexual abuse material and those that were, were mostly hosted outside the country.<sup>81</sup> The FPB reports that the focus of its Child Protection Units is to assist SAPS with the analysis of material suspected of containing child sexual abuse material so as to provide the Court with the information needed to assist in determining whether the content submitted to the FPB constitutes child sexual abuse material or not.<sup>82</sup> During its Gauteng Distributors Engagement Session, the FPB observed with growing concern that South Africans are increasingly becoming desensitised to violent content and that this will in turn affect society negatively.

### **c. Other developments**

1.43 The FPB and ICASA signed a memorandum of agreement on 14 March 2016 in order to address issues of co-jurisdiction ‘in a seamless and collaborative manner’. One of the aims of this relationship is to create a framework to *inter alia* provide for uniform classification and labelling of content; and promotion of awareness of the role of ICASA and FPB in the protection of children against undesirable content.<sup>83</sup>

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<sup>78</sup> Parliamentary Monitoring Group Films and Publications Bill (B37-2015) available at <https://pmg.org.za>. Accessed on 18 February 2019.

<sup>79</sup> PMG Films and Publications Bill (B37-2015).

<sup>80</sup> FPB Distributors Engagement Session 2017.

<sup>81</sup> Ibid.

<sup>82</sup> Film and Publication Board, Press Statements ‘FPB Statement on the sentencing of child pornography perpetrator, William Beale’ 8 November 2017. available on <http://www.fpb.org.za/press-release/fpb-statement-sentencing-child-pornography-perpetrator-...> Accessed on 8 August 2018.

<sup>83</sup> Ellipsis “The Film & Publications Board and online content regulation” available at <http://www.ellipsis.co.za/the-film-publications-board-and-online-content-regulation/> Accessed on 31 January 2017.

1.44 The National ICT Policy White Paper calls for a realignment of the institutional framework governing electronic communications and content, noting that there is a “need to ensure a specific focus on governance of the Internet”<sup>84</sup> and calling for “effective and holistic governance and administration of the Internet at a national level”.<sup>85</sup> The White Paper requires the consolidation of governance and regulation across the ICT value chain (including the Internet value chain) into one entity. This integrated regulator will have sole responsibility for overseeing and promoting Internet governance, licensing and regulation of networks, services, spectrum and other scarce ICT-related resources. It will not, however, have any jurisdiction over broadcasting and audio-visual content.<sup>86</sup>

### **3 Department of Justice and Constitutional Development:**

#### ***a. The Cybercrimes Bill***

1.45 The Cybercrimes and Cybersecurity Bill 2017 was tabled in Parliament on 19 January 2017. On 23 October 2018 the clauses in the Bill dealing with Cybersecurity were removed from the Bill and it was renamed the Cybercrimes Bill 2017. As at March 2019 this Bill had been approved by the National Assembly and was before the Select Committee on Security and Justice in the NCOP, which had called for further public consultation to assist it in its deliberations.

1.46 Broadly speaking the primary aim of the Bill is to create offences and impose penalties which have a bearing on cybercrime and to regulate the investigation of cybercrime. Amongst other things, it seeks to:

- criminalise the distribution of malicious communications, including those amounting to cyberbullying;
- create an offence for the unlawful and intentional making available by means of a computer system of a data message of an intimate image of a person without his or her consent (popularly referred to as “revenge pornography”);
- provide for protection orders for the victims of these crimes;
- provide for broad jurisdiction of the South African courts in respect of cybercrimes and greater cooperation and mutual assistance treaties with other countries in the detection, prevention, mitigation and investigation of cybercrimes;

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<sup>84</sup> DTPS National Integrated ICT Policy White Paper 2016 155.

<sup>85</sup> Opcit 156.

<sup>86</sup> Ibid.

- provide for training for law enforcement agencies in the prevention and investigation of cybercrime; and
- place reporting obligations in respect of specific crimes on electronic communications service providers.

1.47 Various amendments are proposed to the SOA in order to comprehensively deal with ‘child pornography’ in accordance with the proposals of the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in respect of offline ‘child pornography’ and the Budapest Convention on Cybercrime in respect of ‘virtual child pornography’.<sup>87</sup> The Bill further seeks to comprehensively criminalise ‘child pornography’ in the SOA and to consolidate the criminal law applicable to crimes related to the sexual abuse of children in the SOA. To this end the Bill proposes:

- the amendment of section 1 of the FPA by the substitution for the definition of " child pornography" of the following definition: “child pornography” means “child pornography” as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).
- The deletion of section 24B of the FPA which criminalises child pornogra[hy and the sexual exploitation of children.
- The deletion of section 27A of the FPA which requires the registration of Internet Service Providers with the Film and Publications Board and imposes obligations on them in respect of the reporting, investigation and handling of ‘child pornography’ and access thereto.
- The deletion of section 30B(1)(b) of the FPA.

***b. Judicial Matters Amendment Act 8, of 2017***

1.48 The Judicial Matters Amendment Act, 8 of 2017 came into effect on 2 August 2017. 88 It inserts the following definition in the SOA:

**“sexual offence against a child’** includes any contravention of section 24B(1) or (3) of the Films and Publications Act, 1996 (Act No. 65 of 1996).’

<sup>87</sup> Mabena S “Cybercrime bill a milestone towards building safer communities, Justice Department says” (Times Live) 19 January 2017 available at [www.timeslive.co.za](http://www.timeslive.co.za). Accessed on 19 January 2017.

<sup>88</sup> Judicial Matters Amendment Act, 8 of 2017, Government Gazette of the Republic of South Africa No.41018 Vol.626 2 August 2017.



1.49 The reason for the amendment is that section 50 of the SOA provided that the particulars of a person who has been convicted of a sexual offence against a child only in terms of the SOA must be included in the National Register for Sex Offenders.<sup>89</sup> The effect of the amendment is that a person who is convicted of offences relating to 'child pornography' in terms of section 24B of the FPA should also now be included in the National Register for Sex Offenders. Furthermore, in an attempt to overcome the challenge being experienced to obtain correct verifiable information, the amendment seeks to contain the obligation placed on retrospective population of the National Register for Sex Offenders to those offenders who have served a sentence of imprisonment as a result of a conviction for a sexual offence; have a previous conviction for a sexual offence; are or were subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 as a result of an act which constituted a sexual offence against a child or a person who is mentally disabled, to five years preceding the commencement of chapter 6 i.e. after 16 June 2003.<sup>90</sup>

## **G Outline of the Discussion Paper**

1.50 The following chapter (Chapter two) considers concerns relating to children accessing or being exposed to pornography including what children are being exposed to; whether this exposure is inadvertent or deliberate; the effects of exposing children to pornography; and what the appropriate legal response to children at risk of exposure should be. It includes submissions received from respondents to the issue paper on questions pertinent to this chapter; provides an overview of current law and concludes with provisional recommendations aimed at reducing the risk of children accessing or being exposed to pornography.

1.51 Chapter three primarily focuses on unpacking the risks and legal challenges that arise from the creation and distribution around self-generated sexual images. It provides an overview of the current law; reflects legislative proposals contained in Bills before Parliament; and considers submissions received on when these images should be considered child sexual abuse material and what the legal response should be towards children engaging in this behaviour. In making its provisional recommendation on this issue the Commission has given consideration to UNICEF's recommendation that the act of consensual self-generated child sexual abuse material by certain children should only be decriminalised in respect of possession and production of child sexual abuse images; should

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<sup>89</sup> The Memorandum on the Objects of the Judicial Matters Amendment Bill, 2016.  
<sup>90</sup> Chapter 6 of the SOA commenced on 16 June 2008.

only be for children who have reached the age of consent and that the images may only be possessed and produced with their consent and only for private use.

1.52 Chapter four discusses some of the legislative concerns relating to the adequacy of the existing definition of child pornography (child sexual abuse material) and the criminalising of offences related to the creation, possession and distribution of child sexual abuse material and sexual crimes associated with or which are facilitated by pornography. It provides an overview of pertinent submissions received from respondents and concludes with a discussion and preliminary recommendations. In so doing it reflects relevant portions of the key international instruments including the UNCRC, its OPSC, and the Council of Europe's Convention on Cybercrime which have been central in defining minimum international standards in protecting children online and combating sexual exploitation through online activities. It further discusses the relevant clauses in the Films and Publications Bill and the Cybercrimes Bill which seek to ensure the protection of children by way of either amending the FPA or the SOA or enacting new offences. The role, responsibility, complicity and need for accountability of industry and some parents form part of this discussion. The focus of this chapter is both legislative and non-legislative in order to provide a response which is aimed at prevention and reaction.

1.53 Chapter five focuses on the phenomenon of grooming. Children have been found to be particularly susceptible to online grooming as interaction with known and unknown people over social media, including dating sites forms part of some children's daily socialisation and networking. This chapter considers the involvement of family members in the grooming of particularly young children and the need for police officials to be pro-active in protecting children online. Submissions received in response to the issue paper include evaluating the current law and whether this crime is adequately criminalised. In its recommendation the Commission affirms the current legislative response and the inter-sectoral approach underpinning the National Policy Framework as provided for by the SOA.

1.54 Chapter six discusses certain aspects pertaining to the investigation of matters relating to a child's exposure to pornography or child sexual abuse material; highlights certain procedural matters that have been identified by respondents and advisory committee members as warranting attention and considers matters relating to sentencing and ancillary orders. A focal part of this chapter is the need for multi-disciplinary intervention in the response towards all sexual offences, including those discussed in this discussion paper

# CHAPTER 2: ACCESS TO OR EXPOSURE OF A CHILD TO PORNOGRAPHY

## A. Introduction and background

2.1 This chapter seeks to address concerns relating to children accessing or being exposed to pornography from a law reform perspective. Pornography in this context refers to material which is legal for adults (a person 18 years and older). Pornography rated X18 is permitted by the law if it is sold to persons over the age of 18 in registered stores called 'adult premises'.<sup>91</sup> It is currently an offense to host a pornographic website in South Africa due to the requirement that pornography can only legally be distributed from designated, licensed physical premises. The focus in this chapter is on the harmfulness and not the illegality of this material in that exposing or allowing a child to access this material carries a probability of harm to the child.<sup>92</sup> This chapter provides an overview of concerns raised in the issue paper pertinent to children's access to or exposure to pornography, an overview of pertinent submissions received from respondents and concludes with a discussion and preliminary recommendations. The Commission has taken a holistic approach in making its preliminary recommendations. The recommendations found in this chapter are legislative and non-legislative and include the recommendation to amend the definition of 'pornography' in the SOA; makes provision for specific additional crimes in the SOA and provides among other recommendations that safety initiatives and messages should be effectively communicated and accessible to users and where apposite to their parents who may be illiterate. It highlights the need to establish close working partnerships between the law enforcement authorities and the ICT industry and internet and wireless application service providers. In this regard the Commission is of the view that content providers that are offering child-oriented services should take greater responsibility for the conscious targeting of children. The access to or exposure to illegal material i.e. child pornography or child sexual abuse material will be dealt with in chapters 3, 4 and 5 below. This includes the manner in which 'child pornography' is defined and in terms of which legislation it should be regulated.

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<sup>91</sup> Section 24 of the FPA.

<sup>92</sup> Nyachowe PN *Failing the children Without Prejudice* April 2010 (3) 34. URI: <http://hdl.handle.net/20.500.12144/23727>.

## B. Overview of the Issue Paper

### 1 General position

2.2 The issue paper<sup>93</sup> makes the point that the advent of the internet has had the unintended consequence that children can access or be exposed to pornography (explicit adult sexual content) in a manner that is unrestricted by legal and social constraints that govern such access and exposure in the 'real' world. The concern is raised that two thirds of all pornographic websites, including extremely graphic and violent pornography in the form of the gonzo genre,<sup>94</sup> do not include any type of adult content warning. The issue paper notes that children are being harmed through the exposure of a wide array of pornography which ranges from single-frame photographs to live pornography via webcam and other technology.<sup>95</sup> The available content is said to be increasingly cruel, violent and degrading.<sup>96</sup> The effect of pornography on children is also reported as wide ranging. The issue paper raised concerns around the distortion of a child's concept of sexuality; development of sexually dysfunctional attitudes and behaviours; sexual acting out towards younger, smaller or more vulnerable children i.e. committing of 'real time' abuse; being encouraged to take and generate material of themselves or other children; and becoming the victims of 'real time' abuse.

2.3 The issue paper has sought to place the discussion in context by determining what type of pornography children are being exposed to; what the effect of exposure to pornography on children is; how children are being exposed to pornography; what legislative mechanisms are or should be put in place to protect children from exposure to pornography and what obligations apply or should apply to broadcasters, publishers and service providers. The options of reforming the law, improved implementation or drafting or

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<sup>93</sup> SALRC Sexual Offences Issue Paper (2015) 35.

<sup>94</sup> Opcit 37 explains 'Gonzo films' as having '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>95</sup> Opcit 38.

<sup>96</sup> Opcit 39.

amending policies including the option of filtering have also been explored by way of the questions and discussions held in workshops.<sup>97</sup>

## 2 The current law

2.4 The issue paper details the current law applicable to exposure of children to pornography in South Africa and for ease of reference a synopsis will be given below.<sup>98</sup> The SOA defines 'pornography' 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;<sup>99</sup>
- (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;'

2.5 The SOA specifically criminalises the exposure to or display of pornography<sup>100</sup> to children, irrespective of how this display is done.<sup>101</sup> In terms of section 19 of the SOA, 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.<sup>102</sup> This would include material

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<sup>97</sup> A complete list of the questions may be found in the SALRC Sexual Offences Issue Paper (2015).

<sup>98</sup> SALRC Sexual Offences Issue Paper (2015) para 3.45 and further.

<sup>99</sup> It is notable that given the existence of cultural practices in South Africa in which breasts are exposed and non-sexual behaviour such as breastfeeding these acts are excluded from the definition of pornography through this specific description.

<sup>100</sup> The SOA defines 'pornography' and 'child pornography'.

<sup>101</sup> Section 19 of the SOA.

<sup>102</sup> SALRC Sexual Offences Issue Paper (2015) para 3.46

defined in the FPA.<sup>103</sup> One of the objects of the FPA is to protect children from exposure to ‘disturbing and harmful’ materials, from premature exposure to adult experiences,<sup>104</sup> and to make the exposure of children to pornography punishable.<sup>105</sup> The FPB is responsible for the classification of both films<sup>106</sup> and publications<sup>107</sup> in South Africa. Sections 16(1) and 18(6) of the FPA provide for the exemption of broadcasters and publishers from the regulatory authority of the FPB. Exemption is however not 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.’ It should however be noted for purpose of this discussion that not all children are disturbed by adult content, although it may have harmful consequences for them.

2.6 Section 24A of the FPA provides for prohibitions, offences and penalties related to the distribution and exhibition of films, games and publications. Bearing the above exemptions in mind it is an offence to broadcast, distribute or exhibit in public, offer for sale or hire or advertise for exhibition, sale or hire any film, game or publication which has been classified as a ‘refused classification’ or been classified ‘XX’.<sup>108</sup> Specifically with regard to children section 24A(4) makes it an offence for any person to distribute or exhibit any film, game or publication classified as ‘X18’; or 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, to a person under the age of 18 years. The relevant definitions read as follows:

“**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;

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<sup>103</sup> Mr Chetty (KINSA South Africa) is of the opinion that section 19 was included in the SOA 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.

<sup>104</sup> Section 2(b) of the FPA.

<sup>105</sup> Section 2(c) of the FPA.

<sup>106</sup> In Chapter 4.

<sup>107</sup> In Chapter 3.

<sup>108</sup> Section 24A(2).

- (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>109</sup> and

“**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>110</sup>

2.7 Despite the offences listed under section 24A of the FPB prohibiting child sexual abuse material and strictly regulating the distribution of certain pornography, it appears that sections 24A(2),(3) and (4) of the FPA are not consistently implemented or problems are experienced in implementing these sections in respect of online distribution and exhibition through local and offshore websites and on- and offline advertising.

2.8 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’. Sections 24C(2) and (3) are of relevance to this chapter. For ease of reference it is included below:

- (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.

<sup>109</sup> Definition of ‘sexual conduct’ inserted by section 1 of Act 18 of 2004.

<sup>110</sup> Definition of ‘explicit sexual conduct’ inserted by section 1 of Act 3 of 2009.

(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.’

2.9 The Film and Publication Regulations 2014 (the 2014 Regulations) provides for various matters under the FPA.<sup>111</sup> Paragraph 21(3) of Part 7 of the 2014 Regulations clearly requires that:

‘(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.’<sup>112</sup>

2.10 The issue paper also highlighted inconsistencies between the 2014 Regulations and the FPA, namely that 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.<sup>113</sup>

2.11 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>114</sup> It would however appear that despite the current legislative framework exposure to or the ability of children to access pornography or legal adult content is still a problem.

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<sup>111</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.

<sup>112</sup> According to Dominic Cull (ISPA representative on the Commission advisory committee) the premise is that ISPs should register in the fight against child abuse, but according to ISPA this is not the function of ISPs. ISPA reports that although non-registration is an administrative offence in terms of the regulations, only a few ISPs are actually registered. Having said this if ISPs become aware of CSAM they immediately report it to the SAPS and not to FPB.

<sup>113</sup> It also referred to the FPB’s Draft Online Content Regulations Strategy which sought to ensure uniform classification, labeling and compliance monitoring of content distributed on mobile and digital platforms, i.e. online distribution of television films and programs streamed via the internet. In this regard see SALRC Sexual Offences Issue Paper (2015) paras 3.123 and 3.84; and <http://www.scribd.com/doc/2508141625/draft-online-regulation-policy>. The Online Policy did not receive wide acceptance and consequently the development of this strategy seems to have stalled. In this regard see SALRC Sexual Offences Issue Paper (2015) para 3.88 and 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>114</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 as reflected in the SALRC Sexual Offences Issue Paper (2015) para 3.116.



## C. Submissions

2.12 As mentioned above a number of questions were posed in the issue paper in order to elicit comment on the prevalence and concerns around children accessing or being exposed to pornography. The submissions received in response to these questions will be dealt with below under the relevant question. Exposure to self-generated sexual material between consenting children i.e. material which according to the current legal definition in the SOA and the FPA constitutes child pornography is dealt with in chapter three. As it is a separate crime, the exposure of a child to child sexual abuse material is dealt with in chapter four and exposure to pornography or child sexual abuse material with the aim of grooming a child is dealt with under chapter five below as a standalone matter.

### 1 What is considered to be pornography?

2.13 A few respondents confirmed that their understanding of the definition of pornography correlates with the definition found in the SOA.<sup>115</sup> Other respondents highlight concerns with the current legislative understanding of pornography.<sup>116</sup> For example Google South Africa notes that the FPA does not define pornography as such, but refers, instead, to images of ‘explicit sexual conduct.’ Further that the ambiguity and subjectivity of the SOA’s definition also gives rise to uncertainty as to what may be deemed to be pornographic material.<sup>117</sup> It comments that one of the key issues with the existing legislation is the inconsistency in definitions of ‘pornography’ and ‘child pornography’ in the FPA and the SOA. It is of the opinion that this results in a lack of enforcement and understanding of the offences triggered by the Acts.<sup>118</sup> The SAPS comments that:

‘It is impossible to create a universal or standard definition of pornography, simply because people look at this matter with different subjective minds. What one person may regard as pornography may be regarded by another as art. The definition of “pornography” where it involves consenting adults, should be confined to explicit acts of a sexual nature. Nakedness in itself cannot be regarded as “pornography”. It is recommended that the definition of “pornography” as contained in the Criminal Law (Sexual Offences and Related Matters Amendment Act), 2007 (Act No.32 of 2007) (hereinafter referred to as “the Act”) be retained, subject to minor amendments. It is proposed that the words contained in sub-par (j) of the definition be replaced to read as follows:

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<sup>115</sup> Cause for Justice; Kimberley workshop participant; consolidated comment by the National Prosecuting Authority; Daine Snyders.

<sup>116</sup> Google South Africa; NPA; South African Police Service.

<sup>117</sup> Google South Africa.

<sup>118</sup> Ibid.

“(j) engaged in any conduct, activity or function characteristically or biologically associated with sexual intercourse;”

2.14 The view is held that pornography refers to images or descriptions or material of individuals/groups of adult people that are naked, in sexually explicit positions, or engaged in or performing sexual acts.<sup>119</sup> Daine Snyders submits that pornography is not only restricted to persons who are naked, they can be clothed too. These sexual acts could be consensual or non-consensual. A number of respondents propose various definitions which describe their understanding of the term ‘pornography’.<sup>120</sup> It could be a visual display<sup>121</sup> of sexually explicit material, a film, video game,<sup>122</sup> video or a photo;<sup>123</sup> or written or audio,<sup>124</sup> drawing, painting, sculpture, animation,<sup>125</sup> through magazines, DVD, books or displayed on any other device.<sup>126</sup> Sidhartha Philander confines the definition of pornography to ‘any form of public media (film, radio, adverts, magazines etc.) which contains sexually explicit content (softcore or hardcore)’ thereby excluding photos taken in a home or which is not contained in public media. In turn some respondents were of the view that distribution of the material was needed to constitute pornography.<sup>127</sup> The purpose of pornography was described as being intended for or used by adults for sexual pleasure,<sup>128</sup> sexual stimulation; arousal<sup>129</sup> and gratification of another, or which demeans such person, their gender, race, ethnicity, disability, age, sexual preference or dignity, in an attempt to capitalize on such exposition in any way.<sup>130</sup> WMACA adds that there are producers of coerced and non-consensual adult pornography which is often violent and cruel. It states that this form of pornography is produced by private individuals without the necessary safeguards. The images could be considered to be depictions of the sexual assault and exploitation of adults, which constitute crimes. WMACA comments further that generally ‘pornography’ is the depiction of adults in

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<sup>119</sup> Robynne Alexander; Peter Anderson Rev United Congregational church of Southern Africa; Pretoria workshop participant; NPA; Family Policy Institute; Cherry Hochfelden; WMACA; Daine Snyders; Nicola Kostlin; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Riki van Deventer; Christel Long, Crystal Clear Ministries International.

<sup>120</sup> Robynne Alexander; WMACA.

<sup>121</sup> Robynne Alexander; Prof T Zabow uses the qualifier “visual sexual stimuli”; Daine Snyders.

<sup>122</sup> Christel Long, Crystal Clear Ministries International.

<sup>123</sup> Louie Claasen, UNISA; Daine Snyders; Christel Long, Crystal Clear Ministries International.

<sup>124</sup> Peter Anderson Rev United Congregational church of Southern Africa; Family Policy Institute; Daine Snyders.

<sup>125</sup> Christel Long, Crystal Clear Ministries International

<sup>126</sup> Rob Schultz..

<sup>127</sup> Louie Claasen, UNISA.

<sup>128</sup> Ibid.

<sup>129</sup> Pretoria workshop participant; WMACA.

<sup>130</sup> Family Policy Institute.

various consensual<sup>131</sup> sexual acts which are not degrading to any other beings. In respect of these acts the consenting participants, who are mostly involved for monetary reward, know they are being filmed and understand that the resulting footage is for user consumption, distribution and or sale in designated legal places.<sup>132</sup> It is of the opinion that this form of pornography is regulated by various bodies and as a result there is some form of accountability and the correct ratings and warnings are applied. One respondent comments that material constitutes pornography when a child is exposed to naked and intimidating pictures and scenes (presumably of adults).<sup>133</sup> The NPA is of the view that 'not only the use of children to create pornography but the exposure of children to pornography should be seen as a crime against children and a violation of relevant sections of the SOA and the FPA'. The view was also expressed that the intention to stimulate erotic feelings on the part of the person who created the image should not form part of the definition.<sup>134</sup>

2.15 One source in the NPA highlights the following shortcomings in the definition of 'sexual conduct' in the FPA:

- the undue display of genitals or of the anal region does not include the display of breasts;
- masturbation does not specify or include the actions of one person by another;
- bestiality is not defined or in line with the definition in the SOA;
- the description of sexual intercourse as being real or simulated, including anal sexual intercourse interpreted conventionally means penetration of a penis into the vagina or anus. It does not include digital penetration or oral penetration as is covered in the SOA;
- the penetration of a vagina or anus with any object does not include penetration by any other part of the body of one person;
- the object to be inserted does not specify that it includes an object resembling or representing the genital organs into the mouth of another person to cover aspects like dildos and vibrators; and
- oral anal contact does not include oral breast contact.

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<sup>131</sup> The Green Hearts agree that adults have the choice to participate and are in most cases paid to participate in creating pornographic material.

<sup>132</sup> Carol Hinrichsen likens exchange of sexual acts for payment as prostitution.

<sup>133</sup> Ria.

<sup>134</sup> NPA; Christel Long, Crystal Clear Ministries International. The NPA cautions "that this is a subjective rather than objective criterion – an image may stimulate erotic feelings in some people but merely aesthetic feelings in others. Perhaps the 'intention' should be deduced from the quality of the image, regardless of its nature, and not from the intention of its creator.

2.16 The definition contained in the SOA is preferred by the NPA as it is wider and addresses the concerns raised above. The NPA states that the definition includes the following behaviour for example:

- 'Engaging in sexually suggestive or lewd acts;
- Sadistic or masochistic acts;
- Conduct characteristically associated with sexual intercourse.'

2.17 A further concern raised by the NPA is that the conduct addressed by the FPA may not be inclusive enough to read simulating sexual intercourse into 'engaged in conduct or activity characteristically associated with sexual Intercourse' or any of the other parts of the definition.<sup>135</sup> The concern is raised in the context of many programs not showing actual pornography but rather simulated sex scenes in movies or shows like the Bold and the Beautiful.<sup>136</sup>

## **2 Is exposure of children to pornography a problem in South Africa?**

### ***a. The internet***

2.18 A number of respondents affirm the view that exposure of children to pornography on the internet is problematic.<sup>137</sup> In order to illustrate the extent of the problem in South Africa Minister Fritz refers to a study conducted by the UNISA Youth Research Unit at the Bureau of Market Research.<sup>138</sup> This study conducted in Gauteng reveals that of the more than 1500 High school children surveyed:

- '41.9% opened an unfamiliar message or website link containing pictures of naked people or people having sex.'

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<sup>135</sup> NPA.

<sup>136</sup> Ibid.

<sup>137</sup> Media Monitoring Africa; Minister Albert Fritz (Adv) of the Ministry for Social Development, Western Cape; Christel Long, Crystal Clear Ministries International; Louie Claasen, UNISA; Robynne Alexander; Riki van Deventer; Cathy Mclean, Child Welfare Tshwane; Kimberley workshop participant; Pretoria workshop participant; M Sekelwa Noluvo; Benita Nel; J Moses, Grace Community Church; Peter Anderson Rev United Congregational church of Southern Africa; Cause for Justice; Child Welfare South Africa; Khayaletu Rutsha, Department of Communications; NPA; Family Policy Institute; Google South Africa; Women and Men Against Child Abuse (WMACA); Miss Santy Maggio (Zimbabwe); Memory Eckard; Sandra and Chris van Heerden; John R Blacklaws; Cherry Hochfelden; Mr Cebo Chiliza; Ulanda Seitz; Daine Snyders; Carol Hinrichsen; Nicola Kostlin; Paul Barter; Ronald Muthambi; Lyn Seymour Westville KZN; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Ria; Rob Schultz; The Green Hearts.

<sup>138</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC.

- 43% reported to have accidentally come across websites with sexually explicit material.
- 29.2% intentionally accessed pornographic material.
- 77.6% accessed pornographic sites occasionally and 9.1% daily.’

2.19 Cathy Mclean of Child Welfare Tshwane is particularly concerned about the exposure to children of pornography through mobile phones with internet access.<sup>139</sup> The NPA also flags the distribution between children of pornography as problematic. Ulanda Seitz submits that easy exposure to pornography has led to an increase in child on child abuse,<sup>140</sup> with allegations of rape by children in primary schools.<sup>141</sup> Some respondents submit that although exposure to pornography is problematic, it has always been a problem and cannot be attributed to the advent or expansion of access to the internet alone.<sup>142</sup> Nicola Kostlin argues that the only change is the prolific nature thereof.<sup>143</sup> It is further argued that the easy availability of pornography is exacerbated by the uptake of mobile phone usage by an increasingly younger audience.<sup>144</sup> According to some respondents<sup>145</sup> further contributing factors are that almost every child has access to a mobile phone, iPad, tablet, laptop or computer and children can accidentally or deliberately log onto sites; parents are not cyber smart and do not know about filters and blocking of sites.<sup>146</sup> Child Welfare SA (CWSA) and the NPA flag insufficient internet controls i.e. insufficient web-site content control and easy availability of internet access. CWSA flags online ‘pop ups’ on so called ‘safe sites’ and seemingly innocent internet word searches leading to listing and re-direction to web sites containing graphic pornographic materials.<sup>147</sup> Prof T Zabow comments that the opportunity for exposure of children is further exacerbated due to the accessibility and affordability of pornography.

<sup>139</sup> Endorsed by Peter Anderson Rev United Congregational church of Southern Africa; J Moses, Grace Community Church; Cause for Justice; Sidhartha Philander.

<sup>140</sup> Endorsed by National Training Manager, Child Welfare South Africa.

<sup>141</sup> Carol Hinrichsen.

<sup>142</sup> Nicola Kostlin, MMA. In this regard MMA states that it is important to note that the internet is one of the fastest-growing areas of technical infrastructure development. Today, Information and Communication Technologies (ICTs) are omnipresent (for those with access) and the trend towards digitization is growing. The demand for internet and computer connectivity has led to the integration of computer technology into products that have usually functioned without it, such as cars, buildings and home appliances.

<sup>143</sup> “It was a problem when I was a child, my brother's friend's father brought in material from Holland for his sons as he had frequent business trips there. Now with girly magazines been sold openly in our shops as well as "Sexpo" advertising and "Teazers" advertising, its a huge problem in SA as its readily available especially on the internet, even with parent control on You-tube still throws out unacceptable videos when for e.g. I am looking up shark vidoes with my son - when you've watched the clip it brings up a selection of clips and low and behold I've had to cover up the screen because what's there is unacceptable.”

<sup>144</sup> Sidhartha Philander.

<sup>145</sup> Kimberley workshop participant; Child Welfare South Africa; WMACA.

<sup>146</sup> Kimberley workshop participant. Benita Nel; Daine Snyders.

<sup>147</sup> Endorsed by Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

2.20 MMA is of the view that content providers that are offering children-oriented services are clearly not doing enough. It states that ‘there are various ways apart from a mere algorithm that can ensure that children remain safe online’. MMA comments that it has on numerous occasions and continues to urge all service providers in SA to come together to host workshops that will assist not only children but also parents in understanding the digital space and staying safe online. It reports that it has also urged service providers not to leave it to government and civil society alone in trying to combat child sexual abuse material (this includes sexting and cyberbullying). Google South Africa in turn acknowledges that ‘children have been exposed to some of the worst forms of exploitation, violence and abuse online.’ It submits that without downplaying the seriousness thereof it is of the view that this should be seen against the backdrop and context of where the internet can aid with school work, help connect them with friends, and offer a creative outlet. It recommends close collaboration in order to mitigate the unintended negative aspects of this medium on children, while at the same time maximising the benefits that can accrue from it. Although Minister Fritz<sup>148</sup> agrees that exposure to pornography should be seen in the broader context of what the internet offers, he warns that it should also be seen from the perspective that internet users are becoming younger and younger and consequently require more protection.

### ***b. Advertising and publications***

2.21 WMACA submits that billboards advertising sex-related websites and or services can be found on most of our main roads countrywide literally exposing millions of children to inappropriate content.<sup>149</sup> In its view this type of exposure is not adequately addressed by the SA Advertising Standards Authority. It mentions that ‘the Sex Trader has three big billboards on the M1 Highway on which escort agencies advertise their services’. It states that the Advertising Standards Authority has dismissed numerous complaints by aggrieved parents about street adverts promoting adult content which further exacerbates the challenges of trying to protect children from harmful material. It is also argued that exposure is exacerbated where publications which used to be sealed in plastic sleeves are now available in book stores;<sup>150</sup> adult shops do not require identity documents or ask for identity documents and video shops do not have cordoned off sections for adult movies which restrict children from access and exposure to adult material.<sup>151</sup>

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<sup>148</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC

<sup>149</sup> Endorsed by Daine Snyders; Nicola Kostlin.

<sup>150</sup> Kimberley workshop participant; Daine Snyders.

<sup>151</sup> Ibid.

### **c. Broadcasters**

2.22 There are divergent views about whether children are exposed to pornography through television or not. According to M-NET and Multichoice, television is not the problem. They aver that exposure of children to pornography is overwhelmingly through access to the internet, access to mobile phones, the viewing of DVDs and through magazines. They further aver that television is not identified as one of the mediums through which children are exposed to pornography. For this reason it states that other mediums require the attention of the Commission, and subsequently of the legislature. They submit that it is not necessary to further regulate television broadcasters as regards the exposure of children to pornography, nor would a system other than this current regulatory system be permissible given section 192 of the Constitution. M-NET and Multichoice submit that the appointment of ICASA as an independent authority to regulate broadcasting in the public interest is working and should be permitted to continue. One respondent agrees and states that through the efforts of religious groups in particular, and other interested parties such as educational institutions, television has been largely but not entirely rid of the scourge of pornography.<sup>152</sup> CWSA however identifies free viewing television channels as contributing to the exposure of children to pornography, particularly through adult movies.<sup>153</sup> It views the ability of these channels to legally advertise and screen pornographic material thereby making the responsibility to monitor and police these channels the duty of parents or caregivers as problematic. The NPA comments that this material is both explicit and age inappropriate. SAPS also flags the practice of free to air television channels in South Africa of indiscriminately advertising mobile phone pornography at certain hours on Friday and Saturday nights as problematic. It submits that this practice is far more harmful to children than the internet since the service is openly advertised and is accessible to any person who has access to a mobile phone. It suggests that for the sake of protecting children, this issue should be addressed by the intended legislative framework, coupled with strict penalties. It comments that it is no excuse to broadcast these advertisements late at night, since children are not necessarily at sleep at those hours.

2.23 Jack Carstens of the David & Jonathan Foundation submits that government can do more. He agrees with SAPS, CWSA and the NPA that it can start with the SABC TV. He believes that age restrictions on television are a farce. He submits that adult viewers who want to watch pornography should be forced to go to a pay channel and that Christian

<sup>152</sup>

J Moses, Grace Community Church

<sup>153</sup>

Kimberley workshop participant; Daine Snyders.

organizations should stop blocking pay channels because in his view they can't have it both ways. He holds the view that there are many international pay sites which South African viewers have access to. Although CWSA accepts that parents or care-givers do have a role to play it comments that the reality is that many children are left unsupervised for extended periods of time or do not have parents or care-givers who are even aware of adult content broadcasts or are educated in this area. It also flags the naivety of children as contributory to exposure.

#### ***d. Exposure by parents, other adults and peers***

2.24 WMACA reports that during therapy sessions conducted by its social workers at WMACA Kidz clinics they are seeing an increasing number of reports of children groomed through exposure to pornography, and or used in the production of child sexual abuse material - and or children abused by peers who have been exposed to pornography, voluntarily or involuntarily. CWSA submits that this exposure leads to short term and long term harm. In this regard it supports chapter two of the issue paper. Memory Eckard (a great-grandparent) expresses her concern regarding the prevalence and exposure of children to pornography worldwide.

2.25 Russell Jackson identifies the root of the problem of child pornography as the consumption of pornography by adults. He submits that children role-play the behaviour they see in adults as children are quick to identify duplicity in adults, and ignore statements such as 'Do as I say, not as I do.' He is of the view that adults need to be leading by example, teaching children at age-appropriate levels how to say 'No' to pornography. He states that children would be unlikely to have access to pornography if it were not used by adults. He therefore believes that any solution to child pornography would need to address the legality of adult pornography. Louie Claasen,<sup>154</sup> comments that 'more and more cases are coming to the fore where families are discovered to have been sexually abusing children and many of them are involved in either exposing children to pornography or using the children to make and distribute child pornography'. Miss Santy Maggio<sup>155</sup> submits that this is caused by exposure to pornography which is particularly harmful when done at a young age. Sekelwa Noluvo highlights a number of concerns in this regard, namely that in his view children are exposed to pornography as a result of adults (particularly parents) being very negligent with adult material; and that the law is not strict enough in dealing with negligent exposure of children to such material. He suggests that parents should be the first people to

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<sup>154</sup> UNISA.

<sup>155</sup> Who submitted her response from Zimbabwe.



be educated about this. Benita Nel adds that this is complicated in rural areas, where staff/infrastructure to implement legislation is not there and information, prevention and knowledge to protect children is not up to standard which means that it is not regulated or controlled in rural areas. WMACA submits that parents are generally either absent or ignorant on what their children are doing on their computers, they are just not as technologically advanced as their own children – and are therefore not in a position to stop their children from accessing pornography. In its view even if parents make every effort to install programmes to block inappropriate content on their children’s computers and mobile phones they cannot control the peer to peer exposure and or the increasing inappropriate material in the form of advertising in public spaces and or in the entertainment industry or by and through the mass media . Jack Carstens of the David & Jonathan Foundation acknowledges that a parent is the primary guard over the morals of a child and must exercise responsibility in this regard. He believes that the church and school should play a bigger role. He flags the fact that churches seldom speak about this topic and that schools providing ‘sexual contact education’ without teaching on abstinence is problematic. Jonathan Bremner states that protecting children from exposure to pornography is often outside the control of parents. He personally recounts that although there was never pornography in the parental home his children were introduced to pornography by friends who had access to their father’s pornography and showed it to their friends while in junior school when they did not know what to do with the things adults enjoyed, with devastating consequences. The view is expressed that for as long as pornography is legal for adults, children will be exposed to it despite attempts by parents to protect them from it.<sup>156</sup> Furthermore that as a matter of progression in the exposure and use of pornography there is no clear boundary between viewing pornography and the participation in the creation thereof, including of the abuse of children. Based on a tragic personal account Lyn Bremner expounded on the addictiveness of pornography and the dangers which addiction gives rise to, Cause for Justice and Jack Carstens of the David & Jonathan Foundation state that parents, guardians and other carers exercising supervision over children (e.g. teachers, day carers etc.) are not able to protect children without assistance from other stakeholders, such as the state through legislation and its organs, internet service providers and industry watchdogs such as the Broadcasting Complaints Commission of South Africa (BCCSA). WMACA submits that not enough prevention action is taking place.

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<sup>156</sup> Jonathan Bremner.

### 3 What are children being exposed to?

2.26 Respondents are of the view that children are being exposed to a range of pornography including adult pornography, self-generated sexual material between peers and child sexual abuse material.<sup>157</sup> In this regard Minister Albert Fritz<sup>158</sup> comments that uncontrolled access to movies containing potentially harmful material, as well as peer pressure have been identified as significant factors influencing young people's media choices and ultimately their viewing behaviour. Louie Claasen<sup>159</sup> is of the opinion that the material a child is exposed to depends on the circumstances surrounding the exposure i.e. whether a child is being groomed for abuse or is exposed through inquisitiveness or by peers. Some respondents are of the view that the latter form of exposure namely self-generated explicit material is more prevalent,<sup>160</sup> while others are of the view that access to adult legal content is not that prevalent.<sup>161</sup> Yet Sidhartha Philander states that the sending of pictures between peers is not only self-generated explicit material but may include adult pornography downloaded off the internet or consensual or non-consensual sexual images of peers.

2.27 The Family Policy Institute comments that although both pornography (adult legal content) and explicit self-images are an issue and contribute to the overarching problem, illegal content is much more readily available, explicit, violent and degrading. It submits that the effects of child sexual abuse material are much more harmful and disturb the mind more extensively. However it notes that child sexual abuse material (illegal content) is easier to limit due to the internet sources it is derived from and thus makes it more susceptible to effective restriction, while self-images are usually produced in the privacy of one's home and passed around privately. This in its view makes it much harder to monitor or restrict.

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<sup>157</sup> Robynne Alexander; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Ria; Cathy McLean, Child Welfare Tshwane; NPA; Family Policy Institute; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Women and Men Against Child Abuse (WMACA); Rob Schultz; John Blacklaws; Cherry Hochfelden; Daine Snyders; Carol Hinrichsen; Nicola Kostlin; Paul Barter; Ronald Muthambi; Sidhartha Philander; Christel Long, Crystal Clear Ministries International; National Training Manager, Child Welfare South Africa; Sidhartha Philander.

<sup>158</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC

<sup>159</sup> UNISA. Endorsed by Cause for Justice.

<sup>160</sup> Endorsed by Cause for Justice; Khayaletu Rutsha, Department of Communications; NPA; Sidhartha Philander.

<sup>161</sup> Riki van Deventer.

2.28 Riki van Deventer<sup>162</sup> comments that the internet and television have made it possible for children to view pornographic content without the knowledge of their parents or anyone else. She further comments that in her view this exposure may stimulate sexual excitement and desires, which usually leads to sexual activity and even sexual abuse of others. In this regard the National Training Manager of CWSA highlights the increase of sexual abuse on younger children and more disturbingly amongst children themselves. She comments that the nature of these acts is becoming more vicious and gruesome. She states that children's exposure to movies with greater explicit sexual and violent nature on the public channels is common place and that the pay channels are also frequently used by children. Further that:

'Children are technologically more literate than their parents and are at risk of greater exposure to age inappropriate material due to increased access to the internet, television and mobile phones'.

#### **4 Is the exposure of children to pornography inadvertent or do children deliberately view it?**

2.29 Although most respondents believe that children are exposed to pornography both inadvertently and deliberately,<sup>163</sup> some respondents believe that children are only exposed to pornography accidentally or inadvertently,<sup>164</sup> and others believe that exposure is as a result of intentional seeking for pornography.<sup>165</sup> The view is also held that although pornography may be accessed by children by accident or on purpose, intentional or specific searches flow from initial inadvertent or deliberate exposure.<sup>166</sup> Respondents ascribe children's (and adults) exposure to pornography to a number of causes such as the free<sup>167</sup> availability of hard-core explicit pornography;<sup>168</sup> a variety of deceptive marketing techniques used by online pornographers;<sup>169</sup> easy internet access;<sup>170</sup> peer pressure;<sup>171</sup> natural inquisitiveness of

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<sup>162</sup> Endorsed by National Training Manager, Child Welfare South Africa.

<sup>163</sup> Robynne Alexander; Louie Claasen; Lyn Bremner; Kimberley workshop participant; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Cause for Justice; NPA; Women and Men Against Child Abuse (WMACA); John Blacklaws; Sidhartha Philander; Paul Barter; Yolandi Singleton, Child Welfare Tshwane; Daine Snyders.

<sup>164</sup> Rob Schultz; Khayaletu Rutsha, Department of Communications; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Cherry Hochfelden; Nicola Kostlin.

<sup>165</sup> Cathy McLean, Child Welfare Tshwane

<sup>166</sup> Louie Claasen, UNISA; Lyn Bremner; Peter Anderson Rev United Congregational church of Southern Africa; Carol Hinrichsen; National Training Manager of Child Welfare South Africa; Christel Long, Crystal Clear Ministries International; Riki van Deventer.

<sup>167</sup> Confirmed in the Journal American College of Pediatricians 'the Impact of Pornography and Children' June 2016.

<sup>168</sup> Sidhartha Philander; Daine Snyders

<sup>169</sup> Christel Long, Crystal Clear Ministries International.

<sup>170</sup> The NPA; Cherry Hochfelden; Daine Snyders.

<sup>171</sup> The NPA.

children;<sup>172</sup> innovation and advancement of technology;<sup>173</sup> unsupervised late night watching of adult content on television;<sup>174</sup> and the content of ordinary television channels.<sup>175</sup>

2.30 Yolandi Singleton<sup>176</sup> draws the Commission's attention to more vulnerable children who, irrespective of whether they have been intentionally or unintentionally exposed to pornography, seek sexual images or some gratification in order to feed another need. She explains that:

'A lot of children are growing up in extremely violent homes or in a home where they do not experience a secure attachment with their primary care-givers. In order to feed that need to belong, children are more vulnerable to engage in activities such as pornography. This is obviously a wrongful thinking of children where they feel they might get satisfaction from this belonging.'

This is an important distinction to make as Professor Zabow notes that not all children react to the exposure of pornography in the same manner. The reaction is dependent on factors relating to the child's background and social and moral modelling.

#### **a. The internet**

2.31 Nicola Kostlin relates the following experience:

'... it pops up when you are looking for something. My daughter was doing a project on rabbits and innocently typed in "bunnies" thankfully I was right there to guide her. It's inadvertent and readily available.'

2.32 The National Training Manager of CWSA elaborates that 'pop ups'<sup>177</sup> on the internet (either during searches or during an internet game) is a frequent problem as well as invitations to chats from 'friends' who are 'scantily clad'. This sparks interest as children who are naturally curious are lured to view age inappropriate explicit content. This increases their risk of becoming victims of criminals who seek to target and abuse children for commercial gain.<sup>178</sup> The Family Policy Institute also highlights the prolific promotional material available on the internet coupled to the increase in sexualised language. It comments that often sexual pornographic terms are masqueraded as normal phrases, but

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<sup>172</sup> The NPA; Sidhartha Philander; The National Training Manager of Child Welfare South Africa; John Blacklaws.

<sup>173</sup> Ronald Muthambi; South African Police Service

<sup>174</sup> Mapule Dorothy Matjokana; John Blacklaws

<sup>175</sup> South African Police Service; Daine Snyders.

<sup>176</sup> Child Welfare Tshwane.

<sup>177</sup> Endorsed by Deborah Nkobane, Child Welfare; Paul Barter; Family Policy Institute.

<sup>178</sup> Louie Claasen, UNISA.

with a sinister hidden meaning. In its view this is what allows a naïve child to be searching for something over the internet that seems harmless on face value, but ends up being a sexual website or portal. The Family Policy Institute cautions that:

‘pornographic websites make their money off advertising and subscriptions and thus the advertising is not merely to promote what they have available to view, but also to entice people to access their websites. These promotional materials are readily available and poorly monitored, allowing for children to stumble upon them quite easily.’

2.33 However Minister Fritz<sup>179</sup> warns that the internet is only one source of exposure to sexual content. He refers to a study of random selected youth which showed that music contained the most sexual content (40%) followed by movies (12%) and television (11%).

### ***b. Advertising and publication***

2.34 A number of respondents flagged the exposure of children to pornography through advertising and the normalising of sexual and adult content as problematic.<sup>180</sup> This exposure was said to desensitize children and adults to sexual content, making adults think that children are capable of dealing with adult content when they are not.<sup>181</sup> The SAPS further submits that children are deliberately exposed to advertisements for cellular phone pornography on free to air television channels and that it is particularly concerned about this. The SAPS also comments that exposure to pornography is not a new challenge: children in the pre-computer or internet age also had access to pornography in the form of magazines, 16 mm films, photographs or videos, albeit limited access. It states that the free flow of information due to the development of the internet has exacerbated this problem. In addition, the extent of the creation and availability of child pornography was unheard of a few decades ago. The view is held that advertisements with a sexual undertone should be banned in the same way that cigarette advertisements are banned.<sup>182</sup>

2.35 A victim of child abuse linked to deliberate exposure to pornography submits that in her view exposure of children to pornography through advertising is overt and deliberate.<sup>183</sup>

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<sup>179</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC

<sup>180</sup> Louie Claasen, UNISA; Minister Albert Fritz (Adv), Ministry for Social Development, WC; The National Training Manager of Child Welfare South Africa; Family Policy Institute.

<sup>181</sup> Louie Claasen, UNISA.

<sup>182</sup> Ibid.

<sup>183</sup> N Tolken.

She uses adult magazine covers; advertising for 'sexy underwear' and adult entertainment (including that of brothels) at malls and on highways to illustrate her point.

### ***c. Broadcasters and parental supervision***

2.36 Ms Mapule Dorothy Matjokana believes that exposure may inadvertently or deliberately (on the part of the child) take place at home where children are not supervised and have access to late night television programmes meant for adults. The same victim of child sexual abuse material referred to directly above submits that television and movie broadcasters allow sexual commercials between children's cartoons and in cinemas.

## **5 What are the effects of exposing children to pornography?**

2.37 While a wide range of views and personal experiences were shared on what the effects of exposing children to pornography are, the common response was that the effects on children are all negative. WMACA submits that the risk of harm from exposing children to 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. The effects of exposing a child to pornography which have been identified by all of the respondents point to a negative and sometimes life impacting change in the child's behaviour which in turn can affect future life choices and behaviour.<sup>184</sup> These effects can broadly be categorised under the following headings: affecting the child's psychological and behavioural functioning; addiction; making the child more vulnerable to abuse and long term problems with relational and sexual functioning. Comments received have been listed under these headings below.

### ***a. Psychological and behavioural functioning***

2.38 Exposure to pornography is said to have an incredibly negative impact and effect on the child's mental and emotional state and growth (psychological harm).<sup>185</sup> It is submitted

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<sup>184</sup> Russell Jackson.

<sup>185</sup> Anonymous Pretoria workshop; Judy Dutlow; Cause for Justice; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Paul Barter.

that children are neither emotionally, spiritually, physically or psychologically mature enough to engage in activities that promote sexuality in the manner that pornography does.<sup>186</sup> The content may be of such a nature that it may result in mental trauma.<sup>187</sup> It is submitted that whereas adults are mature enough to distinguish between fantasy and reality in relation to pornography and they are able to contextualise what is acceptable sexual behaviour, children cannot do this.<sup>188</sup> Children internalise an inaccurate and inappropriate perspective on human sexuality, at an age when their values, beliefs and behaviours are being shaped for the rest of their lives.<sup>189</sup> Children exposed to pornography have a fictional understanding of sex education as it edits out the consequences of unhealthy sex practices.<sup>190</sup>

2.39 The Family Policy Institute argues that exposure to pornography to children before their minds are developed distorts their idea of sex and what it entails. It trains the child's brain to objectify women and indoctrinates their mind to view women in a mere sexual way.

2.40 It is submitted that exposure to pornography may also taint children's view of their own bodies<sup>191</sup> (particularly female youth report feeling physically inferior),<sup>192</sup> and it may cause sexual uncertainty regarding own values, beliefs, morals<sup>193</sup> and sexual behaviour.<sup>194</sup> Male youth who use sexually explicit material may develop unrealistic sexual values and beliefs and demonstrate sexual preoccupation.<sup>195</sup> It is also submitted that extended use of pornography can cause 'self-inflicted' erectile dysfunction for men even in their 20's.<sup>196</sup> This may lead to the child losing self-respect and respect for others.<sup>197</sup> Exposure to pornography may furthermore cause dysfunctional or deviant sexual behaviour such as acceptance of bestiality and incest;<sup>198</sup> normalise illegal sexually aggressive behaviour like rape to the extent that children commit sexual crimes;<sup>199</sup> or reinforce cognitive sexual distortions, i.e. the belief

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<sup>186</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Daine Snyders; Memory Eckhard; Cherry Hochfelden; Robynne Alexander; Louie Claasen, UNISA; Kimberley workshop participant; Christel Long, Crystal Clear Ministries International.

<sup>187</sup> Khayaletu Rutsha, Department of Communications.

<sup>188</sup> NPA; The Green Hearts; John Blacklaws.

<sup>189</sup> John Blacklaws; Barbara Schnaid.

<sup>190</sup> Christel Long, Crystal Clear Ministries International.

<sup>191</sup> Robynne Alexander.

<sup>192</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC

<sup>193</sup> Cause for Justice; Carol Hinrichsen; John Blacklaws.

<sup>194</sup> NPA; Judy Dutlow.

<sup>195</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC

<sup>196</sup> Christel Long, Crystal Clear Ministries International.

<sup>197</sup> Ria.

<sup>198</sup> Kimberley workshop participant; J Moses, Grace Community Church; Family Policy Institute.

<sup>199</sup> Kimberley workshop participant; Family Policy Institute; Christel Long, Crystal Clear Ministries International; Sidhartha Philander; Cathy McLean, Child Welfare Tshwane; Riki van Deventer; J Moses, Grace Community Church; Peter Anderson Rev United Congregational church of Southern Africa; Deon Goosen.

that sex with children or violent sex is acceptable; and may result in the re-enactment of what has been seen, either with peers, younger more vulnerable children, and or with adults.<sup>200</sup> The abused child may become an abuser as an adult person.<sup>201</sup> It may lead to promiscuity,<sup>202</sup> more sexually permissive ideas and behaviour, greater acceptance of casual sex and risky sexual behaviour.<sup>203</sup> This heightens the risk of the child becoming a victim of unwanted sexual violence, unplanned pregnancy and of contracting HIV and other sexually transmitted diseases<sup>204</sup>

2.41 The Family Policy Institute cautions against a rapid rise in sexual attacks against women as a result of exposure of children to pornography.<sup>205</sup> It mentions that in the past year in South Africa there were over 53 000 reported cases of sexual assault, where research has shown that only approximately 1 in every 13 rapes are reported.<sup>206</sup> It states that these numbers are extremely disturbing and have only been getting worse over the past few years.<sup>207</sup> The Family Policy Institute questions whether we as a nation can afford to have our next generation growing up with a mind that objectifies women and sees them as mere sexual objects existing for their pleasure.<sup>208</sup> The Family Policy Institute attributes the spike in cases in South Africa involving child pornography linked to international rings and the disturbing trend of violent abuse of babies of only a few days old and an increase in the rape and mutilation of women and children to moral decay caused largely by the exposure to and influence of pornography.

2.42 Although adults and children may legally access material which contains sexual conduct subject to age restrictions and other exemptions provided for in the FPA, pastor Colin Clifford states that the exposure of children to pornography can only be termed ‘a “plague” which infects the minds and the whole being negatively with drastic consequences for individuals, families and the whole of society.’ He submits that he is strongly opposed to all forms of pornography as he views it as ‘very harmful to men, women and children’. He

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<sup>200</sup> WMACA; The Green Hearts; Rob Schultz.

<sup>201</sup> NPA.

<sup>202</sup> Kimberley workshop participant; J Moses, Grace Community Church; NPA; Minister Albert Fritz (Adv), Ministry for Social Development, WC; N Tolken.

<sup>203</sup> Cause for Justice; NPA; Christel Long, Crystal Clear Ministries International

<sup>204</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC; Dr Robin Stephenson (M.B.B.Ch.Wits.).

<sup>205</sup> Endorsed by Sandra and Chris van Heerden who link pornography to an increase and rape and corruption of the mind; and endorsed by Jack Carstens, David & Jonathan Foundation; Sidhartha Philander.

<sup>206</sup> Sidhartha Philander substantiates this point by making reference to a 2012 study in Soweto in which 60% of children between the ages of 10-19 said that it is acceptable to force sex on someone they know. 25% of them also admitted that jackrolling (gang rape) is “fun”.

<sup>207</sup> Endorsed by Ria.

<sup>208</sup> Endorsed by Russell Jackson



further submits that exposure to pornography results in further problems such as a high incidence of rape, promiscuity among young children and teenage pregnancies.<sup>209</sup> Ulanda Seitz voices a similar sentiment. She endorses the finding by the 'National Centre on Sexual Exploitations' in the US which says, '[P]ornography is causing a public health crisis by not only contributing to sex trafficking, child abuse, and lifelong addictions, but also by stripping many individuals of the ability to have lasting meaningful relationships.'<sup>210</sup> Deon Goosen is of the view that pornography alters the mind of the viewer, irrespective of age and that it does not make sense to expose adults to pornography but only to prosecute when children are involved in a sexual crime.

### **b. Addiction**

2.43 A number of respondents submit that viewing pornography, even if the initial exposure was not voluntary, can be addictive.<sup>211</sup> Some respondents liken the addiction to pornography to an addiction to multiple drugs. They submit that this addiction to pornography may override the child's thinking pattern and perception, interfere with rational decisions and in effect 'rewire' it.<sup>212</sup> They further submit that children who become addicted to pornography become impulsive, compulsive, aggressive and emotionally unstable, exhibiting impaired judgement and acting inappropriately.<sup>213</sup> The Family Policy Institute<sup>214</sup> submits that the initial addiction to pornography may with time escalate into a need to combine sexual arousal with aggressive release. It argues that this may result in a need to view extreme pornography such as material of women being physically harmed, in order to achieve the same level of excitement and arousal. Philander<sup>215</sup> submits that the addiction of children to pornography follows a four step process, namely, addiction; escalation to a need for more explicit, deviant or sexually shocking material; desensitisation towards more shocking material and finally an increased tendency to act out what has been viewed. Addiction to pornography is also submitted to be self-destructive.<sup>216</sup>

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<sup>209</sup> Endorsed by Jack Carstens, David & Jonathan Foundation.

<sup>210</sup> Endorsed by Lyn Seymour Westville KZN

<sup>211</sup> Sidhartha Philander; Family Policy Institute; J Moses, Grace Community Church; Lyn Bremner; NPA; Judy Dutlow; N Tolen; Ronald Muthambi; Daine Snyders; Riki van Deventer.

<sup>212</sup> Sidhartha Philander; Family Policy Institute; Lyn Bremner.

<sup>213</sup> Ibid.

<sup>214</sup> Endorsed by Sidhartha Philander and Lyn Bremner.

<sup>215</sup> Endorsed by Cathy McLean, Child Welfare Tshwane; Kimberley workshop participant; Riki van Deventer.

<sup>216</sup> Barbara Schnaid; 'I know of people who have become addicted to this and it has destroyed their lives. We need to help to protect our children!' - Daine Snyders.

### **c. More vulnerable to abuse**

2.44 Some respondents submit that exposure to pornography may increase a child's susceptibility to sexual abuse.<sup>217</sup> WMACA submits that one of the effects of exposing a child to pornography is that it creates sexual awareness at an age when they are not emotionally equipped to have such awareness which may make a child vulnerable to being 'groomed' into engaging in sexual behaviour which imitates the adult sexual acts they have seen.<sup>218</sup> An anonymous respondent submits that the effect of childhood exposure to pornography and the ensuing sexual abuse she endured has impacted on her marriage and the manner in which she parents her children.<sup>219</sup>

2.45 A social worker attending the Nelspruit workshop<sup>220</sup> submits that exposure to pornography not only may make a child more susceptible to sexual abuse but may predispose them to abusing other children. She referred to a particular case where a young adult had been groomed and abused as a child. He had in turn abused at least 10 boys in the same manner as he had been. She argues that more should be done to interrupt the cycle of abuse e.g. provision of pre- and post-trial counselling.

### **d. Long term problems with relational and sexual functioning**

2.46 The view is held that irrespective of whether exposure is deliberate or due to adult negligence, this exposure distorts sexual development.<sup>221</sup> A number of respondents submit that the effect of being exposed to pornography as a child is carried through to adulthood and affects sexual relationships and sexual functioning. Some of the problems are that for the most part pornography models sexual behaviour as being forceful and being performed in an abnormal way,<sup>222</sup> including the idea of sex coupled to violence as a means of stimulation.<sup>223</sup> Women, love, sex or sexuality are viewed as things to be exploited for

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<sup>217</sup> Louie Claasen, UNISA; N Tolken; Christel Long, Crystal Clear Ministries International.

<sup>218</sup> Women and Men Against Child Abuse (WMACA); endorsed by the personal account of Anonymous (1).

<sup>219</sup> This account is endorsed by Anonymous (2) who was abused from the age of 8 by her 10 year old brother who had acted out what he had been exposed to on her.

<sup>220</sup> She requested to keep her identity anonymous so as not to compromise the child involved in any way (Anonymous (3)).

<sup>221</sup> Women and Men Against Child Abuse (WMACA); Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>222</sup> NPA.

<sup>223</sup> Family Policy Institute.

personal gratification.<sup>224</sup> The unrealistic and maladaptive attitudes about relationships that develop as a result of premature exposure to pornography are said to cause an inability to interact or relate with others in a healthy way.<sup>225</sup> In some instances this has been linked to the increasing rates of rape in South Africa.<sup>226</sup> It has also been linked to having less interest in having children when older.<sup>227</sup> Barbara Schnaid submits that most married pornography addicts 'end up having affairs and end up divorced with a broken spouse and children.'<sup>228</sup> She further submits that the heartbreak of people addicted to pornography is real and that for members of Sex Addicts Anonymous (SAA) groups 'most of their stories started in childhood with exposure to pornographic material.'<sup>229</sup>

## 6 Does the law adequately address concerns around children's exposure to pornography?

2.47 Although some respondents are of the view that the law adequately addresses concerns around children's exposure to pornography,<sup>230</sup> a number of respondents are of the view that it does not.<sup>231</sup> Minister Albert Fritz<sup>232</sup> submits that the lack of harmonisation of law enforcement between criminal law and a regulatory response is one of the biggest threats that society faces as far as access and exposure to pornography is concerned. A number of respondents agree that the existence of more than one Act with different definitions causes confusion and is difficult to police.<sup>233</sup> Most respondents endorse the submission by the NPA and WMACA that all related offences should be contained in one

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<sup>224</sup> Family Policy Institute; Lyn Bremner; Paul Barter; Cause for Justice; J Moses, Grace Community Church; Peter Anderson Rev United Congregational church of Southern Africa; Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>225</sup> NPA; The Green Hearts; Anonymous Pretoria workshop; Ria; Daine Snyders; Pastor Debbie Minnaar, Church Alive.

<sup>226</sup> Dr Robin Stephenson.(M.B.B.Ch. Wits.); Rob Schultz

<sup>227</sup> J Moses, Grace Community Church.

<sup>228</sup> Endorsed by J Moses, Grace Community Church; Pastor Debbie Minnaar, Church Alive; Cause for Justice; Dr Robin Stephenson.(M.B.B.Ch. Wits.).

<sup>229</sup> N Tolken.

<sup>230</sup> Deon Goosen; Louie Claasen, UNISA; Memory Eckhard; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications; South African Police Service.

<sup>231</sup> Anonymous Pretoria workshop; Carol Hinrichsen; Prof T Zabow; Rob Schultz; The Green Hearts; Minister Albert Fritz (Adv), Ministry for Social Development, WC; John Blacklaws; Christel Long, Crystal Clear Ministries International; Deon Theron; Peter Anderson Rev United Congregational church of Southern Africa; Mrs. A L Haslam; Daine Snyders; Women and Men Against Child Abuse (WMACA); Nicola Kostlin; Ronald Muthambi; Deon Theron; Cause for Justice; NPA; Daine Snyders; Nicola Kostlin; Sidhartha Philander; Christel Long, Crystal Clear Ministries International.

<sup>232</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>233</sup> Cathy McLean, Child Welfare Tshwane; Riki van Deventer; NPA; Women and Men Against Child Abuse (WMACA).

Act, preferably the SOA.<sup>234</sup> Lack of adequate law enforcement and insufficient or uniform penalties were also flagged as concerning.<sup>235</sup>

2.48 SAPS identifies the prevailing socio-economic circumstances and poverty as one of the biggest contributors to exposure to pornography,<sup>236</sup> and is arguably a challenge to reporting. Google South Africa<sup>237</sup> identifies inconsistencies with the existing regulations and suggests that it should be clarified to harmonise the applicable legislative framework. In a similar vein the NPA recommends that directives, instructions, regulations and policies issued in terms of section 66 of the SOA should be amended in accordance with the amendment to section 18 of the CPA providing that child pornography offences are an exception to prescription. Deon Goosen however submits that harsher enforcement and better policing methods should be devised. In his view the internet providers should install pornography filters and the police should get easier access to permission to tap into personal devices that are used by internet pornography users. He is of the view that it is much easier to force internet providers by way of legislation to stop pornography from entering South Africa, than to catch the perpetrators after they have already destroyed the lives of their victims. Google South Africa however emphasises the importance of an holistic approach in protecting children from abuse online, which includes policy predictability, user empowerment (reporting and filtering tools), and digital literacy, as opposed to just introducing a new law . It notes that any new law will have to take into account the practical and technical considerations in its implementation with regards to online content.

2.49 A view was also expressed that in a global context the law does not adequately address peer to peer child pornography and/or exposure to self-generated sexual material with consent.<sup>238</sup> The lack of harmonised laws and the absence of extradition treaties amongst the global states and/or the global states defining the conduct as an offence in that state or lack of any law defining the acts e.g. Zimbabwe, Congo and Namibia was also identified as a problem.<sup>239</sup> A lack of regulation regarding the production of 'soft' pornography was also identified as a shortcoming in the law.<sup>240</sup>

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<sup>234</sup> Endorsed by WMACA.

<sup>235</sup> Endorsed by Lyn Bremner; Louie Claasen, UNISA; Lyn Bremner; Peter Anderson, Rev United Congregational church of Southern Africa; Women and Men Against Child Abuse (WMACA); . Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>236</sup> Endorsed by Louie Claasen, UNISA.

<sup>237</sup> Kimberley workshop participant.

<sup>238</sup> Ibid.

<sup>239</sup> Rev Peter Anderson, Rev United Congregational church of Southern Africa.

2.50 Cause for Justice comments that in addition to legislation the focus should be on education of children, parents, teachers and caregivers regarding what pornography is, what the harms are, what constitutes a healthy sexual relationship, how to respond to peer pressure and to put in place measures to protect children against grooming.<sup>241</sup> Mrs Haslam reiterates this view and submits that schools should take a more pro-active role in preventing children from being exposed, and educating them how to avoid being in situations of exposure.<sup>242</sup> One respondent comments that exposure to pornography should not be seen in isolation.<sup>243</sup> In her view lowering of the age of consent has caused children to engage in sexual behaviour, especially child pornography in the form of children filming themselves and publication thereof by themselves or others, with or without an understanding of the consequences. Nicola Kostlin submits that advertising on billboards (which seems to be lawful) also causes unwanted exposure.

## **7 What is the appropriate legal response to children at risk of exposure to pornography?**

2.51 All respondents are in agreement that children should be protected from exposure to pornography and where appropriate that protection should be afforded through the law.<sup>244</sup> Comment made in respect of the different mediums through which pornography is accessed is dealt with under corresponding headings below.

### ***a. The internet***

2.52 Some respondents submit that the law needs to be amended to put better controls in place in order to protect children from exposure to pornography on the internet.<sup>245</sup> Some respondents suggest that the solution to protecting children from exposure would be to make the default position that all pornography is unavailable on the internet. To access it adults would have to pay an extra fee or specifically subscribe to it.<sup>246</sup> Ms Matjokana submits that exposure and access to adult pornography should be addressed in a family context. In her view there should be regulatory provisions in respect of service providers especially internet service providers to control access to pornographic websites and a penalty provision should exist if those provisions are not complied with. She also advocates for community

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<sup>241</sup> Endorsed by Memory Eckhard.

<sup>242</sup> Mrs. A L Haslam.

<sup>243</sup> Daine Snyders.

<sup>244</sup> Specifically endorsed by Cause for Justice; Daine Snyders.

<sup>245</sup> Rob Schultz; Desiree Gengan; Daine Snyders.

<sup>246</sup> Daine Snyders; Carol Hinrichsen.

awareness regarding reporting matters of children's exposure to pornography and accessing help. The SAPS recommends that internet access to certain forms of pornography such as bestiality and child abuse material should be dealt with by regulation (by means of filtering and blocking) of certain websites. Jack Carstens of the David & Jonathan Foundation submits that restrictions on the internet should be seen as a last resort, but if it can be restricted it should be. He further submits that access to pornography through the internet should be blocked for mobile phone users via local mobile phone providers. He believes that they have a responsibility to protect the children to whom they are selling the phones. The NPA in turn submits that internet access and social media should be limited for children. Pornography access should be regulated by paid sites only, and finger print access should be implemented and be compulsory.<sup>247</sup> It explains that this is to regulate whether the user is an adult or not and this would limit the accessibility of children to pornography sites. SAPS cautions that it should be borne in mind that internet based crimes are difficult to address effectively. Even if legislation prohibits certain forms of conduct, it does not mean that action can immediately be taken against a perpetrator for the contravention of the legal provisions. The perpetrator is often outside the jurisdiction of a specific law enforcement entity, and before action can be taken against the perpetrator, onerous and mutual legal assistance procedures have to be followed. These procedures are complicated and time consuming.

### ***b. Advertising and publications***

2.53 Nicola Kostlin submits that irrespective of whether it is a 'shop or a publisher or Sexpo<sup>248</sup> or Teazers'<sup>249</sup> it should be fined and a conviction should be accompanied by imprisonment. Louie Claasen<sup>250</sup> raises the point that many companies use material of a sexual nature in advertising for the simple reason that 'sex sells'. She believes that although this advertising may desensitise children, the legality of this practice remains debatable especially where it is not intended to groom a child. Professor Zabow also cautions that a clear definition of 'sexual nature' is needed in order to avoid a flood of charges in this regard.<sup>251</sup> The SAPS adds that it is foreseen that it would be difficult to enforce or police such an offence.

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<sup>247</sup> Endorsed by Amalinelah Thabane.

<sup>248</sup> Described on [www.sexpo.co.za](http://www.sexpo.co.za) as a 'premier health, sexuality and lifestyle expo' which includes all aspects of adult entertainment such as burlesque, exotic dancing and pornography.

<sup>249</sup> Adult entertainment venue.

<sup>250</sup> UNISA.

<sup>251</sup> Endorsed by Minister Albert Fritz (Adv), Ministry for Social Development, WC.

### ***c. Broadcasters***

2.54 The NPA recommends that there should be more accountability for the content which is allowed to be broadcast. Some respondents suggest that the solution to protecting children from exposure would be to make the default position that all pornography is unavailable on television. To access it adults would have to pay an extra fee or specifically subscribe to it.<sup>252</sup> MMA is of the view that in light of the seriousness of child sexual abuse material and that it is linked to other criminal acts such as the illegal drug trade, grooming and exploitation of children and human trafficking, media companies and broadcasters in particular should not in any way act in a manner that may feed the market and encourage illegal activities. It suggests that mechanisms must therefore be developed to ensure films classified as pornographic must go through sufficient checks and balances to ensure the safety and willingness of participants. Some respondents submit that the law needs to be amended to put better controls in place in order to protect children from exposure to pornography on television.<sup>253</sup> MMA submits that it is important to note that the roles of ICASA and the FPB are different and should remain different. It explains that the FPB is responsible for classification of content, such as movies, games, books etc. whilst ICASA regulates broadcasters to ensure that they meet their license conditions (one of the conditions is to abide to the classification process). MMA states that in an effort to combat exposure to pornography it does not wish to create a situation where FPB classifies everything from films to news content screened on a daily basis. MMA expresses its support for an independent, self-regulatory and or co-regulatory classification body for all content. In its view the present weakness with media convergence is the lack of acceptance that things are changing and they are doing so in rapid speed. MMA states that a body is needed that is capacitated to deal with the online space whilst maintaining and promoting freedom of expression. It however is not of the opinion that the FPB is best suited to this task.

### ***d. Parents, care-givers and other parties***

2.55 The SAPS is of the view that insofar as it relates to children accessing or being exposed to pornography, it is the responsibility of parents, guardians, and care-givers to ensure that children are exposed to equipment and services that are child friendly and age appropriate.<sup>254</sup> It believes that the criminal law cannot always address wrongs (such as the

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<sup>252</sup> Daine Snyders; Carol Hinrichsen.

<sup>253</sup> Rob Schultz; Desiree Gengan; Daine Snyders.

<sup>254</sup> South African Police Service.

conduct of school children on school premises or the conduct at home behind closed doors).<sup>255</sup>

### ***e. Criminal law response***

2.56 Some respondents are of the view that age restrictions serve a good purpose and should be enforced.<sup>256</sup> It is also submitted that criminal charges must be laid against the responsible adult party/parties and any connected parties (distributors etc.) must be brought to account.<sup>257</sup> This includes parents, caregivers and educators who do not prevent access by children. However children who expose other children ‘should receive counselling and programmes to sensitise them to the harmful effects of pornography as well as to heal any harm they themselves have experienced due to exposure’. WMACA further submits that criminal sanction should follow irrespective of whether the behaviour is intentional or unintentional. And penalties should be tough and consistent<sup>258</sup> and include compulsory effective programmes sensitising perpetrators to the harmful effects of pornography on children.<sup>259</sup> The view was also held that the source person (producing, purveying or encouraging the consumption of any pornography) should be publicly exposed.<sup>260</sup> Some respondents however support the outright banning of pornography in South Africa.<sup>261</sup> Deon Goosen submits that:

‘[Y]ou cannot have 16 days of activism against woman abuse but also allow pornographic abuse of women and soft penalties for sexual offences. That nullifies your good intentions totally.’

2.57 Lorna Boshoff submits that where it is not possible to ban pornography that people should be protected against it.<sup>262</sup> The view was also expressed that strict regulations should be put in place, and that the justice system should ensure that these regulations are

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<sup>255</sup> Ibid.

<sup>256</sup> Cathy McLean, Child Welfare Tshwane; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>257</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; WMACA.

<sup>258</sup> Endorsed by Rob Schultz; Khayaletu Rutsha, Department of Communications; Deon Goosen.

<sup>259</sup> Deon Goosen endorses the need for harsh penalties. He states that his views are “based on discussions with prison inmates on the topics of porn and sex , as well as their views on our justice system.” He adds that “They HATE perpetrators of sexual crimes towards the elderly and children and have a system in prison where they punish these convicts themselves.” Further that “[T]hey consider the present day sentences to be too lenient and therefore inadequate to scare people off crimes.”

<sup>260</sup> Peter Anderson Rev United Congregational church of Southern Africa; Carol Hinrichsen.

<sup>261</sup> Santy Maggio (Zimbabwe); Monique Leppan; Carol Hinrichsen; Sidhartha Philander; Sandra and Chris van Heerden; Pastor Colin Clifford; Lorna Boshoff; Ria Zietsman; Deon Goosen; Lyn Bremner; Filo Mooney.

<sup>262</sup> Endorsed by Ulanda Seitz; Lyn Seymour Westville KZN.



respected and reinforced.<sup>263</sup> Similarly it is recommended that child court proceedings should be instituted as soon as possible and that the child should be removed from the environment which poses a risk to exposure. The view is also expressed that the removal of children should be accompanied by social service intervention (including post trial counselling),<sup>264</sup> counselling and rehabilitation.<sup>265</sup> Cathy McLean of Child Welfare Tshwane submits that the material and the source of the material should also be removed<sup>266</sup> so that the child and other children are protected from further exposure as far as possible. In this regard a recommendation is made for the expedition of the preservation of stored computer data, search and seizure of stored computer data and interception of content data.<sup>267</sup> Louie Claasen<sup>268</sup> comments that if a child is merely at risk of exposure the only legal recourse that can be followed is in terms of the Children's Act, where an investigation can be requested to ascertain if the child is at risk and then to follow steps to ensure the child's safety.<sup>269</sup> A Kimberley workshop participant submits that in terms of South African law, the legislative review which follows this investigation should differentiate between the criminal law and the regulatory response.

2.58 MMA has explored the possibility of a hotline, especially tailor made for children to report any of these offences. It strongly recommends that a closer partnership be developed with local experts, such as Childline, which already has extensive experience in dealing with such complaints and issues. The view is also expressed that the maximum priority should be given to child pornography investigations and particular attention should be given to protect the interest of the child when combating this form of crime.<sup>270</sup> It is suggested that this may include special task teams.<sup>271</sup> Prof Zabow comments that the focus should be on the 'child abuse' element and protecting children from ensuing abuse.

2.59 John Blacklaws emphasises the need for an effective criminal justice system, particularly in respect of implementation and compliance with the law. In this regard the NPA comments that the FPB must have a more specific oversight role in relation to monitoring to ensure that with related offences built in the FPA, this will amplify a possible

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<sup>263</sup> John R Blacklaws endorsed by Ulanda Seitz; Rob Schultz.

<sup>264</sup> Evidence N Riba.

<sup>265</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Kimberley workshop participant; Evidence N Riba; WMACA.

<sup>266</sup> Endorsed by Sidhartha Philander who is in favour of confiscation particularly of child pornography.

<sup>267</sup> Endorsed by the NPA.

<sup>268</sup> UNISA.

<sup>269</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Cherry Hochfelden.

<sup>270</sup> Endorsed by the NPA.

<sup>271</sup> Christel Long, Crystal Clear Ministries International.

watchdog and enforcement responsibility for the FPB. WMACA submits that all service providers must be obliged to warn clients and provide preventative measures; and that all service providers should be obliged to monitor their systems and to report any suspicious activities to a police task team. The Family Policy Institute submits that filtering of online content would be apposite.

#### ***f. Education and awareness raising***

2.60 The view was also expressed that education could be harnessed to protect children at risk of exposure. Minister Albert Fritz<sup>272</sup> suggests that educational institutions could be used to teach children about the responsible use of technology by introducing this technology into teaching practices at school. He is of the opinion that there should be a more aggressive approach to promote the responsible use of social media in schools. Children should be taught about the principles of the use of social media and ICT's, the risks, dangers and unacceptable use of the ICT. WMACA agrees that comprehensive and effective education programmes should be established by the DoE and awareness campaigns should be distributed through the media for adults and children. Some respondents are of the view that children should not be exposed to any material of an intimate sexual nature and that they can be educated about healthy sexuality without explicit images.<sup>273</sup> The Green Hearts warn that even initial accidental exposure to sexual material can become addictive, desensitise children and increase the need for more extreme pornography. Other respondents however believe that it should not be an offence to expose children to appropriate material which educates them about generally accepted healthy sexuality.<sup>274</sup> Amalinelah Thabane submits that children should also be given adequate sex education at home. She warns that if they are not given this information and do not understand the consequences of engaging in pornography and sexual relationships they will try it in an irresponsible manner and will not understand the harm.<sup>275</sup> Ria agrees that parental guidance at the right age is important to protect children from exposure.

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<sup>272</sup> (Adv), Ministry for Social Development, WC.

<sup>273</sup> Cherry Hochfelden; Daine Snyders; Paul Barter; Sidhartha Philander; Riki van Deventer.

<sup>274</sup> John Blacklaws.

<sup>275</sup> Endorsed by Ronald Muthambi who explains that indulgence in pornography is destructive.

## **8 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'?**

2.61 The general view expressed by respondents is that it is or should be an offence to expose children to material of a sexual nature, even if that material does not fall within the definition of 'pornography' in the SOA but is 'contemplated' in the FPA.<sup>276</sup> This discrepancy is said to highlight the need to align the definitions in the two Acts or to address this matter in one Act.<sup>277</sup> In this regard some respondents make reference to section 19 of the SOA which makes it an offence to unlawfully and intentionally expose or display or to cause the exposure or display of child pornography, pornography or any other material of a 'sexual nature' regardless of the age of the person(s) depicted in that material, to a child.<sup>278</sup> Thereby arguing that the definition in the SOA is wide enough to include material 'contemplated in the FPA.

2.62 The submission by Google South Africa explains that in theory it may be:

'conceivable that material may not be considered "pornography" under the Sexual Offences Act / Criminal Law Amendment Act but nevertheless come to be classified as "XX" or "X18" under the FPA, with the result that anyone who distributes or exhibits that material to a person under the age of 18 years may be guilty of an offence under the FPA (see section 24A(4) (and also section 24(2)). In practice, however, given that the definition of "pornography" in the Criminal Law Amendment Act is apparently broader than the descriptions afforded to categories XX and X18 in the FPA, such instances may be rare. It is also worth noting that it is an offence to knowingly distribute or exhibit in public a film or game without first having it registered with the Board (section 24A(1) of the FPA). This means that anyone who distributes any unregistered material (sexual or not, and whether or not it falls within the definition of pornography in the Criminal Law Amendment Act) to another person (whether child or not), will be guilty of an offence under the FPA.'

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<sup>276</sup> Cathy McLean, Child Welfare Tshwane; Robynne Alexander; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications; Carol Hinrichsen; Nicola Kostlin; Rob Schultz; Anonymous Pretoria; Kimberley workshop participant; Cause for Justice; NPA; Google South Africa; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Lyn Bremner; Ronald Muthambi; Women and Men Against Child Abuse (WMACA); Cherry Hochfelden; Daine Snyders; Paul Barter; Riki van Deventer; Christel Long, Crystal Clear Ministries International; The Green Hearts; Sidhartha Philander.

<sup>277</sup> Google South Africa.

<sup>278</sup> NPA; Kimberley workshop participant.

## **9 Exposure through broadcasting: 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?**

2.63 The majority of the respondents submitted that broadcasters are not or should not be allowed to screen films which cinemas may not exhibit and which distributors may not sell or hire out. A number of respondents are of the opinion that irrespective of where pornography is being made available for viewing it should stop. Professor Zabow is of the opinion that this practice will only stop if it is outlawed and the limitation is implementable. However other respondents, including the National Association of Broadcasters (NAB) submit that broadcasters are allowed to screen films which cinemas may not exhibit and which distributors may not sell or hire out. Different reasons are given for this, including that broadcasters are regulated by ICASA, and are therefore exempt from the requirement to submit films intended for broadcast for classification (section 18(6) of the FPA). Google South Africa submits that the Broadcasting Complaints Commission Codes (the New Code of Conduct for Free to Air Licensees and Code of Conduct for Subscription Broadcasting Service Licensees) also does not apply the same classification system provided for by the FPA. Thus, differences in the regulatory regimes may result in inconsistent outcomes such as a broadcaster being permitted to exhibit a film which another distributor may not.

Cause for Justice therefore submits that 'it does not make sense to have different or separate classification schemes for different telecommunication mediums'. It is of the opinion that the FPB classification system can be applied across the spectrum. The NPA is also of the opinion that this system should be reviewed to 'align responsibilities between broadcasters, cinemas and video distributors'. WMACA is also firmly of the view that no broadcaster or service provider should be allowed to screen harmful content. It notes that the Cybercrimes Bill seems to be attempting to put protective measures in place through section 20A. Christel Long emphatically states that broadcasters should not be able to broadcast material not suitable for children as the ratings are not strict enough letting inappropriate material slip through the cracks.

2.64 The NAB however comments that:

'while ICASA may not have a classification arm, ICASA administers a Code that has as its core principles the protection of children by prohibition of age, inappropriate content (during times when children comprise a large number of the audience). Broadcasters, who air programming of an adult/mature nature, can do so after watershed periods when it is expected that children are not watching. This follows, that films that a broadcaster airs, whether also available through cinema distribution, or not, will always conform to the watershed requirement in protection of children.'

2.65 The NAB also points out that the ICASA Broadcasting Code as well as the BCCSA Codes prohibits the broadcasting of content that among others contains scenes of child pornography. In its view ICASA as a regulatory body applies the FPA principles and has adopted these into its Codes. To that end, the ICASA Broadcasting Code requires that where a FPB classification exists in respect of a film, such a classification (e.g. XX) should be used by broadcasters. It disagrees that there is no obligation on ICASA to enforce or classify material and that 'soft porn' has been aired late at night on public television.

**10 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**

2.66 Although a few respondents submit that adult only channels could be an option they raise a concern about monitoring access to this content.<sup>279</sup> A number of respondents submit that broadcasters should not be allowed to screen films in the categories of 'Refused Classification', 'XX' or 'X18', whether classified or not.<sup>280</sup> A few respondents submit that no unsuitable material should be aired at any hour.<sup>281</sup> This sentiment is supported by Christel Long where she states that:

'They should not be allowed. I think broadcasters don't think about the consequences or they think they are "protecting" children just because the broadcast is late at night. We are feeding an already sick adult nation while fooling ourselves thinking we are protecting a future generation. We are actually also partly guilty when the "adults" watching these broadcasts go out and use them against children.'

2.67 Cause for Justice however submits that the current regulation in terms of the ICASA and BCCSA Codes of Conduct does not allow the broadcasting of content similar to content classified as 'refused classification' and 'XX' and therefore it is aligned with the FPA. It notes that the only instance where it is not aligned is in respect of 'X18' content, i.e. explicit sexual

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<sup>279</sup> Cherry Hochfelden; Ronald Muthambi.

<sup>280</sup> Cathy McLean, Child Welfare Tshwane; Rob Schultz; Louie Claasen, UNISA; Peter Anderson Rev United Congregational church of Southern Africa; John Blacklaws; Cherry Hochfelden; Daine Snyders; Carol Hinrichsen; Nicola Kostlin; Ronald Muthambi; Riki van Deventer; WMACA; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; The Green Hearts; Christel Long, Crystal Clear Ministries International; Sidhartha Philander.

<sup>281</sup> Cherry Hochfelden; Ronald Muthambi; Sidhartha Philander.

conduct. In terms of sections 24 and 24A(3), material containing explicit sexual conduct is allowed to be on display in an 'adults only' shop, where the consumer can be identified. The BCCSA Code of Conduct does not contain any similar restrictions. Khayaletu Rutsha of the DOC submits that this may be an oversight on ICASA's part. Cause for Justice believes that there should not be a difference between the rules applicable to broadcasters and all other distributors of material containing explicit sexual conduct. It argues that when such explicit sexual conduct constitutes pornography, regulatory discrepancies and/or the lack of proper regulation cause even greater risks of harm.

2.68 MMA is similarly of the view that the issue around films that are classified as 'XX' and/or 'X18' and whether broadcasters should not be allowed to screen such films, is an issue that deals directly with parental control and the issue around what parents should and should not encourage their children to view. It comments that the main aim of classification of such programs, especially viewed at home, is to provide consumer advice. Broadcasters can never replace the parental role. The onus is on the parent and or caregiver to educate, not only to block viewing from children but to educate them around the dangers of viewing such content and the potential consequences. This will also enable children to understand the dangers and make informed decisions.<sup>282</sup> The NPA however warns that an offender can make use of this opportunity in the grooming/exposing of children to age inappropriate material. For this reason, it argues that this should be reviewed to align responsibilities between broadcasters, cinemas and video distributors. However the NPA concedes that ultimately the responsibility for not allowing children to view this material will lie with their parents/guardians.

2.69 MMA submits that the FPB exempts broadcasters and print media as they are covered by the BCCSA and Press Council of South Africa respectively (PCSA). The code of ethics adopted and enforced by the BCCSA and the PCSA both deal with certain aspects of the FPA, however an identified weakness of both the BCCSA and the PCSA was a lack of regulation on the online space. To address this, as of 2016, online publications are part of the PCSA. However this does not resolve the bigger issue of internet content providers that are not 'publishers'. It submits that the best solution for this is having one body that will deal with all complaints and violations. MMA states that it strongly believes that laws should never be designed in isolation. It therefore supports the notion that offences relating to child abuse material should be adequately addressed by the SOA, with the FPB referring all such violations in terms of the SOA and the procedures set out therein. In its view the main aim of

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<sup>282</sup> Endorsed by the NPA.

the FPB is not to create or legislate crimes against or involving children. Creating and legislating crimes against or involving children is contained within the scope and objectives of the SOA, and therefore the SOA should be given preference. It is also of the view that the role of the FPB is not to create crimes but to classify content and for this reason that it should not include any sentencing in this regard. If there is a violation, it should be referred and dealt with in accordance with the SOA, which should be able to apply adequate remedies.

## **11 To what extent is the FPA applicable to regulatory authorities of broadcasters and publishers?**

2.70 Google South Africa submits that the FPA is not applicable to regulatory authorities of broadcasters and publishers.<sup>283</sup> NAB states that any broadcasting service which meets the definition of broadcasting currently contained in the Electronic Communications Act 36 of 2006 (the ECA), is exempt from the classification obligations set out in the FPA. These authorities are vested with distinct powers and obligations independent of the FPA.<sup>284</sup> The ICASA Act was enacted in compliance with the Constitution to provide for an ‘independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.’<sup>285</sup> The NAB submits that for this reason any attempt to regulate broadcasting through an administrative body other than ICASA is likely to be unconstitutional.<sup>286</sup> It also submits that section 18(6) of the FPA<sup>287</sup> provides expressly that broadcasting services are exempt from its application,<sup>288</sup> and that section 23(3) of the FPA provides that:

‘A person who is or is deemed to be the holder of a broadcasting licence in terms of the Independent Broadcasting Act, 1993 (Act No. 153 of 1993), and who is subject to s56(1) or (2) of that Act, shall be exempt from the duty to apply for a classification of a film and, subject to s26(4), shall in relation to the exhibition of a film not be subject to any classification made by the Board or any condition imposed in relation to the exhibition of the film by the Board under section 18(4)(b).’

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<sup>283</sup> Endorsed by NAB.

<sup>284</sup> Endorsed by Sidhartha Philander; Khayaletu Rutsha, Department of Communications; WMACA.

<sup>285</sup> Section 192 of the Constitution.

<sup>286</sup> Endorsed by M-Net and Multichoice.

<sup>287</sup> ‘A broadcaster who is subject to regulations 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 film or game, not be subject to any classification of condition made by the Board in relation to that film or game.’

<sup>288</sup> NAB; endorsed by Cause for Justice.

2.71 M-NET and Multichoice submit that section 54 of the ECA requires ICASA to draw up a statutory code of conduct, to which code all broadcasting service licensees must adhere. Section 54(3) contemplates the possibility of content broadcast by broadcasting service licensees being dealt with, in appropriate circumstances, on a self-regulatory basis. ICASA has recognised the NAB as a body whose members adhere to a code of conduct enforced by the BCCSA and its own disciplinary mechanisms. They argue that for this reason a member of the NAB is not required to comply with the statutory code of conduct. M-NET and Multichoice further submit that members of the NAB which are free-to-air broadcasting service licensees must comply with the BCCSA's Code of Conduct for Free-To-Air Broadcasting Service Licensees, 2009 ("the FTA Code"), whilst subscription broadcasting service licensees must comply with the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees ("the Subscription Code"). Both M-Net and Multichoice are members of the NAB and consider themselves bound by, and comply with, the BCCSA's Subscription Code. In their view the BCCSA Constitution provides that complaints alleging a breach by a broadcaster of either of these Codes must be adjudicated.<sup>289</sup> The FTA Code has a clause dealing with programming for children and what that programming may not contain; indicates which programming may not be broadcast before the watershed period; prohibits the broadcasting of material which contains scenes of various forms of sexual conduct, including child pornography ('sexual conduct' and 'child pornography' are both defined in the Code); and requires licensees to provide audience advisories as to what is to be broadcast, which must include guidelines as to age, and where such broadcasts contain violence, sex, nudity and/or offensive language.<sup>290</sup> Where a FPB classification for a film exists in terms of the FPA, that classification may be used as a guideline for an advisory to the broadcast of a film. Finally, the Code provides that no film which carries an 'XX' classification in terms of that Act may be broadcast.<sup>291</sup> Similar provisions are to be found in the Subscription Code. In addition, the Subscription Code requires a subscription broadcasting licensee to implement parental control mechanisms. M-Net and Multichoice aver that they have an effective parental control mechanism in place i.e. providing information on the television screen regarding each program and in the electronic programme guide. The electronic programme guide enables subscribers to block certain programmes, or entire channels, from being viewed. Unblocking requires a pincode.

2.72 Furthermore according to M-Net and Multichoice an assessment of complaints to the BCCSA over the past 25 years has revealed 'very few concerning broadcasts which were

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<sup>289</sup> M-NET and Multichoice.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.



sexually explicit and degrading, and only one of those related specifically to child pornography (which was a complaint made against e.tv in 2004).’ The conclusion drawn by M-Net and Multichoice is that television broadcasts do not pose any significant problems concerning the exposure of children to pornography. They are of the view that the current regulation of broadcasting together with the FPA adequately protects children from being exposed to pornography on television broadcasts, and that there is no justification for any further intervention.

2.73 The NPA submits that in spite of the Code and 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. In its opinion a television broadcaster may therefore broadcast a film that a cinema may not exhibit or a distributor may not sell or hire out. The NPA observes that in light of the above, and that the regulating authority seems to be powerless regarding enforcement of the regulations, it is recommended that the mandate of the FPB should be extended because currently it is only limited to classifications. Their obligation should be to have a monitoring and evaluation responsibility coupled with enforcement of that responsibility in the FPA i.e. a watchdog function.<sup>292</sup> WMACA is also of the view that broadcasters and other service providers must be regulated under one body.<sup>293</sup> The WMACA submits that although the FPA provides for the exemption of broadcasters and publishers from provisions related to the protection of children, exemption is not granted from sections of the Act that provide obligations to meet the objectives of the Act. In its view 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.

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<sup>292</sup> Endorsed by Peter Anderson Rev United Congregational church of Southern Africa.  
<sup>293</sup> Endorsed by Daine Snyders.

## **12 Do broadcasters and publishers who are exempt from the regulatory authority of the FPA meet the objectives of the FPA as required?**

### ***a. Broadcasters and television***

2.74 The NAB (representing all three tiers of broadcasting as well as signal distributors and associate members) states that it meets the objectives of the FPA and further comments that:

‘Notwithstanding that broadcasters are exempted from a duty to apply for classification with the FPB, the NAB members give effect to the objectives of the FPA as they provide audience advisories and protect children from exposure to disturbing and harmful material and do not expose children to pornography.’

2.75 Further pertinent comment received from the NAB is reflected below:

‘. . . members of the NAB adhere to a co-regulatory Code of Conduct for Broadcasters as administered by the Broadcasting Complaints Commission of South Africa (“BCCSA”), recognised by the Independent Communications Authority of South Africa (“the ICASA”) and in legislation. . . The BCCSA administers two Codes, one in respect of free-to-air broadcasting service licensees and the other for subscription broadcasting service licensees. In terms of both Codes, child pornography is defined as:

“Child pornography 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 (a) engaged in or participating in sexual conduct; (b) engaged in an explicit display of genitals; (c) assisting another person to engage in sexual conduct which, judged within context, has its predominate objective purpose, the stimulation of sexual arousal in its target audience....”

Furthermore, the Codes address programming for children as well as the scheduling of such programming. The watershed provision and audience advisories (also outlined in the Issue Paper) have been implemented by broadcasters since the initial publication of the Broadcasters Code of Conduct by the former broadcasting regulator, the Independent Broadcasting Authority (“IBA”).

The NAB notes that Part E of Chapter 2 of the Issue Paper, suggests that the exposure of children to pornography is overwhelmingly through access to the Internet, access to mobile phones, the viewing of DVDs and through magazines. Television is not identified as one of the mediums through which children are exposed to pornography.

It seems that the evidence before the Commission does not indicate that television poses any significant harm concerning the exposure of children to pornography. It is therefore arguably these other mediums which require the attention of the

Commission. As discussed above, licenced broadcasters in SA comply with the relevant Codes of Conduct in the best interest of protecting children.

It must also be noted that programming that falls within the broader definition of “child pornography” is prohibited in law and as such does not find any expression on any ICASA licensed broadcasting radio and television services.

The NAB wishes to further point out that licenced multichannel subscription broadcasters provide Electronic Programme Guides (“EPG”) that enables a viewer to block certain programmes, and/or channels.

The SALRC is reminded that unlike the print and online media, broadcasting in South Africa is heavily regulated and broadcasters are issued licenses by ICASA with set conditions and transparent regulatory requirements. ICASA also administers a Broadcasting Code, which prohibits the broadcasting of child pornographic material.

The NAB is aware that the FPB agreed in principle, to defer the regulation of online press content to the Press Council of South Africa, in the impending FPA amendments. Similarly the NAB urged the FPB to consider extending the exemption to broadcasters who also provide their broadcasted content online.’

2.76 The DOC submits that despite there being an exemption from the regulatory authority of the FPA there is a memorandum of understanding between the authorities in this regard. However a number of respondents submit that in their opinion broadcasters and publishers who are exempt from the regulatory authority of the FPA do not meet the objectives of the FPA. The NPA submits that the predominant view point in the NPA is that broadcasters should not be exempt from the regulatory authority of the FPA and that there should be stricter control from the FPB in this regard. Reverend Anderson submits that it is only ‘as a result of protest action that pornography has been kept off ETV or a specific channel for pornography’.

### ***b. Internet and online regulation***

2.77 The view is submitted that in practice there still seems to be loopholes in application. Dr Basson submits that although there are obligations listed in the FPA, in her view ISPs do not adhere to these obligations and nothing is done about this issue. She is of the view that that the role of ISPs needs to be reviewed with regard to the online regulation of pornography and protection of children.

### ***c. Publishers and books***

2.78 The NPA submits that the predominant viewpoint in the NPA is that publishers are not exempt from the regulatory authority of the FPA and that there should be stricter control

from the FPB in this regard. It notes that for example Mills and Boons books contain graphic descriptions of pornography and none of these books contain warnings about age restrictions. They are freely available to children of all ages. It is of the view that retailers including libraries should have a responsibility to ensure that these books with the required warnings must not be displayed or provided to children in line with the restrictions. The NPA further submits that:

‘shops that have books containing any kind of pornography being sold in adult only sections and bookshops should be obliged to monitor who purchases certain books and that these customers are indeed age appropriate in line with the restrictions (production of identification documents). Failing to do so should be an offence. These books should have sufficient warnings for parents and parents who fail to adhere to these warning should be charged.’

### **13 Should broadcasters and publishers be obliged through legislation to provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care so as to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences?**

2.79 Most respondents agree that legislation should provide that 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 enable them to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences. In this regard Prof Zabow explains that ‘premature exposure to adult material and experiences has a negative impact, leads to sexual callousness and behaviour’. The view is also expressed that this obligation should include strong penalties and fines and should be written in such a manner that it will provide for speedy civil action too and that the award amount should not be capped. The National Training Manager of CWSA comments that general remarks such as not ‘suitable for children’ will not suffice. In order to demonstrate the unsuitability of such a warning the analogy of keeping a loaded gun in the home with the safety catch on with a specific instruction to children saying ‘not suitable for children’ is used. WMACA submits that the media should be legally obliged to ensure that harmful images are not published especially when reporting on child sexual abuse cases. Furthermore that government should promote

awareness that consumers must ensure they have received all the necessary warnings and information from the various service providers and why.

2.80 Cause for Justice comments that the current regulatory schemes must be integrated i.e. the ECA, ICASA Act and Codes of Conduct (BCCSA and ICASA codes) on the one hand (applicable to broadcasters) and the FPA (applicable to films, games and publications) on the other, must be consolidated into a single regulatory scheme in respect of classification and consumer advice to remove the current legal uncertainty. However the NAB submits that ICASA is well capacitated to address issues of age inappropriate content and child pornographic content. It explains that there are classification guidelines in place for broadcasters who adhere to the ICASA Broadcasting Code. It further explains that:

‘Regulation 8 of the Code sets out classification guidelines for broadcasters, and recognises age advisories 10, 13, 16 and 18, and further recognises symbol advisories V(violence), L(language), S(sex) PG (parental guidance). The Code further requires that an audio advisory before the commencement to the programming must also accompany broadcast of a film with an age restriction of 18. In our view, and with the advice from members of the NAB, broadcasters are more conservative with their classification, as they hold a much stricter public service mandate to entertain, educate and inform than private cinema and other content outlets have. The advisories address the SALRC’s concerns raised in question 12 of the issue Paper, as they enable adults to make informed viewing, both for themselves and for children in their care. It also allows adults to protect children from exposure to disturbing and harmful content.’

2.81 The NAB elaborates on the application of the ‘Watershed Period’ as follows:

‘broadcasters have time limitations as to when to broadcast age-inappropriate content. Regulation 6 of the ICASA Broadcasting Code requires that programming on television which contains scenes of explicit violence and/or sexual conduct and /or nudity and/or grossly offensive language intended for adult audience must not be broadcast before the watershed period. The watershed period for free to air broadcasting service licensees is 9pm while the watershed period for subscription service licensees is 8pm’.

2.82 While the view is also expressed that pornography should be banned altogether and so nullify the need for broadcasters and publishers to provide consumer advice, some respondents are of the view that adults who have children in their care should be just as liable to protect them from exposure to inappropriate material.<sup>294</sup>

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<sup>294</sup> Santy Maggio (Zimbabwe); Monique Leppan; Carol Hinrichsen; Sidhartha Philander; Sandra and Chris van Heerden; Pastor Colin Clifford; Lorna Boshoff; Ria Zietsman; Deon Goosen; Lyn Bremner.

## **14 Do service providers provide adequate protection to children who use child-oriented services?**

2.83 The response to the question whether service providers provide adequate protection to children who use child-oriented services varies. A number of respondents feel that the protection is not adequate, while others feel that there is some protection. Some respondents are however unsure if enough is being done. Sidhartha Philander is of the view that internet service providers do not have adequate capabilities to regulate pornography on the internet and mobile devices. He submits that due to the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA) service providers are prohibited from monitoring internet traffic. The NPA states that it is not aware that warnings are displayed, and if there is, whether these warnings comply with section 24C(1)(a) of the FPA which defines 'child orientated service'. Reverend Anderson submits that if service providers were providing adequate protection there wouldn't be the proliferation of pornography that there currently is, including on mobile phones. And Superintendent Lopes questions the content and intent of some of the material targeted at children and states that this requires parents to fully engage and monitor viewing. Yet other respondents note that even where protection is provided children are still clever enough to access information if they really want to.

2.84 Nomagugu Nzomane submits that in the South African context where some children are being raised by grandparents who have no idea of the technology and its consequences, service providers are obliged to be fully engaged in combating exposure to pornography. The Green Hearts agrees. It comments that the scale and nature of pornography and child abuse material has changed dramatically and now requires a new approach to investigation, control and legislation. CWSA suggests that software should be embedded in phones to prevent any and all access to pornographic sites. It contends that while some may feel this impinges on their right of access to information this needs to be balanced against the best interests of the child. It also issues a reminder that all the rights contained in the Constitution ascribe to children and not only those found in section 28. CWSA argues that the focus should be on prevention and that there should be automatic activation of restrictions which adults, who choose to, can deactivate and where required, pay for in an effort to curb the creation and proliferation of material which has been known to impact on child sexual abuse and exploitation. It supports the reduction of the market and possible future incidents of abuse. Daine Snyders agrees that protective blocking against inappropriate material should be the standard for the internet, television or mobile phone. He submits that currently

protection devices for the internet are expensive and that this does not prevent a child from accessing inappropriate material on another device or at another location away from home. In his view a person should have to pay for the removal of the protection.

2.85 Google South Africa comments that in 2012 it launched a multi-stakeholder Online Child Safety Plan to enable children to engage with technology safely. Its focus is primarily on a user empowerment approach, with law enforcement taking responsibility for online protection of children. Google South Africa advocates for an approach to protecting children from abuse online which includes legislative responsiveness, standardised global approaches to regulating content online, and programmes aimed at educating all users on how to be safe online. Google submits that it is a member of the International Age Ratings Coalition (IARC), which is a standard rating system recognised in more than 150 countries around the world. This system allows Google to distribute content on its platforms, 'using pre-determined and globally accepted ratings systems.' It further submits that its other platforms (such as YouTube) are

' based on community guidelines, which set out what sort of content can be uploaded on the platform, and provides for user complaint mechanisms (such as "flagging"), which enable us to rate specific content on a case by case basis.'

2.86 Despite this assurance, WMACA cautions that despite most service providers providing awareness programmes and or mechanisms for parents and educators to block inappropriate content off mobile phones and computers these services have not been widely adopted or implemented and remain unused. It comments that as it is impossible for service providers to verify the age of users that the easiest solution would be for service providers to ban all pornography on their systems.

## **15 What is the position in respect of content service providers who are internet service providers?**

2.87 The DOC submits that content service providers are obliged to report any offence to SAPS. Google South Africa confirms that there appear to be more obligations on content service providers than those that apply to 'internet access and service providers'. It however points out that the reference in section 24C in the FPA to 'any person' who provides 'child-oriented services' is ambiguous and requires more clarification. Google South Africa submits that it is not clear which service providers would fall under this category. Rev Anderson points out that in his view it is all about money and that a content service provider will show

'anything that sells and porn sells well'. Rob Schultz however submits that some content providers are more responsible than others. Despite the varied response to this question there seems to be an impression that content service providers operate with impunity. Christel Long comments that content service providers do not seem to be regulated or monitored well enough. She is of the view that there should be strict and clear guidelines to follow with repercussions if they don't follow them. WMACA is of the opinion that content service providers who are ISPs have control over the content distributed through their networks – they provide the vehicle and what goes in it – therefore they should be dealt with more harshly as they have shares in the exposure of the content. Thus they should put the protection of children first, watch for any contravention and be more heavily policed.

2.88 In respect of ISPs WMACA submits that where one of an ISPs customers has been found to be in possession of child sexual abuse material, the rights of the child(ren) involved trump the rights of the customer. ISPs who alert such customers' to a SAPS enquiry or imminent arrest and thereby provide the customer an opportunity to destroy evidence in this regard should be held accountable. WMACA further submits that legislation should hold ISPs responsible for reporting child sexual abuse material when found on their networks and for not making every effort to holding customers accountable for engaging with this material on their platforms. Sidhartha Philander submits that while placing an outright ban on pornography is a noble notion in his view, it will be difficult to implement. Paul Barter however proposes that pornography should be blocked by service providers unless clients opt in. He explains that this is already done in the UK because of the well documented harmful effects of pornography on all people (children and adults).

## **16 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?**

2.89 A number of respondents agree that foreign-based services used by children such as WhatsApp fall under the obligations found in section 24C of the FPA.<sup>295</sup> Other respondents are of the view that if they do not that they should.<sup>296</sup> The NPA however comments that section 24(C)(1)(b) specifically refers to people previously unacquainted. The question is

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<sup>295</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC; Ronald Muthambi; Cathy McLean, Child Welfare Tshwane; Cause for Justice; Khayaletu Rutsha, Department of Communications; Sidhartha Philander; Daine Snyders; Kimberley workshop participant.

<sup>296</sup> Sidhartha Philander; Peter Anderson Rev United Congregational church of Southern Africa; Riki van Deventer; Carol Hinrichsen; WMACA; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Christel Long, Crystal Clear Ministries International.



what about persons who are acquainted? Are they assumed to be automatically included? It suggests that to eliminate confusion the wording in the FPA should be amended to specifically include acquainted people (section 24C(1)(b)). Hence the definition in section 24C(1)(d)(ii) for content service should be aligned with the specifications of RICA. This would be essential in relation to the interception of information for purposes of investigations and prosecution. By way of example the NPA provides the following practical scenario:

'I can send a random Whatsapp message to a random number in the hope of getting a "hit". It would be a fishing expedition to "hook-in" a random (previously unacquainted) person, if the recipient's cell number is not known; or not available to me. It is not impossible, but it would imply a great deal of effort. If the "fisher's" Whatsapp message reaches the recipient, the latter can "add" or "block" the sender. In order to connect with a person on Whatsapp, you have to add the person (who sent you the message) to your directory, or you should previously have saved (previously acquainted with) an existing contact.'

2.90 Google South Africa however submits that under section 24C(2) of the FPA, 'any person' who provides a child-oriented service, including chat rooms on or through mobile cellular phones or the internet, must moderate such services and take reasonable steps to ensure that the service is not being used to commit an offence against children. In its view the following definitions are relevant in this context:

*"child-oriented service" is a contact service and includes a content service which is specifically targeted at children.*

*"contact service" defined as "any service intended to enable people previously unacquainted with each other to make initial contact and to communicate with each other".*

*"operator", though unused in the section, means any person who provides a child-oriented contact service or content service, including Internet chat-rooms.'*

2.91 It concludes from the wording of the section, that it is unclear whether the chat room has to be an exclusively child-oriented service or merely a chat room that may also be used by children and the FPA is, silent as regards its application to foreign based services. Google South Africa submits that ordinary canons of statutory interpretation would confirm that local legislative enactments do not apply to parties located outside of South Africa. Google South Africa therefore is of the view that while section 24C of the FPA does not expressly exclude this, it is unlikely to find application in relation to foreign-based services such as WhatsApp.

## 17 Are the blocking possibilities for parental control adequate?

2.92 Some respondents comment that the blocking possibilities for parental control are adequate but may need improvement. Minister Fritz submits that parental control does exist in the television and film sectors, computer and video games sectors and within mobile devices. The parental control mechanisms allows parents to for example filter the content of programs in other words limit access to age inappropriate content, constrain the use of devices by placing time limits on usage or forbidding certain types of usage and by applying computer usage management tools. He explains that the increased use of mobile devices that include full featured internet browsers and downloadable applications has created a demand for parental controls on these mobile, smart devices. Mobile device software enables parents to restrict which applications their child can access while also allowing parents to monitor text messages, phone logs, MMS pictures, and other transactions occurring on their child's mobile device, to enable parents to set time limits on the usage of mobile devices, and to track the exact location of their children as well as monitor calls in and out and the content of texts in and out. He however notes that the internet has made it so much easier for children to obtain advice on how to get past parental control mechanisms on for instance mobile devices and computers. He believes that unless a stop is put to these free services and advice, parental control will always be inadequate.

2.93 The majority of respondents indicate that existing parental control mechanisms are not adequate. The reasons given for this view vary, including that:

- the mechanisms are inaccessible due to the high cost thereof;
- advertisements of or providing a link to inappropriate material is still available;
- computer illiteracy of parents;
- the blocking possibilities are not user friendly enough to access or to use;
- the blocking possibilities are not advertised well enough;
- there is no enforcement requirement. If there was a requirement then detection and control would be challenging;
- some children are technically more proficient than their parents and have the ability to unblock the control mechanisms; and
- exploiters deliberately target children including using stealth sites.

2.94 WMACA acknowledges that some service providers have made it very difficult to unblock their mechanisms once they are implemented - for example the only way to unblock Vodacom's mechanism, is to present an identity document and the handset to their customer service facilities. However the point is also made that, even if available, parental control mechanisms are not effective for the reason that it only applies within the limited sphere of parental control. Where other parents don't or can't make use of these controls their

children are exposed to content that is not appropriate for children and in turn these children expose other children to this content. WMACA expresses the view that all service providers and ISPs should ban and disallow all pornography on their networks – ‘acceptable pornography’ should only be accessible at adult content physical stores. It submits that 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. The rights of adults who wish to access pornography would be curtailed to licensed adult premises as is currently provided for in the FPA. Another 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. WMACA however notes that age verification may prove especially difficult or impossible with the existence of pre-paid services and access to public broadcasting.

2.95 The National Training Manager of CWSA submits that the deciding factor should be whether this type of content is suitable enough for general public viewing. She believes that there is a need for greater awareness and education on these areas. Sidhartha Philander notes that irrespective of parental control children would be able to create or access pornography on any mobile device that connects to the internet. He suggests that it may be advisable to remove mobile phones from children altogether.

## **18 Are the instructions for parental control available in multiple languages?**

2.96 Although the option of using Google translate was tabled as an option, most respondents are of the view that parental control instructions are only available in English and not in multiple languages. Given that the Constitution recognises 11 official languages in South Africa, respondents are of the opinion that the instructions should be available in multiple languages. WMACA comments that in its view illiterate parents are not considered and that this impacts on their ability to implement the control instructions as they would be reliant on instructions in their own language to understand the technology and steps required. The view is also held that the warnings of “SLV” or “PG” on television may hold no meaning in languages other than English and that the required action would be unclear.

## **19 Are parental control tools adequately promoted?**

2.97 The DOC believes that parental control mechanisms are adequately promoted. However a number of respondents believe that the converse is true. These respondents highlight a need for education and awareness. The NPA is of the view that relevant government departments should have a coherent and focused public awareness campaign targeting both children and adults (parents, guardians, educators and stakeholders) and that this should include sufficient promotion of the FPA. The view is also held that while the national broadcaster and independent television channels in South Africa do a lot to promote parental control when airing their programs the same cannot be said about ISPs. It is however interesting to note that some respondents feel that although these mechanisms are available people are not applying security/blocking apps. One respondent submits that although controls may be advertised they are difficult to activate.

## **20 Is law reform necessary to protect children from exposure to pornography or is the existing legal framework adequate?**

2.98 Although DOC submits that the existing legal framework is adequate the general view is that law reform is necessary to protect children from exposure to pornography. The reasons given for the need to reform the law ranges from a need to improve existing regulations, to the need to have one law to cover all child sexual abuse material. CWSA comments that dealing with pornography in different laws creates confusion amongst law enforcers. The availability of online pornography was highlighted as a particular concern. CWSA highlights the need to more adequately regulate pornography including internet images and screenings and to provide for 'sex-torting' and revenge pornography. It however states that there may be a need to place less emphasis on criminalization and more on social learning and education to ensure that children in conflict with the law are protected. Google South Africa agrees and submits that law reform needs to be supplemented by a national digital literacy programme which will empower users (young and old), with the tools and knowledge of how to navigate the web in a safe and responsible manner. WMACA submits that a single definition of pornography, a standard penalty clause and changes to match technological advances are needed. It therefore promotes the drafting of a new law dealing with crimes relating to the creation, possession and distribution of pornography and child sexual abuse material. It suggests the inclusion of the 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.

2.99 Sidhartha Philander endorses the need for reform particularly in respect of the internet. He explains that the internet not only provides anonymity but is easily available and accessible on mobile phones. He also highlights the problem created by counterfeiting (pirating) of pornography DVDs. He explains that this is a problem in poor and rural areas where these DVD's are sold on the street and there seems to be no legal framework to stop this.

## **21 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?**

2.100 Although there was some support for improved implementation of the current law<sup>297</sup> and for the effective and efficient interpretation, application and enforcement of the law by relevant stakeholders in the CJS,<sup>298</sup> a number of respondents believe that a mere change in policy or improved implementation of existing legislation would not be sufficient to address the problem of children being exposed to pornography through the mass media, especially through the internet, media and mobile phones.<sup>299</sup> WMACA warns that improved implementation would not be sufficient to protect children from exposure to pornography as 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. In terms of monitoring WMACA submits that well trained special task teams should be created and operationalized.<sup>300</sup>

2.101 The view is held that legislative change which criminalises exposing children to pornography and failing to protect children from exposure is needed and that such offences

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<sup>297</sup> Prof T Zabow; Khayaletu Rutsha, Department of Communications; Christel Long, Crystal Clear Ministries International.

<sup>298</sup> NPA; John Blacklaws; Rob Schultz.

<sup>299</sup> Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; Cathy McLean, Child Welfare Tshwane; Robynne Alexander; Carol Hinrichsen; Nicola Kostlin; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Sidhartha Philander; Carol Hinrichsen; Louie Claasen UNISA; Debra Minnaar, Church Alive; Kimberley workshop participant; Peter Anderson Rev United Congregational church of Southern Africa; Cause for Justice; NPA; WMACA; Riki van Deventer; John Blacklaws; Daine Snyders; Ria; Christel Long, Crystal Clear Ministries International; The Green Hearts.

<sup>300</sup> Endorsed by Superintendent Arthur Lopes, Buffalo City Metropolitan.

should be coupled with a harsh minimum sentence<sup>301</sup> Further, that the free distribution of pornography by way of the internet, television etc. should be criminalised as reckless endangerment.<sup>302</sup> A similar view was put forward for exposure of children to pornography at cinema's and through magazines,<sup>303</sup> and that protective mechanisms such as internet filters, mobile phone service providers placing restrictions on content and filters on internet access are needed.<sup>304</sup> The view is also held that strict oversight of implementation will be needed.<sup>305</sup> The opinion was proffered that due to the scale of the problem this would include active public participation in combating exposure of children to pornography.<sup>306</sup> A number of respondents identify the need for parenting and life skills programs in schools with a focus on prevention, protection and early detection and intervention where needed.<sup>307</sup> The view that pornography should be banned completely was also mooted again.

2.102 Louie Claasen<sup>308</sup> is of the view that the sexualized culture in which children are being raised desensitises them to sexual material and exposure to it. She believes this culture needs to be addressed. Advocate Smith<sup>309</sup> agrees and submits that there is a need for more aggressive campaigns, awareness sessions and information sessions by all stakeholders to educate parents, children and schools regarding internet and social media safety in order to promote protection of children against exploitation in general. In this regard the WMACA specifically recommends that 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;
- 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;
- rename 'sex and relationship education' (SRE) to 'relationship and sex education' (RSE) to place emphasis on the importance of developing healthy, positive, respectful relationships.'

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<sup>301</sup> Debra Minnaar, Church Alive; Peter Anderson Rev United Congregational church of Southern Africa; John Blacklaws; WMACA.

<sup>302</sup> Debra Minnaar, Church Alive.

<sup>303</sup> Ria.

<sup>304</sup> Daine Snyders.

<sup>305</sup> Louie Claasen UNISA.

<sup>306</sup> Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS.

<sup>307</sup> Benita Nel, CWSA Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>308</sup> Endorsed by Benita Nel.

<sup>309</sup> Adv E Smith, DDPP, FS; endorsed by WMACA; The Green Hearts; Kimberly workshop participant.

2.103 WMACA further recommends that Government, in partnership with ISPs 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;
- 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 and young people’s exposure to violent sexualised imagery within their peer groups and relationships;
- establish youth centres, prioritising underprivileged communities to provide creative opportunities to assist and inspire our youth and to improve the targeting of interventions for young people to prevent violent, or sexually harmful, behaviours;
- establish a sophisticated effective centralised hotline for complaints about illegal material and procedures.’

2.104 The National Training Manager of CWSA supports implementation of the processes set down in the Children’s Court i.e. children who are found in need of care and protection will follow the Children’s Court process in terms of Chapter 9 of the Children’s Act and the Criminal Court process i.e. children who are victims of a criminal offence will follow the criminal process in terms of the SOA, the Criminal Procedures Act (No. 51 of 1997) and the Organised Crime Act (No. 121 of 1998), amongst others. A Kimberly workshop participant submits that it would also be necessary to encourage other countries to ratify relevant treaties and to harmonise the law in other countries.

## **22 Is it necessary to investigate existing structures and policies that govern classification, enforcing and monitoring of the production, distribution and exhibition of pornography?**

2.105 Although a few respondents are of the view that the existing structures are sufficient and that the focus should be on implementation, a number of respondents are of the view that it is necessary to investigate existing structures and policies that govern classification, enforcing and monitoring of the production, distribution and exhibition of pornography. The NPA notes that it is necessary to determine if the processes followed cater for the online or cyber world. The Family Policy Institute agrees that the state must re-look at current protocols and do everything that it can to restrict access to criminal content, including that which is facilitated over the ‘Deep and Dark Web’. The NPA further submits that the FPB is

not visible enough. Ronald Muthambi explains that he is of the view that there is already too much sex, and explicit footage being aired by the public broadcaster during prime time which is not ideal for child consumption and that this needs to be investigated. WMACA submits that ‘the State is under a constitutional obligation to combat child abuse in order to combat the harm that arises therefrom.’ For this reason its structures and policies need to be investigated to ensure it complies with this obligation.

## **23 Is there a lack of synergy between the FPB and ICASA, and if so does this warrant investigation?**

### ***a. Broadcasters***

2.106 A number of respondents believe that there is a lack of synergy between the FPB and ICASA which warrants investigation. The DOC however states that synergy has been brought about through a memorandum of understanding (MOU) which has been signed by the regulators. It is argued that the MOU ensures that ICASA does incorporate the objects of the FPA in terms of its Code of Conduct for Broadcasters. The NPA however submits that the role of the FPB as a regulatory arm should be extended with required and improved enforcement capabilities. Sidhartha Philander argues that the FPB merely classifies the material and ICASA gives permission to a broadcaster based on this classification. He states that in fact ICASA has the final authority and can still allow the broadcaster to broadcast. He believes that this creates confusion between both parties. An example would be that there is some material that is not appropriate based on the FPA criteria, but ICASA can still decide to allow the broadcaster to continue.

2.107 In support of its response to this question the NAB makes reference to the National Integrated ICT Policy Review Panel which concluded ‘that the current regulatory and co-regulatory systems are functional, but however advocates for coordination between all stakeholders involved in protecting children from harmful and offensive content.’ It urges the Commission to take cognisance of the following findings and recommendations of the ICT Policy Review Panel:

‘4.1.1. There must be a closer working relationship between the FPB, ICASA and other content related regulators to ensure an easier process for audiences and users to complain;

4.1.2. The DTSPS together with the Department of Communications (“the DOC”) must facilitate cooperation between regulatory authorities (including ASA, FPB, and the Press Ombudsman) to ensure coordination and address protection issues in an era of convergence;



4.1.3. Consideration must be given to the development and formalisation of co-regulation structure, which has worked well to date in the broadcasting sector.

4.2. On the issue of online regulation, the ICT Policy Review Panel recommends that external internet content providers should be regulated in the same way as local providers, if they specifically target South African audiences and/or revenue and reach the minimum threshold of influence set by the regulator. This in our view will provide the necessary regulatory parity.’

### ***b. The internet***

2.108 On a practical level it is argued that there is a need for ISPs<sup>310</sup> to take pro-active steps to prevent the access, download and distribution of pornography to children. It is further argued that software exists to identify users who are accessing this material and it is unclear why this is not being used.<sup>311</sup> The National Training Manager, CWSA explains that the reality is that:

‘there are real cases of children who are obtaining age inappropriate information of a sexual nature such as random pop ups of nude and explicit body images when children are surfing the internet for homework projects’ and this needs to be addressed.’

2.109 The NAB submits that in respect of the FPB’s Film and Publications Online Regulations Policy, 2016 South African online content distributors should not be over-regulated at the expense of their international counterparts; that a Regulatory Impact Assessment process should precede this Policy and that best practice should be considered and applied. The Commission deems it necessary to note upfront that this policy has not yet come into force and unlikely to do so.

## **24 Would a uniform classification system for content exhibited or distributed through the mass media in South Africa be a move in the right direction?**

2.110 A number of respondents support a uniform classification system for content exhibited or distributed through the mass media. It is argued that a uniform classification system would promote legal certainty for all stakeholders and role players. Further that it would serve to prevent contradictions, inconsistency and frustration to law enforcement. The NPA however warns that implementing a uniform system would need to recognise the

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<sup>310</sup> It is more accurate to refer to Electronic Communications Service Provider as opposed to ISP in respect of matters not related to the FPB. In order not to cause confusion between the submissions and the discussion the Commission acknowledges this but elects to refer to ISPs as including ECSPs for the purpose of this paper.

<sup>311</sup> Sidhartha Philander.

tension between total censorship and the right to freedom of speech and expression. However some respondents caution that providing for uniform classification may create loopholes or broaden access to pornography. Google South Africa does not agree that it would be beneficial to have a uniform classification system. It explains that currently the FPA provides that the FPB is responsible for the classification of both films and games in South Africa in accordance with the terms of the Act, with the following exceptions:

- 'First, sections 16(1) and 18(6) of the Act exempt a bona fide newspaper that is published by a member of a body recognised by the Press Ombudsman and certain broadcasters, respectively, from applying for the Board's classification.
- The rules of classification under the FPA do not expressly deal with classification of internet distributed content, and its implementation in this context remains unclear.'

2.111 Google South Africa highlights the need to first take into account the practical and technical considerations of implementing a uniform classification system in respect of online content. It explains that online content is different from traditional media, and any law should reflect this. By way of example it comments that:

'the classification model proposed in the FPB's Online Policy is based on traditional offline media (such as movies, games, DVDs), etc and ignores the sheer numbers associated with online content. For example, there are:

- 6+ trillion+ webpages on the web (and this number keeps growing by millions by the minute)
- 100+ billion web searches per month
- 159+ languages
- 30,000+ apps uploaded on Google's Play Store everyday
- 450+ hours of YouTube videos uploaded every minute<sup>312</sup>
- More than 6 billion hours watched per month'

2.112 Google South Africa reasons that it is not technically feasible for content distributors to submit all their content to anybody for pre-classification before publication, without interfering with the dynamic nature of the Open Web. It suggests that the international standards developed by the International Telecommunications Union and the OECD Guidelines on the Protection of Children Online should be examined for an alternative solution. It explains that:

'The OECD, in its Guidelines on The Protection of Children Online argues that "policies to protect children online should not undermine the framework conditions that enable the Internet to operate as a global open platform for communication, innovation, economic growth, and social progress. The consistency of policies designed to protect children online with other economic and social Internet policies

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<sup>312</sup> Cyberlaw & Technology Watch Issue no:1711 Wednesday 29 November 2017 reports that '[E]very hour of every day, more than six years' worth of content is uploaded to YouTube'.

should be carefully assessed prior to adoption and implementation,” and that “policies... should be technology neutral to ensure their sustainability in a dynamic environment characterised by rapidly evolving technologies and patterns of usage.”

## **25 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?**

2.113 The question on whether restrictions on the public display of pornography would amount to censorship was met with a varied response. Some respondents submit that it would not amount to censorship and others that it would. Yet others feel that given the best interests of the child if it amounts to censorship it would be justified. A restriction of this nature is likened to the restriction of alcohol and smoking to adults and the restriction of smokers to designated areas. The NPA argues that there should be no public display of pornography. It further submits that classified pornography should still be regulated in terms of allocated distribution sites, i.e. to which children under 18 do not have access. It adds that the concern is not necessarily hard copy pornography, but rather the accessibility to internet/website pornography.

2.114 Louie Claasen submits that ‘heavy restrictions’ should be put in place for public display of pornography as in her view ‘age restrictions for movies are nearly non-existent these days especially regarding nudity and sexual content.’ She believes that this is unacceptable as it normalises the viewing of sexual content. WMACA supports the enactment of a legislative obligation ensuring adherence of all journalists, broadcasters, advertisers and all service providers to aligned standards for the display of pornography. Minister Fritz however warns that where this restriction infringes on an advertisers right to freedom of expression or freedom of trade, occupation and profession this restriction would have to be aligned with the limitation clause in the Constitution.

## **26 If 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?**<sup>313</sup>

2.1115 Some respondents are of the view that filtering pornography at tier one level would be seen as an unjustifiable limitation of adult consumers’ rights to privacy and freedom of

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<sup>313</sup> For ease of understanding this question and the response thereto there are 3 levels of ISPs (tier one, two and three). Tier one ISPs are the networks that provide the backbone of the internet. They provide traffic to all other ISPs, not end users. Filtering pornography at this level would accordingly provide the most protection to children.

expression.<sup>314</sup> Other respondents are however of the view that this limitation would pass constitutional muster,<sup>315</sup> as the rights of children not to be exposed to pornography weigh heavier than the rights of adults to access pornography over the internet.<sup>316</sup> Cause for Justice submits that it could be argued either way. The NPA agrees that each case will have to be determined and evaluated on its own merits. It argues that:

‘if it is adult pornography exposed to adults, limitations can be regarded as unjustifiable. However, the prevention of children being exposed to or having access to pornography, then the limitation herein will be justifiable.’

2.116 However the Family Policy Institute bases its argument in favour of filtering at tier two or three level.<sup>317</sup> It states that although the restriction of pornography by way of filtering online content, which adopts the ‘opt-in’ approach<sup>318</sup>, does violate certain rights, those rights should be deemed validly limited for the safety of children, which ought to remain of paramount importance to the state.<sup>319</sup> It submits that there does not seem to be a less restrictive means of achieving the goal of protecting children from accessing pornography online. It further submits that the right to privacy and the freedom of expression should be viewed in the context of the historical reason for recognising these rights in the Constitution, the prevalence of sexual crimes and the fact that it is not a denial of the rights but a limitation thereof. The Family Policy Institute submits that legal pornographic content would be accessible if an adult chooses to elect to opt-in and has provided proof of age. The Family Policy Institute further submits that the limitation on accessing pornography through the internet can also be justified based on the established link between sexual crimes and pornography as a driver of the crimes. It states:

‘...But that doesn’t mean the facts aren’t already there. “In spite of the lack of formal research, though, the FBI’s own statistics show that pornography is found at 80 percent of the scenes of violent sex crimes, or in the homes of the perpetrators”

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<sup>314</sup> Ronald Muthambi; Kimberley workshop participant; Google South Africa; Media Monitoring Africa.

<sup>315</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; Cathy McLean, Child Welfare Tshwane; Lyn Bremner; Renee Swanepoel, Loreto Convent School; Prof T Zabow; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications; Family Policy Institute; John Blacklaws; Daine Snyders; Deon Goosen; Carol Hinrichsen; Nicola Kostlin; Paul Barter; Sidhartha Philander; Rob Schultz; Riki van Deventer; National Training Manager, Child Welfare South Africa; WMACA.

<sup>316</sup> Cathy McLean, Child Welfare Tshwane.

<sup>317</sup> A tier two level ISP is the link between the tier one level ISP and the tier three level ISP who provides access to users to the internet. This would mean that pornography would be available on the internet but would be restricted by the ISP who provides access to a user.

<sup>318</sup> This level of filtering however refers to tier two filtering.

<sup>319</sup> Endorsed by Sidhartha Philander.

2.117 Google South Africa submits that aside from constitutional compliance the option of filtering at tier one level, effectively blocking pornography before it enters the country risks being unrealistically ambitious and it is unclear to Google how such filtering would work in practice. Google South Africa argues that no filtering software or tools can, by themselves help protect children online. In its view these efforts need to be supplemented by digital literacy programmes. In addition to user empowerment/digital literacy, Google submits that it also provides users with and continues to invest in the development of family safety technology and tools that are available in all its platforms globally, such as SafeSearch; YouTube Safety Mode and parental content administration. Google further affirms the need to establish a national strategy to protect children online. It believes that there is a greater need to proactively equip children with the necessary skills required to navigate the Internet (digital literacy). Both the OECD and the International Telecommunications Union (ITU) recommend child protection strategies based on awareness raising and digital literacy programmes focusing on online safety, appropriate online behaviour, aimed at encouraging digital citizenship among children. It submits that this will have a greater long-term impact on the effective protection of children from abuse online.

2.118 MMA submits that aside from the issues relating to freedom of expression, and the constitutionality of filtering content, it is important to note that children are not merely victims; they are experts on their own behaviour; what places them at risk; how they should act to protect themselves and how to contribute to the safety of their peers. It advises that external protection in a form of filters needs to be developed in partnership with children in light of their own concerns and experiences in using the online environment. It further states that policy and legislation is not enough to address the issue of access, and exposure to pornography. In this regard MMA advocates for digital literacy as a key component to the protection of children.

2.119 The National Training Manager, CWSA, submits that the prevalence of pornography is a broader societal problem and that filtering may not necessarily address the problem of children's exposure to pornography.<sup>320</sup> She comments that:

'we all need to take and own the responsibility of creating a culture of safety and well-being of all children. It takes a collaborative effort to eradicate offences against our children and all parties should be involved as this involves the value system and

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<sup>320</sup> Endorsed by Robynne Alexander.

moral core of our society. Our inaction as adults is allowing this behaviour to become normalised in our culture.’

2.120 The view was also expressed that ISPs need to be actively involved in preventing access to, downloading of and distribution of pornography due to the prevalence of distribution of pornography via peer to peer networks.<sup>321</sup> SAPS provided one example of over 14 000 images of child sexual abuse material being downloaded onto a mobile phone. However as a Kimberley workshop participant noted, the distribution of child pornography is already illegal.

2.121 Carol Hinrichsen points out that filtering pornography at tier one level will have the benefit of suppressing demand. She submits that in turn this will reduce the number of actors in legal pornography who are routinely exposed to venereal diseases e.g. syphilis, gonorrhoea and chlamydia.

## **27 What responsibility and accountability do, or should, parents and caregivers have towards their children to protect them from exposure to pornography and other adult material?**

2.122 The view is held that section 28(1)(d) of the Constitution imposes a positive obligation on the state and parents to prevent harm to children. The SAPS states that parents and caregivers are the first line of defence in the protection of children.<sup>322</sup> The police can only act once a report is made in this regard. CWSA submits that parents and caregivers responsibility and accountability towards children includes taking an active stance to educate and protect children from accessing or being exposed to inappropriate sexually explicit material. John Blacklaws submits that anyone with children in their care, including teachers share responsibility for the welfare of children in their care and that they are primarily accountable for protecting these children. This responsibility extends to parents educating themselves, blocking sites on the internet, monitoring internet usage and providing information on sexuality before a child is exposed to it elsewhere. Minister Fritz submits that:

‘The Children’s Act provides that a parent, guardian or other person caring for a child is guilty of an offence if that parent or care-giver abuses or deliberately neglects the child; or abandons the child. Parents therefore have a responsibility to protect children from harm. Parents and guardians have a responsibility to monitor the use of technology by children/learners both at home and outside of the home. The

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<sup>321</sup> Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS.  
<sup>322</sup> Endorsed by CWSA; John Blacklaws; Minister Fritz.

education of children or a learner and a parent to the growing use of social media sites requires an educational effort that involves the school, social networking organisations and the government. Parents must not allow children to access the internet in isolation or behind closed doors. Parents and guardians must discourage their children from publicly divulging personal information such as contact details and whereabouts.’

2.123 The view is expressed that a parent or caregiver may be accountable for a child sexting or distributing pornography on a device that was provided to the child by the parent.<sup>323</sup> The Green Hearts explains that parents should be held accountable for children accessing undesirable material in the same way as parents are held accountable in terms of the Firearms Act when a child gets access to a firearm and uses it. It argues that if a parent gives a child access to a mobile phone or any other multi-media device, without educating the child and applying strict rules and regulations, they are placing a weapon of destruction in the child’s hands. Superintendent Arthur Lopes agrees and states that where every reasonable precaution to prevent children accessing pornography is not taken, parents should be criminally liable for neglect. The view is also held that parents or guardians must at least monitor children’s internet activity, internet history and who the children’s friends are on social media.<sup>324</sup> Further, that parental controls should be engaged on Television sets, gaming devices and mobile phones and that only the providers should be able to deactivate these controls with proof of identification.<sup>325</sup> Parents should also be advised by service providers of available filtering options. Daine Snyders takes a firmer stance and suggests that all devices should be fitted with an automatic filter/block which can be lifted if a request is made to the service provider by an adult. The view is also held that parents should review the ratings of games before buying them and be able to report any service provider whose ratings are misleading. SAPS submits that children must also be encouraged to resist being exposed to age inappropriate material or pornography and be taught how to report incidents where they are exposed to pornography either to a parent or caregiver and other responsible persons (such as the police or a teacher etc.).

2.124 CWSA submits that it is mindful that, mostly due to a lack of awareness, a number of parents do not engage security options, are unable to secure the internet in their homes and that a number of children are able to bypass security measures. Louie Claasen agrees and submits that peer to peer sharing also bypasses restrictions. She reasons that holding parents accountable for what their children access or are exposed to is near impossible. Cherry Hochfelden submits that as a child grows the ability of a parent or caregiver to restrict

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<sup>323</sup> John Blacklaws.  
<sup>324</sup> The Green Hearts.  
<sup>325</sup> Ibid.

access to explicit content diminishes. Riki van Deventer comments that a parent or caregiver does not have control of what a child accesses when they are away from home and that for this reason explicit content should not be so available in the mass media. A Kimberley workshop participant comments that in light of poor economic circumstances certain parents and caregivers need to be encouraged to take care not to have sexual encounters in front of children and to comply with specific requirements on how to keep 'x-rated' materials safe from children. Prof Zabow points out that in multiple deprived or dysfunctional families' children will not be afforded the required protection. Rev Anderson agrees and states that this is why pornography needs to 'be stopped at source'.

2.125 Cause for Justice comments that the responsibility to protect children needs to be shared between teachers, parents, the community, distributors/broadcasters/service providers and the state and not be placed on parents and caregivers alone. In this regard Cause for Justice highlights the need for awareness campaigns detailing the harm caused by exposure to pornography and steps to avoid exposure. A need for parenting skills in order to facilitate communication between children and caregivers was also raised. Google South Africa endorses the need for digital literacy and comments that 'no tool or programme that any company creates to help parents filter content can take the place of active parental engagement and user empowerment'. It supports active collaboration between stakeholders to empower and improve children's awareness and readiness (resilience).

2.126 With regards to accountability the NPA submits that the SOA provides for some accountability in terms of section 19 of the Act and that depending on the merits of the case section 305(3) of the Children's Act will also find application specifically in relation to the definition of sexual abuse in relation to a child (paragraph (c)). It states that it could be argued that the exposure of the child to these images or publications might be harmful to the psychological or emotional development of the child. It also argues in favour of public education and awareness. WMACA agrees that deliberate exposure would be an offence and that not protecting a child from exposure to pornography e.g., not monitoring a child's internet access would constitute neglect as the offence and could be a lack of care and dealt with by section 150 of the Children's Act. It also argues that 'failure to protect children from exposure to harmful material may be seen as falling within the context of "distribute" as defined in the FPA and therefore constitutes an offence'.



## **28 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?**

2.127 A number of respondents support restricting the availability of pornography to ‘adults only’ licensed shops and submit that it would constitute an inconvenience and not a true limitation of the right to access pornography.<sup>326</sup> Others argue that this restriction would amount to a true limitation of the right. Some respondents argue that it would amount to both an inconvenience and a limitation. However the view is also expressed that the harm caused to children by exposure to such content is of more importance than the inconvenience that would be caused to adults.<sup>327</sup> In other words the benefit of this limitation would outweigh the detriment thereof. The NPA argues that:

‘Whether the limitation . . . is an inconvenience or not is actually irrelevant. Once a limitation is in line within the legal framework of legislation, the mere fact that it is an inconvenience will not be sufficient for it to be regarded as unconstitutional.’

2.128 Cause for Justice is of the view that the names of visitors to adult shops should be compared with the National Register for Sex Offenders and the criminal records for persons convicted of violent crimes. It is argued that children should be educated on the harm of exposure to pornography and the reason why pornography is restricted to ‘adults only’ shops. It was also argued that the reach of the internet; online access; and the fear that the ‘black market’ for pornography would increase, or that children would access it anyway as adults who access/purchase this material might not care whether children are exposed to it does not militate against this proposal.

## **D. Comparative approach to addressing exposure of children to pornography**

2.129 As the distribution of films, access to televised broadcasts and uptake of the internet largely blurs jurisdictional boundaries the Commission has sought to assess what the approach to the exposure of children to pornography is internationally and particularly in countries which have identified and tried to remedy the problem of children’s access and exposure to pornography. The United Nations Human Rights Council has affirmed that ‘the

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<sup>326</sup> WMACA; Cause for Justice.  
<sup>327</sup> Ibid.

same rights that people have offline must also be protected online'.<sup>328</sup> Consequently although the United Nations Convention on the Rights of the Child (UNCRC) was enacted before the prolific uptake of the internet the application of the UNCRC to the online world is widely accepted.<sup>329</sup> This includes Article 19 of the UNCRC which enshrines children's right to protection 'from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.'<sup>330</sup> Child Helpline International aligns itself with this interpretation and is of the view that:

'Protecting children from online violence, sexual abuse and exploitation is critical to delivering on the promises made by governments under Agenda 2030 and Sustainable Development Goal target 16.2 that calls for protection of children from violence, abuse and exploitation.'<sup>331</sup>

For this reason a number of countries

'impose or apply regulatory schemes to restrict access to content that may be harmful for children's development (as opposed to illegal), as, for example, in rules governing access to gambling, so-called 'adult' pornography or access to services that may require explicit parental consent.'<sup>332</sup>

2.130 Bulger et al argue that public discourse on children and the internet focuses on content (e.g. accessing pornography); and contact (e.g. online grooming).<sup>333</sup> They however caution that in respect of accessing content and contact, ignoring the reality that some children engage in risky online conduct themselves and are therefore not always innocent roleplayers or bystanders, is to the detriment of children. For example a risk identified in research conducted in Namibia is that some children lie about their age online, with boys being more likely to do so than girls (40% versus 31%).<sup>334</sup> Being mindful of this differentiation this chapter will focus on the content children may access or may be exposed to, while chapter three will focus on conduct in the form of self-generated sexual images and chapter five will focus on the conduct of sexual grooming. However it is important to also

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<sup>328</sup> United Nations General Assembly Human Rights Council "The promotion, protection and enjoyment of human rights on the Internet" A/HRC/32/L.20 27 June 2016.

<sup>329</sup> SALRC Sexual Offences Issue Paper (2015) 48 includes an exposition of the international imperative to protect children. The instruments referenced however focus primarily on 'child prostitution' as opposed to pornography (legal adult sexual material) as referred to in this instance.

<sup>330</sup> Bulger et al Where policy and practice collide 2017 3.

<sup>331</sup> UNICEF Child Helpline International A New Reality Child Helplines Report on Online Child Sexual Exploitation and Abuse from Around the World 2018.

<sup>332</sup> Bulger et al Where policy and practice collide 2017 3.

<sup>333</sup> Opcit 4.

<sup>334</sup> Namibia University of Science and Technology and the Centre for Justice and Crime Prevention Exploratory research study on knowledge, attitudes and practices of ICT use and online safety risks by children in Namibia 2016 6.

consider the findings of Tokaji. She has found that although the legal response to active exposure of children to pornography has given rise to the criminalising of grooming, not all exposure can be linked to grooming behaviour. Passive or negligent exposure to pornography is becoming more commonplace. Tokaji reports that a growing number of children in Australia live in households alongside large-scale pornography users.<sup>335</sup> She ascribes the sharp rise in the number of children sexually abusing other children (in her research 60% of these children were abusing a sibling) to this exposure.<sup>336</sup> This trend is linked to an escalation in the seriousness of the sexual acts being perpetrated and a steady decline in the age of the perpetrators and victims.<sup>337</sup> She therefore suggests that exposure to indecent material should not be linked to 'grooming' alone anymore.

2.131 It is not surprising that the offline consumption of explicit images has found such a rapid uptake on the online platform. As pointed out by Nicola Kostlin it is a well-known adage that 'sex sells'.<sup>338</sup> Sexualised content sometimes provides a readily understood reference, a common language to easily and convincingly convey messages and ideas.<sup>339</sup> As such, pornography has become both pervasive and persuasive - which means that advertisers, studios and artists find it an easy vehicle to sell products and entertainment. The influence of pornography has spread beyond its boundaries as a genre and has come to be increasingly felt in other forms of mainstream entertainment including advertising, music, movies and television both on and offline. Alarm at the prevalence of sexualized content has given rise to a range of responses including content classification schemes, filtering software, access control, age verification requirements and pay channels. Regulatory intervention is increasingly being utilized to protect children's physical, mental and moral welfare.<sup>340</sup>

2.132 The nature of the internet has made it particularly easy to access or to be exposed to pornography and other adult content. Countries which are considered to be proponents of fundamental human rights such as the freedom of expression and privacy are increasingly engaging with the concept of internet filtering as a policy tool in an attempt to protect children. According to Breindl and Wright<sup>341</sup> internet filtering takes the shape of self-, co- or

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<sup>335</sup> Tokaji A "Due diligence obligation of a State to children harmed by porn: a critical appraisal" (2016) Vol 7 *The Western Australian Jurist* 209. 210.

<sup>336</sup> Opcit 213.

<sup>337</sup> Opcit 217.

<sup>338</sup> See para 2.49 above.

<sup>339</sup> Mullen J (Deputy Chief Censor) "Pornography in New Zealand: do we really still need to be concerned?" (19 January 2016) available at <http://www.classificationoffice.govt.nz/blog/blog-pornography-in-nz.html>. Accessed on 26 September 2016.

<sup>340</sup> Bulger et al Where policy and practice collide 2017 4.

<sup>341</sup> Breindl Y and Wright J "Internet Filtering Trends in Western Liberal Democracies: French and

state-regulation. Breindl and Wright categorise filtering into four types i.e. DNS poisoning, IP header filtering, deep packet inspection and hybrid approaches.<sup>342</sup> Whereas child sexual abuse images are prohibited expressly in a number of countries, countries tend to deal with accessing or being exposed to pornography (legal adult content) differently. Some of these measures include preventing direct access by way of establishing age verification as a gatekeeper; requiring adults to **opt in to access pornography** and protecting children from being lured into watching pornography by **criminalizing the existence of misleading domain names** which lure internet viewers (including children) into being exposed to pornography.

## 1 New Zealand

2.133 In New Zealand pornography is not illegal per se but age restrictions apply and only some forms of pornography are illegal; this includes material involving dead people, cruelty, severe violence as well as child and animal abuse that are deemed objectionable.<sup>343</sup> R18 or adult material is available on the internet providing the person accessing it can prove they meet the age criteria. Anybody who knowingly supplies, distributes, exhibits or displays a **restricted publication** to any person who does not meet the age criteria is committing an offence.<sup>344</sup> A restricted publication is objectionable if made available to a person underage, and an individual can receive up to three months imprisonment or a fine not exceeding \$10,000. 'Objectionable' is defined in the New Zealand Films, Videos and Publications Classification Act 1993 as a 'publication . . . (that) describes, depicts or expresses, or otherwise deals with matters such as sex, horror, crime, cruelty or violence in such a manner that the availability of the publication is likely to be injurious to the public good.'<sup>345</sup> Examples of offences include:

- a video outlet renting a restricted DVD to an underage youth;
- or a parent supplying an R18 computer game to underage children;
- or an adult sending sexually explicit text or images to a person under 18.

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<sup>342</sup> German Regulatory Debates" (15 August 2012) Paper delivered at the 2012 Workshop on Free and Open Communications on the Internet (FOCI'12) 1.

<sup>343</sup> Opcit 2.

<sup>343</sup> Netsafe. "What is the difference between legal and illegal content?" (14 September 2015) available at Retrieved from <https://www.netsafe.org.nz/legalandillegalcontent/> accessed on 26 September 2016.

<sup>344</sup> Films, Video and Publication Classification Act 1993.

<sup>345</sup> New Zealand Films, Videos and Publications Classification Act 1993 New Zealand Department of Internal Affairs. available at [dia.gov.nz](http://dia.gov.nz). Accessed on 2 February 2019.

2.134 Not taking adequate precautions to prevent under 18 year olds viewing pornography is illegal under New Zealand law.<sup>346</sup> Technically this means that anyone sending out junk emails with pornographic content without checking the age of the recipient is in breach of New Zealand law.<sup>347</sup> Sections 127 and 128 of the New Zealand Films, Videos and Publications Classification Act 1993 prohibits the exhibition or display of **objectionable publications** (inclusive of sexual content) to persons under 18 and provides for exceptions to such display e.g. for educational or professional purposes respectively.

## 2 United States of America

2.135 In the United States of America the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003<sup>348</sup> amended the United States Code to criminalise the use of misleading domain names, which may deceive a person into viewing obscene material. The offence is identical in respect of a minor but carries a higher penalty. The aim of this amendment is primarily to address spam mails, mistyping of URLs and innocent word searches which may especially cause children to encounter pornography.<sup>349</sup> Section 2252B of the United States Code specifically criminalises knowingly using a **misleading domain name** on the internet with the intent to deceive a person into viewing material constituting obscenity and section 2252C of the Code criminalises the use of **misleading words or digital images** on the internet constituting obscenity in respect of adults and in respect of minors with the aim of deceiving a minor to view that which may be harmful. A higher penalty is applicable in respect of minors.

2.136 The states of Arkansas, Tennessee, South Dakota, and Utah have formally recognized the public health harms of pornography and Florida is said to soon follow.<sup>350</sup> According to Republican Ross Spano who tabled Bill H.R. 157, pornography is ‘contributing to the hyper sexualisation’ of adolescents and he claims that children who view adult content are at a higher risk of developing low self-esteem, eating disorders and a desire to engage in

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<sup>346</sup>

Ibid.

<sup>347</sup>

Createit “Keeping out the pornography”. (27 May 2004) available at <http://www.createit.co.nz/index.mvc?ArticleID=152> accessed on 26 September 2016 ; Bulger et al Where policy and practice collide 2017 6.

<sup>348</sup>

539 U.S. 194 (2003).

<sup>349</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>350</sup>

Washington Times “anti porn bill touted by Florida Senator” (21 September 2017). available at <http://www.washingtontimes.com/news/2017/sep/21/anti-porn-bill-touted-florida-senator/> Accessed on 21 September 2017.

dangerous sexual behaviour.<sup>351</sup> The Bill orders the state to create ‘**recovery programs** for porn-addicts’ and highlights the need for education, prevention, research and policy change to protect the citizens of the state.<sup>352</sup> The National Center on Sexual Exploitation, the country’s leading anti-pornography organization is reported to support this proposed Bill.<sup>353</sup>

2.137 Television shows have also been subjected to scrutiny in the USA. For example The National Center on Sexual Exploitation (NCOSE) has found that the HBO television series ‘The Deuce’ glorifies and normalizes sexual behaviours and violence. The main themes are pornography and prostitution where performers team up for very disturbing pornographic scenes that have graphic sexual content. The NCOSE has condemned HBO for building its business model on sexual violence and exploitation and is calling on it to remove the shows programming. Commenting about the show, Executive Director and Vice President of NCOSE, Dawn Hawkins, said it is not a documentary but is entertainment that normalizes the sexual exploitation of those who actually undergo the abuses of pornography and prostitution.<sup>354</sup>

### 3 United Kingdom

2.138 The United Kingdom has and is further seeking to implement more stringent measures to protect children from exposure to pornography.<sup>355</sup> The United Kingdom introduced **a clean-feed internet by default** following an announcement by David Cameron in July 2013.<sup>356</sup> Since 2013 a voluntary code of practice agreed to by all four major ISPs meant that all new customers had to ‘opt out’ of the ISP filtering to gain access to blocked content. However Baroness Howe of Idlicote informed Parliament that despite the progress, ‘very significant problems remain’ necessitating significant changes to online child protection arrangements.<sup>357</sup> One of the more glaring limitations of the self-regulatory filtering of adult content is that the 14 smaller ISPs are not party to the agreement making filtering an option

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<sup>351</sup>

Ibid.

<sup>352</sup>

Ibid.

<sup>353</sup>

Ibid.

<sup>354</sup>

Hawkins D “Statement” *National Center on Sexual Exploitation* available on <http://endsexualexploitation.org/hbo/>.

<sup>355</sup>

Vincent J “The UK wants to police social media with new ‘online safety’ laws” (21 May 2018) The Verge available at <https://www.theverge.com/2018/5/21/17375450/uk-social-media-online-safety-legislation-...> Accessed on 13 September 2018.

<sup>356</sup>

See the SALRC Sexual Offences Issue Paper (2015) para 4.22 for further elucidation on this point.

<sup>357</sup>

Lords Hansard text for 17 July 2015 Online Safety Bill [HL] Second Reading, available at <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/150717-0001.htm>.

which is unenforceable.<sup>358</sup> Another identified limitation is that the voluntary agreement does not provide age verification to establish that someone seeking to lift adult content filters installed at set-up is adult.<sup>359</sup> The Online Safety Bill required that households, schools and businesses with public Wi-Fi must make a choice about adult content filters and that proper age verification should be applied. During the course of 2015 and 2016 existing customers were notified of the implementation of the filtering system and the option of 'opting out'.<sup>360</sup> When users try to access blocked content a warning page is displayed on a redirected page explaining the restriction on access to those 18 years and older. **The default assumption is that a user is under 18.**<sup>361</sup> **Adult content filtering was also extended to mobile phone operators.** Mobile operators set their filters in accordance with a framework prepared by the British Board of Film Classification (BBFC).<sup>362</sup> Mobile operators place access controls on all commercial chat rooms for mobile, unless they are moderated chat rooms.<sup>363</sup> Adults may have the block lifted on request. The operator O2 provides an additional opt-in whitelist service aimed at users under 12 years for access to categories deemed suitable for that age group.

2.139 The pledge to introduce age-verification on 'all sites containing pornographic material' was launched off the back of a National Society for the Prevention of Cruelty to Children (NSPCC) report that claimed a tenth of all 12 to 13 year olds thought they were 'addicted' to pornography. Consequently the Audiovisual Media Services Regulations 2014 introduced a series of restrictions on the pornography produced and sold in the United Kingdom. This means **some sexual acts have been banned from content produced and sold in Britain.** Pornography produced in the United Kingdom was effectively censored after an amendment was made to the 2003 Communications Act. It banned a list of sexual acts by demanding that paid-for video-on-demand (VoD) online pornography must be regulated by the same guidelines (set out by the British Board of Film Censors (BBFC)) that DVD pornography (R18 films) sold in sex shops must adhere to. The Communications Act 2003 requires sites based in the United Kingdom that provide R18 on-demand programme services – i.e. the opportunity to watch restricted films that can be bought only from sex shops if purchased as physical media - to make their services available in such a way that

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<sup>358</sup> Lords Hansard Online Safety Bill 2015; Vincent "The UK wants to police social media with new 'online safety' laws" 2018).

<sup>359</sup> Lords Hansard Online Safety Bill 2015.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

<sup>362</sup> Mobile UK Codes of Practice available at <http://www.mobileuk.org/codes-of-practice.html> Accessed on 31 January 2018.

<sup>363</sup> UK Code of practice for the self-regulation of content on mobiles. Version 3, published 1<sup>st</sup> July 2013.

they cannot be accessed by children. The Authority for Television On Demand (ATVOD) is responsible for enforcement thereof.<sup>364</sup> An identified pitfall is that the majority of this material accessed in the United Kingdom is accessed from websites based outside the United Kingdom and therefore untouched by the legislation.<sup>365</sup> The proposal is to require those sites to have a United Kingdom license, akin to online gambling site requirements, which require robust age verification checks.<sup>366</sup> The proposal is to give the United Kingdom licensing authority the power to direct financial transaction providers not to process transactions between such websites and people in the United Kingdom if they operate without a license.<sup>367</sup> A further proposal is to extend the application of age verification to 18 rated as well as R18 rated material. Furthermore, in order to facilitate better education an obligation is placed on ISPs and Mobile Phone Operators (MPOs) to make available **information about online safety** to account holders in a prominent and easily accessible format throughout the duration of their contract.

2.140 Implementing these restrictions has not proved as straight forward as first thought. In fact categorising what is and isn't pornography is fraught with difficulty. It is reported that there are thriving pornography communities on Twitter, Tumblr and Reddit, but few would put them in the same category as PornHub.<sup>368</sup> It has also been argued that the United Kingdom government's assertion that introducing age-verification checks will protect children also creates a unique problem i.e. some children actively participate in creating pornography.<sup>369</sup> Furthermore, it is argued that but for BREXIT the filtering of content by ISPs may have found itself in opposition to proposals to create a single digital market for European Union member states which includes rules for net neutrality.<sup>370</sup> These rules require that all internet traffic has to be treated equally, without blocking or slowing down certain data (net neutrality guidelines were announced in August 2016 by the Body of European Regulators of Electronic Communications). However ISPA<sup>371</sup> submits that ISPs in Europe can filter and have themselves reported harmful activity. Further that net neutrality laws do not prevent filtering out of pornography. However unhampered by net neutrality guidelines, in July 2017 Matt Hancock, the Minister of State for Digital in the United

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<sup>364</sup> Lords Hansard Online Safety Bill 2015.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Temperton J. "Pornography is under attack" 1 May 2015 .available at <http://www.wired.co.uk/article/pornography-general-election-2015> accessed on 05 October 2016.

<sup>369</sup> Temperton "Pornography is under attack".

<sup>370</sup> Ibid.

<sup>371</sup> Cull D, Advisory Committee member.



Kingdom, announced the commencement of the Digital Economy Act 2017.<sup>372</sup> This was the first step towards implementing the new age verification requirement for online pornography. From April 2018 a person must prove that he or she is 18 before viewing pornography online in the United Kingdom.<sup>373</sup>

2.141 As stated above the new system is policed by the British Board of Film Censorship, but publishers of pornography will implement their own age checks. Section 16 of the Act provides for the designation and funding of the age-verification regulator who may be different persons for different functions.<sup>374</sup> It has been speculated that the British Board of Film Classification may hand over the age verification platform to a third party in the private sector.<sup>375</sup> Further speculation is that this third party may be Mindgeek<sup>376</sup> which has developed its own age verification platform, AgeID.<sup>377</sup> According to the Act sites which fail to identify users can be fined up to £250,000, and the government can ask payment services to withdraw their support.<sup>378</sup> Although the safety, security and anonymity of users' information have been questioned,<sup>379</sup> this concern seems to be coupled to the mode of implementation and not necessarily the principle of age verification. However even if there is veracity to this concern it may not be sufficient in the face of the harm to be prevented, especially when reference is made to the mainstreaming of pornography which lessens the stigma attached to viewing it.

2.142 Additionally the Online Safety Bill [HL] 2016-17 has been tabled for debate. It promotes online safety, requires ISPs and MPOs to provide an internet service that excludes adult-only content; and provides for a range of measures which include provision of online safety measures.<sup>380</sup>

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<sup>372</sup> UK Parliament Department for Digital, Culture, Media and Sport "Digital Economy Act commencement: Written statement – HCWS51" 17 July 2017 available at <https://www.parliament.uk/business/publications/written-questions-answers-statement/writt...> Accessed on 2 January 2018.

<sup>373</sup> Waugh R "New porn laws due in April will force porn sites to ID everyone – here's what you need to know" Metro News 15 January 2018 available at <http://metro.co.uk/2018/01/15/new-porn-laws-due-april-will-force-porn-sites-id-everyone-..> Accessed on 22 January 2018; Cooper D "Pornhub owner may become the UK's gatekeeper of online porn, But who watches the watchers" 23 November 2017 available at <https://www.engadget.com/2017/11/23/pornhub-mindgeek-age-verification-ageid-digital-economy-uk-online-porn/>.

<sup>374</sup> Section 16(2).

<sup>375</sup> Cooper "Pornhub owner may become the UK's gatekeeper of online porn".

<sup>376</sup> According to Cooper "Pornhub owner may become the UK's gatekeeper of online porn" Mindgeek is the conglomerate that owns some of the world's most visited porn sites, including Pornhub, RedTube and YouPorn.

<sup>377</sup> Ibid.

<sup>378</sup> Waugh "New porn laws due in April".

<sup>379</sup> Ibid.

<sup>380</sup> House of Lords Summary of the Online Safety Bill 2016-17 (UK), available at

2.143 Voluntary default filtering has had its share of growing pains. Some legitimate sites have been blocked by ISPs and MPO's in the United Kingdom. In an attempt to allow children access to educational advice for young people the United Kingdom Council for child Internet safety met with ISPs, charities, representatives from government, the BBFC and MPO's. Some of the sites are aimed at educating young people about topics such as sex, drugs and health issues. For example it is reported that one of the ISPs failed to identify 7 percent of adult content online whilst blocking sites such as the Edinburgh's Women's Rape and Sexual Abuse Centre.<sup>381</sup> Consequently they began constructing a **whitelist** of the charity-run educational sites for children that should be unblocked by ISPs.<sup>382</sup>

2.144 It is also not clear if filtering will be applicable to online private chatrooms and the use of webcams through which real time and on demand pornography is provided. These performances are live streamed, not recorded and therefore not classified. It would seem that the Digital Economy Act will not be applicable.<sup>383</sup> According to Stuart webcam hosting sites process all their transactions through the banking system, which in turn charges between 7% and 15% for providing payment facilities. She also reports that the hosting site retains between 40% and 65% of the performer's earnings, estimated at between US\$2 and US\$3 billion in 2016 alone.<sup>384</sup> It would seem that specific obligations would need to be applied to hosting sites, independent performers and to banks to ensure that children do not have access to these performances.

2.145 It is pertinent to note that in South Africa the convergence between online pornography and prostitution - whereby adults are paid to perform certain sexual acts over a webcam - amounts to the operation of illegal online brothels and illegal distribution as an adult licence is needed in terms of the FPA for distribution of such material and prostitution is illegal in terms of the Sexual Offences Act 23 of 1957.<sup>385</sup> The FPB Amendment Bill however

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<sup>381</sup> <http://services.parliament.uk/bills/2016-17/onlinesafety.html>  
Vincent J "Government to introduce approved website 'whitelist' to counter indiscriminate filters" 31 January 2014 available at <http://www.independent.co.uk/life-style/gadgets-and-tech/government-to-introduce-approv...> Accessed on 30 January 2018.

<sup>382</sup> Ibid.

<sup>383</sup> Stuart R "Webcamming: the sex work revolution that no one is willing to talk about" The Conversation available at <https://theconversation.com/webcamming-the-sex-work-revolution-that-no-one-is-willing-to-talk-abo...> Accessed 26 January 2017.

<sup>384</sup> Ibid.

<sup>385</sup> Section 2 of the Sexual Offences Act 23 of 1957 makes it a crime to keep a brothel. This Act defines a 'brothel' as 'any house or place kept or use for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose'. While the Act was drafted prior to the uptake of the internet in South Africa a purposive interpretation could be used to extend the application of this crime to the

seeks to legitimise the distribution of adult material subject to certain safeguards and age verification. If this Bill is enacted it would protect children from exposure to this material. The real time sexual abuse of children streamed over webcam is dealt with in chapter four below.

2.146 In the United Kingdom the area of online gaming has also been flagged for further attention. The functionality of online gaming platforms (computers, video game consoles, or hand-held gaming systems) has evolved and expanded to include internet access, messaging platforms, and photo and video sharing which may be of an explicit sexual nature, thus enabling people around the world to communicate and play games with each other in real time. The unique capabilities of video games often enable video and voice communications which may also be of a sexually explicit nature.<sup>386</sup>

2.147 In the UK mobile operators work with the Internet Watch Foundation and law enforcement agencies to deal with the reporting of content that may contravene the criminal law. Illegal content is then removed pursuant to the required notice and take-down provisions.<sup>387</sup> Mobile operators in the UK block the internet browser from accessing any URL on a list of potentially illegal content provided by the Internet Watch Foundation.<sup>388</sup> Although the blocking of a device is useful this however does not mean that children cannot access the Internet. It is however of interest to note that the UK code of practice for the self-regulation of content on mobile phones does not cover premium rate voice or premium rate SMS text services<sup>389</sup>. These services are regulated under the PhonepayPlus Code of Practice. With regard to children accessing adult content the PhonepayPlus Code of Practice provides as follows:

‘2.3.7

Level 2 providers of sexual entertainment services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age.

2.3.8

Level 2 providers of virtual chat services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age. However, nonsexual entertainment text and picture-based virtual chat services

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internet. Furthermore section 20 of the same Act criminalises living on the earning or prostitution and committing or assisting in the commission of indecent acts.

<sup>386</sup> ICMEC Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017 3

<sup>387</sup> UK Code of practice for the self-regulation of content on mobiles. Version 3, published 1<sup>st</sup> July 2013.

<sup>388</sup> Ibid.

<sup>389</sup> See SALRC Sexual Offences Issue Paper (2015) 119 – 131 for an overview of Industry Codes of Practice in South Africa.

may be used by those aged 16-17 provided that no advertising for the service has occurred in media where the target audience is below 16 years of age.<sup>390</sup>

2.148 The United Kingdom is reported to be working on further legislation to protect children online and is said to be working on a White Paper.<sup>391</sup> It is pertinent to note that the Digital and Culture Secretary is quoted as saying that ‘letting social media companies police themselves had failed . . . internet firms had not responded to a recent request from the UK government to discuss future legislation’. For the UK Government this is said to be proof that ‘new laws are needed to redress this power imbalance’ by way of legislation.<sup>392</sup>

## 4 Australia

2.149 In Australia the Broadcasting Act 1992 (Cth) regulates pornography and media is regulated by the Classification Board. For the purpose of classification the website must be hosted in Australia and a complaint must be lodged with the Australian Communications and Media Authority (ACMA) – the ACMA must then refer the website to the Classification board for formal classification.<sup>393</sup> If it is found to be prohibited content the ACMA will issue the website owner with a takedown notice and issue a direction to have the content removed or have access restricted. The content is deemed to be prohibited where it is (or in ACA’s judgment likely would be):

- Refused classification, or classified X18+
- Classified R18+, and not protected by an adult verification system;
- Classified MA15+ and not protected by an adult verification system, where the user has paid to access the content.

2.150 The ACMA may issue local sites with a takedown notice under which the content must be removed; failure to do so can result in fines of up to \$11,000 per day.<sup>394</sup> Overseas-hosted prohibited content is added to the list of banned URLs which is provided to third party filter companies for use in content filtering systems.<sup>395</sup> With regard to child pornography and abuse, the Australian Federal Police compel ISPs in terms of the

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<sup>390</sup> UK Code of Practice 2016 (Fourteenth Edition) PhonepayPlus.

<sup>391</sup> Vincent “The UK wants to police social media with new ‘online safety’ laws” 2018.

<sup>392</sup> Ibid.

<sup>393</sup> Tokaji A “Due diligence obligation” 2016 219.

<sup>394</sup> Moses A “Banned hyperlinks could cost you \$11,000 a day” 17 March 2009 The Sydney Morning available at Herald<https://www.infowars.com/in-australia-banned-hyperlinks-could-cost-you-11000-a-day/>. Accessed 9 February 2018

<sup>395</sup> Tokaji “Due diligence obligation” 2016 219.

Telecommunications Act 1997 to block such websites, using a blacklist<sup>396</sup> maintained by Interpol.<sup>397</sup> And Child Exploitation Material is blocked at ISP level under the Telecommunications Act 1997.<sup>398</sup> Essentially Australia has two blacklists, the first to filter 'illegal' content, and the second used to filter additional content unsuitable for children. The first is mandatory and the second provides an opt out function.

2.151 There are calls that Australia should follow the example set by the United Kingdom and that ISPs should provide a default option of a pre-filtered service to block pornography and other sites harmful to children, and require provable age verification for all pornography websites.<sup>399</sup> Tokaji argues that the State has a positive obligation and is bound by a responsibility of due diligence to ensure that children are not harmed by external actors and that women are protected equally under the law. She supports a nation-wide opt-out Clean feed Internet Service Provision in Australia to all homes, tablets, smartphones and other devices that have the potential to host harmful material online which can be viewed by children.<sup>400</sup> Tokaji also supports a system where adults should be able to opt out of the 'clean feed' on request to their ISP or MPO, using an age verification process. She specifically proposes that legislative provisions against 'exposure to indecent materials' should be strengthened in Australia, and no longer only be subject to the act of 'grooming'. She endorses a restorative process for child perpetrators and victims following exposure to pornography and a thorough education program on healthy sexuality, healthy relationships and the harms of abusive behaviour.<sup>401</sup>

## 5 Germany

2.152 Against the backdrop of human rights violations and state control, measures to block certain websites thereby limiting citizen's freedom of speech have faced considerable resistance.<sup>402</sup> For this reason the German government tried to legislate for the removal of

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<sup>396</sup> This list however only targets pornography involving children under the age of 13 and considered to be 'severe'.

<sup>397</sup> Tokaji A "Due diligence obligation" 2016 219.

<sup>398</sup> Opcit 220.

<sup>399</sup> Opcit 221.

<sup>400</sup> Opcit 224.

<sup>401</sup> Opcit 227.

<sup>402</sup> This was the case in Germany when the German Family Minister tried to pass a law banning child pornography websites. Opponents not only opposed these measures on the grounds that it would constitute a limitation to the freedom of the internet but aver that censorship measures are easily bypassed and ineffective. (Spiegel Online "Family Minister vs. Freedom of Speech anti-Child Pornography Law Flounders" 29 May 2009 available at [Http://www.spiegel.de/international/germany/family-miister-vs-freedom-of-speech-it...](http://www.spiegel.de/international/germany/family-miister-vs-freedom-of-speech-it...) Accessed 8 September 2014). A voluntary agreement between government and the ISPs

child abuse material (not pornography) at source instead of blocking, but this was later revoked.<sup>403</sup> The Grundgesetz (similar to a constitution) provides for the restriction of the freedom of expression where such expression is offensive, injurious or indecent. To this end Germany currently maintains a blacklist of books, comic books, magazines, videotapes and music. The original intention of this blacklist was to shield youth from pornographic material.<sup>404</sup> Although ISPs are not responsible for transmitted information in terms of the Telecommunication Media Law 2007, 76 ISPs have been required to block right-wing extremist websites or be excluded from the Google search engine. Section 184(1) of the German Criminal Code states

'Whoever, in relation to pornographic writings . . . offers, gives or makes them accessible to a person under eighteen years of age . . . shall be punished with imprisonment for not more than one year or a fine.'

2.153 In addition, the dissemination of pornographic performances through electronic media is prohibited if the provider does not ensure by technical or other means that the performance is not accessible to persons under 18 years of age (Section 184d of the German Criminal Code). These laws are taken as a requirement for websites with adult content to implement a strict age verification system. Breindl and Wright caution that where ISPs are increasingly in charge of surveillance and filtering online traffic, the need for an independent control mechanism of these systems becomes ever more urgent.<sup>405</sup>

## 6 Zambia, Uganda, China & Namibia

2.154 Although details are lacking at this point in time Zambia has recently indicated its intention to regulate internet use by way of legislation in order to protect internet users.<sup>406</sup> In 2014 the Uganda Cabinet agreed to ban erotic dances and vulgar language on radio and television. The Ugandan Anti-Pornography Act 2014 prohibits the broadcasting of sexually explicit material in the form of still pictures, video footage and vulgar presenter utterances on

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was signed with five major German ISPs on April 22, 2009. As a result of overwhelming criticism, a legislative proposal was prepared to extend the blocking system to all ISPs and was adopted, as the Access Impediment Act on 18 June 2009. (Breindl and Wright "Internet Filtering Trends" 2012 3). A law to revoke internet blocking was however enacted in December 2011 which has meant that although internet blocking was adopted it was never applied.

<sup>403</sup> Breindl and Wright "Internet Filtering Trends" 2012 3.

<sup>404</sup> Opennet Initiative Germany 15 December 2010 available at <https://opennet.net/research/profiles/germany>.

<sup>405</sup> Breindl and Wright "Internet Filtering Trends" 2012 4.

<sup>406</sup> Gondwe K "Government to introduce laws against social media misuse" Lusaka Times 27 January 2018 available at <https://www.lusakatimes.com/2018/01/27/government-introduce-laws-social-media-misuse/> Accessed on 29 January 2018.

the airwaves. The Anti-Pornography Act, 2014 prohibits the production and consumption of pornography. Section 13(1) provides that “A person shall not produce, traffic in, publish, broadcast, procure, import, export, sell or abet any pornography.”<sup>407</sup> Under section 17(1) ISPs whose systems are used to upload or download pornography can be imprisoned for five years and fined US\$4,000.<sup>408</sup> They are further obliged to install software to block access to pornography by devices such as computers and mobile phones. Critics say the law should only require service providers to detect and suppress child pornography and that adults who consume adult pornography in private should not be stopped from doing so.<sup>409</sup> Similar arguments to those raised in the United Kingdom against filtering state that filtering content violates the principle of net neutrality, which requires ISPs and governments to treat all data on the internet equally. It is argued that liability needs to only be placed on internet content developers, publishers or broadcasters who allow pornography to be published to the public, as well as to users who consume pornography in the public domain.<sup>410</sup> The Daily Monitor reports that the Ugandan Ethics minister inaugurated a nine-member pornographic control committee to prevent use or spread of pornographic materials and information.<sup>411</sup>

2.155 China is also said to be increasing censorship of the internet, with new laws and regulations targeting online expression.<sup>412</sup> The Namibian National Conference on Child Online Protection discussed online protection of children and amongst other proposals towards law reform proposed that ICT’s should use their products e.g. SMS to remind children of protective measures and not only use them as marketing tools.<sup>413</sup>

## 7 Facebook, Google and online industry

2.156 Whereas it was thought near impossible, the cyber industry has shown that it is able to develop reactive systems and take some measures to limit users from freely accessing adult content. India’s Supreme Court has recently ordered Tech giants to overhaul child

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<sup>407</sup> CIPESA ICT Policy Briefing Series How Recently Enacted Laws Undermine Ugandan Citizen’s Rights April 2014 CIPESA Promoting effective and inclusive ICT Policy in Africa. Hard copy accessed 12 November 2018.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

<sup>411</sup> Angurini TB & Tajuba P “Lokodo appoints committee to fight pornography” Daily Monitor (Uganda) 29 August 2017 available at <https://www.monitor.co.ug/News/National/Lokodo-appoints-committee-to-fight-pornography/688334-4074914-m7iysl/index.html>.

<sup>412</sup> *Legalbrief eLaw* “Sex, lies and surveillance tapes” Cyberlaw & Technology Watch (18 October 2017).

<sup>413</sup> National Conference on Child Online Protection, Windhoek, Namibia 18 – 19 May 2016.

abuse monitoring.<sup>414</sup> This judgment follows Facebook's refusal for more than a year to remove a page featuring images of children taken in public under which users posted graphic descriptions of sexual abuse. A report in The Guardian notes that a Facebook post advertising rape videos was also permitted to stay online despite being reported several times, while police in the western state of Kerala allege another page was being used to run a child-sex ring.<sup>415</sup> The three cases were raised during an Indian Supreme Court inquiry into how technology giants, including Facebook and Google, handled abusive content from India on their platforms. The Supreme Court ordered the companies and the Indian Government to overhaul their processes for dealing with child-abuse materials and videos depicting rape or gang rape. Facebook said in a statement it was 'committed to providing a service where people feel safe'. The Supreme Court ordered the technology companies involved in the probe, which include Yahoo, WhatsApp, Microsoft and Google, to work with the Indian Government to expand their list of key words associated with child abuse material. Key words in Indian languages and slang must also be added, as should terms associated with rape and gang-rape imagery, the court said.<sup>416</sup>

2.157 Similarly Major US tech firms have reversed course and endorsed a proposal in Congress which could hold website owners liable for human trafficking and online sexual exploitation.<sup>417</sup> The US Internet Association, which includes Facebook, Google, Microsoft and Amazon, said in a statement it supported the measure after reaching a compromise with legislative sponsors of the Stop Enabling Sex Traffickers Act (SESTA).<sup>418</sup> Tech firms and others had argued earlier this year the measure, aimed at modifying the liability provisions of the Communications Decency Act, could eliminate the free-speech underpinnings of the internet, giving websites immunity from content posted by others.<sup>419</sup> Facebook has however already demonstrated that it has an algorithm to remove naked images, after it took down the image of the nine-year-old Vietnamese girl Kim Phuc running away from an American napalm attack in 1972. An algorithm essentially identified the picture and censored it demonstrating the ability of a platform to filter such images.<sup>420</sup> Although Facebook reviewed

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<sup>414</sup> Safi M "Facebook allowed child abuse posts to stay online for more than a year, Indian court hears: Post advertising rape videos was also permitted to stay online despite being reported several times" The Guardian 3 November 2017 available at <https://www.theguardian.com/world/2017/nov/03/facebook-allowed-child-abuse-posts-stay...>

<sup>415</sup> Ibid.

<sup>416</sup> Ibid

<sup>417</sup> Volz D "Lexis Nexis In reversal, US tech firms back bill on human trafficking" Reuters 3 November 2017 available at <https://www.reuters.com/article/us-usa-cyber-trafficking/in-reversal-u-s-internet-firms-back-bill-to-fight-online-sex-trafficking-idUSKBN1D32GR> Accessed on 6 November 2017.

<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

<sup>420</sup> *Legalbrief eLaw* "Sex, lies and surveillance tapes" Cyberlaw & Technology Watch (18 October



its policy on nudity on its platform in 2015 clarifying that depictions of nudity in artwork were acceptable opening the way for the posting of Gustave Courbet's L'Origine du Monde (a closeup of a woman's crotch and abdomen),<sup>421</sup> it has recently demonstrated its intention to seek to provide a safe online space for children with a number of multi-sectoral engagements.<sup>422</sup>

2.158 Facebook's public policy team for the Southern African Development Community (SADC) region has indicated that it seeks to better partner with more local organisations to raise awareness of its safety resources. Some of the resources available on the Facebook platform include: 'Safety Centre Resources'; 'Parents' Portal'; 'Bullying Prevention Hub'; 'Online wellbeing'; 'Security Check-up'; 'Privacy Check-up'; 'Our Community Standards'; 'and 'Safety for Journalists'. Facebook has also publicly announced through its chief privacy officer that it would introduce a new education campaign to manage privacy settings, make core privacy settings easier to find, and to share Facebook's privacy principles.<sup>423</sup> Facebook's new education videos are set to appear in users' timelines and will feature topics like how to control what information Facebook uses to show adverts etc.<sup>424</sup> One of Facebook's policies is that it may remove certain kinds of sensitive content or limit the audience that sees it in order to encourage respectful behaviour and to help balance the needs and safety of its diverse community.<sup>425</sup> It is unclear how this plays out though. Although Facebook requires a user to be 13 years old to create an account and makes an open ended statement that its privacy and visibility settings for teens are generally more restrictive than the setting for adults, it also states that '[Y]ou're in charge' giving 'people control over what content they share, what content they see and experience, who can contact them, with whom they share, and more.'<sup>426</sup> Protective measures are mostly reactionary in that users can report content and block people.<sup>427</sup> Users are expected to be respectful and accountable for selecting their own privacy and audiences. To its credit Facebook has proactively developed a global Safety Network of partners for advice on

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2017) Issue no: 1716.

<sup>421</sup> The Guardian AFP in Paris "Facebook to French court: nude painting did not prompt account's deletion: Teacher says his account was shut down because he posted a Gustave Courbet painting of a woman's genitals" 1 February 2018 available <https://www.theguardian.com/technology/2018/feb/01/facebook-nude-painting-gustave-cour...> Accessed 5 February 2018.

<sup>422</sup> Facebook Public Policy Team meeting at Facebook Offices Johannesburg South Africa October 2017.

<sup>423</sup> Legalbrief Cyberlaw & Technology Watch (7 February 2018) Issue Number 1718.

<sup>424</sup> Ibid.

<sup>425</sup> Safety at Facebook booklet.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

safety issues and to bring online safety educational campaigns as is alluded to above.<sup>428</sup> Google has in turn removed apps targeted at children from its online store after it was revealed they were infected with malware that encouraged users to click on pornographic content and advertisements. It displayed pornographic adverts and tried to trick users into buying premium services.<sup>429</sup> Dubbed ‘AdultSwine’ by researchers, the malware hid inside gaming apps that Google Play data says were downloaded up to 7 million times. The most shocking element of this malware is its ability to cause pornographic adverts (from the attacker’s library) to pop up without warning on the screen over the legitimate game app being displayed.<sup>430</sup> YouTube (owned by Google) on the other hand is said to have recently lifted restrictions from videos showing Swaziland’s reed dance, which featured bare-breasted women. It is reported to allow nudity when ‘culturally relevant or properly contextualised’.<sup>431</sup> This followed the classification as ‘age restricted’ or removal of material being posted by young South African girls in a cultural context where their breasts were exposed.<sup>432</sup> This aligns with the definition of what is considered ‘pornography’ in the SOA. The SOA requires stimulation of the breast for inclusion in this definition. Furthermore in terms of section 56(8) of the SOA a person may not be convicted of an offence in terms of section 9 or 22 (exposure of female breasts to an adult or child ‘flashing’) if that person commits such act in compliance with and in the interest of a legitimate cultural practice. There is an increasing awareness of the need for a more nuanced approach. Speaking in China Apple CEO Tim Cook has also called for future Internet and AI technologies to be infused with privacy, security and humanity.<sup>433</sup>

2.159 Some of industry’s reticence to actively monitor the internet may have to do with cost. To this end the UK’s Supreme Court is expected to provide guidance in a case before it to decide on website blocking costs.<sup>434</sup> While this particular case has to do with customers’

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Ibid.

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Legalbrief eLaw Cyberlaw & Technology Watch 17 January 2018.

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Ibid.

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Legalbrief eLaw Cyberlaw & Technology 18 October 2017.

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Allison S “Hey Google, our breasts aren’t sexual” Mail&Guardian 12 October 2017 available on [www.mg.co.za](http://www.mg.co.za) Accessed on 25 September 2018. Facebook’s community standards par 14.regulates adult nudity and sexual activity stating that its nudity policies have become more nuanced over time. It states that nudity can be shared for a variety of reasons including images of female breasts that include the nipple and where the intent is clear allowances are made for the content. Available at [facebook.com](http://facebook.com). This follows protests by the cultural pride group Indoni against the removal of pictures which show women in cultural attire with their breasts exposed during cultural gatherings such as the reed dance. Motau K “Indoni feels ‘bullied’ by facebook, instagram over posts”. EWN 28 October 2017 available at <https://ewn.co.za> Accessed 25 September 2018.

433

Legalbrief Cyberlaw and Technology Watch (6 December 2017) Issue No: 1712.

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Out-Law.com “Supreme Court begins to hear arguments regarding website blocking for trade mark infringements” 30 January 2018 available at <https://www.out-law.com/en/articles/2018/january/supreme-court-begins-to-hear-arguments-regarding->

access to websites that facilitate the sale of fake goods it has relevance to this discussion. The Court of Appeal has already held that courts in England and Wales could impose injunctions on ISPs requiring them to block their customers' access to websites facilitating the sale of goods that infringed trademarks. The counter-argument is that innocent parties caught up in the illegal activities of others are rarely expected to pick up the costs of providing the solution. For this reason the Supreme Court's ruling in this case is likely to provide guidance on the circumstances in which costs will be payable by ISPs in similar cases in future.<sup>435</sup>

## E. Discussion and preliminary recommendations

2.160 When discussing access to or engagement with certain information offline or online a balancing of interests becomes pertinent. Constitutionally guaranteed rights including the right to freedom of expression,<sup>436</sup> which includes the right to receive certain types of information; the right to privacy,<sup>437</sup> which includes the right not to have certain communications intercepted when in private; the right to dignity<sup>438</sup> and the protection of children against physical, sexual and mental abuse<sup>439</sup> all need to be considered.<sup>440</sup> South Africa's legislative framework in respect of pornography focuses on children's general protection, with limited and sometimes fragmented recognition of safety for children.<sup>441</sup> As stated in Chapter one a number of laws and or amendment laws and policies seeking to, amongst others address matters of online safety for children are in various stages of deliberation and completion.<sup>442</sup> Most respondents link exposure to pornography and the objectification of the female and child body to a **rise in sexual attacks** and a number of other negative outcomes. A related outcome is the **unrealistic sexual values** that female youth develop from being exposed to pornography i.e. it may create a distorted picture of male and their own sexuality. The same could be said for male youth who may develop a skewed picture of what their own sexuality should be like. This is often forgotten as girls and women are consistently seen as the only victims of sexual offences.

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website-blocking-for-trade-mark-infringements/ Accessed on 7 February 2018; Legalbrief Cyberlaw & Technology Watch 7 February 2018.

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Ibid.

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Section 16 of the Constitution.

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Section 14 of the Constitution.

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Section 5 of the Constitution.

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Section 28(2) of the Constitution.

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Nel S "Child Pornography and the Internet – A Comparative Perspective" (2008) 41 Comp.& Int'l L.J.S.Afr. 221.

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Bulger et al Where policy and practice collide 2017 5

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Opcit 6

2.161 The Commission is of the view that while seeking to protect children from exposure to pornography it should be acknowledged that **children are sexual beings albeit not sexually knowledgeable beings**. This means that even if prohibitive measures are put in place, this will not necessarily stop children from seeking or accessing sexual content (including pornography). The Commission's advisory committee to this project is of the view that the endogenous chemical response to watching pornography is also experienced during consensual legal sexual relations and that committing sexual crimes is not an inevitable outcome of watching pornography. Many factors can and do mediate the impact of exposure to pornography. Mediating factors include guidance on responsible sexual behaviour and a strong appreciation of human and child rights inculcated during childhood and youth. It is also necessary to note that although a call has been made by a number of respondents to place an outright ban on all pornography in South Africa, the review of the legality of adult content/pornography falls outside of the framework of this investigation and is a matter of policy. The current principles which inform media classification in South Africa include recognizing that adults are free to make their own, informed media choices alongside the need to protect children from material which may cause harm.<sup>443</sup> During the Second Reading debate of the FPA Amendment Bill in Parliament the National Assembly was informed that 'significant changes in the way South Africans access media content has sometimes been to the detriment of societal values enshrined in the Constitution' and that children needed to be protected from harmful content.<sup>444</sup> Amidst the growing concern for the wellbeing of children it is however necessary to voice a word of caution in respect of the numerous quotes pertaining to statistics. Unfortunately not all statistics in this often hidden area of the law are supported by science. In fact it is posited that crime statistics do not measure the incidence of crime, but rather measure the reporting behaviour of victims.<sup>445</sup> Consequently it is **important to guard against speculation** and at times exaggeration in order to make the situation appear more ghastly than it is. Having said this, conservative statistics from other countries in respect of exposure to pornography and an increase in adolescent sex offenders and an increase in sexual assaults perpetrated by young children are similar in South Africa and fairly consistent.<sup>446</sup>

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<sup>443</sup> Hansard Films and Publications Bill 6 March 2018 8.

<sup>444</sup> Opcit 9.

<sup>445</sup> Tilley A and Dey K "Police crime statistics: do they reflect the real reporting behaviour of victims?" Daily Maverick 10 September 2018 " available at <http://www.daily-maverick.co.za/article/2018-09-10-police-crime-statistics-do-they-reflect...> Accessed on 10 September 2018.

<sup>446</sup> Van Niekerk J Dr; and Tilley and Dey "Police crime statistics" where the authors state that 'crime statistics do not measure crime; they measure reporting behaviour of the victims of crime since at the reporting stage these cases are not proven' and '[A]s for sexual offences such as rape, these are probably the hardest of all crimes to report'.

2.162 The Commission agrees with Ms Riba that **therapy or counselling** for children exposed to pornography- including children in conflict with the law- who have become affected by or addicted to pornography should always be considered and may be a useful tool in arresting the cycle of abuse. It however does not agree that therapy or counselling should be made compulsory as forcing a child to have therapy may be counter-productive. The Commission has been advised that trauma or sexual abuse takes agency away from children. For this reason receiving treatment or assistance should remain optional.

2.163 The comment on the need to **consolidate all matters relating to children and pornography in the SOA** and to provide **adequate/minimum sentencing and procedures** is also noted and will be dealt with in more detail under chapter four dealing with child sexual abuse material and chapter 6 dealing with investigative and procedural issues. The comment suggesting inclusion of child sexual abuse material offences as an exception to prescription will also be dealt with in Chapter four. The challenges relating to the prosecution of internet based crimes will be addressed in Chapter six below.

2.164 In recognition of the South African context respondents to the issue paper have recommended **legislative and non-legislative measures** to protect children from exposure to adult content. Areas that were flagged as particularly problematic include insufficient website content and age appropriate access control, exacerbated by the easy availability and access to the internet; advertising of mobile phone pornography on television and unsolicited pop-up advertising with direct links to online pornography; and negligence by adults around adult material. It is worth noting that these concerns were reiterated by the Minister of Communications during the Second Reading debate of the Films and Publications Amendment Bill on 6 March 2018.<sup>447</sup>

2.165 The Commission recognises that the role of the FPB is not to create crimes but to classify content and for this reason it provisionally agrees with the majority of the respondents that all related sexual offences, including offences involving pornography should be in one Act, namely the SOA. The Commission notes the comment of some respondents that the implementation of the law and regulations to the FPA is problematic. The Commission is however mindful that legislative change would not be apposite to address problems with implementation. Training, monitoring and evaluation of the

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<sup>447</sup> Hansard Films and Publications Bill 6 March 2018 4.

application of the law might be the correct process to follow. The prevalence of poverty, unemployment and inequality are also contributory socio-economic factors that should be recognized as factors that impact on the added vulnerability of children and the non-reporting of pornographic related offences involving children. The effect of these factors is intensified where a child has inadequate education or access to knowledge. The Commission agrees with the NPA that directives, instructions, regulations and policies issued in terms of section 66 of the SOA should be amended to address the investigation of pornographic related offences involving children. Any amendment of the SOA will necessitate the amendment of all existing directives by all roleplayers identified in the SOA.

## 1 The internet

2.166 South Africa is reported to have relatively high levels of ICT use for the region. 70% of youth aged 9 – 17 access the internet mostly through mobile phone technology,<sup>448</sup> with half of those having access whenever they wanted.<sup>449</sup> The Centre for Justice and Crime Prevention’s South African Kids Online study found that 95.6% of these children reported that they sometimes or always had fun when they went online.<sup>450</sup> A number of opportunities were referred to, including receiving assistance with school work and socializing. A drawback identified by half of these children and two thirds of the parents was that they **could not access content online in their first language**.<sup>451</sup> This finding is important to take note of, particularly when it comes to information on online safety. Le Mottee et al have found that particularly the use of English only is problematic.<sup>452</sup> Contextually this is an important observation given that South Africa has 11 official languages, in which just less than a tenth of South Africans are first-language English speakers.<sup>453</sup> The warnings of “SLV” or “PG” on any form of technology or television may hold no meaning in other languages and the required action would remain unclear.

2.167 The Commission agrees with the view that **safety initiatives** and messages irrespective of the platform should be **available in South Africa in all official languages** and not only English. Furthermore it is of the view that these messages should be effectively

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<sup>448</sup> Bulger et al Where policy and practice collide 2017 5; Burton,et al “South African Kids Online” 2016.

<sup>449</sup> Burton,et al “South African Kids Online” 2016.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid.

<sup>452</sup> Le Mottee,C., Leoschut,L.T, Leoschut,L.C, and Burton P. Digital Parenting in South Africa: Understanding parental mediation in the digital age. (2016) Cape Town: The Centre for Justice and Crime Prevention 19

<sup>453</sup> Ibid.

communicated and accessible to users and where apposite to their parents who may be illiterate. This may necessitate verbal, illustrated or demonstrated instruction e.g. pictograms. The Commission wishes to emphasize that children must be protected from being exposed to pornography, not only in theory but in a substantive manner.

2.168 Some parents do not seem convinced that their interaction with their children on the use of ICTs and the internet is successful. A few parents are reported to employ different approaches, such as monitoring use and or communicating on risks; but even they acknowledge that children hide their activity, act out if restricted and may even not listen to guidance given.<sup>454</sup> The reason most frequently given for not being able to monitor or guide usage was that these parents were not digitally literate themselves and particularly where they faced challenges of a socio economic nature linked to literacy.<sup>455</sup> A culturally specific challenge is that speaking openly about sex or related matters are taboo in many African cultures and communities.<sup>456</sup> The matter of the *Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others*<sup>457</sup> illustrates this point in that a number of traditional bodies took exception to the FPB classification of the film *Inxeba* (the Wound) as 16LS. On appeal, the Film and Publication Tribunal classified the film as X18 SLNVP. It is however of interest to note that the Centre for Justice and Crime Prevention's South African Kids Online study found that 'parents who did use the internet tended to be roughly as skilled as their children, and sometimes more skilled.'<sup>458</sup> According to Burton et al, potential risks were mitigated by nearly half of the children's use of privacy settings and being able to use blocking tools. However half of the children had seen sexual images online in the past year and a third had received a sexual message.<sup>459</sup> Roughly 20% of these children had:

'been sent a message they did not want with advertisements for or links to x-rated websites, 19.2% opened a message or a link in a message that showed pictures of naked people or of people having sex that they did not want and 20.3% had seen or received a sexual message, image or video about someone else that they did not want. More boys than girls experienced this kind of unwanted sexual contact, but more girls than boys had been asked unwanted sexual questions about themselves.'<sup>460</sup>

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Opcit 7.

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Opcit 17.

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Opcit 8.

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*Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others* (3589/2018) [2018]ZAGPPHC 438 (27 June 2018).

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Burton,et al "South African Kids Online" 2016.

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Ibid.

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Ibid.

2.169 According to discussions held at the MMA multi-stakeholder workshop parents in urban areas seem better equipped to dealing with questions and uncomfortable situations that might arise with their children online.<sup>461</sup> However the Kids Online study reveals that **parents, teachers and friends played a negligible role in protecting and making children less vulnerable online.**<sup>462</sup> For this reason Dr van Niekerk argues that children should be taught critical learning so that they can learn to make ‘good’ decisions.<sup>463</sup> Respondents to the issue paper have made a strong call for the Department of Basic Education and content providers offering child-oriented services to provide **effective awareness and education on ICT and social media.** Respondents seem to generally be in favour of a holistic approach which includes programs to educate children and their caregivers on online safety; the provision of accessible online tools; and restricting access to adult content online. **Specific recommendations** include special task teams, the confiscation of the material and the source of the material where required even if legal and appropriate family intervention strategies including, where deemed necessary, the removal of the child and other children following social service intervention. It is important to note that the SAPS Family Violence, Child Protection and Sexual Offences Investigation Service has recently already expanded to include a specialized leg i.e. Serial and Electronic FCS Investigations (SECI) to address crimes of this nature.

2.170 The Commission agrees that there is a real need for an in-depth understanding of the nature of technology including internet technology and how it is used to abuse and exploit children in South Africa. It supports Chetty’s view that the argument that the internet is not open to regulation due to its global and borderless nature is not relevant where the aim is not the regulation of the internet but the regulation of children’s access to objectionable materials by adopting strategies and measures that would minimize the risks of unwanted exposure. The Commission extends the need for understanding to the exposure of children to harmful content through the broader category of media, including where children are exposed through self-access. The Commission is mindful that the development of modern ICT’s and the media is largely controlled by the private sector. Amidst the calls from industry to self-regulate and the view of Dr van Niekerk that legislation is a clumsy tool to use for regulating content, especially when trying to keep the content away from children,<sup>464</sup> the question should be posed as to how it is necessary in the offline world to have statutory protection, but in the online world self-regulation will do? The problem of children being

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<sup>461</sup> MMA *Report on Online Regulation One Year On: What’s changed?* 2017 24.

<sup>462</sup> Burton, et al “South African Kids Online” 2016.

<sup>463</sup> MMA *Report on Online Regulation One Year On: What’s changed?* 2017 23.

<sup>464</sup> Ibid.



exposed to pornography is broader than a need for moral policing, both on a personal and societal level. On a personal level the negative psychological and addictive outcomes for pornography viewers are well documented. The question of what the best interest of the child is becomes pertinent. According to Dr van Niekerk protection of children online is a fine balancing act. In her view children should be given access to the internet (and by extension to all media) that is reasonable and age appropriate because over protection is also a risk. Children need to be given the skills to critically engage with the content they come across and know how best to respond to things that are not appropriate.<sup>465</sup> In Dr van Niekerk's view most children are quite careful about their use of the internet. She notes that funding of self-regulation should also be considered, as self-regulation goes hand in hand with the ability to pay for the self-regulatory mechanism.<sup>466</sup>

2.171 One way to address the access and exposure of children to pornography would be to **establish close working partnerships** between the law enforcement authorities and the ICT industry and internet and wireless application service providers by way of a memorandum of understanding. An alliance between legal regulation and self-regulation includes placing obligations on internet intermediaries to:

- Take steps to prevent the use of their services for the hosting or distribution of pornography to children;
- Report knowledge, and even 'good-reason suspicion', of the commission of any offence related to the exposure of children to pornography; sexual abuse and exploitation of children, including grooming; and
- Provide such support and information as the police may require for the effective investigation of any reported information related to a child's access or exposure to pornography.

2.172 Furthermore as explained in the issue paper ISPA is currently the only recognized Industry Representative Body in South Africa.<sup>467</sup> In compliance with its Code of Conduct 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. The Commission reiterates its concern that none of the mobile network operators – Vodacom,

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<sup>465</sup> Ibid.

<sup>466</sup> Ibid.

<sup>467</sup> SALRC Sexual Offences Issue Paper (2015) para 3.184 and further.

MTN, Cell C and Telkom Mobile – are ISPA members.<sup>468</sup> However it notes that the South Africa’s Cellular Operators Association has adopted a Code of Good Practice<sup>469</sup> which is applicable to all mobile content services provided via the mobile operators’ networks. It is also worth noting again that mobile operators are 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,<sup>470</sup> and blocking of handsets for ‘child pornography’ and ‘adult content’ can be effected after purchase and are not default settings.<sup>471</sup> This again provides for protection in the formal sense but to amount to substantive protection the requirement would be for the default setting to be a block against harmful content and for it to be lifted on production of proof of age.<sup>472</sup>

2.173 It should also be noted that 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’. Sections 24C(2) and (3) are of relevance to this chapter.<sup>473</sup> Although these obligations are crafted in broad strokes it is coupled to a penalty which does not match the severity of the offence. However, it does include the obligation to protect children against the commission of ‘any offence against a child’. This would include being

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<sup>468</sup> Opcit para 3.185.

<sup>469</sup> Opcit para 3.196.

<sup>470</sup> Opcit para 3.197.

<sup>471</sup> Opcit para 3.199.

<sup>472</sup> Endorsed by Deborah Nkobane of Child Welfare; Elfrieda Fleischman. Monica Chikane however comments that due to the risk of exposure to pornography children under 18 should not have mobile phones.

<sup>473</sup> For ease of reference it is included below:

‘(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.’

exposed to pornography in terms of section 19 of the SOA i.e. being exposed to pornography or an act of an explicit sexual nature of an adult which may be disturbing or harmful to, or age-inappropriate, for children.<sup>474</sup> This is an offence irrespective of whether the child was a willing participant or not. Furthermore although section 27A requires ISPs to register with the FPB it is only enjoined in terms of this section to take steps to prevent its services from hosting or distributing 'child pornography'. Despite non-compliance with these provisions being criminalised, it would seem that compliance on the part of the majority of ISPs and enforcement of penalties for non-compliance in terms of the FPA is lacking.

2.174 Although the DOC has confirmed by way of submission that content service providers are obliged to report any offence to SAPS, Google South Africa confirms that there appear to be more obligations on content service providers than those that apply to 'internet access and service providers'. It however points out that the reference in section 24C in the FPA to 'any person' who provides 'child-oriented services' is ambiguous and requires more clarification. Google South Africa submits that it is not clear which service providers would fall under this category. **The Commission requests submissions to provide clarity on this.** The Commission flags the inconsistency between the heading of section 24C and the content thereof. It further flags the limitation of section 24C as it is applicable to domestic ISPs and not internationally based ISPs. The Commission further notes the submission by the NPA that section 24(C)(1)(b) specifically refers to people previously unacquainted which would exclude people who connect on social media who are acquainted. **The Commission requests comment on whether the wording in the FPA should be amended to specifically include acquainted people (Sec 24C(1)(b)) and whether there is a need to align the definition in section 24C(1)(d)(ii) for content service with the specifications of RICA.** The NPA argues that this would be essential in relation to the interception of information for purposes of investigations and prosecution. **The Commission requests submissions regarding the extent to which international platforms such as Google and WhatsApp (owned by Facebook) are bound by local legislative enactments whether they do or do not have a local presence.** The Commission further suggests that the DOC consider the inconsistencies between the 2014 Regulations and the FPA that have been identified by the Commission in its issue paper, particularly that 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.<sup>475</sup>

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<sup>474</sup> Section 24C(2)(a).

<sup>475</sup> SALRC Sexual Offences Issue Paper (2015) para 3.123.

2.175 The advisory committee supports the view of MMA that content providers that are offering child-oriented services are not doing enough. Google and Facebook are selling advertising. These companies do not seem to have a single set of morality rules; they only seem to apply what is strictly necessary by law in a particular country to ensure formal compliance. Google for example has no age restriction. The Commission is of the view that pop up links to pornography are not inadvertent. The view is further held that users are consciously targeted with the aim of developing addiction and online behaviour which may be habit forming. The point is to get online users ‘through the door’ in very much the same way as tobacco and alcohol advertising. This advertising seems to be wilful and directed and not inadvertent. Although the Commission is mindful that there is a shift in community values towards more liberal views around sexual conduct and advertising the pop ups are directed from a corporate commercial perspective. **The view is therefore held that these companies need to take a greater responsibility for the conscious targeting of children. The Commission believes that the best way to do this would be to enforce or expand existing sanctions in terms of the FPA and SOA and if necessary to create further sanctions or develop existing sanctions that match the severity of the offence.** Children’s exposure to pornography and harmful or explicit content is already a crime in terms of the SOA. Section 19 of the SOA clearly criminalises the conduct of a person who exposes or displays or causes the exposure or display of pornography; an act of an explicit sexual nature of an adult person; and material which may be disturbing or harmful to, or age-inappropriate for children in terms of the FPA or in terms of any other legislation. As the word ‘person’ is not defined in the SOA the legal interpretation of the word ‘person’ in terms of the Interpretation Act 33 of 1957<sup>476</sup> is apposite which means that a person can be a juristic person or a non-juristic entity. It could be argued that internet access or ISPs may be guilty in contravention of the SOA of directly exposing or displaying pornography to children or causing them to be exposed to pornography by allowing pornographic pop ups or access to or redirection to pornographic sites or are at least complicit to such a crime. Exposure and viewing of pornography has a ripple effect on a societal level where the normalization of sexual violence in a culture with high levels of sexual violence against women and children exposes women and children to further violence and lack of compassion to victims of sexual violence.

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<sup>476</sup>

“person” includes—

- (a) any divisional council, municipal council, village management board, or like authority;
- (b) any company incorporated or registered as such under any law;
- (c) any body of persons corporate or unincorporate;

2.176 The Commission is mindful that the FPA Amendment Bill [B37B-2015] seeks to address a number of the challenges that have been identified in this chapter. It will however also in effect legalise the online distribution of adult content i.e. 'X18' content on all platforms including digital platforms. In order to regulate online distribution it places obligations on internet access providers regarding curbing the use of their services in propagating prohibited content.<sup>477</sup> The Bill specifically requires that classification decisions be displayed in respect of films and games including those classified by a commercial online distributor and approved for sale or hire online.<sup>478</sup> The Bill seeks to amend section 24 of the FPA to allow for the online distribution of films or games classified as 'X18' provided that a registered distributor has mechanisms in place to ensure that the material will not be distributed to children under the age of 18 and the classification details are clearly displayed throughout the screening thereof. The distributor is also obliged to keep a register of all users. The proposed sub-clause reads as follows:

'(3) Any person who is registered as a film or game distributor in terms of section 18(1)(a) may, subject to an exemption being granted by the Board, distribute a film or game classified as "X18" online, subject to the following conditions:

(a) The distributor shall ensure to the satisfaction of the Board that children under the age of 18 would not be able to access such a film or game on-line;

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<sup>477</sup>

The Bill seeks to insert the following pertinent definitions in the FPA:

'commercial online distributor' means a distributor in relation to films, games and publications which are distributed for commercial purposes using the internet;'

'distribute in relation to a film, game or a publication, without derogating from the ordinary meaning of that word, includes –

- (a) to stream content through the internet, social media or other electronic mediums;
- (b) to sell, hire out or offer or keep for sale or hire, including using the internet; and
- (c) for purposes of sections 24A and 24B, to hand or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereof by such a person;'

'distributor' means a person who conducts the business of distributing films, games or publications and includes a commercial online distributor;'

'harmful' means causing emotional, psychological or moral distress to a person, whether it be through a film, game or publication through any on or offline medium, including through the internet and 'harm' has the corresponding meaning;'

'non-commercial online distributor' means any person who distributes content using the internet, or enables content to be distributed by a user of online services, for personal or private purposes;'

'prohibited content' means content which amounts to propaganda for war, incitement of imminent violence, advocacy of hatred that is based on an identifiable group characteristic, and that constitutes incitement to cause harm, or is prohibited in sections 16(2), 16(4) and 18(3);'

<sup>478</sup>

Clause 18l.

- (b) the distributor shall ensure that the classification and age restriction are clearly displayed on the screen of the user throughout the screening;
- (c) the user must confirm that he or she is 18 years or older prior to commencing viewing of the film or playing the game;
- (d) the distributor shall not distribute any promotion of the film or game to be accessed without it being paid for by way of a credit card or another child secure method agreed to by the Board and, for the purposes of this subsection, the promotion of the film shall be subject to the same conditions regarding distribution as the main feature of the film or game;
- (e) the distributor shall keep, solely for his or her private records, a register of all instances where access was granted to a user, whose name, address and verifiable age must be noted in the register kept for that purpose; . . .
- (h) if the film or game is exhibited online in a public place, that place must be a licensed premises in terms of subsection (1); . . .
- (j) a distributor who knowingly or negligently grants access to a film or game classified as "X18" to a child under the age of 18 shall be guilty of an offence as contemplated in section 24A(4); ...'

2.177 The Bill further seeks to amend the heading of section 24A of the FPA by connecting prohibitions, offences and penalties found in the FPA to **possession** of films, games and publications instead of **distribution and exhibition**. Section 24A however inter alia still criminalises the intentional distribution or exhibition in public of a film or game without being registered by the FPB. It also criminalises a person who does not have a licence to conduct the business of an adult premises and is not registered with the FPB as a distributor or exhibitor of films and games, where such person conducts business with any film, game or publication which has been classified 'X18' or would have been so classified had it been submitted for classification.<sup>479</sup> Section 24(4) is amended to provide that any person who knowingly distributes or exhibits a film, game or publication classified as 'X18' or which contains depictions, descriptions or scenes of explicit sexual conduct which would have justified an 'X18' classification to a person under the age of 18 is a crime. It would also be a crime not to clearly display advisories during advertising or the showing of the film, game or publication itself. The fines connected to these offences have been upwardly revised and range from R50000 to R750000.

2.178 Bearing in mind that no tier one ISPs operate from South Africa **the Commission submits that its preferred option would be for ISPs and MPOs to provide for a clean feed internet (adult content filtering) as the default position** as is the case in the United Kingdom. This would include all mobile phones having software embedded to prevent any and all access to pornographic sites. The default assumption would be that a user is under the age of 18 years and that information about online safety should be provided to account

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<sup>479</sup> Section 24(3).

holders in a prominent and easily accessible format throughout the duration of their contract. **The SOA should be amended to allow for users to opt-out of the clean feed regime by providing proof of age of majority. In addition the FPA could be amended to provide similarly for a clean feed regime for material deemed unsuitable for children.** It would be necessary to be mindful of the challenges experienced in the UK and it would be necessary to engage ISPs, NGOs, and representatives from government to compile a whitelist for suitable content. Australia has additionally compiled two blacklists for ISPs to block websites with banned material, one which is mandatory for illegal content and the other which operates on an 'opt-out' system where the content is considered unsuitable for children. This would mean that illegal sexual content classified or deemed to be classified as 'XX' or a 'refused classification' i.e. 'child pornography' as defined in the FPA or as defined in the SOA would be blocked at source. And that any film, game or publication classified or constituting material which would be classified 'X18' by the FPB; or amounts to 'sexual conduct' as defined in the FPA or 'pornography' as defined in the SOA would have to be subjected to age verification to prevent a person under the age of 18 years from gaining access to it. This amounts to a clean feed or filtering at tier two level. The Commission is mindful of the fact that ISPs cannot fix everything and that there are limitations on the ability of networks to ensure that children are not exposed to pornography. As stated above peer-to-peer sharing may circumvent protective measures and require that a take-down notice be issued. The Commission further provisionally recommends that the person who registers misleading domain names, words or digital images and provides for the use of sexual 'pop ups' or similar advertising aimed at enticing users to explicit sexual content be criminalised.<sup>480</sup> The Commission encourages ISPs and other roleplayers in the internet content delivery value chain to engage with these proposals as set out in the discussion paper.

2.179 The Commission proposes the following preliminary recommendations for law reform in order to further criminalise the exposure of children to pornography. These recommendations are based on the current law which provides that pornography may only be purchased in terms of the FPA at adult premises.<sup>481</sup> If the FPA Bill is adopted into law, allowing pornography online in accordance with its proposed amendment to the FPA, it would be on the basis that adults would have to 'opt-out' of the clean feed service by amongst other things providing proof that they are over the age of 18. In order to provide

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<sup>480</sup> The exemption of aesthetic merit has been re-included in the FPB Bill guidelines – but this does not seem to be the intention of the amendments.

<sup>481</sup> Section 24 of the FPA.

legislative clarity it would be necessary to augment the crime of exposing a child to pornography in terms of the SOA.

2.180 The Commission suggests the amendment of section 19 of the SOA to give effect to the substitution of the term 'child sexual abuse material' for 'child pornography'. The Commission further recommends the criminalisation of the use of 'pop ups' and misleading domain names that entice unsuspecting children to viewing or accessing or being exposed to pornography and sexual content that is deemed harmful for children. by the substitution of the following section for that section. In this regard the Commission suggests the insertion of clauses 19A and 19B after section 19 of the SOA:

**'Exposure or display of, or causing exposure or display of child [pornography] sexual abuse material or pornography to children**

**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] sexual abuse material 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,

through any means 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] sexual abuse material or pornography to a child.'

(iv) the insertion after section 19 of the following items:

**"19A. Enticement to view or making child sexual abuse material or pornography accessible to children**

(3) A person ('A') who unlawfully and intentionally advertises, provides access to or distributes to a child ('B'), or entices B to view any of the items or categories listed in section 19 through any means, with or without the consent of B, is guilty of the offence of enticing a child to view child sexual abuse material or pornography.

(4) A person ('A'), including a manufacturer or distributor of any technology or device or electronic communications service provider –

(d) who unlawfully and intentionally provides a child ('B') with or allows B to engage with any form of technology or device including a mobile phone,



- that is capable of accessing the internet, social media or other digital content, without ensuring that the default setting blocks access to child sexual abuse material or pornography, is guilty of the offence of making child sexual abuse material or pornography accessible to a child;
- (e) who uninstalls the default setting blocking access to child sexual abuse material is guilty of the offence of making child sexual abuse material accessible;
  - (f) who uninstalls the default setting blocking access to pornography without valid identification proving that the requester is a user over the age of 18, is guilty of the offence of making pornography accessible to a child;
  - (d) who, when uninstalling the default setting blocking access to pornography fails to keep a register as prescribed is guilty of an offence;
  - (e) who fails to take reasonable steps to ensure that any of the items or categories listed in section 19 through any means is not made accessible, exposed or displayed to a child ('B'), is guilty of the offence of negligently making accessible, exposing or displaying child sexual abuse material or pornography to a child.
- (3) The Minister must make regulations pertaining to the register provided for in subclause 2(d) and pertaining to the minimum requirements on the steps to be taken as required in subclause 2(e).

**19B. Misleading techniques on the internet**

- (1) Whoever unlawfully and intentionally creates or uses any technique including embedding words, or digital images into the source code of a website, an advertisement or domain name, to deceive a child into viewing or being exposed to child sexual abuse material or pornography is guilty of the offence of creating and using a technique to expose a child to child sexual abuse material or pornography.
- (2) For purposes of this section the term
  - (a) 'domain name' has the meaning assigned to it in section 1 of the Electronic Communications and Transactions Act 2002 (Act No. 25 of 2002); and
  - (b) 'source code' means the combination of text and other characters comprising the content, both viewable and non-viewable, of a webpage, including any website publishing language, programming language, protocol or functional content, as well as any successor languages or protocols.

As the protection provided to children in section 19 of the SOA is mirrored in section 25 of the SOA it is further recommended that section 25 of the SOA be similarly amended to provide protection to persons who are mentally disabled. It should further be noted that section 54 of the SOA places an obligation on anyone with knowledge of the commission of a sexual offence against children or persons who are mentally disabled to immediately report this knowledge to a police official. For the purpose of clarity the Commission recommends that 'police official' be defined in the SOA as per the definition of 'police official' as found in the South African Police Service Act, 1995 (Act No.68 of 1995). The Commission provisionally recommends the insertion of clause 54A in the SOA to address reporting obligations in terms of the proposed clauses 19A and 19B. The proposed insertion of clause 19C will be dealt with Chapter four below.

**“54A. Obligation to report commission of offences under sections 19A, B and C**

- (1) Any person who, having knowledge of the commission of any offence referred to in section 19A, B and C, or having reason to suspect that such offence has been or is being committed and unlawfully and intentionally fails to-
- a) Immediately report such knowledge or suspicion to a police official; or
  - b) furnish, at the written request of a police official, all particulars of such knowledge or suspicion,
- is guilty of an offence.
- (2) An electronic communications service provider or financial institution that is aware or becomes aware that its electronic communications system or facilities have or are being used or are involved in the commission of any offence involving child sexual abuse material referred to in sections 19A, B or C and fails to-
- a) immediately report the offence to a police official;
  - b) preserve any information which may be of assistance to a police official investigating the offence;
  - c) comply with all lawful written requests by a police official relating to the investigation and prosecution of such offence;
  - d) take all reasonable steps to prevent access to the child sexual abuse material by any person, unless otherwise instructed by a police official in writing not to take such steps;
- is guilty of an offence.
- (3) A person referred to in subsections (1) and (2)—
- (a) must provide reasons for that knowledge or suspicion to a police official;
  - and
  - (b) who makes the report in good faith, is not liable to civil or criminal proceedings by reason of making such report.

2.181 As the aim is to protect children from exposure to pornography and explicit content not suitable for children it is recommended that the definition of ‘pornography’ in the SOA should be amended to incorporate elements of the definition of ‘sexual conduct’, ‘explicit sexual conduct’ and ‘sexual violence’ as currently defined in the FPA. Although the proposal was made to extend the definition of pornography to include people or groups of people who are naked or people engaging in sexual acts while clothed, the Commission is of the view that the current definition does not require that a person should be naked or not be clothed when engaged in the listed activities. The definition is crafted in such a way that it also makes provision for cultural activities that incorporate nudity. **The Commission would like to test the recommendation of the NPA to remove the subjective criterion that for an image or description to constitute ‘pornography’ it has to be coupled to the intention of the creator on the grounds that the ‘intention’ should be deduced from the quality of the image, regardless of its nature, and not from the intention of its creator.** The

Commission believes that by expanding the definition in the SOA the further shortcomings identified by the NPA in respect of the conduct covered by the FPA will also be addressed.

2.182 The Commission provisionally recommends the amendment of section 1 of the SOA by the substitution for the definition of 'pornography' of the following definition:

"pornography" means any live display, image or sequence of images[,], however created or portrayed, or any description or presentation of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature whether such image, live display, image, sequence of images description or presentation is intended to stimulate erotic feelings or not [that is intended to stimulate erotic feelings], including any such image or description or presentation 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;'

## 2 Broadcasters

2.183 Although broadcasters are exempt from the classification obligations set out in the FPA they are enjoined to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences. Given the impact of a number of socio-economic factors on the social composition of family units, such as HIV, a re-think is necessitated on the part of broadcasters to ensure that children are protected in fact and not only in theory. The Commission acknowledges the appointment of ICASA as an independent authority to regulate broadcasting in terms of section 192 of the Constitution. But in light of submissions received from the NPA, Child Welfare SA and others in respect of adult movies and advertisements aired by broadcasters indicating that they are explicit and age inappropriate and contribute to the exposure of children to pornography, **the Commission suggests that the FPB and ICASA reconsiders the manner and the accessibility in which adult movies and related advertisements are broadcast.** The

Commission has taken note that the FPB and ICASA signed a memorandum of understanding (MOU) to collaborate on jurisdiction overlap on 14 March 2016. The aim of the MOU being to ‘promote awareness of the role of ICASA and the FPB in the protection of children against undesirable content’ through ‘uniform classification of labeling of content by industry, including the wireless application service providers, electronic communications service providers and broadcasters’ and believes that this is a positive development.<sup>482</sup> The Commission agrees with the recommendation of the ICT Policy Review Panel in respect of online regulation that external internet content providers should be regulated in the same way as local providers. When speaking of convergence the BCCSA may need to broaden its mandate and redefine what constitutes ‘broadcasting’. Uniform content regulation may need to be explored as the BCCSA currently deals with content post-publishing and the FPB deals with pre-publishing classification.<sup>483</sup> An amendment to the FPA could be considered to place a legislative obligation on broadcasters to classify content with a view to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

2.184 The Commission notes the submission made by Google South Africa that the Broadcasting Complaints Commission Codes (the New Code of Conduct for Free to Air Licensees and Code of Conduct for Subscription Broadcasting Service Licensees) does not apply the same classification system provided for by the FPA. Thus, differences in the regulatory regimes may result in inconsistent outcomes such as a broadcaster being permitted to exhibit a film which another distributor may not. It is provisionally recommended that administratively a uniform classification system needs to be consistently implemented. **The Commission further requests comment on the proposal made by MMA in favour of an independent, self-regulatory and or co-regulatory classification body for all content.**

2.185 As mentioned in the issue paper the NAB has adopted a Code of Conduct for Free-to-Air Broadcasting Services<sup>484</sup> and a Code of Conduct for Subscription Broadcasting Service Licensees,<sup>485</sup> and an enforcement mechanism that binds its members. Complaints lodged against NAB members through these codes are adjudicated by the BCCSA. Both codes contain identical or very similar definitions to those found in the FPA for the terms

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<sup>482</sup> ITWeb “ICASA, FPB collaborate on jurisdiction overlap” 14 March 2016 available at <https://www.itweb.co.za/content/rKPNG8v802Dq4mwd>. Accessed on 26 September 2018.

<sup>483</sup> MMA Report on Online Regulation One Year On: What's changed? 2017.

<sup>484</sup> NAB code of Conduct for Free-to-Air Broadcasting Services 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).

<sup>485</sup> Ibid.

'child pornography' and 'sexual conduct'. The Code of Conduct for Free-to-Air Broadcasting Services stipulates that scenes intended for adult audiences should be aired after the watershed period and where this is not done that viewing should be subject to an audience advisory to facilitate appropriate viewing by children. Scenes suitable for adult audiences and X18 rated programs must further be accompanied by a visual and auditory advisory before commencement of the program. No film which carries an XX classification in terms of the FPA may be broadcast. It is however a reality that society has changed considerably since the introduction of free-to-air television. The socio-economic and physical impact of HIV has left many children to fend for themselves in child headed households. The steady decline in the economy has also left many children to their own devices for example as a result of employed parents working shifts or a long way from home necessitating them to leave before the children wake and often returning late at night. Indications are that airing scenes intended for adult audiences after a watershed period to protect children from exposure to harmful material is not the panacea it was intended to be. Furthermore formal compliance before the watershed period i.e. issuing a visual and auditory advisory is not linked to any restriction in terms of how often it may occur in a given period. This means that this advisory could be repeated continuously before the watershed period with no consequences. Substantively this does not amount to protection for children. Unlike section 24 of the FPA which requires proof of age for the purchase of X18 material it cannot be said with certainty that children are not being exposed to this content. The majority of the respondents to the issue paper submit that the existing system, including the display of adult content on television after watershed hours and placing the responsibility of policing access and exposure solely on parents or caregivers is not sufficient. **The Commission is of the view that technology has advanced in such a way that watershed hours can no longer be used as a yardstick to ensure protection of children.** The Commission is further mindful that unless provision is made for 'Pay TV' the SABC as public broadcaster would fall foul of any restriction placed on it to ensure that children are not exposed to pornography as defined in the SOA or 'sexual conduct' as defined in the FPA as it is unable to verify age and thereby restrict viewing.

2.186 In addition the Code of Conduct for Subscription Broadcasting Service Licensees<sup>486</sup> allows content that contains scenes of child pornography, bestiality, incest, rape, sexual conduct and violence and advocacy for war, violence or hatred where it is a broadcast of bona fide scientific, documentary, artistic, dramatic, literary or religious programming material, which, judged within context, is of such nature; broadcasts which amount to a bona

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<sup>486</sup> Ibid.

fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or broadcasts which amount to a bona fide discussion, argument or opinion on a matter of public interest. 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 FPA there cannot be such an exemption. In addition to providing for airing of harmful material to children after the watershed period the service must provide clear and consistent information to its audience about the classification thereof, so that its audience may select the programming they do not wish to view or listen to; and they do not wish their children to view or listen to. It also provides for a parental control mechanism such as a PIN number selected by the subscriber, to block a programme, based on the classification of the programme, or a channel. While this may provide another layer of protection it does not ensure that all children will not be exposed to this content while it is accessible in their homes. Smart TVs allow for time delays and recording of programmes for selected or any time viewing. Furthermore it does not provide protection from exposure against material on the internet which is obtained through a smart TV. It also needs to be highlighted that the definitions used in these codes do not align with the definitions contained in the SOA. It also does not recognize that the exposure caused by televising this content to children irrespective of whether it was sought out by the child or not may be considered a contravention of section 19 of the SOA which criminalises the exposure of pornography as defined in the SOA to children.

2.187 The financial incentive to have more viewers watch what the FPB may consider restricted material became evident in the *Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others* case<sup>487</sup> where the Tribunal's decision to change the age restriction of the movie in question to X18 was argued to threaten the commercial viability of the South African independent Film Industry<sup>488</sup>. It argued that 'it will reduce the amount of money people are willing to invest to make and distribute films, particularly if those films are in any way controversial'. The FPA in turn argued that 'sometimes the commercial rights of investors have to yield to the bearers of human rights'.<sup>489</sup>

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<sup>487</sup> *Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others* case (3589/2018)[2018] ZAGPPHC 438 (27 June 2018).

<sup>488</sup> *Opcit* par 11.

<sup>489</sup> *Opcit* par 13.

### **3 Exposure by parents, other adults and peers**

2.188 The Commission agrees that where parents or caregivers have exposed or given children access to pornography they should be held criminally liable for this. Where appropriate or feasible a forfeiture order should be acquired to forfeit and remove the material and where appropriate the source of the material so as to prevent further exposure to the child in question or other children. Further that especially if children are removed from their homes or place of residence that they should receive intervention in the form of counselling and rehabilitation. The Commission agrees that children who expose other children to pornography should be dealt with in the confines of the process mapped out for children in conflict with the law in the Child Justice Act 75 of 2008 (Child Justice Act) and Children's Act. Where appropriate, the offending child and the victim should receive counselling and programmes as provided for through the Children's Act to sensitize them to the harmful effects of pornography as well as to heal any harm they themselves have experienced due to exposure.

2.189 The Commission also agrees that the Children's Act would be applicable to those matters where a parent, guardian or other person caring for a child exposes the child to pornography and that that parent or care-giver would be guilty of an offence. Parents clearly have a responsibility to protect children from harm. It could be argued that in terms of section 305(3) of the Children's Act the exposure of the child to these images or publications might be harmful to the psychological or emotional development of the child. Deliberate exposure would be an offence and that not protecting a child from exposure to pornography e.g., not monitoring a child's internet access would constitute neglect as the offence and could constitute a lack of care.

### **4 Multi-sectoral approach**

2.190 The realization seems to increasingly be taking hold that efforts to protect children from harm and exposure to harmful behaviour online will not be effective unless they form part of and are integrated into larger child and social protection efforts to provide a protective online and offline environment for children.<sup>490</sup> In theory a combination of digital literacy initiatives targeted at children and caregivers; awareness and messaging through teachers and online platforms; and appropriate response and support for reporting of unwanted

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<sup>490</sup> UNICEF Child Helplines Report 2018.

events is thought to be a primary intervention to protecting children.<sup>491</sup> However in practice a **multi-sectoral approach is particularly important** given the fact that the majority of children in South Africa are raised by caregivers with different capabilities and often only a single or no biological parent.<sup>492</sup> In some instances these children are being raised by children in child headed households. The reality that this translates into is that many households` may mostly not be in a position to provide the amount of time and involvement needed to properly guide a child's interaction with ICT's. In response to unique situational challenges the 'Digital Parenting study'<sup>493</sup> includes recommendations to provide parents/caregivers with the necessary online skill and knowledge in order to discuss and navigate risks; encourage responsible use of devices and the internet; equip them to monitor and manage ICT and internet usage.<sup>494</sup> At the same time however this study recommends that as the responsibility of online safety is increasingly placed into children's hands, internet safety messaging should look to build up a child's 'confidence, resilience and responsible digital citizenship skills' so that they can take responsibility for their own online safety.<sup>495</sup>

2.191 The Commission shares the view that placing the responsibility of protecting children from accessing or being exposed to pornography from external sources primarily on the shoulders of parents or caregivers would not provide children with the protection or guidance they need. Additionally even if parents or caregivers are vigilant about what their children are being exposed to they are not able to monitor what their children are being exposed to while they are at school or are in another person's company or under another person's care. The cooperation of civil society, especially educators, parents and child care-givers in the protection of children through **awareness programmes** needs to be encouraged. However the question should also be asked whether parents who provide their children with access to digital devices should be able to abdicate responsibility of role-modeling and communicating the basics of responsible online behaviour? The logical answer would be that parents or caregivers play a fundamental role as social norms and standards that apply off-line are just as applicable online. This role-modeling should however be extended by and entrenched in educational facilities.

2.192 In order to plot a way forward it would seem necessary to determine how parents and caregivers interact and mediate children's online activity. The Centre for Justice and Crime

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<sup>491</sup> NUST and CJCP Exploratory research study 2016

<sup>492</sup> Phyfer et al SA Kids Online 2016 2; Le Mottee et al "*Digital Parenting in South Africa*" 16.

<sup>493</sup> Le Mottee et al "*Digital Parenting in South Africa*" 8.

<sup>494</sup> Ibid.

<sup>495</sup> Le Mottee et al "*Digital Parenting in South Africa*" 8.



Prevention (CJCP)<sup>496</sup> suggest that this information would assist with developing appropriate strategies which ultimately aim to encourage a balance in children's lives by protecting them and promoting healthy online activity which maximizes the potential benefits of the internet.

2.193 In the broader context of children's online safety the CJCP's Technical Report<sup>497</sup> makes a number of helpful recommendations for policy and practice. An important aspect that is highlighted is the need for a measured approach to online safety messaging i.e. public awareness should be based on accurate data and advice and not use scare tactics based on inflammatory reports of online harm. Another pertinent recommendation focuses on the need for a gender specific response i.e. that the 'discourse and interventions around child exposure to sexual content and sexual experiences online must consider that as many boys as girls are exposed to these risks but that the type of harms experienced by each gender may be different.'

2.194 While being mindful that teachers are increasingly being burdened with a plethora of responsibilities in addition to their primary task of educating children, like school safety, feeding schemes and seeing to health related matters,<sup>498</sup> the Commission suggests that non-legislative proposals could mirror some of the recommendations found in the Children's Commissioner for England's rapid evidence assessment to the following effect or be adapted to the South African context:<sup>499</sup>

1. **The Departments of Basic Education and Communication** should ensure that all schools understand the importance of, and deliver, body positive 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; academies; maintained schools; independent schools; faith schools; and further education colleges.
2. **The Department of Basic Education** should ensure compulsory 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

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<sup>496</sup>

Ibid.

<sup>497</sup>

Phyfer et al *SA Kids Online* 2016.

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UNISA Youth Research Unit 2018 Youth Research Conference 2018 'The online and offline sexual exploitation of children in South Africa' 20 & 21 September 2018.

<sup>499</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 (2013) available at [www.childrenscommissioner.gov.uk](http://www.childrenscommissioner.gov.uk) Accessed on 24 May 2017 The Children's Commissioner for England.

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 of Basic Education** should identify this education as 'relationship and sex education' (RSE) to place emphasis on the importance of developing healthy, positive, respectful relationships.
  
4. The Government, in partnership with internet access and 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 what pornography is; young people's access and exposure to pornography; and responsible safe use of the internet. 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. Specific attention should be given to preferred language of communication.

# CHAPTER 3: CONSENSUAL SELF-GENERATED CHILD SEXUAL ABUSE MATERIAL OF CERTAIN CHILDREN

## A. Introduction and background

3.1 The phenomenon of children generating naked or sexual images, often commonly referred to as sexting,<sup>500</sup> and sharing these images electronically has become more prevalent with improved capability of mobile phone cameras, technology and the availability of platforms to share images and videos. This practice extends to videos of sexual encounters and online video chats via webcam.<sup>501</sup> This material can be circulated widely and very easily between intimate partners and friends or by people with ulterior motives such as bullying, revenge or spitefulness with devastating consequences. An online account could be hacked, a phone could be stolen or someone could betray another's trust.<sup>502</sup> Taking, possessing and sending of these images by a child (even if it is an image of him- or herself) may lead to a charge being brought against the child for any number of child pornography related offences and may result in a conviction of a serious criminal offence. This chapter seeks to address concerns relating to children either self-generating or creating and distributing explicit images of themselves' or of other children within the context of intimate relationships or for distribution to peers or other third parties where there is consent between the parties. This chapter provides an overview of concerns raised in the issue paper; an overview of pertinent submissions received from respondents and concludes with a discussion and preliminary recommendations. In making these recommendations the Commission has given consideration to UNICEF's recommendation that consensual self-generated child sexual abuse material by certain children should only be decriminalised in restricted circumstances and has recommended that specific defences in this regard should be enacted in the SOA. The Commission has again identified the need for awareness raising and education on the risks involved in this behaviour and therefore recommends the inclusion of the Department of Education in the Inter-sectoral Committee for the

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<sup>500</sup> Molosiwa LM "Is sexting a criminal offence?" De Rebus Jan/Feb 2014:34 (2014)] 50; also defined as sending of naked or semi-naked pictures or videos through electronic means: MacGregor L "More teens are sexting and sharing sexts without consent: University of Calgary study" Global News (26 February 2018) available at <https://globalnews.ca/news/4049282/teens-sexting-consent-university-of-calgary/> Accessed on 13 July 2018.

<sup>501</sup> My Police "Sexting- Gold Coast" available at <https://mypolice.qld.gov.au/goldcoast/sexting/> Accessed on 9 February 2018.

<sup>502</sup> Ibid.

Management of Sexual Offence Matters provided for in the SOA; the need for guidelines on the use and risks involved in using the internet and that these guidelines be included in the national education curriculum. This chapter acknowledges the existence of clauses contained in the FPA Bill and the Cybercrimes Bill but as they have not been promulgated yet, the Commission proposes the amendment of the SOA to give effect to these preliminary recommendations.

## **B. Overview of the issue paper**

3.2 The issue paper identified the troubling practice of children using technology to create and distribute explicit self-images as a particular area of concern.<sup>503</sup> The issue paper differentiated between a child who creates or distributes explicit self-images consensually and a child who does so as a result of coercion or grooming.<sup>504</sup> The Commission flagged the concern that such images could fall in the definition of ‘child pornography’ and essentially constitute ‘child sexual abuse material’. Further that once published these images could be used for illegal purposes by child exploiters even though ostensibly no sign of abuse is present in the image or was used to create the image. The image would be judged on its content and not the intention of the distributor. On face value there would be no distinction between whether the image was a self-generated image willingly made and shared or is an image obtained by way of coercion or grooming. Explicit or naked images that are self-generated and initially shared willingly will be dealt with in chapter four and grooming will be dealt with separately in chapter five.<sup>505</sup> In the issue paper the Commission suggests that in uncontested instances of voluntary peer-to-peer sharing of material it may be apposite to refer to the material as ‘images of inappropriate behaviour’ or ‘explicit self-images’ instead of ‘child abuse material’. The Commission has considered that no term will be perfect or exact. For purposes of consistency and in order not to give the impression that the creation of this material is being condoned or promoted the Commission has, after careful consideration of the submissions and research, decided to use the term ‘consensual self-generated child sexual abuse material by certain children’ in this chapter. This term may find application in more than one scenario, for example children who make what amounts to child sexual abuse material of themselves, those who consent to child sexual abuse material being made of them by another child and those who make child sexual abuse material of another child or

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<sup>503</sup> SALRC Sexual Offences Issue Paper (2015) para 1.7.

<sup>504</sup> Ibid.

<sup>505</sup> Opcit para 1.13.

children. In the next section submissions received on pertinent questions will be explicated followed by a discussion and the Commission's preliminary recommendations.

## C. Submissions

### 1 When does or should consensual self-generated child sexual abuse material by certain children (sexting) amount to child sexual abuse material?

3.3 Respondents tabled divergent views on when or whether consensual self-generated child sexual abuse material by children or sexting should be considered child sexual abuse material. With regard to the content of the images, the view was held that the following self-generated material constitutes child sexual abuse material:

- that which falls within the statutory definition of 'child pornography';<sup>506</sup>
- Where the image or message shows the minor engaged in sexual conduct or participating or assisting another person to participate in sexual conduct as defined in the FPA or the Criminal Law Amendment Act;<sup>507</sup>
- only those images which fall within the definition of 'child pornography' in the SOA, not in respect of the FPA as the images would then need to amount to 'sexual exploitation' or be 'capable of being used for sexual exploitation'.<sup>508</sup>
- anything naked/naked in part;<sup>509</sup>
- images of exposure of the genitals or a sex act of or by a child;<sup>510</sup>
- anything considered explicit by adults;<sup>511</sup>
- the nature of the content coupled to the intention;<sup>512</sup>
- Pictures/videos of children (girls and boys), naked, half-naked (bikini or underwear) and any form of sexual innuendo as a form or means of entertainment can be classified as sexting.<sup>513</sup>
- Any image of any naked 'swimsuit body part' should amount to a child abuse image.<sup>514</sup>

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<sup>506</sup> Cause for Justice; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Daine Snyders; Carol Hinrichsen; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>507</sup> Google South Africa; Minister Albert Fritz (Adv), Ministry for Social Development, WC

<sup>508</sup> NPA.

<sup>509</sup> Rob Schultz.

<sup>510</sup> Cathy McLean, Child Welfare Tshwane.

<sup>511</sup> Filo Mooney.

<sup>512</sup> Prof T Zabow.

<sup>513</sup> Sidhartha Philander.

## 2 How should the taking and distributing of sexual self-images by children be dealt with?

3.4 A number of respondents highlight the prevalence of sending sexual self-generated pictures as particularly concerning.<sup>515</sup> Divergent views are held on when such images should be prohibited. A summary of the suggestions for prohibition is provided below:

- when a child creates,<sup>516</sup> possesses or distributes the images,<sup>517</sup>
- where the recipient of the images is an unwilling recipient;<sup>518</sup>
- When images are being distributed without permission and could end up in the wrong hands, or the wrong sites.<sup>519</sup>
- when the child in the image or the recipient is under the age of 12;<sup>520</sup>
- Any self-images or sexting of a child 'under the legal sexual consensual age of 16';<sup>521</sup> where the child recipient is over the age of 12 and there is an age gap greater than 2 years difference between the child sending the images and the child/adult receiving them;<sup>522</sup>
- when the images are no longer between peers but rather between a child and adult over 18;<sup>523</sup>
- As soon as the material is created with the intention of being used for child-abuse, or when it is actually used for child-abuse including where a third party has accessed the material down the line.<sup>524</sup>

3.5 As is illustrated above respondents hold different views on when and which elements of this behaviour should be criminalised if at all. According to Filo Mooney people intervening in these cases should be mindful that children who create these images may have already been exposed to pornography, either through friends, TV or magazines. The submissions are considered in more detail below.

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<sup>514</sup> The Green Hearts.

<sup>515</sup> Cathy McLean; Pretoria workshop participant; Women and Men Against Child Abuse (WMACA)

<sup>516</sup> Riki van Deventer.

<sup>517</sup> Khayaletu Rutsha, Department of Communications; NPA; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Ronald Muthambi.

<sup>518</sup> Cathy McLean, Child Welfare Tshwane.

<sup>519</sup> Christel Long, Crystal Clear Ministries International.

<sup>520</sup> Cathy McLean, Child Welfare Tshwane; endorsed by Louie Claasen, UNISA; WMACA.

<sup>521</sup> Cherry Hochfelden.

<sup>522</sup> Cathy McLean, Child Welfare Tshwane; endorsed by Louie Claasen, UNISA; WMACA.

<sup>523</sup> Louie Claasen, UNISA.

<sup>524</sup> John Blacklaws; Daine Snyders.

### **a. Criminal liability of children**

3.6 WMACA submits that these children are committing a crime and there is a system set up to render services via the Child Justice Act. However, in its view these cases are not used correctly as points of intervention in children's sexual development as they are often simply dismissed by authorities. WMACA suggests that there should be a specific definition of 'explicit child self-image' which separates this behaviour from child sexual abuse material. WMACA is of the opinion that the use of the Child Justice Act could minimise the long term impact of filming these acts which are out in the cyber world forever.<sup>525</sup> Ronald Muthambi advises that the Child Justice Act should be used alongside the Children's Act to address this crime. The NPA refers to sections 18(2)(d)(ii)(cc) (children) and 24(2)(d)(ii)(cc) (which is a mirror provision dealing with persons who are mentally disabled) of the SOA which criminalises this behaviour. Elfrieda Fleischmann argues that the law is needed to protect learners and the way to do this is to make it against the law to take such self-images and to send it to anyone. She explains that a learners' cognitive (cortex) portion of the brain is less developed than their limbic system so they need clear parameters.<sup>526</sup> Adv Robbertse submits that children should however not be criminalised based merely on the risk of subsequent adult deviancy. In his view the current child pornography laws are adequate to pursue adults who solicit, possess or further distribute such images. He further comments that a distinction should be made between the distribution of images between consenting children and the creation and or distribution of images without the consent of the child in the image.

3.7 Charmain Badenhorst suggests that children be given an affirmative defence to a charge of creating an explicit self-image. Adv Robbertse however calls for greater circumspection in these cases and cautions that such a defence may be used as a cover for the distribution of child sexual abuse material or as a defence against possession of child sexual abuse material. Debra Minnaar of Church Alive however suggests that self-images should have a separate classification and rehabilitation recommendation. Reverend Anderson is of the view that both the child and the child's parents should be held

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<sup>525</sup> Endorsed by the NPA.

<sup>526</sup> A primary research article in JAMA Psychiatry notes that pornography consumption is associated with decreased brain volume in the right striatum, decreased left striatum activation, and lower functional connectivity to the prefrontal cortex. Journal American College of Pediatricians 'the Impact of Pornography and Children' June 2016. Although it is argued that these neural changes in the brains of pornography users do not prove causation the changes are similar to the brains of people addicted to cocaine, alcohol, and methamphetamines.

accountable.<sup>527</sup> The Green Hearts agrees and comments that parents should be held responsible where they provide a child with access to the internet without boundaries being put in place regarding usage.

3.8 One respondent suggests coupling criminalisation to moral regeneration efforts, but is sceptical on whether this will stop creation and distribution of explicit images. Khayaletu Rutsha of the DOC comments that the consequence of criminalising this behaviour is that children's names may be included in the National Register of Sexual Offenders if they are convicted of an offence.

### ***b. Non-legal approach in respect of certain children***

3.9 Some respondents are of the view that children should not be treated the same as adults, should not be criminalised and should receive special protection from prosecution similar to the approach followed in respect of consensual sexual acts with children (statutory rape and statutory sexual assault). MMA proposes that the principles outlined in recent cases dealing with consensual sex and automatic registration on the National Register for Sex Offences should be applied in order to recognise children's autonomy and responsibility as well as where the role of the state begins and ends particularly in respect of sexting. It believes that a law around sexting is important but context is also important. Cause for Justice is also of the view that 'this is primarily a social issue and should primarily be addressed by social workers, teachers and psychologists through existing response channels.' Adv Robbertse comments that the position of children between the ages of 16 and 18 who may legally consent to sexual interaction deserves particular attention. He quotes Kimpel as follows:

'[b]randing sexually active minors who seek to memorialize their private intimate conduct as criminal delegitimizes the relationships and sexual autonomy of adolescents.'

3.10 Adv Robbertse however cautions against simply condoning and accepting sexting as harmless. In his view young people may lack sufficient maturity to understand the long-term harmful consequences of sexting and the fact remains that, once digitally sent, little control remains over how and to whom the image may be distributed. He argues that distribution of such images may negatively impact a young person's privacy and reputation and may have a negative impact on future personal relationships and employment prospects with such

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<sup>527</sup> Peter Anderson Rev United Congregational church of Southern Africa; endorsed by Cathy McLean and The Green Hearts.



images becoming an enduring part of a person's digital foot-print and even finding its way into the hands of child sexual exploiters.

3.11 Without explaining how the projectory of offending can be determined Riki van Deventer is of the view that children should be 'warned when caught the first time, but after that there should be some sort of law enforcement.'<sup>528</sup> Adv Robbertse highlights the approach taken in other jurisdictions such as the United Kingdom where child pornography laws allow for prosecution (as in Australia and the United States) and where the approach so far has been to focus on non-legal mechanisms of control 'organized around ideas of risk and the future well-being of the young person as opposed to criminality.' He submits that:

'in Australia, an internet safety program "ThinkUKnow" has been mounted by the Australian Federal Police and Microsoft Australia to deliver interactive information on online safety tailored to young people as well as concerned parents and teachers. This program is based on a similar educational campaign in the United Kingdom created by the Child Exploitation and Online Protection Centre. While there may be some problems with the approach of many current education campaigns, they can help young people to be aware of risks associated with online communication and to develop methods to reduce those risks.'

3.12 However Louie Claasen<sup>529</sup> warns against criminalising sexting between peers and suggests that it should rather be dealt with through mediators or between parents. In a similar vein some respondents suggest that prevention and early education of children and parents on the dangers of using the internet is the correct approach.<sup>530</sup> WMACA adds the need for counselling to that of education and awareness campaigns. Elfrieda Fleischmann proposes that school governing bodies should be consulted on Life Sciences & Life Orientation curriculums to allow parents to provide input into these curricula.<sup>531</sup> CWSA suggests that organisations in the field of child protection should be requested to assist with development of guidelines and training in this regard. Filo Mooney adds that this would have to be age appropriate education. Rev Anderson submits that it should be clear that no child may interfere with another child sexually. He however questions how a school can address this if it does happen as punishment options are limited and many parents are not interested. However Natale Scheckle of Loreto Convent School cautions that this should not allow children to get away with this behaviour. She suggests that they should be dealt with in an age appropriate way. Charlotte Schultz of Snail Attorneys agrees as she believes that these children know what they are doing. CWSA submits that even when such images are

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<sup>528</sup> Endorsed by Cathy McLean.

<sup>529</sup> Louie Claasen, UNISA.

<sup>530</sup> Endorsed by Cathy McLean.

<sup>531</sup> Endorsed by Minister Fritz.

circulated to others with the intention of degrading, humiliating, hurting and/or exploiting another person, counselling and education would be the recommended route to follow.

***c. Child protection addressing the problem at source***

3.13 Another view is that the problem should be addressed at source i.e. the adults producing and distributing pornography. Deborah Nkobane of Child Welfare suggests that the reason why people are drawn to these images should also be explored. Some of the reasons are that the commercialisation of sex has normalised pornography for children and peer pressure and conformity to take explicit self-images (selfies) which end up in the wrong hands.<sup>532</sup> Carol Hinrichsen submits that a device that is used by a child to create or distribute explicit self-images should be confiscated and only used subsequently under responsible adult supervision.

***d. Children as victims of sexual exploitation (payment for explicit material)***

3.14 Jameel Essop comments that the problem of children generating explicit self-images also needs to be seen through the lens of the socio-economic conditions within South Africa. He argues that with unemployment increasing daily, 'children are hard pressed with financial issues which adults should be facing.' He submits that 'perpetrators use this to lure children to become contributors financially'. He further submits that the innocent taking of an explicit photograph 'is seen purely from a child not fully understanding the implication' thereof.

***e. Revenge pornography and associated offending***

3.15 The NPA and Adv Robbertse flag the danger of revenge pornography following the distribution of explicit self-images. WMACA adds that 'revenge images' in teen relationship breakups are distributed without the consent of the other party and in its view this behaviour should be a crime. The NPA also flags the distribution between children of pornography (adult legal explicit material) and child sexual abuse material other than explicit self-images of the child him- or herself as problematic.

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<sup>532</sup> Endorsed by Elfrieda Fleischman.

## D. Discussion

3.16 Currently the law in South Africa criminalizing child sexual abuse material and aspects relating thereto is covered in both the SOA and the FPA and is heralded as being progressive in the fight for the protection of children. The details around the offences, processes and sanctions related to the criminalizing of child sexual abuse images will be dealt with in chapters below. In contrast, other than the offence of grooming, the self-generation and distribution (with or without consent) of child sexual abuse material or sexting by children is not specifically addressed in South African law, apart from the criminal law relating to child sexual abuse material in the SOA and the FPA. The generation of sexualised images of children as part of commercial material such as music videos by musicians which portray young women and teenagers in varying degrees of undress in poses similar to explicit self-generated sexual images has been identified as a concern. The material is generated with the ostensible consent of the children involved and there is no evidence of coercion.<sup>533</sup> It is believed that the nature of this material also poses a risk to the children involved, both physically and in terms of their digital footprint.<sup>534</sup> It should be a concern to parents (particularly parents of underage children who are unable to consent) as it may be a predictor of sexual behaviour and may be associated with other health outcomes and risky behaviours.<sup>535</sup> The Commission is however mindful that children are living in an age with sexualized material in mainstream media and has found this aspect difficult to address as a number of variables may be at play in deciding the criminality of this behaviour or not. The Commission also notes the existence of codes and recognises co-regulatory schemes applicable to the broadcasting and advertising industries. The Commission wishes to flag this matter without arriving at a recommendation at this point in time.

3.17 Phyfer et al argue that the criminalisation of creation and distribution of 'explicit self-images' unnecessarily criminalises developmental normal behaviours and infringes children's digital rights.<sup>536</sup> As indicated above the UNCRC Committee has recommended that South Africa review its criminal law to decriminalise consensual sharing of self-

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<sup>533</sup> The Namibian Children's Parliament at the National Conference on Child Online Protection Windhoek, Namibia 18 – 19 May 2016.

<sup>534</sup> Ibid.

<sup>535</sup> Anhly SM, Rash CL; Van Ouytsel J, Temple JR; "Prevalence of Multiple Forms of Sexting Behavior Among Youth A Systematic Review and Meta-analysis" JAMA Pediatrics Link available at <https://globalnews.ca/news/4049282/teens-sexting-sexits-consent-university-of-calgary/> Accessed on 13 July 2018.

<sup>536</sup> Phyfer et al *SA Kids Online* 2016.

generated images by children.<sup>537</sup> Svantesson<sup>538</sup> argues that although the focus is usually on the criminal law, that explicit sexual images are regulated by a complex matrix of partially overlapping civil and criminal law which if seen as a process includes the creating, sending, collecting, possession, distribution and re-distribution of the material.<sup>539</sup> The creation by children and the possession and distribution of sexually suggestive or semi-naked images of children are considered 'child pornography' (child sexual abuse material) in terms of the SOA and the FPA, even if the images are self-generated. Consequently, children who cross the boundaries of the very law put in place to protect them may face the same penalties that have been put in place to deter and punish adult transgressors of the law.<sup>540</sup> This means that the 'victim' of, and the 'perpetrator' of the act of creating what is defined as 'child sexual abuse material' may be the same person.<sup>541</sup> What complicates the matter further is that the legal age of consent to engage in sexual activity for children is 16 and is further condoned where both children are between the ages of 12 and 16 or where the one child is 16 or 17 that the age difference between them is not more than two years. This means that children may legally engage in sexual activity from 12 with certain children without fear of prosecution but if they capture this activity photographically or on film they are creating child sexual abuse material, albeit of themselves, and thereby committing what is considered a very serious crime i.e. creating, publishing or distributing child sexual abuse material (pornography). There is therefore a clear disconnect between the age of consent to engage in sexual acts and laws prohibiting consensual self-generated child sexual abuse material by certain children.<sup>542</sup>

3.18 Aside from the current legal consequences of being charged for generating and distributing child sexual abuse material the personal consequences and impact for children engaging in this behaviour are wider and potentially more harmful than they could of their own accord anticipate. These explicit self-images immortalize the object of the image as a child in perpetuity.<sup>543</sup> Once this image is uploaded onto the internet or distributed on a platform or distributed by way of social media or instant messaging the child loses control over the material. It may be kept privately by the child's love interest or may be shared publicly, either accidentally or on purpose, thereby becoming available to adults with an

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<sup>537</sup> UN Committee on the Rights of the Child OPCS 2016 paragraph 1.9.

<sup>538</sup> Svantesson DJB "'Sexting' and the law – how Australia regulates electronic communication of non-professional sexual content" (2010) 22.2 *Bond Law Review* 42.

<sup>539</sup> This is confirmed by Badenhorst in the Badenhorst C "Legal responses to cyber bullying and sexting in South Africa" CJCP Issue Paper No.10 (August 2011).

<sup>540</sup> Bulger et al Where policy and practice collide 2017 8. CJCP Issue Paper "Legal responses to cyber bullying and sexting in South Africa 3.

<sup>541</sup> Svantesson "Sexting' and the law" 42.

<sup>542</sup> Bulger et al Where policy and practice collide 2017 8.

<sup>543</sup> Ibid; CJCP Issue Paper "Legal responses to cyber bullying and sexting in South Africa 3.

interest in sexual abuse material of children or be seen or sent to third parties such as peers, friends, family, institutions of learning or potential employers. It may even be used by others as an act of revenge against the child or to bully or extort money or other benefits from the child.<sup>544</sup> Either way, the end result could be devastating to the child's well-being, reputation and future prospects.

3.19 The legal conundrum the Commission is faced with is how to balance the imperative to protect children and curb the proliferation of sexual abuse images of children online with the behaviour of children who may naively explore their sexuality (without coercion) in the same way that they do all other activity, i.e. using social media and sharing images online.<sup>545</sup> According to Bulger et al a growing concern in Europe and elsewhere is that the practice of children generating explicit or sexual self-images has developed into '[Y]outh-produced sexual imagery, abuses of privacy, sexting<sup>546</sup> and an increasing number of calls concerning sextortion'.<sup>547,548</sup> Chetty argues that given the seriousness of the behaviour, prosecution of these children currently seems the only way to send a clear message to children and their parents 'that sexting is not funny when it becomes part of the child pornography industry'.<sup>549</sup> Chetty is of the view that these 'pictures will most likely – almost certainly – end up in the hands of paedophiles and will be exploited'<sup>550</sup> beyond the life time of the child depicted in the material. This may happen at their own hands through uploading photos or at the hands of a boyfriend or girlfriend once the relationship has ended or during a quarrel.<sup>551</sup> While this argument may be compelling the difficulty of weighing up the need to protect children in general as opposed to the need to act in the best interests of a specific child is reflected in the overturning of a recent judgment. In 2013 a 16 year old South African girl was charged with manufacturing and distributing child pornography. She signed a plea agreement and was subsequently convicted of creating and sending explicit self-images and a video to an older man and two teenage boys in her school.<sup>552</sup> However it was reported that in March

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<sup>544</sup> Geldenhuys K "Sexting in schools" Servamus June 2017 19.

<sup>545</sup> Bulger et al Where policy and practice collide 2017 9.

<sup>546</sup> Sexting is the term coined to describe the action of sending sexually explicit photographs or messages via mobile phone.

<sup>547</sup> Sextortion is a combination of the words sexting and extortion.

<sup>548</sup> Bulger et al Where policy and practice collide 2017 4.

<sup>549</sup> Chetty I "*Sexting*" of revealing images of children is the distribution child pornography Visionaries in Africa Foundation September 2017 (copy available on request).

<sup>550</sup> Ibid.

<sup>551</sup> Ibid.

<sup>552</sup> 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.; Wagner Leonie 'Clean slate for sexting teen' 17 March 2018 Sowetan available at <https://www.sowetanlive.co.za/news/2015-03-17-clean-slate-for-sexting-teen/> Accessed on 5 November 2018. It is notable that the man to whom she sent the pornographic material was convicted of child sexual grooming and received a three-year

2015, following the intervention by the Centre for Child Law at the University of Pretoria, the Bloemfontein High Court overturned the judgment and set aside the conviction.<sup>553</sup> The court agreed that she had been prejudiced as she was not dealt with in accordance with the Child Justice Act, was not properly represented and did not understand the implications of signing the plea agreement. The court however gave no clarity on how to deal with children who create and send explicit self-images.<sup>554</sup>

3.20 According to Child Helpline International and UNICEF dealing with self-generated and peer to peer content is rarely straight forward.<sup>555</sup> The complexity of this behaviour includes elements of coercion, blackmail, fear and peer pressure. It is of the view that society as a whole is also responsible for societal grooming and normalization of the sexualisation of children.<sup>556</sup> Child Helpline International and UNICEF are further of the view that although the taking of and distribution of explicit self-images by children is a dangerous practice it is part of some children's sexual development process.<sup>557</sup> In its view the reality is that 'there is a difference between what is happening and what we don't want to be happening.'<sup>558</sup> Although it acknowledges that the balance between protecting children and prosecuting them is tenuous, it warns that there are severe consequences attached to labelling a child a sex offender. Not only would this curtail a child's career options but may become a self-fulfilling prophecy.<sup>559</sup> For this reason it is of the view that it is in the best interests of the child not to criminalise this behaviour.<sup>560</sup> Child Helpline International and UNICEF propose a multi-sectoral approach within which children are not alienated from the police.<sup>561</sup> This proposal aligns with the recommendation made by the UNCRC Committee (alongside other signatories to the UNCRC) to the South African Government that the criminal law in South Africa be amended to decriminalise consensual sharing of self-generated images by children;<sup>562</sup> that there be a differentiation between adult offenders and

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553 suspended sentence. The offence of grooming will be dealt with in the following chapter. The Registrar of the Bloemfontein High Court confirmed to the SALRC that the plea agreement had been overturned. The older man entered a plea and sentence agreement in respect of three counts, i.e. sexual grooming of children; possession of child pornography and exposure or display or causing display or exposure of pornography to children in terms of the SOA and was sentenced accordingly (*S v Pierre Booysen* Case No SHV 88/13).

554 Wagner "Sexting teen girl cleared" It is notable that the man to whom she sent the pornographic material was convicted of child sexual grooming and received a three-year suspended sentence.

555 UNICEF Child Helplines Report 2018 23.

556 Ibid 23.

557 UNICEF National Conference on Child Online Protection; Preventing and Tackling Child Exploitation and Abuse in Namibia Windhoek Namibia 18 – 19 May 2016.

558 Ibid.

559 Ibid.

560 Ibid.

561 Ibid.

562 Dr van Niekerk agrees. She states that we should not be criminalizing 'sexting' but educating

children in conflict with the law in respect of what is defined as child sexual abuse material (child pornography) and that children in conflict with the law should be treated in a manner consistent with the promotion of the child's sense of dignity and in full conformity with the provisions of the Convention on the Rights of the Child and the Optional Protocol; and that awareness-raising programmes for children on risks related to the use of self-generated content through digital media and ICTs should be developed and strengthened.<sup>563</sup> It is important to note that the recommendation only extends to images. The European Cybercrime Centre similarly recommends development of effective, tailor-made awareness programmes to make children and young people aware of acceptable and unacceptable online communication, including the illegality of some online practices, with a particular focus on those in the peer environment. It further recommends that such programmes should be included in school curricula.<sup>564</sup>

3.21 The complexity of dealing with children who generate explicit self-images extends beyond the letter of the law to practical issues of enforcement. Investigative and procedural issues will be dealt with in more detail under Chapter 6, but suffice it to say that this phenomenon has been flagged as a challenge by international law enforcement. This is both in terms of the detection and integration of these types of images into databases, and the identification and classification of its victims.<sup>565</sup> Once Interpol has determined that the original image is an explicit self-image which has been consensually taken it turns its focus on the 'bad actors' i.e. those using the images with nefarious intentions.<sup>566</sup>

3.22 The nature of and potential life cycle of consensual self-generated image of child sexual abuse material is varied and may change from consensual to non-consensual. It is not always possible to determine whether an image has been created with the informed consent of the child in the image. With a view to exploring appropriate remedies the issue of children who generate their own sexual images without any coercion will be dealt with below. Although inter-related the affiliated concerns relating to parents who create, publish and distribute naked or explicit images of their children without their consent; revenge and non-

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children. In her view most children are not even aware that taking pictures of their sensitive parts and sending them to others is a crime. MMA Report on Online Regulation One Year On: What's changed? 2017.

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MMA Report on Online Regulation One Year On: What's changed? 2017.

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Europol EC3 European Cybercrime Centre *Online sexual coercion and extortion as a form of crime affecting children Law Enforcement Perspective* European Union Agency for Law Enforcement Cooperation 2017 7.

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Interpol "Study finds boys and younger children at greater risk of severe online sexual abuse." 2018 – Media statement issued by Interpol dated 6 March 2018.

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Brigadier (Ret) Anneke Pienaar.

consensual distribution of self-generated material will be dealt with in chapter four in an attempt to separate consensual and non-consensual behaviour.

3.23 The benefit of social media is that it gives young people the ability to interact with peers and to observe and or interact within a global community.<sup>567</sup> The consequence of observing and interacting with others is that it may influence behaviour both positively and negatively. For example what is observed may lead to comparison and set a standard for what is appealing and what should be shared to be accepted by others.<sup>568</sup> The use of mobile phones with camera's and the prolific presence of social media, web-cameras and self-images ('selfies')<sup>569</sup> documenting the lives of users sometimes in minute detail has become part of modern living. A number of people monetize the digital documentation of their lives (including private lives) through web or live-streaming, lifecasting or on blogs,<sup>570</sup> and some enter into an arrangement with other users where the exchange of or uploading of images is considered to be currency for participation on a particular platform or in exchange for tangible goods. Anecdotal evidence exists of children who are experiencing crippling financial constraints providing self-generated explicit images for air time and monetary reward. The use of virtual currencies like Bitcoin makes this increasingly complex.<sup>571</sup> It is important to note that the making, sending or distribution of sexually-explicit images of adults or children via mobile cellular phones is not a new offence but a new activity facilitated by the convergence of new technologies and behaviour.<sup>572</sup> Social media is simply a platform for human beings to behave or misbehave. It is not about the medium,<sup>573</sup> but about the offence.

3.24 As has been alluded to above the reasons for making and sharing explicit self-images by children are divergent. At an elementary level the age old game of 'show me yours and I will show you mine' has developed a whole new dimension with the introduction of mobile phones with cameras. Anecdotal evidence exists of Grade 7 boys (12 – 13 year

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<sup>567</sup> Pillay D "Is social media a friend or foe?" Herald Live 17 June 2016 available at <http://www.heraldlive.co.za/my-heraldlive/2016/06/17/social-media-friend-foe-youth/> Accessed on 5 February 2017.

<sup>568</sup> Ibid.

<sup>569</sup> Jacobs T *Teen Cyberbullying Investigated: Where do your rights end and consequences begin?* Free Spirit Publishing 2010 88.

<sup>570</sup> According to Duermyer blogging started as 'a personal web log, in which a person would journal about their day. From "web log" came the term "blog."' Blogs are updated regularly with new content and allows for reader engagement and contribution. Blogs may also be used to generate income through the presence of advertisements. Duermyer R 'Blogging - What is it and Why is it Popular? Definition of and Information about Blogging' updated July 18, 2017 The Balance available at <https://www.thebalancesmb.com/blogging-what-is-it-1794405>. Accessed on 18 May 2018.

<sup>571</sup> IWF Annual Report 2016 18.

<sup>572</sup> Chetty I "Sexting" of revealing images of children is the distribution child pornography (2017).

<sup>573</sup> House of Lords – Social Media and criminal offences – Communications Committee Chapter 2: Social Media and the Law available at <http://parliament.uk>. par 12.



olds) daring girls to send them photos – ‘bra or no bra’.<sup>574</sup> Recent research shows that 69.5% of learners in secondary schools in Gauteng have taken pictures of themselves in a sexual pose.<sup>575</sup> UNICEF Namibia states that its data suggests that the majority of adverse online experiences occur between children or adolescents, rather than the adult-child typology often associated with online risks.<sup>576</sup> The 2016 Internet Watch Foundation Annual Report<sup>577</sup> confirms this finding as it has found an increase in the number of images of 11 to 15 year olds. It makes the assumption that this trend is due to a number of factors which includes the increase in ‘self-produced’ content created using webcams and then shared online. The appearance of this conduct has given rise to a realization that consideration should be given to the need for a different approach to how sexual content that is produced as part of sexual experimentation, with no abusive elements, as opposed to content that is malicious, non-consensual or abusive, is dealt with. Badenhorst is of the view that taking and keeping explicit photos or videos of oneself for personal use is not illegal.<sup>578</sup> Chetty agrees with this interpretation of the law with the understanding that the taking of an explicit image of oneself is for strictly personal and private use and not for distribution. Chetty however explains that ‘taking a sexually-suggestive or semi-naked or naked picture of oneself and sending it via a mobile phone to a friend amounts to the creation, possession and distribution of child pornography’<sup>579</sup> and he adds that ignorance of the law in this regard is no excuse. The intended destination or recipient of the image is irrelevant to this offence. The question of whether or not the sexual conduct depicted in the image was consensual or coerced is also irrelevant – what is relevant is whether or not the image contains a person under the age of 18 years engaged or involved in an act or conduct of a sexual nature or is sexually explicit.<sup>580</sup>

3.25 Although it is argued that self-generated sexual imagery of children which is created and shared between children does not fit comfortably in the definition of child sexual abuse material, some children do not meet the criteria of innocent bystanders who are exposed to

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<sup>574</sup> Geldenhuys K “The link between teenage alcohol abuse, sexting & suicide” (June 2017) Servamus 15.

<sup>575</sup> UNISA Bureau of Market Research Youth Research Unit 2017 Seminar Series “Top three social challenges faced by children in South Africa” presentation Online Sexual Exploitation of Children Dr A Basson 12 September 2017.

<sup>576</sup> UNICEF Namibia Voices of children: An exploratory research study on knowledge, attitudes and practices of information and communication technology (ICT) use and online safety risks by children in Namibia 2016 43. This finding is confirmed by a study conducted by the University of Calgary which shows more teens are sexting and at a younger age. MacGregor L “More teens are sexting and sharing sexts without consent”.

<sup>577</sup> Internet Watch Foundation Annual Report 2016 9. available at [www.iwf.org.uk](http://www.iwf.org.uk).

<sup>578</sup> CJCP Issue Paper “Legal responses to cyber bullying and sexting in South Africa” 3.

<sup>579</sup> Chetty I “Sexting” of revealing images of children is the distribution child pornography (2017).

<sup>580</sup> Ibid.

images of this nature, but are in fact active producers and distributors thereof.<sup>581</sup> At the same time they do not fit the description of sexual exploiters as they are producing consensual imagery mostly of themselves and other consenting parties who are close in age. The problem is that once an image is distributed there may be little indication of the circumstances under which the image was created and whether it was consensual or not. Badenhorst uses the example of children who take pictures of an explicit or revealing nature of other children without their knowledge or consent in school bathrooms, sports change rooms; sports events or parties. She is of the view that children with disabilities may be particularly vulnerable. So although the aim should be to interpret the law in a manner which protects and advances the interests of the child,<sup>582</sup> this should be done with the understanding that the rights of a child are not absolute.<sup>583</sup> Having said this, particularly where children are concerned, it is important to adjudicate such matters within context.<sup>584</sup> It could be argued that children should be given the leeway to make mistakes and then learn from these mistakes<sup>585</sup> without encountering the harsh reality of the law. Siljeur endorses the sentiment that in order for children to develop into rational, autonomous adults, who are capable of making their own decisions, children should initially be protected against their irrational actions.<sup>586</sup> The Constitutional Court has already expressed its view against provisions which criminalise developmentally normative conduct for adolescents in *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* case.<sup>587</sup> The court<sup>588</sup> has also held in the matter of *Le Roux and Others v Dey* that in defamation cases concerning children the parties should be required to engage meaningfully with each other in reconciliatory proceedings before any court action is brought. However the conclusion was drawn that a person (in this case three school children) who is genuinely contrite about infringing another's right cannot raise an immediate apology and retraction as a defence to a claim for damages in a civil matter.<sup>589</sup>

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<sup>581</sup> Bulger et al Where policy and practice collide 2017 9.

<sup>582</sup> *S v M (Centre for Child Law as Amicus Curiae)* [2007]ZACC 18; 2008 (3) SA 232 (CC).

<sup>583</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC) 72.

<sup>584</sup> *Le Roux and Others v Dey* (CCT 45/10)[2011]ZACC 4 [208]

<sup>585</sup> Opcit [212]

<sup>586</sup> Siljeur N "Protecting children against cyber-sex in South Africa" (2016) South African Professional Society on the Abuse of Children Child Abuse Research: A South African Journal 17(2): 95 – 102 97.

<sup>587</sup> *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* CCT12/13 3 October 2013.

<sup>588</sup> *Le Roux and Others v Dey* (CCT 45/10)[2011]ZACC 4 [195]

<sup>589</sup> Ibid.

## 1 Comparative approach

3.26 Comparatively the creation, possession and distribution of consensual self-generated child sexual abuse material by certain children are dealt with differently in other jurisdictions. For example a number of charges of creation, possession and dissemination of explicit child self-images by a child not depicted in the image have been made in the United States of America.<sup>590</sup> The legislature in Ohio is reported to be considering a Bill that would reduce the penalties for young people under 21 who create or possess or distribute sexually explicit material involving minors and allow for no charge where it is a first offence. The offender would however need to complete a 'sexting educational diversion program which is state funded'.<sup>591</sup> The aim seems to be to give child perpetrators a second chance.<sup>592</sup> It would however seem to apply to all first offenders and thereby not allow for prosecution where the circumstances of the case might dictate the necessity of a prosecution.

3.27 The UNICEF study<sup>593</sup> states that child and adolescent pornography are regulated as two separate offences in the German Penal Code (Strafgesetzbuch). The differentiation however seems to only speak to the range of sentence. The Code allows for an exemption in that the production and possession of adolescent pornography is not criminalised where it is produced by them solely for their own private use and with consent of the person depicted therein. The UNICEF study<sup>594</sup> points out that adolescents may however still be prosecuted for the distribution of such pictures. Further if the picture is distributed to the person depicted in the picture he or she will not be covered by the exemption as they did not produce it. The same would apply where a person takes an explicit picture of him or herself and sends it. The receiver would still be in possession of child pornography as he or she did not produce it.

3.28 Section 163.1(6) of the Canadian Criminal Code contains defences to 'child pornography' offences. Publication of an intimate image is only considered an offence where it is distributed without consent of the depicted person.<sup>595</sup> The UNICEF study reports

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<sup>590</sup> Chetty I "Sexting" of revealing images of children is the distribution child pornography (2017) para 6.6.1.

<sup>591</sup> Snyder K "USA – Sexting Bill to give young people a second chance" 9 Oct 2017 USA Today Network Ohio available at <http://www.newarkadvocate.com/story/news/local/2017/10/09/proposed-sexting-bill-designed-give-young-people-second-chance/106462514/>. Accessed on 12 July 2018.

<sup>592</sup> Ibid.

<sup>593</sup> UNICEF Namibia Regulation of Child Online Sexual Abuse Legal Analysis of International Law and Comparative Legal Analysis Draft Report April 2016 24.

<sup>594</sup> Ibid.

<sup>595</sup> Ibid.

that prosecutors in Canada can decide on a case to case basis whether they consider the sharing of explicit pictures between minors as being so severe that it should be prosecuted as a child pornography offence, or as the more moderate offence of section 162.1 (sent without consent). The latter offence would allow the child not to be prosecuted as a child pornography offender as it would not be proportional to the severity of the penalty and the associated stigma. This offence is treated as closer in nature to harassment and humiliation than a crime of pornography.

3.29 This defence has the unintended consequence of penalizing minors who engage in sexting consensually and give consent to distribution more severely than where distribution is effected without the consent of the minor. The first category may be charged as child pornography offenders and the second category may only be charged with the 'publication of an intimate picture without consent'. Furthermore the first category is coupled to a minimum sentence and is linked to mandatory registration on the sex offender registry. Another concern is that there is no indication as to what age a child may give consent in this regard.<sup>596</sup>

3.30 In Victoria (Australia) the Crimes Act has introduced exceptions to its child pornography offences where children are involved in 'non-exploitative sexting'.<sup>597</sup> These exceptions only apply to children (under 18) and only apply where the child pornography is an image.<sup>598</sup> It contains exceptions to the child pornography offences in sections 68 (production), 69 (procuring) and 70 (possession) of the Crimes Act. The same exceptions have also been introduced into the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 in relation to the publication and transmissions of child pornography.<sup>599</sup> A generic exception is not used as different permutations and combinations of certain relevant factors are considered, namely:

- does the image depict only the accused child or is another child or person depicted?
- whose depiction makes the image child pornography?
- what is the age difference between the accused child and the child whose depiction makes the image child pornography?
- does the image depict criminal conduct?
- is the accused the victim of the depicted criminal conduct?

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<sup>596</sup> Opcit 26

<sup>597</sup> Section 70AAA Crimes Act.

<sup>598</sup> Department of Justice & Regulation Victoria Victoria's New Sexual Offence Laws An Introduction Criminal Law Review June 2015 25.

<sup>599</sup> Ibid.

In some situations, the exceptions may overlap, but as the exceptions are not mutually exclusive it is argued that it will not be problematic.<sup>600</sup>

3.31 In Namibia section 2(2)(d) of the Combating of Rape Act, No.8 of 2000 sets the age of consent at 14 years, with a close-in-age clause of three years. However section 14 of the Combating of Immoral Practices Amendment Act 7 of 2000 amended the Combating of Immoral Practices Amendment Act, No.21 of 1980, setting the age of consent at 16 years, with a close-in-age clause of three years. As these two Acts co-exist<sup>601</sup> the cumulative effect of these Acts is that a 12 year old child can have sex with a 14 year old child, as the two aspects of the provision are cumulative. From a very early age children can consent to sex as long as their partner is not more than three years older.<sup>602</sup> Similar to the position in South Africa, the anomaly is that if these same children take a picture of this act or send a semi-naked or naked picture to their partner, they may be prosecuted for the crime of child pornography.<sup>603</sup> The UNICEF report argues that it is contradictory to deny those who are deemed mature enough by law to have sex to depict these same acts in an image.<sup>604</sup>

3.32 With a view to proposing legislative change in Namibia, UNICEF differentiates between primary and secondary sexting. Primary sexting means the consensual sharing of pictures within a sexual relationship, secondary sexting means the further dissemination of these pictures without the consent of the depicted person. It is argued that these should be treated differently and that the exemption clause should only apply to primary sexting.<sup>605</sup>

3.33 The UNICEF report argues in favour of the application of Art 20(3) of the Lanzarote Convention which provides the following exemption:

Each party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material [...] involving children who have reached the age set in application of Article 18, paragraph 2 [*age of consent*], where these images are produced and possessed by them with their consent and solely for their own private use.

3.34 It highlights three elements:

- Decriminalisation only for possession and production of child pornography;

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Opcit 26.

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Available at [www.lac.org.za](http://www.lac.org.za).

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UNICEF Namibia Draft Report 2016 33.

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Ibid.

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Ibid.

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Ibid.

- Decriminalisation only for minors who have reached the age of consent;
- Decriminalisation only for images possessed and produced with their consent and only for private use.

3.35 The proposed clause to address making and distributing of consensual self-generated child explicit images in Namibia reads as follows:

‘[Section x] shall not apply to acts of persons related to child pornography produced or possessed by them solely for their own private use and with the consent of the persons therein depicted and while under eighteen years of age, but not if one person is under the age of fourteen years and the other person is more than three years older.’<sup>606</sup>

3.36 The UNICEF study however argues that secondary sexting (further dissemination without consent) should be considered a harassment or defamatory offence in order to protect the minor from being labelled a sex offender.<sup>607</sup>

3.37 The United Kingdom has enacted a specific offence which became effective on 13 April 2015<sup>608</sup> of disclosing private sexual photographs or films without the consent of an individual who appears in them and with intent to cause that individual distress.<sup>609</sup> Various defences to charges of committing the offence of disclosing private sexual photographs and films are available. They are as follows:

1. Section 33(2): It is not an offence to disclose the photograph or film to the individual who appears in the photograph or film (mentioned in Section 33(1) (a) and (b)).
2. Section 33(3): It is a defence if the defendant reasonably believed that the disclosure was necessary for the investigation, prevention or detection of crime.
3. Section 33(4): It is a defence where a person discloses material in the course of or with a view to the publication of journalistic material so long as the person concerned reasonably believed that the publication in question was or would be in the public interest.
4. Section 33(5): It is a defence where the defendant reasonably believed that the material was previously disclosed for reward e.g. commercial photography and had

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<sup>606</sup>

Opcit 34.

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Opcit 33.

<sup>608</sup>

“The dark side of the surge in online porn” Legalbrief Cyberlaw & Technology Watch (5 April 2017) Issue no: 1677.

<sup>609</sup>

Section 33 of the Criminal Justice and Courts Act 2015.

no reason to believe that the previous disclosure for reward was made without the consent of the individual.

5. Section 33(8): A person charged with an offence is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.<sup>610</sup>

## 2 Local legislative developments

3.38 As alluded to in Chapter one, a raft of parallel legislative initiatives relevant to the Commission's current investigation into sexual offences have been tabled in Parliament before the Portfolio Committee on Justice and Correctional Services and the Portfolio Committee on Communications. Clauses in both the Films and Publications Amendment Bill [B37B – 2015] and the Cybercrimes Bill [B6 – 2017]<sup>611</sup> (in its proposed amendment of the SOA) seek to prohibit non-consensual distribution of privately generated explicit images and the distribution of such images to cause harm i.e. revenge pornography. Neither Bill directly addresses the generation of explicit self-images by children and the consensual distribution thereof. As 'child pornography' i.e. 'pornography' of anyone under the age of 18 which would arguably include self-generated sexual photographs and films by and of a child, is considered 'refused content' and is expressly criminalised in terms of the section 24B of the FPA, clause 18F of the Amendment Bill could be interpreted in light of this prohibition and could be seen to not cater for children distributing explicit content. However the word 'person' is used in the prohibition against distribution of private sexual photographs and films (clause 18F). No differentiation is made between adults and children who distribute 'consensual' explicit material. It would seem that if there is consent, or no harm was intended or the person is not identifiable in the photograph or film that it would be legal to distribute such material, thereby legalizing the distribution of explicit self-images of children. The age of the recipients of such images is not mentioned in these clauses. An unintended consequence of this provision could be legal uncertainty as to what is considered 'child pornography' and consensual distribution of explicit self-images by or of children. .

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<sup>610</sup> UK Criminal Prosecution Service Revenge Pornography - Guidelines on prosecuting the offence of disclosing private sexual photographs and films available at [http://www.cps.gov.uk/legal/p\\_to\\_r/revenge\\_pornography/](http://www.cps.gov.uk/legal/p_to_r/revenge_pornography/)

<sup>611</sup> According to the Parliamentary Monitoring Group the Deputy Minister of Justice and Constitutional Development and the Department of Justice briefed the Parliamentary Portfolio Committee on Justice and Constitutional Development on 23 October 2018 that structures dealing with cybersecurity, crimes relating to infrastructure and child pornography had been removed from the Cybercrimes and Cybersecurity Bill and had been renamed the Cybercrimes Bill. Information obtained from [www.pmg.org.za](http://www.pmg.org.za) on 26 October 2018.

3.39 Clause 16 of the Cybercrimes Bill (B6-2017) prohibits the distribution of a data message<sup>612</sup> of an intimate image without consent. For the purpose of this chapter it is necessary to note that this clause read on its own does not proscribe the creation of intimate images and the making available, broadcasting or distribution thereof by the person who has made the image if it is an explicit self-image or if someone else has made it with the person's consent. As with the FPA Amendment Bill, there is no restriction of age linked to this prohibition or the concomitant allowance for distribution where consent is involved. This offence only requires the absence of consent. It could be argued that this clause allows children to distribute consensual 'intimate' images to each other or to adults or vice versa if they are in an intimate relationship. This makes it unclear what the criteria for 'consent' would be, for example attaining the age of sexual consent i.e. 12 years of age or if adults are involved 16 years of age and to whom these images may be distributed to. As a discussion of these clauses fits better under the discussion of revenge pornography and related offences it will be dealt with in more detail in chapter four.

## **E. Preliminary conclusion and recommendations**

3.40 While being mindful of the immaturity of children and the impact that this may have on decisions they make, the Commission is cautious about condoning and accepting the generation of explicit self-images and resultant distribution thereof (albeit to a consenting love interest) as harmless. The Commission finds merit in the expression that prevention is better than cure. As such the Commission supports information, awareness raising, education and guidance before and while a child engages with digital devices that provide access to the internet or social media. The Commission supports active intervention, education and early awareness programs for children and their caregivers or parents.

3.41 The Commission provisionally recommends that the Department of Education partners with relevant stakeholders to draft guidelines on the use and risks involved in using the Internet and that these guidelines be included in the national education curriculum. A specific section should be dedicated to the child's rights and responsibilities in respect of the child's and other children's sexuality and the consequences of creating, possessing and distributing explicit self-images.

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<sup>612</sup> 'data message' is defined in the Bill as 'data generated, sent, received or stored by electronic means, where any output of the data is in an intelligible form'.



3.42 In the event that children have not heeded the information or guidance given the Commission agrees that the constitutional imperative contained in section 28(2) of the Constitution that a child's best interests must be of paramount importance in all matters concerning the child must be coupled to the need for the State to protect children who engage in developmental normative sexual conduct. As such it is necessary to find a suitable approach to deal with children who consensually self-generate images of child sexual abuse material.<sup>613</sup>

3.43 Children who may legally engage in consensual sexual conduct and who make consensual sexual self-material can hardly be categorized together with criminals who inflict harm on children.<sup>614</sup> The sentences attached to convictions for creating and distributing child sexual abuse material (child pornography) are sometimes harsh but do not fit the behaviour of children in respect of consensual explicit self-material and do not warrant the labelling of a child as a sex offender. Currently the intended destination or recipient of the image is irrelevant and the question of whether the sexual conduct depicted in the image was consensual or not is also irrelevant. It stands to reason that the manner in which the self-generated images is obtained and distributed i.e. consensually or non-consensually should be considered when deciding on a remedy. The Commission agrees that a distinction should be made between material that is consensually made and which is captured without consent or knowledge and that which is distributed or threatened to be distributed without the consent of the child in the image. This would include the installation of devices to facilitate observation.<sup>615</sup> Attention should also be given to child recipients of consensual self-generated sexual material of children. Currently they are not allowed to be complacent and are enjoined to report the receipt of the images or videos promptly, even when receipt of the material was unsolicited.<sup>616</sup> In this regard it may be necessary to consider a defence for unsolicited receipt where the recipient is technically in possession of the image or video.

3.44 The Commission is mindful that if a child is charged in terms of section 19 of the SOA i.e. exposure or display of or causing exposure or display of child pornography to children, this charge will fall under Schedule 3 of the Child Justice Act. Offences listed in this schedule are considered to be serious offences and provide for the possible arrest of children facing a charge under this schedule. The child will face the same charge an adult

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<sup>613</sup> *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* CCT 12/13 3 October 2013.

<sup>614</sup> Svantesson "Sexting' and the law" 43.

<sup>615</sup> Opcit 45.

<sup>616</sup> Section 24B(2)(a) of the FPA; Svantesson "Sexting' and the law" 42; Molosiwa "Is sexting a criminal offence?" 50.

would. This means that prior to appearing at a preliminary Inquiry the child may be remanded in detention or be released on bail under the care of parents or caregivers. If the child was rather charged with a lesser offence for example distribution of consensual self-generated child sexual abuse material by certain children instead of display of child sexual abuse material (child pornography) a summons or written warning would be issued for the child to appear at the preliminary hearing. Diversion would be a consideration depending on the charges the child faces, the child taking responsibility for the offence and acknowledging the wrongfulness of the behaviour. The decision to divert or not would still lay with the prosecutor as each case is evaluated on its own merits and circumstances.

3.45 The Commission has given consideration to UNICEF's recommendation that the act of consensual self-generated child sexual abuse material by certain children should only be decriminalised in respect of possession and production of child sexual abuse images; should only be for children who have reached the age of consent and that the images may only be possessed and produced with their consent and only for private use. If the image is of the child's legal sexual partner or of them both it would mean that if the image is sent from the one partner to the other partner consensually, the recipient would still be committing a crime in terms of the FPA and SOA as distribution of the image would remain criminalised. The Commission believes that the UNCRC recommendation to decriminalise consensual sharing of self-generated images between certain children arose after similar considerations.

3.46 The Commission however also believes that it is important to heed the expert opinion of Chetty that while it is not illegal to create and possess an explicit self-image (without distributing it) that the likelihood of these images falling into the wrong hands when distributed may have unintended but serious consequences for the child involved and is a likely outcome of such behaviour. In light of this advice it may be an option to create a defence in terms of section 56 of the SOA to the creation or possession and the consensual exposure of such an image to another child. This defence could be applicable to consensual self-generated child sexual abuse images by certain children that are produced as part of sexual experimentation, with no abusive elements, as opposed to content that is malicious, non-consensual or abusive, but to moderate it in terms of reference and outcome. The Commission has therefore proposed three options, the first in response to the recommendation made by UNICEF; the second in response to the recommendation made by the UNCRC and the third to provide for a less serious offence where children engage in this behaviour. With regards to all of the options and with a view to emphasise the seriousness of this behaviour the Commission recommends that once a child turns 18 there will be no defence for the continued possession or distribution of the material (even if this is

of him or herself with another child). The Commission requests consideration of and comment on the preferred option.

3.47 As the clauses contained in the FPA Bill and the Cybercrimes Bill have not been promulgated yet, the Commission notes these legislative developments but proposes the following insertions into the SOA to give effect to these preliminary recommendations. Option 1 is the Commission's preferred position:

**Option 1 (no distribution allowed, but would be able to display/show the image only to another child in a consensual lawful relationship and where it depicts another child only to that child)**

**Amendment of section 56 of Act 32 of 2007**

1. Section 56 of the Principal Act is hereby amended –  
(a) by the insertion of paragraph (9):

“(9) A child ('A') may not be convicted of an offence and the prosecutor must refer A to the probation officer who must deal with A in accordance with the provisions of section 9 of the Child Justice Act, 75 of 2008, with the necessary changes, in the following circumstances –

(a) A may not be convicted of an offence in terms of sections 19C(1) or 19C(2) if A is the child in the child sexual abuse material;

(b) A may not be convicted of an offence in terms of section 19 if A is the child in the child sexual abuse material,<sup>617</sup> and the exposure or display is made to a child B, who is 12 years or older and not more than 2 years younger than A, who consented to the exposure or display;

(c) A may not be convicted of an offence in terms of sections 19, 19C(1), 19C(2) or 20(1) if the child sexual abuse material is of another child with or without A, where the other child depicted consented to the creation of the child sexual abuse material and the exposure or display is only to the other child, and the other child is 12 years or older and not more than 2 years younger than A.

(d) A may not be convicted of an offence in terms of section 10 if A is also the child in the image and the exposure or display is made to an adult person B.

- (b) the substitution of section 20 for the following, by the addition of the following section:

“(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] sexual abuse material, is guilty of the offence**

<sup>617</sup>

The Commission would like to flag these clauses as it is concerned that children may, despite the element of consent, display or expose another child to material in which the child is self-harming or of the child engaging in harmful conduct such as sado-masochism or criminal conduct such as bestiality. The child consenting to receive child sexual abuse material may not fully understand what he or she will be exposed to.

of using a child for child **[pornography]** sexual abuse material.

(2) A [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] sexual abuse material.

(3) A person ('A') who unlawfully and intentionally recruits, coerces or deceives a child complainant ('B'), with or without the consent of B, whether for financial or other reward, favour or compensation to B or a third person ('C') or not, for purposes of –

(a) being used as described in subsection(1); or

(b) participating in a live performance involving child sexual abuse material is guilty of the offence of recruiting a child for child sexual abuse material.

(5) A person ('A') who unlawfully and intentionally coerces or deceives a child ('B') through whatever means to provide child sexual abuse material of him or herself in any manner whatsoever is guilty of the offence of coercing or deceiving a child to provide child sexual abuse material .

**Option 2 (allowing for distribution but only within the age limit, for private use and only to the child that meets the criteria and or is in the image)**

**Amendment of section 19 of Act 32 of 2007**

1. Section 19 of the Principal Act is hereby amended –

(a) the substitution of the following heading:

**“19 Exposure, display or distribution or causing exposure, display or distribution of child sexual abuse material to children”**

(b) the substitution of the following section for section 19:

A person ('A') who unlawfully and intentionally exposes, displays or distributes or causes the exposure, display or distribution of-

(a) any image, publication, depiction, description of child sexual abuse material 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 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, displaying or distributing or causing the exposure, display or distribution of child sexual abuse material or pornography to a child.

And the

**Amendment of section 56 of Act 32 of 2007**

1. Section 56 of the Principal Act is hereby amended –  
(a) by the insertion of paragraph (9):

“(9) Whenever an accused person is charged with the offence under –<sup>618</sup>

(a) Section 19(a), it is a valid defence to such a charge to contend that the accused person is a child older than 12 years of age and is the child –

(i) in the image, publication, depiction, description or sequence<sup>619</sup> himself or herself; that the exposure, display or distribution is in respect of another consenting child older than 12 but younger than 16, or is 16 or 17 and the age difference between them is not more than two years at the time of the alleged commission of the offence and the content does not depict an act that is a criminal offence;

(ii) in the image, publication, depiction, description or sequence<sup>620</sup> himself or herself together with another consenting child older than 12 but younger than 16, or is 16 or 17 and the age difference between them is not more than two years at the time of the alleged commission of the offence; and the exposure, display or distribution is being made to that child for private use only with his or her consent and the content does not depict an act that is a criminal offence;<sup>621</sup>

(iii) who created the image, publication, depiction, description or sequence<sup>622</sup> himself or herself of another consenting child older than 12 for private use only; they are both younger than 16, or are 16 or 17 and the age difference between them is not more than two years at the time of the alleged commission of the offence; and the exposure, display or distribution is being made to that child only with his or her consent and the content does not depict an act that is a criminal offence;

(b) Section 20(1), it is a valid defence to such a charge to contend that the accused person is a child older than 12 years of age and created, made or produced the image, publication, depiction, description or sequence of –

(i) himself or herself solely for private use;

(ii) himself or herself and a consenting child older than 12 but younger than 16, or is 16 or 17 and the age difference between them is not more than two years at the time of the alleged commission; it was for private use only; and the content does not depict an act that is a criminal offence;

(iii) another child, with his or her consent, who is older than 12 but younger than 16, or is 16 or 17 and the age difference between them is not more than two years at the time of the alleged commission of the offence; the content was for private use only and does not depict an act that is a criminal offence.

(iv) himself or herself (alone or with another person) as a victim of a criminal offence.

<sup>618</sup> UNICEF only recommends decriminalization of production and possession not exposure or display or distribution.

<sup>619</sup> Note: New Zealand and Victoria (Australia) only makes the defence applicable to images and not videos. Consider what would be appropriate for SA.

<sup>620</sup> Note: New Zealand only makes the defence applicable to images and not videos. Consider what would be appropriate for SA.

<sup>621</sup> For example where the other child was groomed and what about sado-masochism?

<sup>622</sup> Note: New Zealand only makes the defence applicable to images and not videos. Consider what would be appropriate for SA.

(iv) other children older than 12 years but younger than 16, or who are 16 or 17 and the age difference between them is not more than two years at the alleged commission of the offence; with their consent and the content does not depict an act that is a criminal offence

**Option 3 (creating a lesser offence for certain children in respect of child sexual abuse material by a child)**

**Amendment of Act 32 of 2007 by inserting clause 19A**

1. by the insertion after item 19 of the Principal Act by item 19A –  
“19A Consensual exposure, display or distribution of child sexual abuse material of a child to a child

A child ('A') who is older than 12 years of age who intentionally and unlawfully exposes, displays or distributes child sexual abuse material of A to another child ('B') or child sexual abuse material of B to B or of the children together to B with consent and where B is 12 or older, but younger than 16 or is 16 or 17 and the age difference between them is not more than two years is guilty of the offence of exposing, displaying or distributing consensual child sexual abuse material to another child.

# CHAPTER 4: CHILD SEXUAL ABUSE MATERIAL (CHILD PORNOGRAPHY)

## A. Introduction and background

4.1 This chapter seeks to address legislative concerns relating to the adequacy of the existing definition of child pornography (child sexual abuse material)<sup>623</sup> and the criminalising of offences related to the creation, possession and distribution of child sexual abuse material and sexual crimes associated with or which are facilitated by pornography. It provides an overview of concerns raised in the issue paper in this regard, an overview of pertinent submissions received from respondents and concludes with a discussion and preliminary recommendations. Although exposure to pornography and exposure to child sexual abuse material are stand-alone items in this paper, the reality is that research has shown that there is often a link between the two and that where age is not easily determined grey areas exist. The viewing of pornography (adult legal material) has been found to act as a stimulus to cross the boundary between the viewing of legal to illegal material (child sexual abuse material) and a motivator in the real time abuse of children and the creation of child sexual abuse material.<sup>624</sup> Behaviour found on the periphery of the physical crime of sexual abuse which is used to create child sexual abuse material includes that of parents who create, publish and distribute naked images of their own children, the non-consensual distribution of self-generated child sexual abuse material or 'revenge' pornography by children; the creation of sexual content (not of themselves) by children; and online sexual coercion and extortion. Once consensual or 'innocently taken' material is distributed wider than the intended audience, this material takes on a life of its own, often providing new material for people with ulterior motives. This chapter further discusses whether the definition of 'child pornography' in the SOA is adequate and specifically whether the definition of 'child pornography' in the SOA needs to be amended to reflect that it is not a victimless crime; whether it is relevant that the material is artistic, aesthetic or family photo album material; whether downloading material onto a digital device should amount to 'creation' thereof in law; whether it is sufficient for the Children's Act to make reference to 'child pornography' without defining it; whether the offences relating to 'child pornography' are correctly placed in the FPA and whether the crimes in the SOA should be given preference. Underpinning the recommendations in this chapter is the reality that child sexual abuse and exploitation is not

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<sup>623</sup> Para 1.16 above explains the development of the term 'child pornography' to the preferred term of 'child sexual abuse material'.

<sup>624</sup> SALRC Sexual Offences Issue Paper (2015) 24.

a problem that can, or should, be addressed only through the criminal justice system or after an offense has been committed. The Commission has found that primary prevention holds more benefits for society than secondary intervention and notes the need for risks and protective factors related to victimization and perpetration to be identified and for evidence-based intervention strategies to be developed to help those who have been abused. The provisional recommendations in this chapter include that the current definition of ‘child pornography’ in the FPA should be deleted and that the proposed amended definition of ‘child pornography’ in the SOA as proposed in this chapter should be included by reference; the criminalisation of the participation of a child in a pornographic performance and the coercion of children to produce child sexual abuse material and related offences; endorses the need for training of police officers and other members of law enforcement agencies; increasing child protection efforts; strengthening law enforcement and regional and international cooperation to combat sexual exploitation through travel and tourism; and reiterates its emphasis on the seriousness of creating child sexual abuse material by children by recommending that once a child turns 18 there will be no defence for the continued possession of consensually created child sexual abuse material.

## **B. Overview of the issue paper**

4.2 The issue paper explains that the preference for using the term ‘child abuse material’ arises from the fact that the creation of what constitutes most child sexual abuse material requires that a child be physically abused to produce that material and or may be emotionally or psychologically harmed by that physical abuse or through exposure thereto.<sup>625</sup> Further that the physical abuse is both compounded and aggravated by the creation and distribution of the child sexual abuse material.<sup>626</sup> As explained in chapter one above the Commission has adopted the preferred term ‘child sexual abuse material’.<sup>627</sup> The issue paper also raises the likelihood that the viewing of child sexual abuse material is linked to or may progress to the actual sexual abuse of other children.<sup>628</sup> The child sexual exploiter may be an adult who has digressed from viewing pornography to viewing and then creating child pornography; or may be a child who has been exposed to child abuse material and in turn exploits other children and/or creates child abuse material. A pressing concern is that although the immediate physical, psychological and emotional abuse that precedes or

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<sup>625</sup> SALRC Sexual Offences Issue Paper (2015) 24.

<sup>626</sup> Opcit 25.

<sup>627</sup> See para 1.16 above.

<sup>628</sup> Opcit 26.



accompanies the creation of child sexual abuse materials may have passed, these victims remain vulnerable to a range of harms as a result of the existence and continued existence caused by the further distribution of the child sexual abuse material.<sup>629</sup> The range of harms is identical for those children who have generated explicit self-images which are distributed without their consent. With non-existent borders in cyberspace it is concerning from a digital import and export perspective that regionally neighbouring countries like Zimbabwe, Namibia and the Congo do not have laws specific to child sexual abuse material.<sup>630</sup> An added concern is that children's vulnerability to exploitation may be enhanced by parental neglect, and active collusion for material gain or as a source of income for the family.<sup>631</sup>

4.3 For the purposes of the SOA and the FPA a child is considered to be a person under the age of 18 and aspects of what is termed 'child pornography' are criminalised in both Acts. The SOA contains a detailed definition of what constitutes 'child pornography'. It further criminalises exposing an adult to 'child pornography'<sup>632</sup> and the exposure to or display of 'child pornography or any material of a 'sexual nature' to children, irrespective of whether they consented to the display or not.<sup>633</sup> The issue paper suggests that as both section 19(a) and 19(b) of the SOA could be interpreted to deal with 'child pornography' (although described differently) this may need attention. According to Chetty the reason for including section 19 in the SOA was that prohibitions against the exposure or display of materials of a sexual nature to children in the FPA only applies to distributors as defined in the Act and not the general public.<sup>634</sup> It was deemed 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. It is instructive to note that the offences in the SOA were promulgated prior to the amendments made to the FPA in 2009. Following amendments to the FPA in addition to the physical sexual offences for which a child sexual exploiter could be charged, e.g. rape, he or she could be charged for offences in terms of the SOA and the FPA. If the person is only charged in terms of the SOA the viewer or person who may have sought or willingly received the material is not guilty of an offence. As the law stands currently, in order to criminalise all who have participated in this criminal behaviour, charges would have to be brought in terms of SOA and the FPA. The full range of charges would be:

- 'Violation of section 10 or 19(a) of the SOA, depending on the age of the viewer; or
- Violation of section 24B(1)(a) of the FPA; and

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629

Ibid.

630

SALRC Sexual Offences Issue Paper (2015) 31.

631

Opcit 33.

632

Section 10 of SOA.

633

SALRC Sexual Offences Issue Paper (2015) 63.

634

Ibid.

- 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.<sup>635</sup>

4.4 The issue paper further highlights inconsistencies between the 2014 FPA Regulations and the FPA, namely that:

- In terms of subsection 19(1)(a) of the 2014 Regulations the 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 of the Commission is that when it comes to ‘child pornography’ it should be stopped irrespective.<sup>636</sup>
- What amounts to ‘child pornography’ (illegal content) in section 19(1)(a) does not seem consistent with the definitions contained in the SOA and the 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’.<sup>637</sup>
- 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 sexual abuse material content. There should be no delay in reporting the matter to the police.<sup>638</sup>
- 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.<sup>639</sup>

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<sup>635</sup> SALRC Sexual Offences Issue Paper (2015) 64.

<sup>636</sup> Opcit para 3.119.

<sup>637</sup> Opcit para 3.121.

<sup>638</sup> Opcit para 3.122.

<sup>639</sup> Opcit para 3.123.

## C. Submissions

4.5 A number of questions were posed in the issue paper in order to elicit comment on what constitutes child sexual abuse material; whether the current legal definitions are adequate and due to overlapping and uncertainty when bringing charges whether the crimes are placed in the correct Acts. The submissions received in response to the batch of questions posed in this regard will be dealt with below under the relevant question. It should be noted that although the submissions in respect of generating explicit self-images are dealt with in chapter three above, the discussion on non-consensual creation, possession and distribution of this material will form part of the discussion below.

### 1 Defining child sexual abuse material (child pornography)?

4.6 A few respondents confirmed that their understanding of the definition of 'child pornography'<sup>640</sup> correlates with the definition found in the SOA. Google South Africa submits that one of the key issues with the existing legislation is the inconsistency in definitions of 'child pornography' in the FPA and the SOA. It is of the opinion that this results in a lack of enforcement and understanding of the offences triggered by the Acts.<sup>641</sup>

4.7 A few respondents view the existing definition in the SOA as adequate and therefore the preferred definition.<sup>642</sup> However another group of respondents suggest that 'child pornography' should be more clearly defined and easy to understand.<sup>643</sup> Caren Mortlock of the NPA comments that it is critical to clearly define 'child sexual abuse material' as the current definition of 'child pornography' is so wide on the one hand and so limited on the other. In respect of 'child pornography' MMA is of the view that:

'given the severe consequences of child pornography (child abuse material) it is important that the definition is as precise as possible, however at the same time, the definition must be flexible enough to ensure that certain images of children- such as family pictures of semi naked children are not regarded by law as child pornography. Context must be key in determining whether such images amount to child pornography. The context, in which they are taken, stored, etc., may all indicate a sexual interest.'

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<sup>640</sup> Cause for Justice; Kimberley workshop participant; consolidated comment by the National Prosecuting Authority; Daine Snyders.

<sup>641</sup> Google South Africa.

<sup>642</sup> Khayaletu Rutsha of the Department of Communications; NPA; WMACA; Daine Snyders; Rob Schultz.

<sup>643</sup> Robynne Alexander; Petronella Linders, DTPS; Natale Scheckle, Loreto Convent; Shelley, Zoë Life; Family Policy Institute; Media Monitoring Africa.

4.8 The view was also held that a comprehensive clear definition would ensure that loopholes are addressed, to create legal certainty and to assist with educating parents, educators and children on healthy sexual behaviour.<sup>644</sup> The Family Policy Institute however acknowledged that with the increase in types of pornography and the sordidness thereof no definition would encompass everything.<sup>645</sup> For this reason it suggested that the court should be able to expand or interpret what constitutes pornography on a case by case basis. MMA agrees that where content does not fall in the definitions it should be dealt with on a case-by-case basis with the interests of the child receiving paramount consideration.

4.9 Reverend Peter Anderson<sup>646</sup> is of the opinion that the exposure in word or deed of the sexual organs and enacted intercourse should also be included in the definitions. Cathy Mclean of Child Welfare Tshwane comments that the definition in the SOA should be amended to include the aspect of distribution of pornography as provided for in the FPA; criminalising the accessing of already created images; and that child pornography should not be seen as a victimless crime. WMACA adds that downloading and viewing of images of the sexual assault of children even if they cannot be traced should also be included. Daine Snyders is of the view that the definition should not only relate to naked bodies but clothed bodies too. Christel Long, representing Crystal Clear Ministries International, submitted that the definition should include the actual words 'exhibition of genitals' and the actions of an adult showing a child how to get an erection.

4.10 Advocate Robbertse comments that the meaning of the term 'child pornography' in international instruments reflects a consensus and follows similar approaches using common elements. He states that the definition provided for by the Lanzarote Convention is based on the Optional Protocol to the United Nations Convention on the Rights of the Child. Paragraph 2 of Article 20 of the Lanzarote Convention defines the term 'child pornography' as 'any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes'. He comments that both explanatory reports of the Budapest and Lanzarote Conventions state that 'sexually explicit conduct' must cover at least the following real or simulated acts:

- ' (a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex;
- (b) bestiality;

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<sup>644</sup> Shelley, Zoë Life; Family Policy Institute.

<sup>645</sup> This view is endorsed by Cherry Hochfelden.

<sup>646</sup> Rev United Congregational church of Southern Africa.

- (c) masturbation;
- (d) sadistic or masochistic abuse in a sexual context; or
- (e) lascivious exhibition of the genitals or the pubic area of a child.'

4.11 The proposal<sup>647</sup> in the issue paper to change the terminology of 'child pornography' to 'child sexual abuse material', 'child abuse material' or as a 'crime against children' was supported by a number of respondents.<sup>648</sup> WMACA comments that to label the images of actual crimes of sexual abuse of children as 'pornography' undermines the reality that the images are of sexual crimes against children. In other words you cannot equate pornography with a clandestine world where children are being raped – so we have to rather say and call it what it really is: images of sexual abuse and crimes against children. John Blacklaws however is of the view that the primary term 'child pornography' should be retained but that the nature of what child pornography is should be elaborated at every opportunity, so that the general public better understands the issues at stake. Advocate Sarel Robbertse<sup>649</sup> comments that while the term 'child pornography' is still widely used, 'child sexual abuse material' has increasingly been used to describe sexually explicit representations of children, as the term is believed to more accurately reflect the nature of the content and to challenge any notion that such acts might be carried out pursuant to the consent of the child. He however notes that both the Lanzarote Convention and the Budapest Convention, which represent international standards that serve as benchmarks and may support the harmonisation of criminal law aimed at protecting children against sexual exploitation and abuse are still using the terminology 'child pornography'. He is of the view that

'child sexual abuse material is of particular relevance to cyberspace as the preferred medium to distribute or store this material. International co-operation is further essential to address aspects relating to child abuse material. International co-operation is mostly based on reciprocal criminalisation of certain conduct. It is generally, although not universally accepted that a more appropriate term to use is "child sexual abuse material" or "child abuse material". This will not adversely affect the application of the Budapest Convention or the AU Convention if the newly defined offences are within the ambit of these Conventions. My submission is that the term "child sexual abuse material" should be used which is a more precise description than "child abuse material", which may have a wider connotation.'

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<sup>647</sup> SALRC Sexual Offences Issue Paper (2015) para 1.9.

<sup>648</sup> Petronella Linders, DTSP; Natale Scheckle, Loreto Convent; Gavin Hendry, Pastor, Centurion Vineyard Christian Fellowship; Google South Africa; WMACA; Sidhartha Philander.

<sup>649</sup> Department of Justice and Constitutional Development.

4.12 Advocate Robbertse further submits that in his view:

‘the definitions of both the FPA and the SOA are in line with the aforementioned Conventions. It is however submitted that the broader updated definition of the SOA is to be preferred over that of the FPA.’

4.13 A number of respondents proposed various definitions which described their understanding of the term ‘child pornography’. ‘Child pornography’ was described as sexually explicit material of children for the sexual pleasure of adults i.e. images or descriptions of children in sexually explicit positions, or images of naked children.<sup>650</sup> Christel Long comments that in her view child pornography may include actual or simulated sexual intercourse involving minors, deviant sexual acts including bestiality, masturbation and the exhibition of genitals in a sexually arousing fashion.<sup>651</sup> Daine Snyders comments that the definition should not only apply to naked bodies but to children who are clothed too. Rob Schultz adds that this material is non-consensual on the part of the children involved and compliance is induced by way of adult coercion or violence. The SAPS is of the view that:

“‘child pornography’ is ‘regarded as pornography that exploits children for sexual stimulation. It may be produced with the direct involvement or sexual assault of a child (also known as child sexual abuse images) or it may be simulated child pornography. Furthermore, it can also be described as the visual depiction of the use of a child, or a person appearing to be a child, engaging in sexually explicit conduct. The visual depictions may be by means of photographs, film, video, pictures or computer generated games.’”

4.14 WMACA and Carol Hinrichsen agree that ‘child pornography’ is illegal and a serious criminal offence. WMACA and The Green Hearts view this material as ‘proof of the sexual abuse and brutalisation of children for the sexual gratification of users and must be abolished.’ Carol Hinrichsen shares her view that the material depicts ‘the actions of male or female paedophiles in their sexual abuse of children or in their encouragement of children’s abuse of their peers that they abuse.’ However the view expressed by Superintendent Arthur Lopes of the Buffalo City Metropolitan Municipality is that the material irrespective of its origin is used by paedophiles to give effect to their innermost fantasies and as such holds no benefit to society. The NPA is of the view that the use of children to create pornography should be seen as a crime against children and a violation of relevant sections of the SOA and the FPA. One respondent notes that ‘child pornography is the worst thing ever for our

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<sup>650</sup> Louie Claasen, UNISA; Cherry Hochfelden; Daine Snyders; Nicola Kostlin; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Sidhartha Philander; Ria; Rob Schultz; Riki van Deventer; Christel Long, Crystal Clear Ministries International.

<sup>651</sup> Crystal Clear Ministries International.

children to be exposed to.<sup>652</sup> Sidhartha Philander restricts the content to ‘sexually explicit content between minors or minors and adults.’

4.15 WMACA suggests that at the very least a basic definition of child sexual abuse material should include any image, publication, depiction or sequence containing a visual presentation, description or representation of a sexual nature of a child under the age of 18 years but also those who are ‘depicted, made to appear, look like, represented or described’ as under 18 years even if over 18 years.

4.16 The view was also expressed that the intention to stimulate erotic feelings on the part of the person who created the image should not form part of the definition as any image (however innocently created) can be perceived as erotic from the perspective of offenders.<sup>653654</sup> Child sexual abuse material includes depicting an adult posing as a child in a sexually explicit position in such material.<sup>655</sup> In line with the Constitution, children are referred to as being persons under the age of 18 years.<sup>656</sup> However Cherry Hochfelden comments that child sexual abuse material reflects the involvement of any person under the legal consensual age, which depending on the context, ranges from the age of 12 years. In her view an international mean age would have to be established. The Family Policy Institute states that the definition includes manufacturing, distribution or sale of such material.

4.17 WMACA rejects the term ‘child pornography’ as in its view it undermines the stark reality of what the material is actually depicting. WMACA prefers the terms ‘child sexual abuse content/material’. It submits that this material is used in this context when it is seized in child abuse investigations. It is also used as evidence of the abuse of children and proof of a crime rather than as a way to sexually arouse adults and as a result is not pornography. John Blacklaws however comments that although he agrees with the Commission’s view that ‘child pornography’ is not pornography but rather the memorialisation of child abuse increasingly in digital form, he believes that the vast majority of society has a clear and adequate understanding of the issue, using the familiar phrase ‘child pornography’.

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<sup>652</sup> Mr Cebo Chiliza.

<sup>653</sup> NPA; Christel Long, Crystal Clear Ministries International.

<sup>654</sup> The NPA cautions “that this is a subjective rather than objective criterion – an image may stimulate erotic feelings in some people but merely aesthetic feelings in others. Perhaps the ‘intention’ should be deduced from the quality of the image, regardless of its nature, and not from the intention of its creator.

<sup>655</sup> NPA; Pretoria workshop participant; South African Police Service, WMACA.

<sup>656</sup> NPA; Family Policy Institute, WMACA.

4.18 Khayaletu Rutsha of the DOC makes a further distinction between children being exposed to 'adult illegal content' (pornography which is only legal for adults to view) and children being exposed to 'child illegal content' (child sexual abuse material which is totally illegal).

4.19 The comprehensive comment by the NPA on its understanding of the definition of 'child pornography' explains that the FPA covers the following elements, acts and, or behaviour:

- '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 –
  - (i) engaged in sexual conduct;
  - (ii) participating in, or assisting another person to participate in, sexual conduct; or
  - (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.'

4.20 The NPA explains that in terms of the FPA it therefore does not matter whether this is an image of a real child as is required in some countries or a morphed image or superimposed image which creates a 'new child' using technology. It advises that this is a progressive approach and should therefore remain. It further explains that the FPA covers written descriptions of 'child pornography' and verbal descriptions of 'child pornography' (such as where a person reads to a blind person and describes child pornography to them) or stories involving sexual intercourse involving two children or an adult with a child. The image need not be of a real child but can also include 'cartoons like the Bart Simpson cartoon where he is engaged in sexual conduct with Lisa'. It concludes that this approach should remain as it shows that any kind of exploitation of children or which promotes exploitation of children is criminalized.

4.21 The NPA explains that the definition of 'sexual conduct' in the FPA is integral to the understanding of what constitutes child sexual abuse material in terms of the FPA. The definition of 'sexual conduct' includes –

- 'male genitals in a state of arousal or stimulation;
- the undue display of genitals or of the anal region;
- masturbation;



- bestiality;
- sexual intercourse, whether real or simulated, including anal sexual intercourse;
- 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;
- the penetration of a vagina or anus with any object;
- oral genital contact; or
- oral anal contact.'

4.22 As the definition of 'sexual conduct' in the FPA is integral to both the definitions of 'pornography' and 'child pornography' it is necessary to repeat the shortcomings identified by one of the NPA delegates in its submission in respect of the conduct covered by the FPA here:

- 'the undue display of genitals or of the anal region does not include the display of breasts;
- masturbation does not specify or include the actions of one person by another;
- bestiality is not defined or in line with the definition in the SOA;
- the description of sexual intercourse as being real or simulated, including anal sexual intercourse interpreted conventionally means penetration of a penis into the vagina or anus. It does not include digital penetration or oral penetration as is covered in the SOA;
- the penetration of a vagina or anus with any object does not include penetration by any other part of the body of one person;
- the object to be inserted does not specify that it includes an object resembling or representing the genital organs into the mouth of another person to cover aspects like dildos and vibrators; and
- oral anal contact does not include oral breast contact.'

4.23 The NPA notes that paragraph (c) of the definition of 'child pornography' in the FPA deals with matters where the image or description does not involve any sexual act or conduct, but is an image or description of the body, or parts of the body, of a child. Here the context will determine whether or not that image or description amounts to or constitutes 'child pornography'. The NPA provides the example of the so called bath tub cases where parents photograph their naked children in the bath or running naked on the beach. The NPA flags this part of the definition as problematic as all images of a naked child's breasts, genitals or anus are capable of been used for exploitation in the wrong hands and context is not read into this part of the definition. This can also cover images of children who are made to pose in sexually suggestive poses or 'kissing'. The image may be of an adult kissing a child. Furthermore it notes that no mention is made in this definition as to whether the intention of the image must be to stimulate erotic feelings.

4.24 The NPA questions the support given by the Constitutional Court in *Tascoe Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*, CCT 03/5) to the dictionary meaning of ‘pornography’ as:

“the 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”; and the subsequent finding that the “stimulation of erotic rather than aesthetic feelings is an essential element of the definition of child pornography” and that any “image that predominantly stimulates aesthetic feelings is not caught by the definition”.’

4.25 It submits that images of children simply standing naked with their genitals or breasts caught on camera would not stimulate erotic feelings in the reasonable person. In the hands of a child sexual exploiter however these images will stimulate erotic feelings. The view is held that the definition contained in the SOA which uses the phrase ‘of an explicit or sexual nature’ expands the type of images or descriptions that will constitute ‘child pornography’ under this Act thereby including a naked picture of a child, for instance, even if not of a sexual nature, depending on its context. Furthermore the intended effect of the image is not a relevant factor for prosecution. It states that it is irrelevant whether the intention is to stimulate erotic or aesthetic feelings or not. Google South Africa raises the same concern and states that the SOA goes a step further than the FPA by making it expressly clear that ‘child pornography’ is to be assessed by reference to the content being perceived in a sexual way (by a third party), as opposed to what was in the mind of the maker/ producer of the material.<sup>657</sup> However Google South Africa notes that ‘the inherent subjectivity and unpredictability of how an image transmitted via a Google platform may ultimately be seen or abused’ still begs the question as to when ‘a picture of a child (taken with innocent intent) become an illegal image’.

4.26 The NPA prefers the definition of ‘child pornography’ contained in the SOA. The NPA states that the definition includes the following behaviour for example:

- ‘Engaging in sexually suggestive or lewd acts;
- Sadistic or masochistic acts;
- Conduct characteristically associated with sexual intercourse.’

4.27 The NPA however suggests that the words ‘or breasts’ should be added to part (f) in the definition of child pornography in the SOA as an image capturing the mere exposure of

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<sup>657</sup> See, for example, *De Reuck v DPP & Others* [2003] JOL 11909 (CC) and *Spier Films SA and Another v Film and Publication Board* [2013] JOL 30932 (FPAT), where this interpretation has been confirmed.

the breasts of a child (male and female) is erotic to certain offenders. It raises a concern that the conduct addressed by the FPA may not be inclusive enough to read simulating sexual intercourse into 'engaged in conduct or activity characteristically associated with sexual Intercourse' or any of the other parts of the definition.<sup>658</sup> A further concern is raised in the context of many programs not showing actual pornography but rather simulated sex in sex scenes in movies or television shows like the Bold and the Beautiful which constitutes pornography.<sup>659</sup>

4.28 The NPA argues that although the definition of 'child pornography' in the SOA is wider than the definition in the FPA, many of the substantive offences utilised in child pornography matters contained in the FPA cannot be used to cover these crimes. Prosecutors therefore have to work between the two Acts which can be confusing. The NPA suggests that either the definition of 'child pornography' in the SOA (with a few amendments including the undue display of the female breasts not just the stimulation thereof) be included in the FPA or that a separate Act dealing with child pornography and pornography be promulgated and the offence in the FPA and SOA be repealed and included in the new Act.

4.29 Google South Africa highlights what it views to be another anomaly between the definitions in the FPA and the SOA i.e. 'that the FPA definition of child pornography begins with the word 'includes' – whereas the Criminal Law Amendment Act does not. The word 'includes' in this context is thought to be ambiguous and to create uncertainty as it suggests that child pornography could include other material not covered by the definition'

4.30 With regards to peer to peer sharing of explicit material in the context of child pornography, the view is held that an exemption should be included in the definition where the creation of the material is consensual and there is less than two years age gap between the peers.<sup>660</sup> Natale Scheckle<sup>661</sup> adds that attention should be given to the intent of creation of child abuse material on the one hand and the way in which it is perceived by a child on the other hand. Daine Snyders cautions that certain images may be used for medical writings and education purposes, as well as art. The above description is close to the ideal.

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NPA.

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NPA.

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Kimberley workshop participant.

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Loreto Convent.

## 2 Defining offences relating to child sexual abuse material (child pornography)

4.31 Advocate Robbertse is of the view that in order to align with Article 21 of the Lanzarote Convention the participation of a child in pornographic performances should be criminalised. He explains as follows:

‘Article 21 of the Lanzarote Convention requires that the following conduct must be criminalised:

- \* recruiting a child to participate in pornographic performances or causing a child to participate in such performances;
- \* coercing a child into participating in pornographic performances;
- \* profiting from or otherwise exploiting a child for such purposes;
- \* knowingly attending pornographic performances involving the participation of children.

The United Nations Convention on the Rights of the Child, in Article 34, requires Parties to take all appropriate measures to prevent “the exploitative use of children in pornographic performances”. Similarly, EU Directive 2011/92 provides as an offence the recruiting of a child into participating in pornographic performances.

According to the Lanzarote Convention Explanatory Memo (Rep. 147), Article 21 establishes links between the supply and the demand by attaching criminal liability to the organiser of such pornographic performances as well as the customer. The definition “pornographic performances” is left to the Parties to interpret, taking into account, for example, the public or private, or commercial or non-commercial nature of the performance. The provision is intended to deal essentially with organised live performances of children engaged in sexually explicit conduct.

The EU Directive 2011/92 defines in Article 2 (e) “pornographic performance” as a live exhibition aimed at an audience, including by means of information and communication technology, of: (i) a child engaged in real or simulated sexually explicit conduct; or (ii) the sexual organs of a child for primarily sexual purposes.’

4.32 He expresses the view that in respect of the offence of child pornography:

‘Articles 20 and 21 of the Lanzarote Convention and Article 9 Budapest Convention apply. In so far as it relates to the content of the criminalisation of child pornography it is submitted that the offence must include:

- producing child pornography;
- producing child pornography for the purpose of its distribution through a computer system;
- offering child pornography;
- offering child pornography through a computer system;
- making available child pornography;
- making available child pornography through a computer system;
- distributing child pornography;
- distributing child pornography through a computer system;
- transmitting child pornography;
- transmitting child pornography through a computer system;
- procuring child pornography for oneself or for another person;

- procuring child pornography through a computer system for oneself or for another person;
- possessing child pornography;
- possessing child pornography in a computer system or on a computer-data storage medium;
- knowingly obtaining access, through information and communication technologies, to child pornography;
- recruiting a child to participate in pornographic performances or causing a child to participate in such performances;
- coercing a child into participating in pornographic performances;
- profiting from or otherwise exploiting a child for such purposes;
- knowingly attending pornographic performances involving the participation of children.'

4.33 Advocate Robbertse submits that section 24B of the FPA creates various offences relating to child pornography. In his view section 24B of the FPA, comprehensively covers the requirements of Article 20 of the Lanzarote Convention. He comments that although various acts relating to child pornography in cyberspace seem on face value not to be covered by the FPA, section 15 of the Electronic Communications and Transactions Act bridges this gap and the only scenario which may not be covered relates to 'knowingly' obtaining access, through ICT's, to child sexual abuse material'. He further states that although the FPA does not cover the scenarios provided for in Article 21 of the Lanzarote Convention this is covered by section 20 of the SOA. He therefore concludes that the preferred option would be to address child pornography in the SOA.'

4.34 Advocate Robbertse notes that jurisdiction is addressed in section 30A(a) of the FPA and section 61 of the SOA, which 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.

4.35 The view is expressed that a pro-active stance should be taken to protect children and not be re-active only. A respondent identified as Ria submits that naked pictures of children should also not be used in advertisements or magazines.

4.36 WMACA recommends that for purposes of sentencing, viewers should be found guilty of being accessories to child rape. It also notes the inclusion of child pornography in the (then) draft Cybercrime and Cyber Security Bill (28 August 2015) which aimed to repeal the SOA and to impose 'a MAXIMUM fine of R 5 000 000 and/or MAXIMUM of 5 years

imprisonment'. It however notes that the aforementioned Bill does not seem to state a minimum sentence which in its view is an issue.

### **3 Is the definition of 'child pornography' in the SOA adequate, or should it be amended? If so how?**

4.37 A number of respondents are of the opinion that the definition of 'child pornography' in the SOA is adequate.<sup>662</sup> However a significant number of respondents are of the opinion that it is not adequate<sup>663</sup> and needs development.<sup>664</sup> The respondents in the joint NPA submission are divided with some agreeing and some disagreeing that change is needed. Louie Claasen,<sup>665</sup> submits that the term 'age inappropriate' is ambiguous. She questions that in a culture that is so desensitised to sexual content who determines what is age appropriate or not? Daine Snyders comments that the definitions should clearly stipulate that it does not only relate to nakedness but suggestive material including written items such as books, short stories and other anecdotes.

4.38 Debra Minnaar<sup>666</sup> submits that:

- 'C.A.M should be clearly classified according to severity and this classification used for prosecution (not material itself)
- Possession (downloading, viewing, storing) should ..... The same severe consequence as creating and distributing
- Sentencing should be clear with strong consequence 20 years imprisonment as it is not a victimless crime
- Legislation should be well advertised and implemented to reverse the trend that RSA is open to C.A.M.'

4.39 Prof Zabow suggests that the definitions be amended to reflect that it is abuse and that it does not have to be aimed at stimulating a sexually erotic response. WMACA agrees that aesthetics or intention must be omitted – a harmful image remains so regardless of an individual's intention. The view was expressed that the definitions in both the FPA and the

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<sup>662</sup> Peter Anderson Rev United Congregational church of Southern Africa; Cause for Justice; Ronald Muthambi; Khayaletu Rutsha, Department of Communications; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Daine Snyders; Ngwenya Orlan.

<sup>663</sup> Carol Hinrichsen; Louie Claasen, UNISA; Debra Minnaar, Church Alive; Kimberley workshop participant; Adv E Smith, DDPP, FS; Prof T Zabow; Christel Long, Crystal Clear Ministries International; Family Policy Institute; Women and Men Against Child Abuse; Sidhartha Philander.

<sup>664</sup> Robynne Alexander; Debra Minnaar, Church Alive; Prof T Zabow; Christel Long, Crystal Clear Ministries International; Daine Snyders; Adv E Smith, DDPP, FS; Family Policy Institute; Women and Men Against Child Abuse; Sidhartha Philander.

<sup>665</sup> UNISA.

<sup>666</sup> Church Alive.

SOA need to be standardised to avoid confusion<sup>667</sup> and that the definition of 'child pornography' in the SOA must be amended to make provision for victimless crimes.<sup>668</sup> The view was also expressed that the current definitions do not make provision for different cultures and religions.<sup>669</sup> Sidhartha Philanda submits that there is a need to make provision for exceptions to what is considered child pornography for cultures and religions where this is done with the legal consent of the child and in the context of a specific group of people/organisations.

4.40 The consolidated comment provided by the NPA contains two schools of thought:

'(a) In the first instance colleagues are of the opinion that the definitions are indeed adequate. They seem to be similar to each other but the definition in the SORMAA is preferred, as it is broader and encompasses more possibilities/circumstances of child pornography to ultimately ensure a successful prosecution. This school of thought also indicated that the definition of child pornography in SORMAA already caters for victimless crimes. Once again it must be noted that the intention and the modus operandi (within context of it being used) of the alleged offender in relation of child pornography must always be determined on the merits of each case individually.

Furthermore it is also our opinion that the definition effectively provides for the inclusion of victimless offences related to child pornography due to the broad nature of the definition as stated supra.

(b) In the second school of thought the opinions are that the said definitions are indeed not adequate.

Some colleagues are of the opinion that the definition should make provision for victimless crimes as well, although the 1st school of thought has a different opinion as noted supra.

Reasons for definitions being inadequate are listed accordingly:

The definition should provide for the offence of possession of child pornography in SORMAA, as the offence still currently resorts within the FPA. It is suggested that section 24 B of the FPA be included in SORMAA. It was submitted that if you charge under SORMAA, the facts of your case must provide that a child was used. When you only have possession of an image on the phone or computer of the accused, you cannot charge the accused under SORMAA. Then you have to charge the accused in terms of the FPA (just photo or image – no child used). If the material / photo / image depict erotica – one's hands are tied!

(c) It is however our suggestion that all child pornography offences and issues related thereto should be covered in one piece of legislation. We therefore recommend that an additional chapter or sections should be added to SORMAA, as it specifically deals with sexual offences in general, including chapter 3 which deals with offences against children. This will be in line with the pre-ambule/objectives of the

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<sup>667</sup> Adv E Smith, DDPP, FS.

<sup>668</sup> Kimberley workshop participant.

<sup>669</sup> Sidhartha Philander.

SORMAA to deal with all legal aspects relating to sexual offences in one single statute.’

4.41 The Family Policy Institute identifies two gaps. The first relates to the shift away from using images towards amateur or professional video footage. It suggests that the definition be amended to include the words ‘means any image, video or audio representation, whether amateur or professional, irrespective of its purpose’. The second relates to ensuring that the definitional elements of a specific crime are fulfilled. It suggests that the definition be broadened for example to include audio clips.

4.42 WMACA endorses a dedicated law to combat child sexual abuse material and harmonised definitions in relevant legislation to ensure uniformity of crimes and penalties. It states that the Child Justice Act should also be aligned in this regard. WMACA supports the following

- ‘Reword definition from child porn to sexual abuse material;
- Pornography and child sexual abuse material must be clearly defined to avoid confusion and or loopholes for prosecution purposes;
- The 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”;
- Must include that it is an offence to unlawfully and intentionally expose children to any material of a sexual nature;
- Definitions do need to be reformed and aligned with the definitions of the FPA;
- The legal definition of “pornography” needs to be reviewed, the age, intention and actual nature of the images in the current definition pose problems;
- The “intention” should be deduced from the quality of the image, regardless of its nature, and not from the intention of its creator; and
- 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 of the image to a form of sexual exploitation - any benefit or advantage from the image including sexual gratification or sexual stimulation.”

4.43 Christel Long,<sup>670</sup> suggests that the definition of ‘child pornography’ should be changed as follows:

“Child pornography/child abuse material” is any naked; sexual explicit image or written description of an act or child under the age of 18, included in film, print and publication of any form, as well as online and any electronic device that is intended to sexually arouse, lure, sexually stimulate, groom, exploit or abuse;’

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<sup>670</sup> Crystal Clear Ministries International.



#### **4 Should the law reflect through its definitions that child sexual abuse material (child pornography) or explicit images of children are not victimless crimes?**

4.44 The majority of the respondents believe that the law should reflect through its definitions that child sexual abuse material or explicit images of children are not victimless crimes.<sup>671</sup> The view is also expressed that this message should be inserted in the preamble to the SOA.<sup>672</sup>

4.45 The Green Hearts avers that every image of child sexual abuse material is ‘definitely images of real children undergoing very real and horrific criminal atrocities, if the children can’t testify, surely the images do?’ It submits that every image is an image of a crime taking place against a child or children. Captain Gounder<sup>673</sup> is of the view that there is a victim in the creation of every image as crimes such as kidnapping, child stealing, rape, sexual assault are committed to produce child pornography images. The view is held that there should be a differentiation between images taken as a result of a crime and explicit images taken consensually between children. A Kimberley workshop participant suggests that the definition of child sexual abuse material or explicit images of children should be amended to make provision for a victimless crime in this regard.<sup>674</sup> The suggestion entails decriminalising the images ‘if it was consensual and the age difference was not more than 2 years between the relevant parties’ as was done in respect of section 15 and 16 of the SOA. Cherry Hochfelden disagrees with this viewpoint. She states that a child has little or no concept of the full damage done to themselves or others in the present or future.

4.46 WMACA comments that perpetrators are being released on bail as court officials claim there is no victim. It believes that the criminal justice system needs these reforms to keep users in custody when necessary for investigation purposes and to prevent them from making contact with other members involved in their criminal activities. It submits that alleged perpetrators must have no access to mobile phones while in custody.

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<sup>671</sup> Cathy McLean, Child Welfare Tshwane; Robynne Alexander; Kimberley workshop participant; Prof T Zabow; Minister Albert Fritz (Adv), Ministry for Social Development, WC; John Blacklaws; Daine Snyders; Carol Hinrichsen; Nicola Kostlin; Ronald Muthambi; Rob Schultz; Riki van Deventer; Christel Long, Crystal Clear Ministries International; Cause for Justice; Kimberley workshop participant; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications; Women and Men Against Child Abuse (WMACA); Cherry Hochfelden; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Sidhartha Philander; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; The Green Hearts.

<sup>672</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>673</sup> Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS.

<sup>674</sup> Endorsed by Sidhartha Philander.

4.47 The joint submission by the NPA contains two opinions:

‘Some colleagues are of the opinion that it constitutes a victimless crime. Others feel that the definition is sufficient to not render it a victimless offence. As a way forward, specifically for the purposes of sentencing, it is recommended that the Minimum Sentences Act should be amended to prevent in those instances where a child cannot be identified it being viewed as a mitigating factor. In addition it must be emphasized that even if a child cannot be identified the rights of a child were nevertheless impaired and sentences should also take into account the amount of violence used to produce the particular child abuse images (child pornography).’

4.48 Louie Claasen however submits that stating that child abuse material or explicit images are victimless crimes is a subjective expression and therefore has no place in the law. She believes that this message should be conveyed by way of advertising campaigns.<sup>675</sup> Christel Long adds that these campaigns should be Government funded.

## **5 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)?**

4.49 The NPA submits that in its current form the definition of child pornography:

‘does not differentiate between artistic or aesthetic purposes where that image or description could be used as child pornography. Therefore the definition is all inclusive. However, the intention or modus operandi or context it was used in by the alleged offender, whether for creation, possession or distribution, will determine if the offender used it for child abuse images (mala fides) or not.’

4.50 The Family Policy Institute submits that each case needs to be evaluated on its own merits but always being mindful of the intention of the owner of the image, his past, the explicit nature of the image and what a reasonable person would perceive when looking at such image, asking the question of whether it was created to stimulate arousal or mere aesthetic feelings. It submits that as per the *De Reuck* case the ‘the purpose must be determined from the perspective of the reasonable viewer. The image must therefore, be seen by the reasonable viewer as having as its predominant purpose the stimulation of erotic rather than aesthetic feelings in a target audience.’ With further reference to the *De Reuck* case the Family Policy Institute states that:

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<sup>675</sup> Endorsed by Christel Long, Crystal Clear Ministries International.

[32] The stimulation of erotic rather than aesthetic feelings is an essential element of the definition of child pornography. Any image that predominantly stimulates aesthetic feelings is not caught by the definition. It does require, however, that the image viewed objectively and as a whole has as its predominant purpose the stimulation of erotic feelings in certain human beings who may conveniently be referred to as the target audience.'

4.51 A number of respondents are of the view that where an image or description could be used as child pornography consideration should not be given to the purpose of the image or description of a child i.e. that it was intended to be artistic or aesthetic. Some respondents explain that allowing this exception provides a loophole for offenders and that the crime should not be watered down. Cherry Hochfelden flags this as a very difficult area as photoshopping allows for what could be considered a very innocuous image to be used for child pornography. She advises that liability for its creation would have to be decided on the end result. Sidhartha Philander submits that considerations of whether an image or description should be considered artistic or aesthetic only become relevant when the person in the image is 18 years or older i.e. no longer a child. Christel Long submits that in her opinion such images or descriptions should only be exempt and considered artistic or aesthetic in circumstances where they are used for a legitimate purpose such as in the medical field for medical training in the correct context.

4.52 John Blacklaws is of the view that the definition of child pornography (or child abuse material) should be clear enough that it is easy to distinguish between abusive material and harmless material (and how each of these is used/distributed). He believes that it is harmless for parents to capture and enjoy photographs of their children in semi-dress. Similarly some respondents submit that if the purpose of an image or description is artistic or aesthetic it should be a consideration. According to John Blacklaws if these same photographs are picked up and distributed for purposes of sexual fantasy it becomes abusive. However it is argued that the law cannot stop such images from being used for pornographic purposes and there would be difficulty trying to police this. Further difficulties relate to images where a child was not abused in the process and who would determine what is artistic or meant for distribution? Cause for Justice advises that creators of artistic or aesthetic images or descriptions of children which could be used as child pornography (child abuse material) should be alerted and educated to ensure that distribution of such material is restricted to the intended recipient thereof.

## **6 Should photographs or images in family photo albums which are capable of being used as child sexual abuse material (child pornography) be treated differently from those available on or through an electronic device?**

4.53 A number of respondents agree that photographs or images in family photo albums which are capable of being used as child pornography should be treated differently from those available on or through an electronic device.<sup>676</sup> Some respondents hold the view that images in a 'hard copy' family photo album are less open to misuse than electronic images and therefore do not automatically deserve the same treatment<sup>677</sup> and that family photo albums are private and should be treated as such.<sup>678</sup> However a number of respondents disagree and state that these images should not be treated differently.<sup>679</sup> The NPA however states that if an image in an album constitutes child pornography it should be treated as such within context. A number of respondents agree that the context and the intention of photo album and electronic images is important.<sup>680</sup> Daine Snyders explains that images in an album belonging to a single non-parental figure should raise concern. The view is also held that when 'family photos' are published or disseminated through social media and electronic devices the context changes.<sup>681</sup> Cause for Justice is of the view that family images should only be subjected to scrutiny when they are widely distributed to the general public. It suggests that the law should provide for exemptions upon application to use a particular image of a child for a specific purpose. The Green Hearts disagrees with this view and argues that all such images should be dealt with the same. It explains that in the *Alberts*<sup>682</sup> case the accused explained that his interest in child pornography had begun when he viewed naked pictures of children on an artwork site on the internet. Captain Gounder agrees that a child exploiter may collect images from different places that may have at the time been taken with innocent intentions.<sup>683</sup>

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<sup>676</sup> Rob Schultz; Peter Anderson Rev United Congregational church of Southern Africa; Cause for Justice; Sidhartha Philander; Ria..

<sup>677</sup> Louie Claasen, UNISA; Women and Men Against Child Abuse (WMACA).

<sup>678</sup> Peter Anderson Rev United Congregational church of Southern Africa.

<sup>679</sup> Prof T Zabow; The Green Hearts; Khayaletu Rutsha, Department of Communications; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; John Blacklaws; Carol Hinrichsen; Ronald Muthambi; Christel Long, Crystal Clear Ministries International.

<sup>680</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Cause for Justice; NPA; Women and Men Against Child Abuse (WMACA); Minister Albert Fritz (Adv), Ministry for Social Development, WC; Daine Snyders.

<sup>681</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; NPA; Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>682</sup> *DPP North Gauteng v Alberts* Case No A835/14.

<sup>683</sup> Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS.

4.54 John Blacklaws states that all images and material which could be used as child pornography should be managed responsibly by those who hold this material (parents/medical personnel etc.). Cherry Hockfelden agrees and submits that the public should be made aware of potentially inappropriate postings on public media by way of public education and that images could be used differently in the wrong hands.<sup>684</sup> Carol Hinrichsen emphasises that 'It should be law that no provocative material of children should be made anywhere'.

## **7 Could part (iii) of the definition of 'child pornography' in the SOA be interpreted to mean that 'sexting' of self-produced naked or semi-naked images will also amount to the distribution, but not the creation or production, of child pornography?**

4.55 The framing of this question lead to some confusion as the definition is not literally separated into parts. However those respondents who read the definition in parts responded accordingly. Some respondents are of the view that part (iii) of the definition of 'child pornography' in the SOA should be interpreted to mean that 'sexting' of self-produced naked or semi-naked images amount to distribution but not the creation or production of child pornography. Google South Africa comments that this definition read together with section 19 of the Act which criminalises any person exposing or displaying, or causing exposure or display, of child sexual abuse material to a child does not include the actual taking of the image. Google South Africa is of the view that:

'while it is unlikely that a person can violate or offend his or her own sexual integrity or dignity, the same content is arguably capable of being used for such purpose. In this context, it seems at least conceivable that, consensual sexting by an underage person (of a self-produced nude or semi-nude) could amount to the distribution of "child pornography", prohibited under the Criminal Law Amendment Act.'

4.56 Cause for Justice states that this interpretation means that children could be held criminally liable for sending sexting messages to one another, which may be a justifiable measure given the risks and protectable interests involved. However a number of respondents state that although sexting by children under 18 is included in this definition, this interpretation is not clear enough.

4.57 Reverend Anderson submits that this definition should be amended to clearly include the creation and production of self-produced pornography which should be punishable.

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<sup>684</sup> Christel Long, Crystal Clear Ministries International.

Differing interpretations can lead to loopholes. The NPA is however of the view that the definition is already wide enough to include sexting and will therefore amount to the creation, possession and distribution of child pornography, because the definition starts off by stipulating: ‘...means any image, however created...’. It cautions though that the intention, modus operandi and context within which the act was committed will play a crucial role in this regard. Superintendent Lopes agrees that the context is key. He comments that the key is that when images are ‘shared’ they become public consumption material.

4.58 Christel Long submits that taking a naked image with the intent to send it to someone is creating and the sending amounts to distribution. She makes reference to a number of jurisdictions that approach the taking and sending of self-produced naked images in different ways ranging from educational programs to criminalisation. One of the proposals that she moots is to provide protection within the ‘girlfriend’ and ‘boyfriend’ agreement and where distribution is consented to, but to revoke this protection where the images are shared with third parties without the consent of the original producer or distributor.

## **8 Should sections 24A(2)(c) and 24(3) of the FPA be amended by inserting the words: ‘or would....have been so classified had it been submitted for classification’**

4.59 A number of respondents agree that sections 24A(2)(c) and 24(3) of the FPA should be amended by inserting the words ‘or would....have been so classified had it been submitted for classification’.<sup>685</sup> The NPA notes that section 24A(3) of the FPA already makes provision for the suggested wording. It emphasises that it would be crucial to submit expert evidence in court in relation to the classification, had it been submitted for that purpose, to assist the court to arrive at a just verdict.

4.60 Ronald Muthambi proposes the following adjustment to the amendment:

‘or would ...have LIKELY been so classified had it been submitted for classification.’.

4.61 Google South Africa however questions how the legal meaning of these sections of the FPA would be impacted if they were amended as proposed? It submits that the legal effect of adding the phrase ‘or would....have been so classified had it been submitted for classification’ to both these sections would be to criminalise the broadcast, distribution, or

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<sup>685</sup> Cathy McLean, Child Welfare Tshwane; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications; Riki van Deventer; NPA; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Daine Snyders; Filo Mooney.

exhibition in public of material that has not been classified. This could include material that has (in contravention of the Act) deliberately not been put forward for classification but also potentially creates conflict with the exemptions in sections 16(1) and 18(6) of the Act because material that should be exempt from classification would also be caught. This extension would also include in its ambit the regulation of unclassified online content. It believes that it would also create another regulatory problem in that it is unclear who would decide, or how it would be decided, that the material 'would have been so classified' had it been submitted for classification.

4.62 Cause for Justice submits that this is an extremely important issue. It believes that the sections should not be amended with the above insertion. It states that the Legislature rejected this wording because it would be unconstitutional to hold someone criminally liable for an act the perpetrator could not be certain would be a transgression of the law. It however suggests the insertion of the following wording:

'or 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,'

4.63 Cause for Justice argues that the abovementioned wording appears in section 24A(4)(b) and passes constitutional muster. In its view the wording is not unclear or uncertain as 'explicit sexual conduct' is defined in section 1 of the FPA. A perpetrator would accordingly be held criminally liable for actions he would know transgress the law. It submits that the abovementioned wording is crucially important to clear up the uncertainty regarding the application of section 24A(3) to broadcasters that resort under the authority of ICASA. It also formed the crux of the outcome of the case *Justice Alliance of South Africa, Cause for Justice and Doctors for Life International NPC v ICASA, On Digital Media (Pty) Ltd and others - Case no 18519/2013 (WCC)*.

4.64 In conjunction with the aforementioned and for the same reason, Cause for Justice proposes that –

'1. the following wording should be included in section 24A(2)(b) of the FPA:

'or which contains

- (i) 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, game or publication 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';

2. the following wording should be included in section 24A(2)(c) of the FPA:
- ‘or which contains depictions, descriptions or scenes of –
- (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, judged within context, the film, game or publication is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit.’

4.65 WMACA submits that while the amendment may be useful there needs to be a legislative overhaul as changing the definition does not change the fact that all that the Act is doing is classifying and there are no penalty clauses. It argues that what is needed is one coherent piece of legislation dealing with all aspects of the sexual violation of children in images, words etc. where there may be no direct contact and a definition of ‘non-contact sexual abuse’ should be added to the definitions of ‘rape’ and ‘sexual violation’ and it should be treated with the same severity and consistency as the offences of rape and sexual violation rather than in the current inconsistent and incoherent way. It submits that the FPA classifies and defines categories but not crimes and the wording is a problem. Further that if there was a ‘non-contact’ sexual abuse category as an offence we would do away with the need for the use of the term ‘child pornography’ and call it what it is i.e. child abuse and then define it in relation to the other categories i.e. rape and sexual assault. WMACA believes that if these amendments are effected that the viewers would be sex offenders; the children exposed or depicted would be victims, and if the offenders are children that the Child Justice Act should be used to manage them in the criminal justice system.

4.66 Sidhartha Philander however believes that it would make no sense to add the proposed amendment as a perpetrator would not submit X18 and XX content to the FPB and ICASA for classification.



## 9 Are the offences relating to child sexual abuse material (child pornography) correctly placed in the FPA?

4.67 A number of respondents are of the view that the offences relating to child sexual abuse material are not correctly placed in the FPA.<sup>686</sup> And that the penalties for these offences are not clear.<sup>687</sup> They are of the view that these offences and penalties would be better placed in the SOA.<sup>688</sup> The Green Hearts comments that:

‘manufacturing, possession and distribution of child abuse images are one and the same issue. The one feeds off the other and all should be treated equally and at least be treated as a schedule 5 or 6 offence.’

4.68 Adv Robbertse<sup>689</sup> submits that the objects of the FPA is set out in the long title of the Act which provides that the aims of the FPA are to ‘provide for the classification of certain films and publications; to that end to provide for the establishment of a Film and Publication Board and a Film and Publication Appeal Tribunal; to repeal certain laws; and to provide for matters connected therewith’. He is of the view that the criminalisation of child sexual abuse material should be dealt with in the SOA, in order to comprehensively and extensively deal with sexual offences in a single piece of legislation. He suggests that the definition of ‘child pornography’ in the SOA be retained in its current form but named ‘child sexual abuse material’ and that the criminalising provision of section 24B of the FPA be incorporated in the SOA. He submits that this is similar to the amendments proposed in the Draft Cybercrimes and Cybersecurity Bill 2015,<sup>690</sup> but also made applicable to non-virtual situations.

4.69 Some respondents are however of the view that these offences are correctly placed in the FPA.<sup>691</sup> WMACA further submits that these offences should be coupled with penalty clauses.

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<sup>686</sup> Cathy McLean, Child Welfare Tshwane; Carol Hinrichsen; Kimberley workshop participant; K Rutsha, Department of Communications (Durban); Prof T Zabow; NPA; The Green Hearts; Adv Sarel Robbertse, Department of Justice and Constitutional Development.

<sup>687</sup> Cathy McLean, Child Welfare Tshwane; Carol Hinrichsen.

<sup>688</sup> Cathy McLean, Child Welfare Tshwane; Carol Hinrichsen; Kimberley workshop participant; Prof T Zabow; NPA; Adv Sarel Robbertse, Department of Justice and Constitutional Development.

<sup>689</sup> Adv Sarel Robbertse, Department of Justice and Constitutional Development.

<sup>690</sup> Subsequently renamed the Cybercrimes Bill [B6B – 2015].

<sup>691</sup> Ronald Muthambi; Cause for Justice; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Sidhartha Philander; Women and Men Against Child Abuse (WMACA).

## **10 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?**

4.70 Many respondents support the inclusion of a clause that provides that downloading of any image from a digital device constitutes ‘creation’ thereof.<sup>692</sup> Sidhartha Philander argues that this is particularly necessary in respect of South African apps and media companies for example, WhatsApp and Facebook which deletes content. Louie Claasen<sup>693</sup> suggests using the word duplication as in her view the image has already been created. Some respondents are ambivalent and caution that downloading may be unintentional.<sup>694</sup> The NPA however advocates that there should be a definite distinction between downloading and creation. It argues that this would eliminate possible confusion in relation to the difference between creation and downloading of child sexual abuse material. It recommends that the ‘child pornography’ definition in the SOA must be extended to specifically include downloading of these images. Further that downloading should be a specific offence, as is the position with possession, creation and distribution.

## **11 If the purpose of the FPA is to classify and not to create crimes, should the crimes created in the SOA be given preference?**

4.71 A number of respondents agree that the purpose of the FPA is to classify and not to create crimes, and that crimes created in the SOA should therefore be given preference.<sup>695</sup> However some respondents state that this should only be the case where the crimes contained in the FPA are included in the SOA.<sup>696</sup> Cause for Justice submits that the purpose of the FPA is set out in section 2 and crimes created by the FPA should be treated on par with the crimes contained in the SOA. It suggests that one should look for unnecessary duplication and discrepancies and should streamline both Acts to the extent necessary.

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<sup>692</sup> Cathy McLean, Child Welfare Tshwane; Robynne Alexander; Peter Anderson Rev United Congregational church of Southern Africa; Minister Albert Fritz (Adv), Ministry for Social Development, WC; John Blacklaws; Carol Hinrichsen; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Rob Schultz; Riki van Deventer’ Kimberley workshop participant; WMACA; Cherry Hochfelden; Daine Snyders; Sidhartha Philander; Christel Long, Crystal Clear Ministries International.

<sup>693</sup> Louie Claasen, UNISA.

<sup>694</sup> Khayaletu Rutsha, Department of Communications; Ronald Muthambi.

<sup>695</sup> Khayaletu Rutsha, Department of Communications; John Blacklaws; Carol Hinrichsen; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Rob Schultz; Riki van Deventer; Prof T Zabow; Peter Anderson Rev United Congregational church of Southern Africa; WMACA; Daine Snyders; Christel Long, Crystal Clear Ministries International.

<sup>696</sup> Cathy McLean, Child Welfare Tshwane.

4.72 The NPA submits that until these offences are catered for in one piece of legislation which is preferably the SOA,<sup>697</sup> the offences created by the two Acts require different elements to be proved, and a person should be charged in terms of the Act that she or he contravened.<sup>698</sup> It states that for example the SOA does not cover some of the crimes in the FPA. Currently the SOA is limited to exposure or display of pornography and child pornography, using or benefitting from child pornography and grooming. It does not cover offences listed in the FPA.

## **12 In your view is it sufficient for the Children's Act to make reference to 'pornography' without defining it?**

4.73 Some respondents argue that it is not sufficient for the Children's Act to make reference to 'pornography' without defining it.<sup>699</sup> It is argued that a definition would provide certainty on what behaviour is being proscribed as people differ in their interpretations of what pornography is.<sup>700</sup> Further that the definition should refer to the relevant parts of the SOA.<sup>701</sup> Filo Mooney agrees that this behaviour should be defined but that the definition should be of 'child sexual content' and not 'pornography'.

4.74 Some respondents however are of the view that it is not necessary to include a definition in the Children's Act.<sup>702</sup> Khayaletu Rutsha submits that only for the purpose of clarity reference should be made to the definition contained in the SOA.<sup>703</sup> The NPA agrees that reference should be made to the SOA definition.<sup>704</sup> WMACA supports one definition across all the Acts or one single Act pertaining to children and child sexual abuse material.

4.75 The view is also held that it is not necessary to define the word pornography as:

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<sup>697</sup> Endorsed by WMACA.

<sup>698</sup> Sidhartha Philander.

<sup>699</sup> Robynne Alexander; Cathy McLean, Child Welfare Tshwane; Carol Hinrichsen; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Rob Schultz; Ronald Muthambi; Christel Long, Crystal Clear Ministries International; Louie Claasen, UNISA; Cause for Justice; NPA' WMACA; John Blacklaws; Sidhartha Philander; Filo Mooney.

<sup>700</sup> Christel Long, Crystal Clear Ministries International.

<sup>701</sup> Sidhartha Philander.

<sup>702</sup> Prof T Zabow; K Rutsha, Department of Communications (Nelspruit); Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>703</sup> K Rutsha, Department of Communications (Nelspruit).

<sup>704</sup> Endorsed by Daine Snyders.

'There is no vagueness and ambiguity in the word pornography if one has regard to its original meaning. The Concise Oxford Dictionary defines pornography as "printed or visual material intended to stimulate sexual excitement."<sup>705</sup>

4.76 Minister Fritz further submits that it is a rule of legislative drafting that:

'a word or expression that is not used in an enactment should not be defined. The Children's Act uses pornography only in two instances namely in the definitions of "commercial sexual exploitation" and "sexual abuse". The word pornography is not used in the Act itself. There is therefore no need to define pornography.'

## D. Discussion and preliminary recommendations

4.77 It is trite that what is commonly understood by and referred to as 'child pornography' is 'not a form or genre of pornography or erotica, but is in fact and effect, the sexual abuse, exploitation and in some instances, torture of children'.<sup>706</sup> For the vast majority of people all aspects of child sexual abuse material are morally and ethically wrong.<sup>707</sup> Serious child protection concerns exist whenever an adult actively engages in this criminal activity.<sup>708</sup> All respondents to the issue paper agreed that child sexual abuse material is illegal and should remain criminalised as it constitutes a serious sexual offence. Child sexual abuse material was described by respondents in broad terms and included any sexually explicit depiction of a child, whether real or simulated or made to look like a child. The child could be naked or clothed and may, but does not have to be subjected to a sexual act. According to Simon

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<sup>705</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>706</sup> Nel "Child Pornography and the Internet – A Comparative Perspective" 223.

<sup>707</sup> Some people however give a range of reasons for engaging with this material, for example the Legalbrief eLaw Cyberlaw & Technology Watch (30 August 2017) Issue no 1698 reports that 'A New Jersey priest said that he was trying to get revenge on God for poker losses when he collected computerised child pornography at his Pennsylvania home; and the Legalbrief Cyberlaw and Technology Watch (25 October 2017) Issue No 1706 reports that a former gun dealer in the Free State, told the court the naked pictures of a minor girl were part of a project on traditional African custom procedures, where women stretched parts of their genitalia. ... In his words 'because it is important to society,' Cyber Safety expert Susan McLean is quoted by Reynolds as explaining that paedophiles normalise what they do, don't see it as wrong, only regret it when they are caught and even advise each other on how to get closer to young children. She says that some paedophiles operate in isolation, targeting children for grooming and try to solicit photos while a newer online breed, collects photos and videos of children but do not make contact. Reynolds E "GNOC (Get Naked on Cam): The secret world of Australia's paedophiles" (28 September 2017) News.com.au Available at <http://www.news.com.au/lifestyle/parenting/kids/gnoc-get-naked-on-cam-the-secret-world-of-australias-paedophiles/news-story/82052b43cc9139a72fa1d9105fb8e23f> Accessed on 13 July 2018.

<sup>708</sup> Wilson D "Censorship in New Zealand and: The policy challenges of new technology" (2002) Social Policy Journal 1-13 Retrieved from <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj19/censor.ship-new-zealand-challenges19-pages1-13.html> Accessed on 26 September 2016.

Mason,<sup>709</sup> there is an increase in indecent images of children online. Child sexual exploitation occurs via live-streaming, through grooming, sexual blackmail or sextortion. Since 2002, more than 51 million images and videos of pornography depicting children have been reviewed by analysts at the National Centre for Missing and Exploited Children (NCMEC) in their attempts to identify individuals who have been victimized.<sup>710</sup> Most concerning is that in nearly 80% of these ‘pornographic images’, the children are sexually abused and further exploited by someone they know and trust, with 30% of these offenses perpetrated by family members.<sup>711</sup> There is global consensus on the illegal nature of child sexual abuse material and that no country in the world condones possession or distribution thereof.<sup>712</sup> Most jurisdictions criminalise the creation, distribution or consumption of child sexual abuse material.<sup>713</sup> In identifying the key trends from 2016, the 2016 Internet Watch Foundation (IWF) Annual Report states that ‘[E]very five minutes an analyst assesses a webpage. Every nine minutes that webpage shows a child being sexually abused.’<sup>714</sup> It further notes that the hosting of child sexual abuse images and videos has shifted from North America to Europe and specifically to the Netherlands.<sup>715</sup> The IWF reports that criminals are increasingly making use of ‘masking techniques to hide child sexual abuse images and videos on the internet and leaving clues to paedophiles so they can find it.’<sup>716</sup> IWF reports that it has worked to remove 57,335 webpages containing child sexual abuse images or videos in 2016.<sup>717</sup> It also identified 455 newsgroups containing child sexual abuse imagery. It further reports that 53% of the children in the material were assessed as aged 10 or under confirming the 2015 trend that indicated a decrease in age of younger children being depicted in child sexual abuse imagery.<sup>718</sup> There has also been an increase in

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<sup>709</sup> United Kingdom, National Crime Agency CEOP Command, National Conference on Child Online Protection Windhoek, Namibia 18 – 19 May 2016.

<sup>710</sup> United States House of Representatives, Committee on the Judiciary, 2011 as referenced in National Coalition to Prevent Child Sexual Abuse and Exploitation (2012) *National Plan to Prevent the Sexual Abuse and Exploitation of Children* (Rev. ed.). Retrieved from [www.preventtogether.org](http://www.preventtogether.org).

<sup>711</sup> Experts agree that the vast majority of online child sexual abuse material is made by those in the victim’s circle of trust. For this reason it is vital to identify the victim as it will not only provide authorities an opportunity to remove the child from harm, but is often the first step in identifying the offender. Interpol “Study finds boys and younger children at greater risk of severe online sexual abuse” (2018) Media statement issued by Interpol dated 6 March 2018; Rabun, 2008 as referenced in the National Plan to Prevent the Sexual Abuse and Exploitation of Children.

<sup>712</sup> Nel “Child Pornography and the Internet – A Comparative Perspective” 223.

<sup>713</sup> Bulger et al Where policy and practice collide 2017 3.

<sup>714</sup> IWF Annual Report 2016 5.

<sup>715</sup> Ibid.

<sup>716</sup> Cyberlaw & Technology Watch 5 April 2017 Issue no: 1677 Legalbrief eLaw & Management – The dark side of the surge in online porn.

<sup>717</sup> IWF Annual Report 2016 6.

<sup>718</sup> Opcit 9. According to a report released by Interpol and ECPAT International on 6 March 2018, the younger the victim of sexual abuse, the more severe the abuse was likely to be. Interpol Media Statement March 2018.

images of 11 to 15 year olds.<sup>719</sup> IWF reports that image hosting sites and cyberlockers<sup>720</sup> are misused significantly more than other sites to host illegal content and to distribute child sexual abuse imagery. In 2016 social networks were among the least abused site types,<sup>721</sup> but with the advent and application of end to end encryption, particularly on social networks such as WhatsApp the use of social networks seems to be on the increase.<sup>722</sup> IWF's approach is to take down these sites and remove each embedded image so that the image is removed from its source and all other websites it was embedded on. The top five countries found to be hosting child sexual abuse URLs in 2016 were the Netherlands, United States, Canada, France and Russia.<sup>723</sup>

4.78 The European Union Directive 2011/93/EU provides for the principal criminal law framework for member states of the Global Alliance Against Child Sexual Abuse Online. It defines child sexual abuse, including 'virtual child pornography'. It includes a mandatory deletion at source for any illegal child abuse material within a member state's jurisdiction (Article 25).<sup>724</sup> Key international instruments including the UNCRC, its OPSC, and the Council of Europe's Convention on Cybercrime have been central in defining minimum international standards in protecting children online and combating sexual exploitation through online activities. The explanatory note of the European Convention on Cybercrime states that criminal law must keep abreast of technological developments which offer highly sophisticated opportunities for misusing facilities of cyber-space and causing damage to legitimate interests.<sup>725</sup> Article 9 of the Convention obligates member states to criminalise the production, distribution, making available, offering for distribution, transmitting, procuring and possession of child pornography through or in a computer system.<sup>726</sup> Bulger states that this regulatory approach coupled to the 52 country strong Global Alliance Against Child Sexual Abuse Online has largely outlawed the distribution of child abuse materials, regardless of country.<sup>727</sup> In addition to the call from the OPSC<sup>728</sup> for the worldwide criminalisation of the production, distribution, exportation, transmission, importation, intentional possession and

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<sup>719</sup> IWF Annual Report 2016 9.

<sup>720</sup> "These are file hosting services, cloud storage services or online file storage providers. They are internet hosting services specifically designed to host users' files". IWF Annual Report 2016 52.

<sup>721</sup> IWF Annual Report 2016 11.

<sup>722</sup> Guicic S INsig 2 International Association of Prosecutors GPEN Webinar "Cross-border access to data and basics of computer and mobile forensics including encryption issues" 9 January 2019.

<sup>723</sup> IWF Annual Report 2016 12.

<sup>724</sup> Bulger et al Where policy and practice collide 2017 7.

<sup>725</sup> Siljeur "Protecting children against cyber-sex in South Africa" 97.

<sup>726</sup> Opcit 96.

<sup>727</sup> Bulger et al Where policy and practice collide 2017 6.

<sup>728</sup> Volume 2171, A-27531.

advertising of child pornography, it stresses the importance of closer cooperation and partnership between Governments and the internet industry. The OPSC defines 'child pornography' as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.'<sup>729</sup> Although this is a broad and therefore simplified definition the Commission has the following reservations about substituting the current definition with this definition. Firstly the activity 'explicit sexual activities' excludes naked representations which are neutral in this respect. Secondly the representation of only the 'sexual parts' of a child excludes provocative or erotic posing. And lastly the words in respect of 'primarily sexual purposes' excludes material which at the time of creation was not created for sexual purposes but which may be used as such along the chain of distribution.

4.79 As part of this discussion it is instructive to note that the Report on Sexual Offences<sup>730</sup> which gave rise to substantial parts of the SOA did not interrogate or ventilate the legal position applicable to child sexual abuse material due to pending amendments to the FPA at the time and due to a decision by the Commission to deal with the issue of children's exposure to pornography in the fourth part of the sexual offences investigation. However during deliberations before the (then) Portfolio Committee on Justice and Constitutional Development on the Bill which preceded the SOA the Portfolio Committee decided to include these offences in the SOA. Although intensive deliberation in the Portfolio Committee preceded the insertion of the definitions and crimes in the SOA pertinent to 'child pornography' they were not fully ventilated through a public participation process facilitated by the Commission. At the same time that these provisions were drafted, amendments to the FPA and the review of the Children's Act were being deliberated in separate Portfolio Committees. This has led to some uncertainty. Furthermore currently it is not clear how law enforcement should respond to children and adults who create and or distribute self-generated sexual material and particularly in respect of material which constitutes child sexual abuse material as provided for in the SOA and FPA but which may after closer investigation be found to not depict physical child sexual abuse, for example a parent who posts a photograph of a naked baby playing in the bath on his or her Facebook page or a child who distributes a sexual photograph of another child with or without the consent of the child in the photograph. The consent of a child or other parties whose image is posted on the internet or through social media is not readily ascertainable as the context in which the material is generated does not form part of the image. The phenomenon of 'child-

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<sup>729</sup> Article 2 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography Volume 2171, A-27531.

<sup>730</sup> SALC Report on Sexual Offences 2002 285.

produced sexual imagery’ appears to present a challenge to international law enforcement as well.<sup>731</sup> This is both in terms of the detection and integration of these types of images into databases, and the identification and classification of its victims.<sup>732</sup>

## 1 Defining ‘child pornography’ (child sexual abuse material)?

### *a. Current law and legislative developments*

4.80 It is notable that in spite of the DOC and DoJ&CD identifying a need to amend its legislation UNICEF Namibia has found that ‘especially with regard to the definition of “child pornography” South Africa serves as a role model for the highest protection standard.’ The definition of ‘publication’ is also considered to meet the highest international standards as it includes accessing and possessing child pornography for private use.<sup>733</sup>

4.81 The UNICEF study has further commented that the FPA is

‘very comprehensive as it combines all elements proposed in various international definitions. Not only visual depiction, but any description like text and audio is covered. Furthermore, virtual pornography (“however created”) or persons made to appear under the age of 18 years are included. As the definition offers a catch-all provision in subsection (c), “erotic posing” images are covered as well. The description of sexual conduct or engagement or participation is exhaustive.’

4.82 The UNICEF study reports that the SOA also meets the ‘highest standard of protection and is comparably comprehensive’ to the FPA.<sup>734</sup> In its own more critical analysis of the current law the Commission notes that the FPA does not contain a definition of ‘pornography’ (understood as adult legal explicit content) as such, but refers, instead, to images of ‘explicit sexual conduct’. A definition of ‘child pornography’ was inserted in the Act in 2009 and augmented in 2011. This definition states that ‘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;

<sup>731</sup> Interpol Media statement March 2018.

<sup>732</sup> Ibid.

<sup>733</sup> UNICEF Namibia Draft Report 2016 16; Gous N “SA Legislation praised in global report on child sexual abuse” (16 January 2019) TimesLIVE available at <https://www.timeslive.co.za/news/south-africa/2019-01-16-sa-legislation-praised-in-global-report-on-child-sexual-abuse/>. Accessed 17 January 2019.

<sup>734</sup> UNICEF Namibia Draft Report 2016 16.



- (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>735</sup>

4.83 This definition followed after the inclusion of the definition of ‘pornography’ and ‘child pornography’ in the SOA in 2007. The definition of ‘child pornography’ in the SOA provides as follows:

- ‘any image, however created, or any description **or presentation**<sup>736</sup> of a person, real or simulated, who is, **or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not,** 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,**
  - (l) **any act contemplated in paragraphs (a) to (j); or**
  - (l) 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 is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person **or group or categories of persons;**.

4.84 In what would seem an attempt towards uniformity both the FPA Amendment Bill and the Cybercrimes Bill, aim to amend the definition found in the FPA by substituting it with the definition of ‘child pornography’ found in the SOA. From a plain reading of the FPA

<sup>735</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>736</sup> The words reflected in bold print are enhanced to reflect words which are included in the definition of ‘child pornography’ that do not form part of the definition of ‘pornography’ in the SOA.

Amendment Bill it initially seeks to substitute the current definition of 'child pornography' contained in the FPA with the definition of 'child pornography' contained in the SOA but then proceeds to amend the definition it has just substituted by deleting the portion of subsection (c) of the current definition of 'child pornography' in the FPA i.e. that which deems the showing or describing of a body part 'in such a manner that it is capable of being used for the purposes of sexual exploitation. It is therefore unclear whether the definition is to be substituted or merely amended. The Memorandum of the Objects which accompanies the Bill however only makes reference to the latter amendment.

4.85 As the definition of 'sexual conduct' is part of the FPA definition of 'child pornography' it is necessary to note that the FPA Amendment Bill further seeks to substitute the definition of 'sexual conduct' in the FPA with the following definition:

'sexual conduct' includes –

- (a) genitals in a state of arousal or stimulation, **real or simulated**;<sup>737</sup>
- (b) undue display of genitals or of the anal region;
- (c) rape;
- (d) masturbation;
- (e) bestiality;
- (f) sexual intercourse with a person or a human corpse, including anal or oral sexual intercourse;
- (g) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, anus, vagina, testicles or penis, with or without any object;
- (h) the penetration of a vagina or anus with any object;
- (i) oral genital contact; or
- (j) oral anal contact;'

4.86 It is curious that the words 'real or simulated' are added above to subparagraph (a) by the FPA Amendment Bill in the definition of 'sexual conduct' when referring to genitalia but are removed from (j) in an earlier version of the Bill and that given the aim to align the Act with digital advancements provision is not made for people or the acts performed by people, who are simulated. Confusion may arise at the seemingly circular description brought about by this definition and especially as this definition closely mirrors behaviour listed in the definition of 'child pornography' in the SOA. This is further complicated by the substitution of the definition of 'child pornography' in the FPA with the definition in the SOA as the SOA definition incorporates terms that are specifically defined in the SOA, e.g. 'sexual offence'; 'sexual violation' and 'sexual penetration' and the definition in the SOA does not use the term 'sexual conduct'.

<sup>737</sup>

Bold and underlined refers to intended insertions in the FPA and Bold and in square brackets refers to intended deletions.

4.87 The objects of the Act are further blurred by the incorporation of two additional elements i.e.

- '(d) criminalise the possession, production and distribution of child pornography;
- and;
- (e) create offences for non-compliance with this Act.'

4.88 Although the long title of the Act states that the FPA seeks to provide for classification of certain films and publications, the above amendments reflect a clear shift away from a purely administrative function.

4.89 Currently failure to report images or incidents of child pornography is criminalised under the FPA, while the exposure of children or the causing of exposure of children, to pornography and acts of sexual grooming are criminalised under the SOA.

4.90 Both definitions of 'child pornography' (SOA and FPA) include the words 'however created' which is a non-limiting expression. For example a forensic psychologist testifying as an expert witness testified that a child-like doll smuggled into the country was a sex doll and meets the criteria of being child pornography.<sup>738</sup>

#### ***b. Which term should be used?***

4.91 The Commission confirms the support given by the majority of the respondents to the issue paper for and its own provisional preference to substitute the term 'child pornography' with the term 'child sexual abuse material' as it reflects the child sexual abuse that occurs in order to create this material or reflects the abuse of self-generated explicit material of children by a child exploiter who obtains material with the purpose of using it as child sexual abuse material. This confirmation is largely based on the overwhelming support this proposal received from respondents to the issue paper and participants in the workshops that were held. The Commission however acknowledges that in certain instances the substitution of this legally understood term does not truly reflect the true nature of the explicit or naked material of children and complicates matters where children in conflict with the law are involved. In order to navigate this difficulty the Commission has opted to make reference

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<sup>738</sup> Fraize B "Interesting news? Psychologist testifies child-like doll meets criteria for child pornography" (21 March 2017) NTV.ca. available at <http://ntv.ca/psychologist-testifies-child-like-doll-meets-criteria-for-child-pornography/>. Accessed January 2019.

to consensual self-generated child sexual abuse material by certain children. This aspect is dealt with in chapter three above. However the Commission flags the point that the intention of the creator or producer of the material and often the circumstances under which an explicit or sexual image of a child is created may not be obvious from the image itself. An innocently intended or private image could be used for nefarious reasons once distributed.

4.92 With this understanding, the Commission provisionally confirms its recommendation that the term ‘child pornography’ should be changed to ‘child sexual abuse material’ and that this terminology should be used in offences of this nature.

### ***c. The need for one definition***

4.93 The Commission agrees with a number of respondents that one of the key issues with the existing legislation is the inconsistency between the definitions of ‘child pornography’ in the FPA and the SOA. As the NPA and Google aptly comment, one of the consequences of having similar definitions in multiple statutes seems to be the confusion it causes in understanding the offences triggered by the conduct, the enforcement and prosecution thereof. The solution does not simply appear to be to adopt one or the other of these definitions. On the one hand it is argued that the definition contained in the SOA is ambiguous and subjective<sup>739</sup> and on the other hand it is argued that the wording of the definition contained in the SOA is preferred due to its broad application and the belief that it is in line with international instruments.<sup>740</sup> Consequently while all respondents to the issue paper agree that child sexual abuse material (child pornography) is illegal and should remain criminalised as it constitutes a serious sexual offence, differences of opinion exist as to the adequacy of either of the definitions in the FPA or SOA. There seems to be a need for a clearly defined, easy to understand yet flexible definition. Nel is of the view that the definition should be wide enough to offer suitable protection but not be over-broad, in other words avoid legislative overreach but at the same time allowing for each situation to be evaluated ‘in its specific context’.<sup>741</sup> Nel argues that the elements of the crimes incorporating the definition of ‘child pornography’ require *dolus* as the required form of intention which means that *dolus eventualis* is sufficient to constitute the offence.<sup>742</sup> This means that it is sufficient to charge a person in respect of this offence if the person foresaw and reconciled himself to

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<sup>739</sup> Google South Africa.

<sup>740</sup> NPA and Advocate Robbertse of the DOJ&CD.

<sup>741</sup> Nel S “Child Pornography and the Internet – A Comparative Perspective” 230.

<sup>742</sup> Opcit 234.

the possibility that the material may contain child pornography.<sup>743</sup> The internationally accepted definition of ‘child pornography’ and core elements of the term ‘sexually explicit conduct’ are found in both the Budapest and Lanzerote Conventions. It would seem that four elements are required to criminalise child sexual abuse material in international law, namely the offending material, the child as the subject; the depicted conduct and a range of offences. In terms of international law provision is made for riders or exceptions such as possession of such material by law enforcement, serious literary, artistic, political, or scientific purpose having value for minors or the phenomenon of children documenting sexual experimentation.<sup>744</sup> Aggravating circumstances attached to these images include the creation of child sexual abuse material through the sexual abuse of mentally disabled children,<sup>745</sup> generating child sexual abuse material by syndicates or where the perpetrator is a parent, caregiver or holds public office.<sup>746</sup> With regards to the four elements, firstly ‘material’ includes any depiction of child sexual abuse i.e. it does not only have to be a visual depiction of the sexual abuse of a child only. Text and audio are mostly included.<sup>747</sup> Secondly, the child as the subject of the material includes virtual pornography<sup>748</sup> and persons made to appear to be minors.<sup>749</sup> Internationally the age of 18 is used with exceptions coupled to age of consent. Thirdly, conduct in some countries includes real or simulated sexually explicit conduct, depiction of the sexual parts of a child for primarily sexual purposes, naked or semi-naked depictions of a child in an unnatural or sexually suggestive posture (erotic posing).<sup>750</sup> Fourthly the offences are wide-ranging and include the following:

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<sup>743</sup> Ibid.

<sup>744</sup> The child sexual abuse material provisions are intended to protect children from sexual exploitation by adults, not automatically labeling them as sex offenders.

<sup>745</sup> The UNICEF Namibia draft report 20 found that although the definition of ‘child’ was wide enough to include mentally and physically disabled persons it was not technically sound. It found that it would be more accurate to regulate that the sexual abuse of disabled children is considered as aggravating circumstances with regard to the respective offence and enact a separate aggravating ground for adults with physical or personal disabilities with regard to the respective sexual offence.

<sup>746</sup> The UNICEF Namibia draft report 20 points out that in the Philippines syndicated child pornography is specifically criminalised and as such takes into account the dangers of group dynamics. The maximum penalty is imposed where the perpetrator is a parent, ascendant, guardian, step parent or collateral relative or any person having control or moral ascendancy of the child. The maximum penalty also applies where the offender is a public officer or employee. The rationale being that they represent the rule of law and enjoy particular trust.

<sup>747</sup> The Budapest Convention does not expressly include text and audio.

<sup>748</sup> This is not provided for in terms of the OPSC, but is covered in the definition of ‘sexually explicit conduct’ in the Budapest Convention. The later definition covers real or simulated: (a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a minor, of the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse in a sexual context; or (e) lascivious exhibition of the genitals or the pubic area of a minor.

<sup>749</sup> This is not provided for in terms of the OPSC.

<sup>750</sup> The Anti-Child Pornography Act of 2009 in the Philippines (although broadly defined) does not

- Producing child sexual abuse material;
- Inducing, coercing or encouraging a child to engage in any sexual activity.<sup>751</sup>
- Using a child in pornographic activities, performance and materials.<sup>752</sup>
- Offering or making child sexual abuse material available;<sup>753</sup>
- Distributing or transmitting child sexual abuse material;
- Procuring child sexual abuse material for oneself or for another person;<sup>754</sup>
- Possessing child sexual abuse material; or
- Knowingly obtaining access to child sexual abuse material.<sup>755</sup>

4.94 The UNICEF Namibia draft report makes mention of the SADC Model Legislation<sup>756</sup> which arose out of the Support for the Harmonization of ICT policies in Sub-Sahara Africa (HIPSSA) project. The Model Legislation defines ‘child pornography’ as follows:

“Child pornography” means pornographic material that depicts, presents or represents:

- a child engaged in sexually explicit conduct;
- a person appearing to be a child engaged in sexually explicit conduct; or
- images representing a child engaged in sexually explicit conduct; this includes, but is not limited to, any audio, visual or text pornographic material.

A country may restrict the criminalisation by not implementing (b) and (c).’

4.95 According to UNICEF Namibia the definition meets all international standards as the term ‘sexually explicit conduct’ covers the depiction of sexual parts of a child.<sup>757</sup> However it notes that ‘erotic posing’ is not covered by the definition.<sup>758</sup> This definition also does not extend to including pornographic or naked performances by children. The catalogue of

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cover semi-naked or naked posing pictures which do not show the genitals, buttocks, breasts, pubic area and/or anus of the child (“erotic posing”).

<sup>751</sup> ACRWC.

<sup>752</sup> ACRWC. Erotic posing is not covered in the Budapest Convention.

<sup>753</sup> ILO Convention No 182 includes procuring or offering of a child for the production of pornography or for pornographic performances.

<sup>754</sup> Ibid.

<sup>755</sup> The Lanzarote Convention adds “knowingly obtaining access, through information and communication technology, to child pornography” – and therefore includes streaming without downloading it. This wording addresses evidentiary problems created when the offender is using encryption technology to protect downloaded files on his or her storage media (ITU, Understanding Cybercrime: Phenomena, challenges and legal responses (September 2012) 197 as referenced in the UNICEF Namibia draft report.

<sup>756</sup> UNICEF Namibia Draft Report 2016 14.

<sup>757</sup> Ibid.

<sup>758</sup> Ibid.

offences is however aligned with Article 20(1) of the Lanzarote Convention, with the definition that it is limited to the use of computer systems.<sup>759</sup>

4.96 Although there are similarities the definition of and criminalisation of offences relating to child sexual abuse material differs from country to country. Some countries have no definitions of child pornography at all. Quayle notes that of the 184 Interpol member countries, 95 do not criminalise possession of child pornography, regardless of intent to distribute.<sup>760</sup> Many laws contain loopholes and some countries seem to be grappling with the best way of combating the scourge of child sexual abuse material. The United Kingdom is a case in point. As the United Kingdom has recently enacted changes to its legislation dealing with child sexual abuse material and the creation of consensual self-generated child sexual abuse material by certain children reference has been made to these developments in chapter three and are referred to below and in respect of the non-consensual distribution of explicit material of children.

### The Philippines

4.97 In the Philippines section 3 of the Anti-Child Pornography Act of 2009 contains key provisions relevant to the definition of 'child pornography'. They are as follows

'child' refers to a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

4.98 For the purpose of this Act, a child is referred to as:

- (1) a person regardless of age who is presented, depicted or portrayed as a child as defined herein; and
- (2) computer-generated, digitally or manually crafted images or graphics of a person who is represented or who is made to appear to be a child as defined herein.'

4.99 'child pornography' refers to any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of a child engaged or involved in real or simulated explicit sexual activities.

4.100 'Explicit Sexual Activity' includes actual or simulated –

<sup>759</sup>

Ibid.

<sup>760</sup>

Quayle E "The COPINE Project" (2008) Irish Probation Journal vol.5 65 – 83. Available at [www.research.ed.ac.uk](http://www.research.ed.ac.uk).

(1) As to form:

(i) sexual intercourse or lascivious act including, but not limited to contact involving genital to genital, oral to genital, anal to genital, or oral to anal, whether the persons are of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse;

(5) lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus; or

(6) use of any object or instrument for lascivious acts.

4.101 Semi-naked or naked posing pictures which do not show the genitals, buttocks, breasts, pubic area and/or anus of the child ('erotic posing') are not covered.<sup>761</sup> The UNICEF<sup>762</sup> study points out that syndicated child pornography is specifically criminalised in the Philippines and as such takes into account the dangers of group dynamics. The maximum penalty is imposed where the perpetrator is a parent, ascendant, guardian, step parent or collateral relative or any person having control or moral ascendancy of the child. The maximum penalty also applies where the offender is a public officer or employee. The rationale being that they represent the rule of law and enjoy particular trust.

4.102 The UNICEF study found that although the abovementioned definition of 'child' was wide enough to include mentally and physically disabled persons it was not technically sound.<sup>763</sup> It found that it would be more accurate to regulate that the sexual abuse of disabled children is considered as aggravating circumstances with regard to the respective offence and enact a separate aggravating ground for adults with physical or personal disabilities with regard to the respective sexual offence.<sup>764</sup>

### Namibia

4.103 The Namibian Child Care and Protection Act, 3 of 2015 does not contain a definition of 'child pornography'. The Act does however make provision for the combatting of child pornography in section 234 (1)(d):

'A person may not induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography, whether for reward or not.'

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<sup>761</sup> Opcit 20.

<sup>762</sup> Ibid.

<sup>763</sup> Ibid.

<sup>764</sup> Ibid.



4.104 The Child Care and Protection Act does not prohibit the distribution, disseminating, importing, exporting, offering, selling and possessing of child pornography.<sup>765</sup> The Namibian Publications Act 42 of 1974 however prohibits the production, distribution, importation or possession of certain publications or objects and criminalises the exhibition, publication and possession of prohibited or unapproved films. According to the UNICEF draft report child pornography is not mentioned but could arguably be considered undesirable or offensive or harmful to public morals as stipulated in this Act.<sup>766</sup>

4.105 According to UNICEF Namibia section 2(2)(d) of the Combating of Rape Act, No.8 of 2000 sets the age of consent at 14 years, with a close-in-age clause of three years.<sup>767</sup> It further explains that section 14 of the Combating of Immoral Practices Act, No.21 of 1980, sets the age of consent at 16 years, with a close-in-age clause of three years. It concludes that the cumulative effect of these Acts is that a 12 year old child can have sex with a 14 year old child, as the two aspects of the provision are cumulative. From a very early age children can consent to sex as long as their partner is not more than three years older.<sup>768</sup> The anomaly is that if these same children take a picture of this act or send a semi-naked or naked picture to their partner, they may be prosecuted for the crime of child pornography.<sup>769</sup> The UNICEF report argues that it is contradictory to deny those who are deemed mature enough by law to have sex to depict these same acts.<sup>770</sup>

### United States of America

4.106 In both Canada and the United States it is an offence to possess, produce, receive, access and distribute child pornography (whether this involves publishing, selling, sending or transmitting it).<sup>771</sup> In the United States it is an offence to 'knowingly' receive or possess child pornography - the element of intention is required.<sup>772</sup> Accidental accessing or receipt is not criminalised and a defence is provided for such cases.<sup>773</sup>

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<sup>765</sup> UNICEF Namibia draft report 2016 26.

<sup>766</sup> Opcit 27.

<sup>767</sup> Opcit 33.

<sup>768</sup> Ibid.

<sup>769</sup> Ibid.

<sup>770</sup> Ibid.

<sup>771</sup> Nel "Child Pornography and the Internet – A Comparative Perspective" 229.

<sup>772</sup> Ibid.

<sup>773</sup> According to the report in Legalbrief Cyberlaw and Technology Watch 6 December 2017 this is contrary to the case in Japan where Japan's Supreme Court is said to have ruled that the crime of indecent assault does not require sexual intention. It is reported that the case came before the Supreme Court after a man denied having sexual intent when he molested and took naked photos of a girl under the age of 13. He was sentenced to 42 months in prison by

4.107 'Child pornography' falls outside of the First Amendment protection of the freedom of speech.<sup>774</sup> A number of laws have been promulgated to regulate online child pornography.<sup>775</sup> In terms of the 2002 Child Obscenity and Pornography Prevention Act (COPPA) it is a criminal offence to knowingly possess, sell, receive, send or transmit child pornography.<sup>776</sup> However the Supreme Court of Appeal held in *New York v Ferber*<sup>777</sup> that 'virtual' child pornography is protected speech as 'it harms no child in its production and possibly even creates a legal alternative to traditional child pornography'.

4.108 In terms of section 1466A(e) Title 18 USC of COPPA an accused is provided with an affirmative defence which applies when someone comes into possession of one or two items of child pornography and promptly takes reasonable steps to destroy the material or notifies a law enforcement agency.<sup>778</sup> ISPs are required to report as soon as possible any knowledge of facts or circumstances indicating that offences involving child pornography have occurred.<sup>779</sup>

4.109 In the United States 'child pornography'<sup>780</sup> is defined in terms of 'any visual depiction of sexually explicit conduct involving someone under 18 years of age'.<sup>781</sup> This offence is often coupled to mandatory minimum sentencing and registration on a sex offenders register. The law criminalises 'misleading domain names' and 'misleading words or images on the internet' that may cause someone to unintentionally view CSAM.

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a lower court. The man stated that because he only took the pictures to send them to an acquaintance from whom he wanted to borrow money, he could not be convicted of indecent assault. The ruling declares that sexual intentions are irrelevant in charges of indecent assault. The current case is said to reverse a 1970 Supreme Court ruling that found a man could not be convicted of indecent assault after he took naked photos of a woman because he did not have sexual intentions..

<sup>774</sup> Nel S "Child Pornography and the Internet – A Comparative Perspective" 225.

<sup>775</sup> Ibid.

<sup>776</sup> Opcit 226.

<sup>777</sup> 458 US 747 (1982) as quoted by Nel S "Child Pornography and the Internet – A Comparative Perspective" 227.

<sup>778</sup> Nel "Child Pornography and the Internet – A Comparative Perspective" 228. In a case under subsection (b) [dealing with possession], it is an affirmative defence that the defendant – (1) possessed less than three such images; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof (B). (A) took reasonable steps to destroy each such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

<sup>779</sup> Nel S "Child Pornography and the Internet – A Comparative Perspective" 228; (42 USC 13032).

<sup>780</sup> Section 2256 of the 18 USC.

<sup>781</sup> Bulger et al Where policy and practice collide 2017 6.

## United Kingdom

4.110 The law in the United Kingdom criminalises the possession of child sexual abuse images, including downloaded images. And for the purposes of the offence a child is defined as a person under age of 18 – not 16 (the age of consent for sex in the UK).<sup>782</sup> The definition of a ‘child’ in the Act therefore includes depictions of 16- and 17-year-olds who are over the age of consent in the United Kingdom, as well as any adults where the ‘predominant impression conveyed’ is of a person under the age of 18.<sup>783</sup> The legislation for England and Wales which deals directly with offences concerning indecent images of children are as follows:

- The Protection of Children Act 1978 – Section 1
- The Criminal Justice Act 1988 – Section 160

4.111 Offences in relation to indecent images of children in the Protection of Children Act 1978<sup>784</sup> include to:

- take, permit to be taken, or to make any indecent photographs or pseudo-photographs of a child;
- distribute or show such indecent photographs or pseudo-photographs;
- possess such indecent photographs or pseudo-photographs with a view to being distributed; or
- publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs or intends to do so.

4.112 For an offence under Section 1 of the Protection of Children Act the following elements must be established by the prosecution, i.e. that the defendant deliberately or knowingly did one of the following in respect of a photograph of a child: made; took or permitted to be taken; distributed or has shown; or published or caused to be published.

4.113 Section 160 of the Criminal Justice Act covers the offence of possession of an indecent image of a child. There is no requirement that the defendant had to have any

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<sup>782</sup> Pegg S “Could your taste for porn land you in legal trouble?” (15 January 2016) The conversation available at <http://theconversation.com/could-your-taste-for-teen-porn-land-you-in-legal-trouble-53179>. Accessed on 05 October 2016.

<sup>783</sup> UNICEF Child Helplines Report 2018 28.

<sup>784</sup> Section 1.

motive in relation to making or distributing the image – all that is required is that the defendant had the image in his possession.<sup>785</sup>

4.114 It is notable that the Coroners and Justice Act 2009 makes the possession of cartoon pornography of children on the internet a crime. A prohibited cartoon image is defined as one which involves a minor in situations which are pornographic and ‘grossly offensive, disgusting or otherwise of an obscene character’. The Act makes it illegal to own any picture depicting under-18 year olds participating in sexual activities, or depictions of sexual activity in the presence of someone under 18 years old.<sup>786</sup>

4.115 In an attempt to avoid confusion caused by different definitions of what constitutes child sexual abuse material in the late 1990s, the Combating Paedophile Information Networks in Europe (COPINE project) was developed for therapeutic psychological purposes and was used to distinguish between child erotica and child pornography. In cooperation with the Paedophile Unit of the London Metropolitan Police, this was then used to categorize child abuse images for use in both research and law and provided ten levels of severity.<sup>787</sup>

4.116 Quayle<sup>788</sup> and Jordan<sup>789</sup> reflect the COPINE Scale as follows:

#### **Level 1: Indicative**

Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes from either commercial sources or family albums. Pictures of children playing in normal settings. In which the context or organisation of pictures by the collector indicates inappropriateness.

#### **Level 2: Nudist**

Pictures of naked or semi-naked children in appropriate nudist settings, and from legitimate sources.

#### **Level 3: Erotica**

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<sup>785</sup> Trevelyan L "What is the law relating to indecent images of children and the internet?" INBRIEF available at <http://www.inbrief.co.uk/offences/child-porn-and-the-law/> Accessed on 05 October 2016.

<sup>786</sup> UNICEF Child Helplines Report 2018 28.

<sup>787</sup> Quayle "The COPINE Project".

<sup>788</sup> Ibid.

<sup>789</sup> Jordan's solicitors "What are the different levels of child pornography?" (July 2014) available at <http://www.jordanssolicitors.co.uk/2014/07/what-are-the-different-levels-of-child-pornography/> Accessed on 05 October 2016.

Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness.

#### **Level 4: Posing**

Deliberately posed pictures of children fully clothed, partially clothed or naked (where the amount, context and organisation suggest sexual interest).

#### **Level 5: Erotic Posing**

Deliberately posed pictures of fully, partially clothed or naked children in sexualised or provocative poses.

#### **Level 6: Explicit Erotic Posing**

Pictures emphasising genital areas, where the child is naked, partially clothed or fully clothed.

#### **Level 7: Explicit Sexual Activity**

Pictures that depict touching, mutual and self-masturbation, oral sex and intercourse by a child, not involving an adult.

#### **Level 8: Assault**

Pictures of children being subject to a sexual assault, involving digital touching, involving an adult.

#### **Level 9: Gross Assault**

Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation or oral sex, involving an adult.

#### **Level 10: Sadistic/Bestiality**

(a) Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain.

(b). Pictures where an animal is involved in some form of sexual behaviour with a child.

4.117 Quayle explains that the Sentencing Advisory Panel in England and Wales published its advice to the Court of Appeal on offences involving child pornography.<sup>790</sup> In so doing it advised that the nature of the material should be the key factor in deciding the level of

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<sup>790</sup> Quayle "The COPINE Project".

sentence, and adapted the COPINE Scale to five levels. Levels 1 – 3 were dropped completely based on the argument that nakedness alone was not indicative of indecency. Sentencing level 1 comprises COPINE levels 4 to 6 and COPINE levels 7 onwards each constitute an individual sentencing stage. Quayle argues that the use of such objective measures increases the likelihood of consistency across sentencing.<sup>791</sup>

4.118 Advances have been made in crime detection and in one of its biggest crackdowns on child sexual abuse material in the United Kingdom the National Crime Agency apprehended 660 people for downloading and sharing child sexual abuse material leading to charges for serious sexual assault. The massive investigation, involving all 45 British police forces, led to 431 children who were in the ‘care, custody or control’ of the suspects being ‘safeguarded’, including 127 who were identified as being at serious risk of harm.<sup>792</sup>

### Germany

4.119 The UNICEF study<sup>793</sup> explains that child and adolescent pornography is regulated as two separate offences in the German Penal Code (Strafgesetzbuch). The differentiation however seems to only speak to the range of sentence. The Code allows for an exemption in that the production and possession of adolescent pornography is not criminalised where it is produced by an adolescent solely for his or her own private use and with consent of the person depicted therein. The UNICEF study points out that adolescents may however still be prosecuted for the distribution of such pictures. Further if the picture is distributed to the person depicted in the picture he or she will not be covered by the exemption as they did not produce it. The same would apply where a person takes an explicit picture of him or herself and sends it. The receiver would still be in possession of child pornography as he or she did not produce it.

### Canada

4.120 In Canada it is an offence to ‘intentionally’ access or possess child pornography. The element of intention is required.<sup>794</sup> Accidental accessing or receipt is not included and provision is made for defenses such as artistic merit, educational, scientific or medical

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<sup>791</sup> Ibid.

<sup>792</sup> BreakingNews.ie “UK police arrest 660 in massive child pornography crackdown” (16 July 2014) available at <http://www.breakingnews.ie/world/uk-police-arrest-660-in-massive-child-pornography-crackdown-636518.html> Accessed on 06 October 2016.

<sup>793</sup> UNICEF Child Helplines Report 2018 24.

<sup>794</sup> Nel “Child Pornography and the Internet – A Comparative Perspective” 229.

purposes.<sup>795</sup> Section 163.1 of the Canadian Criminal Code makes it an offence to make, print, publish or possess any child pornography for the purpose of publication; and to import, distribute, sell or possess child pornography for the purpose of distribution or sale.<sup>796</sup> Generally possession of child pornography would require downloading the material, however section 163.1(4.1) of the Canadian Criminal Code make it an offence to intentionally access child pornography, for example through an internet browser.<sup>797</sup> The ISP or custodian of the system may be ordered to remove or delete the material. An accused would have to prove that he took all reasonable steps to ensure that the material accessed depicts a person of eighteen years or older.<sup>798</sup>

4.121 Section 163.1(6) of the Canadian Criminal Code contains defences to child pornography offences. Publication of an intimate image is only considered an offence where it is distributed without the consent of the depicted person.<sup>799</sup> The UNICEF study reports that prosecutors in Canada can decide on a case by case basis whether they consider the sharing of explicit pictures between minors as being so severe that it should be prosecuted as a child pornography offence, or as the more moderate offence of section 162.1 (sent without consent). The latter offence would allow the child not to be prosecuted as a child pornography offender as it would be disproportionate to the severity of the penalty and the associated stigma of being classified a sex offender. The offence of being 'sent without consent' is treated as closer in nature to harassment and humiliation than a crime of pornography. However this defence has the unintended consequence of penalising minors who engage in sexting consensually and give consent to distribution more severely than where distribution is effected without the consent of the minor. The first category may be charged as child pornography offenders and the second category may only be charged with the 'publication of an intimate picture without consent'. Furthermore the first category is coupled to a minimum sentence and is linked to mandatory registration on the sex offender registry. Another concern is that there is no indication as to what age a child should be in order to give consent in this regard.<sup>800</sup>

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<sup>795</sup> Opcit 230.

<sup>796</sup> Opcit 224.

<sup>797</sup> Ibid.

<sup>798</sup> Opcit 225.

<sup>799</sup> UNICEF Child Helplines Report 2018 24.

<sup>800</sup> Opcit 26.

## New Zealand

4.122 Although child pornography is illegal in New Zealand, isolated viewing of child pornography images on a website does not constitute an offence, provided that the viewer closes the site as soon as there is recognition of offensive material.<sup>801</sup> However if a person habitually or frequently visits the same website(s) containing child pornography, even if no material is downloaded, this constitutes an offence. The Films, Videos and Publications Classification Act 1993 makes it an offence in New Zealand to make, possess or distribute a publication which:

- 'promotes or supports the exploitation of children and young people for sexual purposes,
- describes, depicts or deals with sexual conduct with or by children or young people,
- exploits the nudity of children or young people for sexual purposes.'<sup>802</sup>

4.123 The New Zealand Films, Video and Publication Classification Act 1993 defines objectionable material as any publication that promotes or supports the:

- 'exploitation of children or young persons for sexual purposes;
- use of violence or coercion to compel any person to participate in sexual conduct;
- sexual conduct upon the body of a dead person;
- use of urine or excrement in association with degrading or dehumanising or sexual conduct;
- bestiality;
- acts of torture or the infliction of extreme violence or extreme cruelty.'<sup>803</sup>

4.124 Courts can also impose orders to seize and destroy objectionable publications, which include computers and CDs (sections 116 and 136).<sup>804</sup>

4.125 Anybody found to 'knowingly' be in possession of objectionable material can receive a maximum of five years imprisonment. Every time a person downloads objectionable material onto their screen, there is the potential for a possession offence having been

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<sup>801</sup> Practice centre "But I was only looking...-managing situation where adults are accessing, exchanging, collecting or producing child pornography" (22 September 2013) available at <http://www.practicecentre.cyf.govt.nz/policy/assessment-and-decision-making/key-information/but-i-was-only-looking.html> Accessed on 26 September 2016.

<sup>802</sup> Te Tari Taiwheina. Second child pornography case in four days, 25 more before the court (23 July 2012) The Department of Internal Affairs available at <https://www.dia.govt.nz/press.nsf/d77da9b523f12931cc256ac5000d19b6/d82721a0688f981c256bff00174c56!OpenDocument> Accessed on 28 September 2016.

<sup>803</sup> Netsafe "What is the difference between legal pornography and illegal content?" (14 September 2015) available at <https://www.netsafe.org.nz/legalandillegalcontent/> Accessed on 26 September 2016.

<sup>804</sup> Te Tari Taiwheina "Second child pornography case in four days".



committed. Anybody who knowingly makes or knowingly trades, distributes, or displays an objectionable publication via the internet may also receive a maximum of ten years imprisonment. A body corporate can be fined up to \$200,000.<sup>805</sup> Although it is illegal to sell pornography to a person under the age of 18 years the approach in New Zealand seems to be permissive in respect of 'soft-core porn' or unrestricted magazines and other print copies which are openly sold at newsstands.<sup>806</sup> Cyber units of the New Zealand Police however actively target online child pornography rings.<sup>807</sup> The Department of Internal Affairs carries out online investigations of people trading in objectionable material, primarily child pornography. It is reported to have prosecuted people who have possessed as many as 190,000 images.<sup>808</sup> According to Taiwheinua the problem with child pornography in New Zealand is largely associated with the possession and distribution of pornography that has been imported as opposed to the production of child pornography within New Zealand itself.<sup>809</sup>

***d. Could the definition of 'child pornography' in the SOA be interpreted to mean that 'sexting' of self-produced naked or semi-naked images amount to the distribution, but not the creation or production, of child sexual abuse material (child pornography)?***

4.126 As discussed in chapter three above there is a growing realization that there is a need to properly assess the creation of and distribution of consensual self-generated child sexual abuse material and the dangers related to documenting sexual experimentation and the role that peer pressure, flirting or grooming may play. The Commission shares the view of Google South Africa that the current definition of 'child pornography' in the SOA read together with section 19 of the SOA which criminalises any person exposing or displaying, or causing exposure or display, of child pornography to a child does not include the actual taking (creation) of a child sexual abuse image. However this content could be used for this purpose and for this reason even if it is consensually distributed is prohibited in terms of the SOA. Furthermore 'creation' of child sexual abuse material is a crime in the FPA as it is synonymous with producing child sexual abuse material. Article 20(3) of the Lanzarote Convention acknowledges that certain children are having sex and that they also engage in sexual behaviour which is channelled through new communication technologies. The

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<sup>805</sup>

Ibid

<sup>806</sup>

World Heritage Encyclopedia List of pornography laws by country (online undated) available at from [http://self.gutenberg.org/articles/list\\_of\\_pornography\\_laws\\_by\\_country#New\\_Zealand](http://self.gutenberg.org/articles/list_of_pornography_laws_by_country#New_Zealand) Accessed on 26 September 2016.

<sup>807</sup>

Ibid.

<sup>808</sup>

Wilson *Social Policy Journal*.

<sup>809</sup>

Te Tari Taiwheinua "Second child pornography case in four days".

UNICEF report argues in favour of the application of Art 20(3) of the Lanzarote Convention which provides for the following exemption:

‘Each party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material [...] involving children who have reached the age set in application of Article 18, paragraph 2 [*age of consent*], where these images are produced and possessed by them with their consent and solely for their own private use.’

4.127 It highlights three elements:

- Decriminalisation only for possession and production of child pornography;
- Decriminalisation only for minors who have reached the age of consent;
- Decriminalisation only for images possessed and produced with their consent and only for private use.

4.128 The Commission has taken note of this approach and has been mindful of the constitutional imperative that recognizes the rights of certain adolescents to engage in consensual sexual activity.<sup>810</sup> Non-consensual or revenge distribution of consensually created child sexual abuse material by certain children and related non-consensual behaviour is addressed later in this chapter.

4.129 The Commission provisionally does not recommend extending the definition of ‘child pornography’ in the SOA or the proposed substituted definition of ‘child sexual abuse material’ to include the creation of consensual self-generated child sexual abuse material by certain children. It does however recommend providing exceptions to child sexual abuse material offences by way of proviso so as not to criminalise all children.

***e. Should the law reflect through its definitions that child sexual abuse material (child pornography) or explicit images of children are not victimless crimes?***

4.130 After evaluating the submissions received in response to this question the Commission is of the view that if the lens of what should be defined as ‘child sexual abuse material’ is used not all sexual or explicit depictions of children depict abuse or portray a victim of abuse. This material may however be used in such a way that the child becomes a victim of abuse through the consequent use thereof, for example non-consensual distribution, grooming or extortion. In this sense some material could be argued to be

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<sup>810</sup> *The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development.*

victimless at the time of creation thereof The Commission is of the view that this is not a definitional issue and can be addressed in the preamble to the SOA and at sentencing stage.

***f. Gaps identified in the FPA and SOA definitions of ‘child pornography’***

4.131 With the aforementioned in mind certain gaps have been identified in both the FPA and the SOA. The UNICEF Namibia draft report notes that although sexually explicit conduct is described in the SOA in a more detailed manner compared to other definitions, some terms are considered very broad making more specific terms redundant, for example due to the broad definition in (l), ‘erotic posing’ images are covered by the definition.<sup>811</sup> UNICEF Namibia also flags a shortcoming in section 20 of the SOA in that it limits the scope of offences to the creation, making and production of child pornography and the assistance of these actions. It highlights that this section does not take into account that distribution, making available or possession of child sexual abuse material is as harmful for the child as the production of the abusive depiction as it continuously violates the child’s rights and creates a market for the production of more child sexual abuse material content.<sup>812</sup>

4.132 Chetty also points out that offences relating to ‘child pornography’ in the FPA cover images and descriptions of a sexual nature and films and publications which advocate; advertise or promote child pornography or the sexual exploitation of children even if they do not contain any images or descriptions of child sexual abuse material, which are not covered in the SOA.<sup>813</sup> Chetty proposes a combination of the definitions of ‘child pornography’ found in the FPA and SOA for inclusion in the SOA. His proposal reads as follows:

‘child sexual abuse material’ means -

- (a) any image, however created, any descriptor; of an explicit or sexual nature, whether such image or description is intended to stimulate erotic or aesthetic feelings or not; of a person, real or simulated; who is, or who is depicted, made to appear, look like, represented, presented or described as being, under the age of 18 years;
- (b) 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

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<sup>811</sup> UNICEF Namibia Draft Report 2016 16.

<sup>812</sup> Opcit 17.

<sup>813</sup> Chetty I “Sexting” of revealing images of children is the distribution child pornography (2017) para 6.2.

- exploitation,<sup>814</sup> or in such a manner that it is capable of being used for the purposes of sexual exploitation; or
- (c) any film or publication which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, even if such film or publications does not contain any depictions, descriptions or scenes of child pornography.

With the exception of paragraph (c) of the proposed definition the current definition of the SOA incorporates the behaviour listed in this definition. The Commission sees merit in amending the current definition of 'child pornography' in the SOA to make provision for this. However the phrase 'sexual exploitation' has a technical meaning in the SOA and therefore needs to be flagged in this discussion. In the SOA this term is used for behaviour akin to 'child prostitution' where a sexual act is met with reward.

4.133 The Commission notes the submission made by the Family Policy Institute that the use of the word 'image' in the SOA definition may be interpreted to preclude the use of amateur or professional video footage or audio clips. With this in mind the Commission agrees that an amended definition should be broad enough to include all kinds of scenarios. However it also takes note of the point made by the Family Policy Institute that with the increase in types of pornography and the sordidness thereof no definition would encompass everything.

4.134 The Commission has taken note of the shortcomings identified by the NPA in the FPA definition but is of the view that the preference for a definition in the SOA will address these shortcomings. With reference to the NPA's suggestion to include the words 'or breasts' in subparagraph (f) in the SOA definition of 'child pornography' it should be noted that the exclusion of or limited inclusion of breasts in certain parts of the SOA was the result of careful deliberations concerning customary practices. The Commission however takes note of the submission made by the NPA that an image capturing the mere exposure of the breasts of a child (male and female) may be found to be erotic for certain offenders. The Commission suggests that if a comprehensive definition, such as is found in the SOA, is preferred that the words 'or breasts' could be included in subparagraph (f) with wording accommodating cultural context or that a simpler definition containing key elements worded in such a way that offenders found in possession or distributing such images could be found to be committing an offence. As noted above section 56(8) of the SOA already provides for an exclusion for legitimate cultural practices in respect of sections 9 and 22 of the SOA

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<sup>814</sup> This term is flagged as it means 'child prostitution' or sexual acts for reward in terms of the SOA.

which among others criminalises the act of ‘flashing’ (exposure) of breasts.<sup>815</sup> An option could be to extend section 56(8) of the SOA to apply to child sexual abuse material offences. As a definition is neutral it would not be apposite to apply the exemption to the definition. If a single definition is used for both the SOA and FPA words accommodating the simulation of sexual intercourse in the context of engaging in conduct or activity characteristically associated with sexual intercourse could also be included in a broader definition. This would ease a prosecutor’s task.

4.135 The Commission is provisionally of the view that it would be preferable to make one definition of child sexual abuse material (housed in the SOA) applicable to both the SOA and FPA. This recommendation is based on the need for simplification, accessibility and to promote implementation of the law.

4.136 The Commission further notes the apparent gap in FPA definition of ‘publication’. In *S v Ferreira*<sup>816</sup> it was held that the definition of publication in respect of section 1(b) calls for some kind of distribution, i.e. section 1, defining publication reads (a)...(b) any writing or typescript which has in any manner been duplicated (c)...(d)... The definition does not provide for a similar limitation/qualification with reference to photographs, prints, drawings, etc. As there was no distribution of the writing the court was unable to find the accused guilty on this count. The judgment itself cannot be faulted on this score.

4.137 The Commission provisionally recommends that the definition of ‘publication’ in the FPA be amended to address this loophole. None of the other means of publication are restricted in this manner. The fact that it has been reduced to writing or typescript makes it a publishable item. The proposed amendment of the definition reads as follows:

‘publication’ means –

. . .

(b) any writing or typescript **[which has in any manner been duplicated]**; . . .

4.138 The Commission also notes the view of Judge Raulinga in the *Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others*<sup>817</sup> where he in reference to the FPA states that ‘[I]t seems to me that when the Act was promulgated, the legislature had no cultural practices and rights in mind. The background to

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<sup>815</sup> See para 2.140.

<sup>816</sup> *S v Ferreira* Case number: CC 193/2015

<sup>817</sup> (3589/2018)[2018] ZAGPPHC 438 (27 June 2018) [65].

the preparation and production of the document excluded cultural rights from the context and purpose of the legislation.’

***g. Should downloading an image on or by way of a digital device amount to ‘creation’ thereof?***

4.139 According to Bulger et al<sup>818</sup> in South Africa definitions of creation do not include the downloading of an image on to any digital device. From the submissions received in response to this question the Commission recognises that for the sake of clarity there is a need to amend the definition of ‘child pornography’ in the SOA to separately make provision for ‘downloading’ and ‘creation’ of an image. It further notes the view that creation and downloading should not be considered synonyms of each other as the context will determine the intention of the person downloading or creating an image and that the digital identification or modification of the material may play a role. In this regard the Commission further notes that downloading or saving of an image or material creates a unique hash value for that image or material which means that for evidentiary purposes it is not identical to the original. Strictly speaking a new image or material is created even though it visually depicts the same image or material.<sup>819</sup>

4.140 Chetty writes that a person downloading ‘child pornography’ from the Internet should be charged with two separate offences i.e. possession and the creation of child pornography.<sup>820</sup> Both are offences in terms of section 24B of the FPA. He cogently argues that computer images only appear as an image following a deliberate ‘point and click’ act which essentially brings the image into existence i.e. creates the image into analogue form from the binary form in which its parts are stored in zeroes and ones.

4.141 The Commission agrees that provision should be made for the inclusion of ‘downloading’ and ‘creation’ of child sexual abuse material. An option would be to insert a definition of ‘create’ in the SOA to the effect that ‘create’ means notwithstanding the ordinary meaning of the word the act of downloading, copying, screen-grabbing or duplicating child sexual abuse material. The Commission is however of the view that the creation of child sexual abuse material is qualitatively different to accessing or downloading it. The Commission is therefore of the view that it would not be apposite to include it in the definition of child sexual abuse material, but rather to ensure that it is included in offences relating to

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<sup>818</sup> Bulger et al Where policy and practice collide 2017 7.

<sup>819</sup> Guicic GPEN Webinar January 2019.

<sup>820</sup> Chetty I “Sexting” of revealing images of children is the distribution child pornography (2017).

child sexual abuse material. As a screen grab of an image may also be made (which would generate its own hash value) or an instruction made to print the image there may be a need to make provision for 'duplication' of such material and in some instances material may never be 'downloaded' but may nevertheless be knowingly accessed through viewing it either as a still image or by way of live-streaming but not storing it. This will be addressed in the discussion on offences below.

***h. Should the definition of 'child sexual abuse material' (child pornography) be linked to the definition of 'child' in the Constitution or the age of consent to engage in a sexual act?***

4.142 The Commission elected to use the age of 18 in the issue paper to define a child in accordance with the Constitution of the Republic of South Africa, 1996 (the Constitution), the Children's Act and the SOA and to thereby use 18 to distinguish between a child and adult for purposes of this investigation. With the exception of Carol Hinrichsen this age was not questioned by respondents. Hinrichsen questions whether the legal age of consent to a sexual act should rather be used to determine what constitutes child- or adult pornography. However, given the revision of the age of consent in South African law, depending on the context, legal consent can be given from the age of 12 for certain children and when an adult is involved from the age of 16 years of age. Given the overall comment presented by Hinrichsen it would however appear that her intention was not to lower the age between child- and adult pornography to below the age of 18 years.

4.143 It stands to be noted that although the legal age of consent for sexual activity is 16, Parliament (in South Africa and the United Kingdom) considered that persons should be protected from sexual exploitation up until the age of 18. The intention behind these provisions is to provide maximum protection for children from those who exploit or seek to exploit them for the purposes of prostitution or pornography. A prosecution will usually take place unless there are public interest factors tending against prosecution which outweigh those tending in favour. These are very serious offences in which the public interest will normally require a prosecution.<sup>821</sup> In its global review and recommendations towards model legislation the International Centre for Missing and Exploited Children (ICMEC) recommends that for purposes of 'child pornography' legislation a child should be defined as 'anyone

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<sup>821</sup> Association of Chief Police Officers ACPO Good Practice Guide for Digital Evidence (adopted by, Police Forces in England, Wales & Northern Ireland) (March 2012) in hard copy. Online version 5 (October 2011). Available at [http://www.cps.gov.uk/legal/p\\_to\\_r/rape\\_and\\_sexual\\_offences/soa\\_2003\\_and\\_soa\\_1956/#a29](http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a29).

under the age of 18 years'.<sup>822</sup> It explains that especially in cross border offences it is critical to have a common age as 'any discrepancy could prevent a child sex offender from being prosecuted'. This argument is strengthened by the strong stance South Africa has already taken towards child protection.

4.144 The Commission provisionally recommends the retention of the age of 18 to define a child. However as this point of discussion has been raised, the Commission requests comment on whether the age of consent to sexual activity (in certain circumstances reflecting the age of 12) should be used to determine what constitutes child sexual abuse material and adult pornography or whether the age of 18 years should be used. It should be noted that Article 9(3) of the Convention on Cybercrime provides a discretion in defining a child for the purposes of 'child pornography' but sets the lower age-limit at 16 years of age.

#### ***i. Provisional recommendation***

4.145 Bearing the aforementioned in mind the Commission provisionally recommends that the definition of 'child pornography' should be substituted with the definition below and that this definition should be used to interpret what is understood as 'child sexual abuse material' in the SOA, the FPA and the Children's Act. It is notable that the reach of the existing definition in the SOA is already broad enough to cover a range of circumstances including where a child is in the presence of another person engaging in sexual acts where the child's presence is peripheral to the pornography.<sup>823</sup> At the same time the Commission wishes to acknowledge that in spite of the identified legislative gaps, cases of child sexual abuse material are increasingly and successfully under investigation in South Africa.<sup>824</sup> Furthermore, as the provisions pertaining to 'child pornography' in the SOA are largely mirrored in the provisions applicable to people with mental disabilities it would be apposite to recommend similar amendments within the context to these provisions as well.

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<sup>822</sup> International Centre for Missing & Exploited Children *Child Pornography: Model Legislation & Global Review* 8<sup>th</sup> Edition 2016 1.

<sup>823</sup> Paragraph k(ii) of the definition of 'child pornography'.

<sup>824</sup> According to a report in Legalbrief in March 2017 a man was convicted and sentenced to an effective five years in jail for crimes involving online sexual exploitation of babies and young children. It was reported that in his plea of guilt, he admitted to having being involved in **an international child pornography ring which depicted young children and babies being sexually exploited**. Following this matter a young woman alleged to be part of an international child pornography ring was brought before the court to conclude a plea and sentence agreement and in a separate matter a former prosecutor (42) was arrested and charged with sexual assault and possession of child pornography. Legalbrief eLaw & Management "The dark side of the surge in online porn" 5 April 2017.



4.146 It is provisionally recommended that the current definition of ‘child pornography’ in the FPA should be repealed and that the proposed amended definition of ‘child pornography’ in the SOA be included by reference. The proposed amendment to the definition of ‘child pornography’ in the SOA is as follows:

“child **[pornography] sexual abuse material**” means any live display,<sup>825</sup> image or sequence of images,<sup>826</sup> however created<sup>827</sup> or portrayed,<sup>828</sup> or any description or presentation of a person, real or simulated, who is, or who is<sup>829</sup> depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such live display, image, sequence of images, [or] description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such live display, image, sequence of images, or description or presentation<sup>830</sup> of such person –

- (a) engaged in an act that constitutes a sexual offence;<sup>831</sup>
- (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 or breasts of such person;<sup>832</sup>
- (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

<sup>825</sup> The inclusion of the words ‘live display’ flow from a shortcoming reflected in the EU Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Live displays are addressed in the Cybercrimes Bill amendment to section 20 of the SOA as a standalone offence.

<sup>826</sup> The inclusion of the words ‘sequence of images’ flows from comment made by the Family Policy Institute that it is not clear that video footage is included.

<sup>827</sup> The use of the word ‘created’ could be problematic. If encryption technology is used or streaming then the material is never ‘created’ in a format that can be accessed because it is not necessarily downloaded or saved anywhere. This question should be asked in conjunction with the insertion of section 19C which expressly includes reference to ‘accessing’ and ‘viewing’.

<sup>828</sup> The word ‘portrayal’ is inserted to cover the ‘real time’ portrayal via webcam or live-streaming as there is no record of it thereafter, it is not ‘created’.

<sup>829</sup> The Cybercrimes Bill inserts the word ‘realistically’ but the Commission is of the view that the word ‘is’ refers to real. An option would be to incorporate the word ‘virtual’ which is not in the OPSC. It is unclear whether comics (anime) would be covered under the word ‘is’ as well.

<sup>830</sup> The word ‘presentation’ is inserted as is done in the Cybercrimes Bill for consistency.

<sup>831</sup> The definition of ‘sexual conduct’ in the FPA includes bestiality but as this is a sexual offence in the SOA it is not deemed necessary to include reference to it in the definition.

<sup>832</sup> SAPS request that the words ‘or breasts’ be included. The words are only included in the definition of ‘child sexual abuse material’ and not ‘pornography’ and are kept gender neutral on purpose. The Commission has made this proposal with the understanding that a defence is provided for in section 56(8) in the interest of a legitimate cultural practice for the exposure or display of the female breasts in terms of section 9 and 22.

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|------------|--|
| <p>(i)</p> | <p>(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or</p>  |
| <p>(l)</p> | <p>showing or describing the body, or parts of the body,<sup>833</sup> 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, <u>that could be used to advocate, advertise or promote a child for sexual purposes</u><sup>834</sup> or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons’;</p> |

## 2 The preferred legislative placement of criminal offences relating to child sexual abuse material and administrative provisions relevant to classification

4.147 The Commission is provisionally of the view, as are the majority of the respondents to the issue paper that all related sexual offences, including offences involving child sexual abuse material should be in one Act, namely the SOA. In line with the recommendation above to centralise a uniform definition of child sexual abuse material in the SOA the Commission further provisionally recommends that the criminalisation of the creation, possession, distribution or facilitation of child sexual abuse material and related offences should occur in one law i.e. the SOA and that similar to the recommendation made in the Cybercrimes Bill that section 24B should be repealed in the FPA and incorporated into the SOA.<sup>835</sup> This would make the offence applicable to virtual and non-virtual situations. It would furthermore hold the possessor, distributor and manufacturer accountable.

4.148 As the content of the offences contained in section 24B with the necessary amendments are being transposed into the SOA this recommendation recognises the view of Cause for Justice that the current law i.e. sections 24A, 24B and 24C of the FPA strikes a good balance between the right to freedom of expression and the protection of children.

4.149 The Commission further takes note of the point made by Chetty that section 20 of the SOA makes the use of the words ‘child complainant’ for the purposes of creating, making or producing or in any manner assisting to create, make or produce ‘child pornography’ a criminal offence.<sup>836</sup> He questions whether or not these offences would apply if a complaint is

<sup>833</sup> This could already include ‘erotic’ posing. It is not evident that it needs to be specified.

<sup>834</sup> This insertion follows from the gap highlighted by Mr Chetty and by the ICMEC in respect of advertising of where to find a website and not the material itself. This phrase is included in the Cybercrimes Bill as part of clause 19A(6) where it is incorporated as an offence.

<sup>835</sup> The retention of the content of this section correlates with UNICEF Namibia’s finding that section 24B of the FPA ‘meets the highest international standards and hence serves as an example for comprehensive legal drafting’.

<sup>836</sup> Chetty I “Sexting” of revealing images of children is the distribution child pornography (2017)

not lodged. Although the State Prosecutor is in essence the complainant as crimes against a child are seen as actionable by the State, he is of the view that clarity is needed. Seen from the perspective of the criminalisation of pornography he suggests that the words 'child complainant' in sections 10 and 20 of the SOA be changed to child or child victim.<sup>837</sup> He further points out that although section 20 of the SOA mirrors section 24B of the FPA it is narrower. In his view it will only apply when an actual child is used. Therefore it will not apply where no real child was involved, such as child pornography created through computer-graphics software and will exclude images created by using adults depicted, made to appear, represent or look like children since no child was used. This is despite the wide definition of 'child pornography' in the SOA which read on its own would include these images. He raises a very important point as the advancement of technology has meant that it may be very difficult or impossible to differentiate between real children and those created by way of computer graphics. The only way of proving that the image is of a real child would be to identify the child. This may necessitate an amendment to section 20 and or the definition of 'child' in the SOA. Chetty further argues that copying images is not covered by section 20 of the SOA. He also raises a concern with regard to descriptions of 'child pornography' and whether the concept of 'using a child' would scupper an offence in this regard if a real child has not been sexually abused for the purpose of describing that sexual abuse in writing.<sup>838</sup> The Commission also heeds the comment by Chetty that the SOA should criminalise the taking of steps to procure, access or obtain child sexual abuse material (child pornography). He explains that accessing a known 'child pornography' website, for instance, even if no images were viewed or downloaded, would amount to the offence of taking steps to access child sexual abuse material (child pornography). This would mean that subscribing to a website that hosts child sexual abuse images, even if no such images were viewed or downloaded, would also amount to the offence of taking steps to procure, access or obtain child pornography.<sup>839</sup>

4.150 In order to keep abreast of legislative developments it is however necessary to also keep proposed amendments to the FPA in mind, especially as the Bill proposes an extension of section 24B within the FPA in contrast with the recommendation in the Cybercrimes Bill to repeal this section and to insert additional offences in the SOA and amend section 20 of the SOA by way of the Schedule to the Bill.

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<sup>837</sup> para 6.5.  
<sup>837</sup> Opcit para 6.3.  
<sup>838</sup> Opcit para 6.5.1.  
<sup>839</sup> Opcit para 6.6.

4.151 For the sake of context the Commission notes that the FPA Amendment Bill [B37B – 2015] contains a prohibition against filming and distribution of films and photographs depicting sexual violence and violence against children. This is not referred to as child pornography. Clause 18G (1) provides that:

‘No person may create, produce or distribute in any medium, including the internet, and social media any films or photographs depicting sexual violence and violence against children.’

4.152 The prohibition applies despite the individual appearing in the film or photograph having consented to the original creation of such photograph or film.<sup>840</sup> The ban includes images which have been altered in any way.<sup>841</sup> An obligation is placed on ISPs to provide the FPB or SAPS with the identity of the person who published the film or photograph depicting ‘sexual assault and violence against children’.<sup>842</sup> The use of the word ‘sexual assault’ instead of ‘sexual violence’ in sub-clause 18G (7) is assumed to be a typographical error. It would need to be corrected as the term ‘sexual assault’ has a specific meaning in the SOA i.e. referring to non-penetrative sexual acts only, which would restrict what is being prohibited.

4.153 The Bill further seeks to amend section 16 of the FPA which regulates the classification of publications. Currently two items are found in the category ‘refused classification’. The first includes child pornography and the second relates to advocacy of hatred aimed at inciting harm. With the exception of child pornography, an exemption applies to the second item namely that it is a ‘*bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest’. The Bill deletes reference to ‘child pornography’ in the second item but builds in the safeguard that if it is found to be a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest that ‘such publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.’ The same amendment is made in respect of the classification of ‘XX’ and ‘X18’ publications. The practical effect of these amendments is that the classification process will immediately be interrupted and the matter referred to the police as soon as ‘child pornography’ is detected as determined in item (a)(i) of section 16 or in the context of item (a)(ii) no longer be interrupted and reported to the police as soon as ‘child pornography’ is detected but will continue so that the classifiers can determine if it is *bona*

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<sup>840</sup> Sub-clause 18G (2)(c).

<sup>841</sup> Clause 18G (2)(c).

<sup>842</sup> Clause 18G (7).

*vide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest. If this is the finding then the publication would not be prohibited but must be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials. Similar amendments are brought about to section 18 in respect of the classification of films and games. Section 18(6) is amended to clarify that a broadcaster subject to regulation by ICASA is exempt from an obligation to classify in respect of broadcasting and online streaming. Both sections 16 and 18 still provide that where a publication, film or game is found to contain ‘child pornography’ this should be referred to the South African Police Service for investigation and prosecution.<sup>843</sup>

4.154 The Bill inserts clause 18C into the Act which provides for ‘self-classification’ in other words a commercial online distributor can apply to be approved and accredited to conduct classifications of films, games and publications. It thereby allows for possession and distribution of XX and X18 films, games and publications. Clause 18C however does not stipulate what should happen in the event of a film, game or publication being found to be ‘child pornography’ and what the reporting channels or criteria are.

4.155 Clause 18E of the Bill provides for complaints against prohibited content and specifically that:

‘(1) Any person may complain to the Board about unclassified prohibited content, or potential prohibited content, in relation to services being offered online by any person, including commercial online distributors and non-commercial online distributors.’

4.156 If merit is found in the complaint a take-down notice will be issued in terms of section 77 of the Electronic Communications and Transactions Act 25 of 2002 in respect of non-commercial online distributors<sup>844</sup> or internet service providers.<sup>845</sup> Clause 18E (3) further compels the internet service provider to furnish the Board or the police with the identity of the person who published the prohibited content. Clause 18E(4) further provides that child pornography found to be hosted outside of South Africa will be referred by the Board to the police or to the hotline in the country concerned for the attention of law enforcement officials in that country. Once the Board has found the content to be prohibited it is unclear why the information is not directly submitted to the police to issue take down notices and for liaison

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<sup>843</sup> Section 16(5) and section 18(5).

<sup>844</sup> Clause 18(2)(a).

<sup>845</sup> Clause 18(2)(b).

with foreign law enforcement counterparts or hotlines. The drafter of the Bill has however seen fit to write in a facilitation of information or content role for the Board in this regard.

4.157 The Bill amends the heading of section 24B to offences and penalties in respect of 'child pornography and sexual exploitation of children'. It further amends section 24B (1) of the FPA by clarifying that each of the subsections (a) to (c) are applicable to child pornography; and inserts subclause (4) which contains a range of penalties applicable to these offences. It is however unclear why the term 'sexual exploitation' is inserted into the heading as it is not used in the subsections below. Furthermore the term 'sexual exploitation' is not defined in the FPA or in the Bill. This term is however used in the SOA but is used to refer to the prostitution of children.<sup>846</sup>

4.158 The proposed clause 24F provides that 'any person who knowingly creates, produces or in any way contributes to or assists in any film or photograph which contains depictions, description or scenes of sexual assault and violence against children, shall be guilty of an offence and liable upon conviction . . .'

4.159 The Bill further amends section 27A of the FPA which provides for the registration and obligations of ISPs. The term 'Internet Service Provider' is changed to 'internet access provider' in section 27A (2) and although the word ISP is used thereafter, it is thought to seek to oblige access providers to take certain steps to prevent access to child pornography, to report the presence thereof and to preserve evidence in this regard.

4.160 It is notable that the Bill was opposed in Parliament's National Assembly on the grounds that legalising pornography online may have public health costs and social consequences such as exacerbated gender based violence against children.<sup>847</sup> Reference was made to nine state legislatures in the USA which have found that pornography is a public health crisis with multiple harmful public health and safety consequences.<sup>848</sup> The National Assembly were also informed that although there are concerns regarding the use of the term 'child pornography' the Portfolio Committee on Communications had decided to retain this term instead of 'child sexual abuse material' as this term is used in the SOA.<sup>849</sup>

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<sup>846</sup> Section 17 of SOA

<sup>847</sup> Hansard Films and Publications Bill 6 March 2018 38.

<sup>848</sup> Opcit 39.

<sup>849</sup> Opcit 50.

4.161 As stated above the Cybercrimes Bill recommends the deletion of section 24B of the FPA and the amendment of section 24B by the FPA Amendment Bill. The Cybercrimes Bill further inserts Clause 19A ‘offences pertaining to child pornography’ into the SOA which seek to incorporate most of the conduct contained in section 24B of the FPA; incorporates Articles 20 and 21 of the Lanzarote Convention and Article 9 of the Budapest Convention; addresses most loopholes in respect of behaviour engaged in by child sexual exploiters identified in submissions received by the Commission and where not already covered in sections 19 and 20 of the SOA seeks to address gaps identified by the EU directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.<sup>850</sup> It is however not clear why the words ‘exports’ and ‘broadcasts’ are omitted from the content transposed into the SOA from section 24B of the FPA. Both words relate to actions offline which would arguably still need to be criminalised.

4.162 The amendments to the SOA proposed in the Schedule to the Cybercrimes Bill read as follows:

‘(d) Chapter 3 is hereby amended—

(i) by the substitution for the heading to Part II of Chapter 3 of the following heading: “Sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child pornography or pornography to children, **offences relating to child pornography** and using children for pornographic purposes or benefiting from child pornography”;

(ii) by the insertion of the following section after section 19 of the Act:

“Offences relating to child pornography

19A. (1) Any person who unlawfully and intentionally creates, makes or produces child pornography, is guilty of an offence.

(2) Any person who unlawfully and intentionally, in any manner knowingly assists in, or facilitates the creation, making or production of child pornography, is guilty of an offence.

(3) Any person who unlawfully and intentionally possesses child pornography is guilty of an offence.

(4) Any person who unlawfully and intentionally, in any manner—

(a) distributes;

(b) makes available;

(c) transmits;

(d) offers for sale;

(e) sells;

(f) offers to procure;

(g) procures;

(h) accesses;

(i) downloads; or

(j) views,

child pornography, is guilty of an offence.

(5) Any person who unlawfully and intentionally, in any manner knowingly assists in,

or

<sup>850</sup>

ICMEC Child Pornography: Model Legislation & Global Review 2016 15 - 16.

facilitates the—

(a) distribution;

(b) making available;

(c) transmission;

(d) offering for sale;

(e) selling;

(f) offering to procure;

(g) procuring;

(h) accessing;

(i) downloading; or

(j) viewing,

of child pornography, is guilty of an offence.

(6) Any person who unlawfully and intentionally advocates, advertises, encourages or promotes—

(a) child pornography; or

(b) the sexual exploitation of children;

is guilty of an offence.

(7) Any person who unlawfully and intentionally processes or facilitates a financial transaction, knowing that such transaction will facilitate a contravention of subsections (1) to (6), is guilty of an offence.

(8) Any person who, having knowledge of the commission of any offence referred to in subsections (1) to (7), or having reason to suspect that such an offence has been or is being committed and unlawfully and intentionally fails to—

(a) report such knowledge or suspicion as soon as possible to the South African Police Service; or

(b) furnish, at the request of the South African Police Service, all particulars of such knowledge or suspicion,

is guilty of an offence.

(9) An electronic communications service provider that is aware or becomes aware that its electronic communications system is used or involved in the commission of any offence provided for in subsections (1) to (7), must—

(a) immediately report the offence to the South African Police Service;

(b) preserve any information which may be of assistance to the law enforcement agencies in investigating the offence; and

(c) take all reasonable steps to prevent access to the child pornography by any person.”.

(iii) the amendment of section 20, by the addition of the following subsections:

“(3) Any person who unlawfully and intentionally—

(a) attends; or

(b) views,

a live performance involving child pornography, is guilty of the offence of attending or viewing a performance involving child pornography.

(4) Any person (“A”) who unlawfully and intentionally recruits a child complainant (“B”), with or without the consent of B, whether for financial or other reward, favour or compensation to B or a third person (“C”) or not, for purposes of—

(a) creating, making or producing any image, publication, depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of recruiting a child for child pornography; or

(b) participating in a live performance involving child pornography, as contemplated in subsection (3), is guilty of the offence of recruiting a child for participating in a live performance involving child pornography.”;



4.163 And in respect of penalties attached to certain of the offences contained in clause 19A, the proposed amendment to section 56A of the SOA is amended as follows:

'(e) the amendment of section 56A, by the addition of the following subsections:  
"(4) Any person who contravenes the provisions of section 19A(3), (4)(f), (g), (h), (i) or (j), or (5)(f), (g), (h), (i) or (j) is liable—  
(a) in the case of a first conviction, to a fine or to imprisonment for a period not exceeding five years or to both such fine and imprisonment;  
(b) in the case of a second conviction, to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment; or  
(c) in the case of a third or subsequent conviction, to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and imprisonment.  
(5) Any person who contravenes the provisions of section 19A(4)(a), (b), (c), (d), or (e), (5)(a), (b), (c), (d) or (e), (6) or 20(3), is liable—  
(a) in the case of a first conviction, to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment; or  
(b) in the case of a second and subsequent conviction, to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and imprisonment.  
(6) Any person who contravenes the provisions of section 19A(7), is liable—  
(a) in the case of a first conviction, to a fine of R1 000 000,00; or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment;  
(b) in the case of a second or subsequent conviction, to a fine of R2 000 000,00; or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.  
(7) Any person who contravenes the provisions of section 19A(8), is liable, on conviction to a fine or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.  
(8) Any electronic communications service provider who contravenes the provisions of section 19A(9), is liable, on conviction to a fine not exceeding R1 000 000,00; or to imprisonment for a period not exceeding five years or to both such fine and imprisonment."'

4.164 In principle the Commission supports the need to amend the SOA. The Commission is however of the view that the amendments should be reflected somewhat differently and provisionally recommends as follows:

**19C. Offences relating to child sexual abuse material**

- (1) A person who unlawfully and intentionally creates, makes or produces child sexual abuse material, is guilty of the offence of creating, making or producing child sexual abuse material.
- (2) A person who unlawfully and intentionally downloads, possesses, accesses or views child sexual abuse material, is guilty of the offence of downloading, possessing, accessing or viewing child sexual abuse material.
- (3) A person who unlawfully and intentionally in any manner distributes, makes available, transmits, offers for sale, sells, offers to procure or procures child sexual abuse material, or allows child sexual abuse material to be distributed, made available, transmitted, offered for sale, sold, offered to procure or procured, is guilty of the offence of making child sexual abuse material available.
- (4) A person who unlawfully and intentionally arranges, attends or participates

in a live performance involving child sexual abuse material is guilty of the offence of arranging, attending or participating in a live performance involving child sexual abuse material.

(5) A person who unlawfully and intentionally advocates, advertises, encourages or promotes child sexual abuse material is guilty of the offence of promoting child sexual abuse material.

(6) A person who unlawfully and intentionally processes or facilitates a financial transaction that will facilitate a contravention of subsections (1) to (5) is guilty of an offence.”

And

**“54A. Obligation to report commission of offences under sections 19A, B and C**

(3) Any person who, having knowledge of the commission of any offence referred to in section 19A, B and C, or having reason to suspect that such offence has been or is being committed and unlawfully and intentionally fails to-

c) Immediately report such knowledge or suspicion to a police official; or

d) furnish, at the written request of a police official, all particulars of such knowledge or suspicion,

is guilty of an offence.

(4) An electronic communications service provider or financial institution that is aware or becomes aware that its electronic communications system or facilities have or are being used or are involved in the commission of any offence involving child sexual abuse material referred to in sections 19A, B or C and fails to-

e) immediately report the offence to a police official;

f) preserve any information which may be of assistance to a police official investigating the offence;

g) comply with all lawful written requests by a police official relating to the investigation and prosecution of such offence;

h) take all reasonable steps to prevent access to the child sexual abuse material by any person, unless otherwise instructed by a police official in writing not to take such steps;

is guilty of an offence.

(3) A person referred to in subsections (1) and (2)—

(a) must provide reasons for that knowledge or suspicion to a police official;  
and

(b) who makes the report in good faith, is not liable to civil or criminal proceedings by reason of making such report.

4.165 The view is held that in respect of the proposed amendment of S56A of the SOA by the Cybercrimes Bill the actions of the procurer are more serious – it amounts to pornography on demand. The Commission further provisionally finds that pornography on demand is not a lesser offence. The Commission provisionally recommends the amendment of the Minimum Sentencing Act whereby a fine is issued for every day that the material is not

taken down.

### **3 Whether sections 24A(2)(c) and 24(3) of the FPA should be amended by inserting the words:**

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

4.166 The Commission heeds the submission of both the NPA and Cause for Justice that section 24A(3) already makes provision for the suggested wording. The Commission however further finds merit in the submission made by Cause for Justice that the following wording should be added to section 24A(3):

‘or 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.’

4.167 The aim of this amendment would be to align the wording with section 24A(4)(b) and to provide clarity to broadcasters who resort under the authority of ICASA.

4.168 In conjunction with the aforementioned and for the same reason, the Commission provisionally supports the related submission made by Cause for Justice that –

‘1. the following wording should be included in section 24A(2)(b) of the FPA:

‘or which contains

- (i) 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, game or publication 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’;

2. the following wording should be included in section 24A(2)(c) of the FPA:

‘or which contains depictions, descriptions or scenes of –

- (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, judged within context, the film, game or publication is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit.'

4.169 The Commission however recommends the substitution of the term 'child pornography' with 'child sexual abuse material' in the abovementioned amendment.

#### **4 Is it sufficient for the Children's Act to make reference to 'pornography' without defining it?**

4.170 The Commission agrees with Minister Fritz that as neither the 'child pornography' nor 'pornography' is used in an enactment in the Children's Act it would be contrary to the rule governing legislative drafting to define these words. The court would interpret the meaning of these words through the use of dictionary terminology or pertinent legislation. The only time that it would be necessary to define these words would be if the Children's Act sought to give a specific meaning to these words or to deviate from existing definitions. As the Act stands this is not the case.

#### **5 Criminalising the participation of a child in pornographic performances**

4.171 Currently the participation of a child in a pornographic performance is not specifically criminalised in South African law. The Commission takes note of the comment by Advocate Robbertse that Article 21 of the Lanzarote Convention requires the criminalisation of the recruiting, causing or coercing of a child to participate in pornographic performances; profiting from or exploiting of a child for such purposes; and knowingly attending pornographic performances involving the participation of children. And that this obligation is endorsed by the UNCRC and the EU Directive 2011/92.

4.172 Taking cognisance of international law and prescripts the aim of such a crime would be to criminalise both the organiser and customer of a pornographic performance and to cover commercial, non-commercial, public or private performances that include the use of ICT's. The core elements are of:

- (i) a child engaged in real or simulated sexually explicit conduct; or
- (ii) the sexual organs of a child for primarily sexual purposes.

4.173 The Commission concedes that this conduct is not addressed in the SOA and needs to be criminalised. It further identifies the need to criminalise the presence of children in adult pornographic performances.

4.174 The Commission provisionally recommends the substitution of section 20 of the SOA as follows:

- “(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] sexual abuse material, is guilty of the offence of using a child for child [pornography] sexual abuse material.**
- (2) A [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] sexual abuse material.
- (3) A person (‘A’) who unlawfully and intentionally recruits, coerces or deceives a child complainant (‘B’), with or without the consent of B, whether for financial or other reward, favour or compensation to B or a third person (‘C’) or not, for purposes of –
- (a) being used as described in subsection(1); or
  - (b) participating in a live performance involving child sexual abuse material
- is guilty of the offence of recruiting a child for child sexual abuse material.
- (4) A person (‘A’) who unlawfully and intentionally coerces or deceives a child (‘B’) through whatever means to provide child sexual abuse material of him or herself in any manner whatsoever is guilty of the offence of coercing or deceiving a child to provide child sexual abuse material .

## 6 Criminalising the use of webcams to access but not ‘possess’ child sexual abuse material

4.175 The advent of the internet has meant that in-person or contact abuse is not a pre-requisite for the creation of child sexual abuse material. The offender and victim do not even have to know one another. They may even be in different parts of a country or the world. Almost all cases of child sexual abuse material orchestrated by means of electronic devices and distributed through the internet involve more than one country.<sup>851</sup> This gives rise to the

<sup>851</sup> SALRC Sexual Offences Issue Paper (2015) 31.

realisation that an increase in one country of child sexual abuse material is an increase in every other country too necessitating an internationally coordinated approach. There is a clear need for a law enforcement approach that thinks globally but acts locally and cooperatively across borders.<sup>852</sup>

4.176 One of the gaps identified in laws seeking to combat the sexual abuse of children is the use of webcams. Children are sexually abused on demand in real time without the person accessing the abuse having to download or ‘possess’ the material. The viewer can therefore not be charged with possessing the material. According to the Global Study the Philippines is believed to be a key location in Southeast Asia for ‘webcam child sex tourism’, which involves children performing sexual acts in front of a camera controlled by the abuser through an intermediary.<sup>853</sup> South Africa is however not immune to this development. On 23 July 2017 MNET’s programme Carte Blanche reported on ‘camming’ facilitated through webcams. The owner of the adult entertainment business Teazers revealed during his interview on the programme that he facilitated 3 new camming studios. He assured the presenters that all content was reviewed by the FPB to verify that all actors are of legal age and all sexual acts abide by local and international laws. He noted in passing that there was no bylaw for the stripping industry to protect club owners or workers in the industry. It is important to note that according to Simon Mason there is an increase in online indecent images of children brought about by live-streaming, through grooming, sexual blackmail or sextortion.<sup>854</sup> Webcamming in South Africa has also been linked to trafficking. On 25 October 2017 it was reported that two women, originally from Lesotho, had been rescued after they were trafficked into a pornography syndicate. ‘Sex toys... web cameras, Wi-fi routers, USBs and cell phones were seized during a raid of a house in Westonaria, where a 29-year-old woman was arrested,’ said police spokesperson Lungelo Dlamini. It was further reported that the arrested woman is believed to be part of the syndicate that creates and distributes pornography on international websites. The raid is reported to have occurred after a provincial police unit investigating serial and electronic crime received information about the syndicate.<sup>855</sup> Siljeur comments that children without adequate supervision, such as street children, are particularly vulnerable.<sup>856</sup> He highlights the danger of cybersex with children

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<sup>852</sup> Ibid.

<sup>853</sup> The Global Study on Sexual Exploitation of children in Travel and Tourism (SECTT): The South African Report on SECTT (2016) launch summary.

<sup>854</sup> Simon Mason, United Kingdom, National Crime Agency CEOP Command, UNICEF National Conference.

<sup>855</sup> Legalbrief Cyberlaw & Technology Watch 25 October 2017.

<sup>856</sup> Siljeur “Protecting children against cyber-sex in South Africa” 96.

involving live-streaming as it is more difficult to detect and monitor.<sup>857</sup> There may not even be a record of it.

## 7 Criminalising sex tourism

4.177 According to Simon Mason, there is an upward trend in contact abuse linked to an increase in transnational child sex offenders who travel to South America, Africa, South East Asia and Eastern Europe to abuse children.<sup>858</sup> The Global Study on Sexual Exploitation of children in Travel and Tourism (SECTT)<sup>859</sup> documents that the exponential growth in different types of tourism, such as ecotourism, homestays and volun-tourism<sup>860</sup> particularly in poverty stricken areas in South East Asia, gives travellers direct access to vulnerable children who, along with their parents, remain uninformed about the threat from travelling child sex offenders. However sometimes parents are informed and involved in the facilitation of the exploitation of their child. Vulnerable children (both girls and boys) in the region (children from ethnic minorities, street children, children who migrate alone or with their families or who remain at home when their parents migrate, refugee and internally displaced children and stateless children) face grave risks of SECTT.<sup>861</sup> Foreign child sex offenders regularly gather child abuse imagery in the course of their exploitation.<sup>862</sup> Such imagery is often

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<sup>857</sup> Opcit 97.

<sup>858</sup> Simon Mason, UNICEF National Conference.

<sup>859</sup> The Global Study on SECTT.

<sup>860</sup> World-wide there seems to be an upsurge of short term volunteer experiences combined with travel for work, study or leisure referred to as “volun-tourism”. The Global Study on SECTT found that increased demand has transformed volunteering into a marketable product and one of the fastest-growing and most lucrative sectors in the tour industry market.

<sup>861</sup> The Global Study on SECTT.

<sup>862</sup> Legalbriefs Legal News Watch (27 August 2018) Issue no: 4531 reports that the Kenyan police have been saluted for detaining a UK paedophile: ‘UK national Geoffrey Fitton has been sentenced to five years and handed a lifetime sex offender registration order after he was deported from Kenya. The 61-year-old paedophile was convicted of four counts of sexual assault of a child aged under 13. The Shrewsbury Crown Court heard that the West Mercia police force was informed that Fitton sexually assaulted a 13-year-old girl he had met online. CapitalFM reports that he travelled to Kenya late last year despite a pending court appearance and was arrested and deported in January. Detective Sergeant Mathew Crisp said it was ‘a complex case which involved working closely with law enforcement agencies on an international scale in order to locate and detain Fitton’. He thanked the Kenya National Police Transnational Organised Crime Unit for its efforts’; Joseph M Capital FM “Briton deported from Kenya sentenced to 5 years for sexually assaulting a minor” (23 August 2018) available at <https://www.capitalfm.co.ke/news/2018/08/briton-deported-from-kenya-sentenced-to-5-years-for-sexually-assaulting-a-minor/> Accessed on 27 August 2018. It is notable that Kenya’s first police unit dedicated to fighting child sexual exploitation and abuse was launched on 17 October 2016 with support of the United Kingdom National Crime Agency as part of a three year collaboration between the NPS and the NCA, with support from the UK Government. National Crime Agency “NCA supports Kenyan police force’s Child Protection Unit” (17 October 2016) available at <http://www.nationalcrimeagency.gov.uk/news/930-nca-supports-kenyan-police-to-launch->

shared with other offenders and is used to groom children for or threaten them into ongoing exploitation.<sup>863</sup> According to the UNICEF study<sup>864</sup> the Philippines is among the top ten countries with rampant cyber pornographic activities involving mostly boys and girls aged 10-14 years. It is however notable that the Global Study has found that the majority of the abusers are male nationals.<sup>865</sup>

4.178 The Philippines is believed to be a key location in Southeast Asia for ‘webcam child sex tourism’, which involves children performing sexual acts in front of a camera controlled by the abuser through an intermediary.<sup>866</sup> Tourist economic zones involve casinos, bars, clubs and brothels which represent high-risk venues for SECTT.<sup>867</sup> The Global Study has identified the infiltration by transnational child sex offenders of pseudo-care professions, particularly at orphanages.<sup>868</sup>

4.179 Contributions to anti-SECTT actions in the region of South East Asia have mainly taken the form of establishing and/or tightening extraterritorial legislation; support for developing sex offender registration and notification systems; and building cooperative relationships between regional, national and international law enforcement agencies.<sup>869</sup> No country fully complies with the recommendations of the Optional Protocol on the sale of children, child prostitution and child pornography. But only the Philippines has specific, robust national legislation describing and prohibiting SECTT.

4.180 The Global Study found that SECTT in North America is also facilitated by widespread access to and use of the internet and other mobile technologies, which help travelling child sex offenders make arrangements for offending, either through specialized websites, via intermediaries or directly with children and adolescents.<sup>870</sup> However Canada and the United States of America both have strict laws governing child sexual exploitation at home and abroad. Several United States of America agencies cooperate to identify and prosecute Americans who offend abroad under the 2003 ‘Protect Act’, which specifically prohibits travel for the purpose of child sexual abuse and operating sex tours. The Department of Homeland Security’s flagship initiative targeting sex offenders, ‘Operation

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<sup>863</sup> pioneering-child-protection-un Accessed on 14 January 2019.

<sup>864</sup> The Global Study on SECTT.

<sup>865</sup> UNICEF Namibia Draft Report 19.

<sup>866</sup> The Global Study on SECTT.

<sup>867</sup> Ibid.

<sup>868</sup> Ibid.

<sup>869</sup> Ibid.

<sup>870</sup> Ibid.

<sup>870</sup> Ibid.



Predator’, has led to over 8000 arrests since 2003.<sup>871</sup> In 2016, the United States government adopted the International Megan’s Law, which created a reciprocal notification system between the United States and foreign law enforcement regarding the travel of sex offenders registered in the United States.<sup>872</sup>

4.181 The Global Study reports that several cross-sectoral partnerships were developed in North America between governments, NGOs and the travel and tourism sector to counteract SECTT, many under the umbrella of corporate social responsibility. Many partnerships incorporate the Guiding Principles set out by the UN Human Rights Commission for companies to inter alia respect human rights.<sup>873</sup> The Global Study reports that the U.S. government is in the process of drafting a National Action Plan on Responsible Business Conduct, with inputs from ECPAT USA on the use of voluntary instruments to prevent child rights violations. The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism is the main vehicle for involving the private sector in efforts to combat SECTT in North America.<sup>874</sup> Some airlines use in flight videos, social media, web and in-flight platforms to call attention to SECTT.<sup>875</sup> According to Siljeur Interpol has recognised that sexual abuse of children has two main international dimensions: exploitation using the internet and sex tourism.<sup>876</sup> Interpol also collaborates with law enforcement agencies to fight global aspects of child abuse. As such Interpol has committed

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<sup>871</sup> The Global Study on SECTT; Homeland Security has been instrumental in the detection and arrest of a number of sexual exploiters. For example three Durban men, were arrested on ‘child pornography’ charge during a swoop by SAPS and the US Department of Homeland Security, after a child pornography website was red-flagged when one of the suspects accessed the site. The charges included rape, sexual assault and grooming a six-year-old child for pornographic purposes. Some of the reports include Waterwork T “Child porn suspects in court” (3 June 2017) Independent on Saturday IOL News available at <https://www.iol.co.za/ios/news/child-porn-suspects-in-court-9510332> Accessed on 5 June 2017 and Legalbrief Africa (5 June 2017) Issue no: 728. In Legalbrief Today Legal Watch News (22 October 2018) Issue no: 4570 it was reported that two life sentences, plus 10 years in prison were handed down after conviction of twice raping a six-year-old girl and of creating and being in possession of more than 3 200 images of child pornography. In arguments on the sentence, the prosecutor said that child pornography sites were constantly monitored by government enforcement agencies around the world. When someone logged onto the sites and downloaded images, their IP addresses were flagged and alerts were sent to the country of origin; Broughton T Sunday Times TimesLIVE “Wayne Parkes gets two life sentences for rape, 10 years for child porn” (19 October 2018) available at <https://www.timeslive.co.za/news/south-africa/2018-10-19-wayne-parkes-gets-two-life-sentences-for-rape-10-years-for-child-porn/> Accessed on 22 October 2018.

<sup>872</sup> The Global Study on SECTT.

<sup>873</sup> Ibid; UNICEF, Save the Children, the UN Global Compact. Children’s Rights and Business Principles.

<sup>874</sup> The Global Study on SECTT

<sup>875</sup> Ibid.

<sup>876</sup> Siljeur “Protecting children against cyber-sex in South Africa” 99.

itself to be a global co-ordinating body for the detection and prevention of digital crimes through the Interpol Global Complex for Innovation (IGCI) in Singapore.<sup>877</sup>

4.182 Recommendations in the Global Study<sup>878</sup> pertaining to business travellers include raising awareness of businesses and business travellers; developing tailored strategies by Governments to prevent and address all forms of SECTT; training of law enforcement personnel; research and awareness raising by civil society and promoting The Code of Conduct among businesses that send their employees abroad.<sup>879</sup>

4.183 The Global Study identifies lack of regulations governing volun-tourism as being at the core of the problem in this sector. It states that selection criteria for training offered to volunteers before their departure are often inadequate, or even non-existent. Since no specific skills are required, background and reference checks are rarely carried out.<sup>880</sup> Even where background checks and preliminary interviews are conducted, police clearances are only required in a small number of projects. Another problem identified by The Global Study is that rules of conduct for volun-tourists are lacking. The Global Study found that weak regulations for orphanages, residential care centres and shelters coincide with a lack of specific child protection policies to enhance risk. Further that government oversight of volun-tourism has been lacking; instead governments encourage all forms of travel and tourism in the hope of boosting economic development and generating employment.<sup>881</sup>

4.184 The Global Study on SECTT recommendations pertaining to volun-tourism include the need for the following:

- 'Regulations for residential child care centres should be tightened.
- Use of international volunteers need to be restricted to qualified or skilled volunteers with police background checks.
- Child sex offender registers need to be maintained to warn counterparts in other countries about the possible threat posed by travelling convicted sex offenders.
- Child protection policies in receiving organisations need to be developed as well as systematic background checks and requiring of police clearances.
- The tourism industry and child rights organisations need to develop child protection strategies and tools to deal with volu-tourism.'

4.185 It is however notable that despite the reported upsurge in abuse by foreigners, the Global Study reports that all regions reveal that a large proportion of offenders come from the same country or region as their victims and that regional and domestic travellers commit

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<sup>877</sup> Opcit 100.

<sup>878</sup> The Global Study on SECTT.

<sup>879</sup> Ibid.

<sup>880</sup> The Global Study on SECTT.

<sup>881</sup> Ibid.

the vast majority of SECTT offences (90% in the Philippines, 75% in Cambodia). Offenders identified in Kenya came from South Africa, Nigeria, Ethiopia, Somalia, Uganda, Tanzania, Rwanda or Sudan, as well as from China and Korea.<sup>882</sup> It is also important to note that the Global Study found that old stereotypes are no longer valid. ‘The stereotype of offenders as Western, male, middle-aged, international tourists is undergoing a transformation, leading to a more nuanced understanding: ‘there is no “typical offender”’.<sup>883</sup> Offenders include preferential and situational offenders. Power imbalances play an important role. The Global Study reports that accounts of abuse of power, bribery and impunity were reported in most regions.<sup>884</sup>

4.186 The Commission heeds the Global Study on SECTT’s recommendation highlighting the need for training of police officers and other members of law enforcement agencies; increasing child protection efforts; strengthening law enforcement and regional and international cooperation to combat SECTT; that travellers should obtain international police clearances; awareness raising around SECTT and the need to develop a code of conduct and reporting mechanisms for employees.<sup>885</sup>

## **8 Should photographs or images in family photo albums which are capable of being used as child sexual abuse material (child pornography) be treated differently from those available on or through an electronic device?**

4.187 The Commission agrees with the NPA that in view of the *De Reuck* case that the purpose of a sexual image of a child should be determined from the perspective of the reasonable viewer. It could be argued that this would mean that extracting an image of a naked child from a family photograph album and placing it in an album of sexual photographs on an internet website would change the context and thereby the perspective of the reasonable viewer.

4.188 In the United Kingdom if the image is in a series then the context of the series can be used to determine if the individual image is prohibited or not.<sup>886</sup>

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<sup>882</sup>

Ibid.

<sup>883</sup>

Ibid.

<sup>884</sup>

Ibid.

<sup>885</sup>

Ibid.

<sup>886</sup>

ACPO *Good Practice Guide for Digital Evidence*; para 7.5.8 United Kingdom Crown Prosecution Service guidance regarding prohibited images of children. Available at [https://www.cps.gov.uk/legal/p\\_to\\_r/prohibited\\_images\\_of\\_children/](https://www.cps.gov.uk/legal/p_to_r/prohibited_images_of_children/).

4.189 The Commission is of the view that creators of artistic or aesthetic images or descriptions of children, particularly in electronic format, which could be used as child sexual abuse material should be alerted to and educated about the consequence of and possibility of abuse of the images as a result of distributing such material. This would include the taking of sexual family photographs. The Commission agrees that the creators of such material should be warned to rather be judicious about what is captured electronically, restrict electronic distribution only to the intended recipient and to exercise caution in this regard. The Commission is of the view that determining whether the possession, accessing or distribution of this material amounts to child sexual abuse material will depend on the context of the creation and later distribution of this material. Publication or distribution through social media would undoubtedly change the context unless measures are taken to restrict access.

## **9 Parents creating, publishing and distributing explicit images of their children**

4.190 A number of parents<sup>887</sup> and family members use social media platforms such as Facebook and Instagram to share digital images of their own or related children in varying degrees of undress or engaging in provocative, suggestive or age inappropriate behaviour such as flirtatious stances or revealing dress. The Commission is provisionally of the view that if these images meet the elements of the crimes pertaining to child pornography in the SOA and the FPA the person could currently be charged with creating, possessing and distributing ‘child pornography’. Some children’s digital footprints are being established before they have an idea of what the internet is and what the effect of the narrative being written on their behalf will be. Representatives of the Namibian Children’s Parliament submit that this behaviour is problematic and may even place these children at physical risk which includes bullying.<sup>888</sup> Infants have no voice other than that of their parents or caregivers. This proxy voice needs to be understood in the context of acknowledging the rights of the child which include the right to dignity, privacy and protection from abuse. Brown warns that ‘parents need to take on the task of protecting their children’s privacy themselves’ by either not oversharing about their children or teaching children to share in such a way that their reputation is not damaged.<sup>889</sup> Parents or caregivers would do well to make their child aware that his or her right to online privacy is not unfettered. The right to privacy is protected in

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<sup>887</sup> The word parent is used loosely to describe any adult who carries responsibilities or duties towards a child.

<sup>888</sup> UNICEF National Conference.

<sup>889</sup> Brown A “When it comes to kids and online privacy – sharing is not caring” (29 June 2018) The Blog Huffington Post available at <https://www.huffingtonpost.co.za/ale-brown/when-it-comes-to-kids-and-online-privacy-shar...> Accessed on 2 July 2018.

South Africa by the Protection of Personal Information Act 4 of 2013 and specific provision has been made prohibiting the processing of the personal information of a child (this would include an image of the child).<sup>890</sup> The only relevant exception to this prohibition is found in section 35 of the Act which provides that personal information of a child may be processed if it is with the prior consent of a competent person (e.g. parent) or where the information has deliberately been made public by the child with the consent of a competent person.<sup>891</sup> It is informative to note that the Canadian guidance around protecting the privacy of children and the US Children’s Online Privacy Protection Act (COPPA) and the General Data Protection Regulation (GDPR) respectively, note that there are unintended consequences to online sharing.<sup>892</sup> Aside from falling foul of the law prohibiting creating, possessing and distributing what constitutes child sexual abuse material (child pornography), these bodies have flagged the now entrenched trend of tertiary recruiters and employers of checking up on prospective or existing student’s online presence. A negative or questionable digital footprint may lead to non-acceptance to tertiary studies or affect employment opportunities.<sup>893</sup>

4.191 Parents also need to be aware that offenders who conform to the DSMV classification of paedophile and not the general definition of child sexual exploiter collect material of a child they are attracted to where the child is clothed, partially clothed, provocatively positioned too i.e. wearing a uniform, swimming suit, sports suits etc. and are not only seeking completely naked images.<sup>894</sup> However truly innocent material remains innocent. There has to be something untoward in the material to exact criminal recourse.

4.192 The Commission is of the view that parents are primarily responsible for ensuring the safety of their children including ensuring that their right to privacy is upheld. Section 28(1)(d) of the Constitution imposes a positive obligation on the state and parents to prevent harm to children. The Commission agrees with the submission made by SAPS and CWSA that parents and caregivers are the first line of defence in the protection of children and should not be complicit in their abuse or placing them at risk. The Commission agrees with Adv Robbertse that the existing law criminalising what is defined as ‘child pornography’ is sufficient to pursue adults, who solicit, possess or further distribute such images. Where parents breach their responsibility towards their children by creating, publishing or distributing explicit images of their children and these images meet the elements of the

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<sup>890</sup> Section 34 of the Protection of Personal Information Act 4 of 2013.

<sup>891</sup> Sections 35(1)(a) and (e).

<sup>892</sup> Brown “When it comes to kids and online privacy – sharing is not caring”.

<sup>893</sup> Ibid.

<sup>894</sup> Reynolds “GNOC (Get Naked on Cam): The secret world of Australia’s paedophiles”; Brown A “When it comes to kids and online privacy – sharing is not caring”.

crimes pertaining to child pornography in the SOA and the FPA a charge of creating, possessing and distributing 'child pornography' would be apposite. No lesser offence is recommended.

## **10 Non-consensual distribution of consensually made child sexual abuse material by certain children and 'revenge pornography' by a child**

### ***a. Scope of the problem and terminology***

4.193 As stated in chapter three above, once child sexual abuse material has been made by that child or a sexual image has been made with consent by someone else, including another child, it may end up being used for purposes it was not intended for. This may be the case for images which are made during a romantic relationship between children; for a legitimate purpose (for example a medical procedure in respect of a child); and for those which are obtained and or distributed without consent (hidden cameras in cloakrooms)<sup>895</sup> or are obtained through a process of grooming or whilst placing the child under duress to provide an image. Revenge pornography or non-consensual pornography as it is increasingly being referred to is defined as 'the act of distributing intimate photography

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According to Svantessen Australia criminalises the installation of devices to facilitate observation. Svantesson "'Sexting' and the law" 45. In South Korea Bicker reports that the country is in the 'grip of what's been described as a spy camera epidemic'. She reports that 'hidden cameras capture women – and sometimes men – undressing, going to the toilet, or even in changing rooms in clothing stores, gyms and swimming pools. The videos are posted online on pop-up pornography sites. Many spy cam videos are taken secretly in toilets and store changing rooms, or posted by ex-partners out for revenge. Bicker reports that some of the women who appeared in the videos took their own lives. She notes that it is difficult to remove these videos once they have been posted and that distribution should be targeted. Bicker also warns that due to the advanced technology in Korea, with the fastest and most accessible internet in the world, the fact that it is a big issue there now merely means that it will become an issue in other countries in time if not addressed at source. Allegedly over 6465 cases were reported in 2017 but only 119 went to prison. Bicker L "South Korea's spy cam porn epidemic" (3 August 2018) BBC News, Seoul available at <https://www.bbc.co.uk/news/world-asia-45040968> Accessed on 14 August 2018; and The BBC News further reports that a South Korean woman has been jailed for secretly photographing a male nude model at an art college in Seoul and posting the image online. The prevalence of being photographed or filmed without consent has caused such consternation that since 2004, the country has mandated that all smart phones should make loud shutter noises when they take a photo or video to make people aware of their use. However, apps can be used to silence the noise, and perpetrators are said to be using miniature cameras hidden in walls, bags, shoes or toilets to photograph people without their consent. BBC News Asia "South Korean woman jailed over secret nude model photo" (13 August 2018) available at <https://www.bbc.co.uk/news/world-asia-45174375> Accessed on 14 August 2018.

through different means without the individual's consent.<sup>896</sup> It is described by Hall as the 'non-consensual posting of sexually explicit images of someone else for revenge, entertainment or political motive'.<sup>897</sup> Revenge pornography is however a broad term, which usually refers to the actions of an ex-partner, who uploads onto the internet, or posts on a social networking site, or shares by text or email, intimate sexual images of the victim, to cause the victim humiliation or embarrassment. It may include images obtained through hacking or theft or the documentation of a sexual offence, or captured without the victim's knowledge.<sup>898</sup> Badenhorst refers to 'sharing someone's secrets or embarrassing information or images online with people whom the information was never intended to be shared' as outing and classifies this type of behaviour under the umbrella of cyber bullying.<sup>899</sup> She also considers the behaviour of distributing consensual child sexual abuse material by certain children for revenge as cyber bullying. It is important to clarify that for the purpose of this discussion paper the term 'revenge pornography' is limited to 'revenge pornography' or non-consensual distribution of consensual child sexual abuse material by certain children distributed by a child.

4.194 In South Africa the distribution of images or videos which the person knows or ought to know will cause harm or inspires the reasonable belief that harm may be caused through electronic or any other communication aimed at a person may be actionable in terms of the criminal and civil law. Criminal law remedies include charging an offender with *crimen iniuria* for unlawfully and intentionally seriously violating the dignity or privacy of the victim; assault where the victim is either harmed or fears or believes that personal violence will take place; in the event where the conduct has come to the notice of someone other than the victim, criminal defamation where the publication has seriously injured the victims reputation; or extortion where the offender threatens to for example distribute information or compromising images about another person unless the victim provides the perpetrator with some benefit.<sup>900</sup> Civil law remedies include an order to keep the peace or an interdict and a defamation

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<sup>896</sup> Hinduja S Revenge Porn Research, Laws, and Help for Victims (14 July 2016) Cyberbullying Research Centre available at <http://cyberbullying.org/revenge-porn-research-laws-help-victims> Accessed on 19 December 2016.

<sup>897</sup> Hall M Revenge Pornography Gender, Sexuality and Motivations Routledge Taylor & Francis Group available at <https://www.routledge.com/Revenge-Pornography-Gender-Sexuality-and-Motivations/Hall...> Accessed on 16 April 2018.

<sup>898</sup> Hill R Cyber-Misogyny: Should 'Revenge Porn' be regulated in Scotland, and if so, how? (2 September 2015) Scripted Volume 12, Issue 2 (2015) 12:2 SCRIPTed 118; Sadleir, in her submission to Parliament's Portfolio Committee on Communications during the public hearings on the Films and Publications Amendment Bill is reported to share this sentiment. Pillay D "SA looks to criminalise revenge porn" (30 Aug 2016) TimesLIVE available at <http://www.timeslive.co.za/scitech/2016/08/30/SA-looks-to-criminalise-revenge-porn?ser...> Accessed on 16 April 2017.

<sup>899</sup> CJCP Issue Paper "Legal responses to cyber bullying and sexting in South Africa" 2.

<sup>900</sup> Opcit 8.

claim.<sup>901</sup> The victim would also have recourse in terms of the Protection from Harassment Act 17 of 2011. In addition to filing a criminal complaint, the complainant would be able to apply for a protection order coupled to a suspended warrant of arrest placing the offending person on clear terms in respect of their conduct and contact of the complainant. This remedy is available to children. The Protection of Personal Information Act 4 of 2014 is also relevant to the sharing of information relating to children. Section 26 prohibits the processing of special personal information which includes the health or sex life of a person and section 34 generally prohibits the processing of personal information of children. This prohibition is however negated where a child makes this information public themselves.<sup>902</sup> However this exception is tempered in that the making public of information regarding a child must be with the consent of a competent person which would include a parent or guardian. This may therefore mean that if a child shares consensual child sexual abuse material by certain children without the consent of his or her parent or guardian that anyone sharing that image will also be in breach of the Protection of Personal Information Act. This may be the case where an image is for example shared with third parties following the break-up of a relationship. Svantesson argues that in Australia it could also constitute the tort of privacy in that it is a wilful act which intrudes upon the privacy or seclusion of the plaintiff in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities, and which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress.<sup>903</sup>

4.195 As alluded to above, Hill notes that the term ‘revenge’ is not necessarily the correct term to use. The argument is that this term implies a ‘tacit justification of the violation, implying that the victim did something to cause the incident’ whereas it is mostly not about revenge or pornography.<sup>904</sup> Hill further observes that although some commentators prefer the term ‘non-consensual pornography’ others consider this behaviour to be gendered hatred, harassment or abuse.<sup>905</sup> Hill expresses a preference for the latter interpretation as women (and by incorporation the girl-child) are predominantly targeted.<sup>906</sup>

4.196 The view is held that attention should also be given to child recipients of consensual child sexual abuse material by certain children. Currently they are not allowed to be complacent and are enjoined to report the receipt of the images and thereafter to delete the

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<sup>901</sup> Opcit 9.

<sup>902</sup> Section 27, 32, 34 and 35 of the Protection of Personal Information Act 4 of 2013.

<sup>903</sup> Svantesson “Sexting’ and the law” 50.

<sup>904</sup> Hill Cyber-Misogyny: Should ‘Revenge Porn’ be regulated in Scotland, and if so, how? 118.

<sup>905</sup> Ibid.

<sup>906</sup> Opcit 120.



images or videos promptly, even when receipt of the material was unsolicited.<sup>907</sup> Nel states that the broad definition of ‘possession’ currently means that even if a person is sent, views or accesses child pornography without any positive action on the side of this person, he or she would be in possession of child pornography. It could be argued that not having the requisite intention would be a defence, however it may need to be pertinently stated.<sup>908</sup> In this regard it may be necessary to consider a defence for unsolicited receipt.<sup>909</sup> In New South Wales<sup>910</sup> it is a defence to a charge for possession of child pornography if the material concerned came into the defendant’s possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it.

### **b. Impact of the behaviour**

4.197 Non-consensual distribution of consensual child sexual abuse material by certain children is said to exact a toll on the child in the image or the recipient child emotionally, professionally, and even physically in the ‘real world’.<sup>911</sup> As explained above, the reputational damage caused by the presence of this material in the cyber world may have other real time future consequences for children such as refusal of employment due to image searches and severe reputational harm in the workplace and with the victim’s family and friends.<sup>912</sup> It may lead to online or offline stalking and physical violence.<sup>913</sup> It may even lead to physical harm as the personal details of subjects are often posted together with the images. The blame may be placed on the victim thereby creating a culture of victim blaming.<sup>914</sup> For children the cumulative effect on the target of this behaviour includes significant emotional distress, self-harm, low school attendance, disengagement from learning, and suicidal thoughts and suicide attempts.<sup>915</sup> In a survey quoted by the Cyberbullying Research Centre 49% of the victims said that they had been harassed or stalked online by perpetrators who saw their consensually made child sexual abuse

<sup>907</sup> Svantesson “Sexting’ and the law” 42.

<sup>908</sup> Nel “Child Pornography and the Internet – A Comparative Perspective” 236.

<sup>909</sup> Nel submits that providing a defence akin to the defence available in the United States of America for someone who comes into possession accidentally and promptly takes steps to destroy or report it to the police may provide a balanced solution to such cases. Nel S “Child Pornography and the Internet – A Comparative Perspective” 237.

<sup>910</sup> Crimes Act 1900 (NSW) S91H(5)(2).

<sup>911</sup> Hill Cyber-Misogyny: Should ‘Revenge Porn’ be regulated in Scotland, and if so, how? 120; CJCP Issue Paper “Legal responses to cyber bullying and sexting in South Africa” 3.

<sup>912</sup> Hill Cyber-Misogyny: Should ‘Revenge Porn’ be regulated in Scotland, and if so, how? 121.

<sup>913</sup> Ibid; CJCP Issue Paper “Legal responses to cyber bullying and sexting in South Africa” 3.

<sup>914</sup> Hill Cyber-Misogyny: Should ‘Revenge Porn’ be regulated in Scotland, and if so, how? 122.

<sup>915</sup> Chetty “Sexting’ of revealing images of children is the distribution child pornography (2017) para 6.4; Geldenhuys K “Sexting in schools” (June 2017) *Servamus* 20; Hinduja Sameer ‘Revenge Porn Research, Laws, and Help for Victims’ Cyberbullying Research Centre 14 July 2016 <http://cyberbullying.org/venge-porn-research-laws-help-victims> 19 December 2016.

material.<sup>916</sup> It is concerning to note that there seems to be an increasing link between teenage alcohol abuse, online distribution of explicit images of children, filming, bullying and suicide.<sup>917</sup> A culture of victim-blaming and exploitation of inebriated teenagers for ‘fun’ seems to be rearing its head.<sup>918</sup> With the latest statistics showing the use of alcohol in secondary schools is at a high of 67.3% the concern is that this harmful behaviour may become more the norm than the exception if clear boundaries are not set.<sup>919</sup> A tragic case in point is that of 17 year old girl who committed suicide in April 2013. Photos of her rape while intoxicated were taken, circulated and used to mercilessly bully her. Children who are subjected to this abuse are more reticent to report as they may feel that they were responsible for the abuse, have found themselves in this position due to underage drinking and have themselves committed a crime.<sup>920</sup> In order to encourage reporting of exploitation, children need to be informed that even if they were not legally allowed to consume alcohol and were too drunk to resist or even remember what happened, this does not amount to consent. It is important to see the consent initially given (if it was at all given) within context. The victim’s consent within the initial context cannot be construed or implied as blanket consent to the distribution of child sexual abuse material.<sup>921</sup> The acts perpetrated against the child in the material depicted in the ‘revenge pornography’ could amount to sexual assault and/or rape and the perpetrators may be charged with these offences.<sup>922</sup> These crimes are particularly serious as they may constitute sexual crimes against children and are coupled to harsh sentencing. Where further exploitation has occurred by capturing the sexual assault/rape in digital format the added dimension of creating child sexual abuse material

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<sup>916</sup> Hinduja Revenge Porn Research, Laws, and Help for Victims.

<sup>917</sup> UNISA Bureau of Market Research Youth Research Unit Seminar Series “Top three social challenges faced by children in South Africa” presentation Online Sexual Exploitation of Children Dr A Basson 12 September 2017.

<sup>918</sup> Ibid.

<sup>919</sup> Ibid.

<sup>920</sup> Geldenhuys K “The link between teenage alcohol abuse, sexting & suicide” (June 2017) *Servamus* 14.

<sup>921</sup> Hill Cyber-Misogyny: Should ‘Revenge Porn’ be regulated in Scotland, and if so, how? On 123 reflects as follows: In *R v M* [2011] EWCA Crim 2752 the defendant had a "one-night stand" with a 17 year old. They engaged in consensual sexual activity after which he took photographs of her naked, resulting in two charges of making an indecent photograph of a child. His defence was that he reasonably believed she was over 18 and had consented to the photographs. It was argued that it was irrational that a girl aged 17 years should be capable of consenting to sexual relations but incompetent to consenting to such acts being photographed unless in a marriage, civil partnership or enduring family relationship. This amounted to a breach of Articles 8(2) and 10(2) of the ECHR and the statutory defence should be read to include "one night stands". These arguments were rejected. The Court held that the need to protect children from sexual exploitation was a "pressing social need". Whilst the defendant could engage in sexual activity with a 17 year old girl, he had no right to make her the subject of "pornography" (as the Court stated). The United Nations Convention of the Rights of the Child and the EU Framework Decision 2004/68/JHA prescribed fundamental rights for children and the provisions of the PCA 1978 were no more than necessary to accomplish the objectives of these international obligations.

<sup>922</sup> Geldenhuys “The link between teenage alcohol abuse, sexting & suicide” 15.

comes into play. In a case similar to that of the young girl referred to above, another young girl<sup>923</sup> committed suicide after she was sexually assaulted while intoxicated and these images were distributed. Three boys were arrested in the USA:

'on charges of misdemeanour sexual battery, felony possession of child pornography and felony sexual penetration...Police found more pictures of other nude teen girls on some of their phones, prompting them to add new charges. One of the boys apparently was also trying to make money by selling the pictures.'<sup>924</sup>

### **c. The roll of the internet and ISPs**

4.198 Websites have been created to facilitate the distribution of 'revenge pornography' but are being shut down amidst a growing awareness of the need to stop this scourge.<sup>925</sup> Even though child sexual abuse material is illegal and it could be assumed that these sites pornography predominantly, the possibility of child sexual abuse material or consensual child sexual abuse material by certain children being hosted on these websites cannot be excluded.<sup>926</sup> Some webmasters have even gone so far as to commodify a victim's distress by charging users a fee to access the images and extorting money from the victims to have the images removed.<sup>927</sup> The Cyberbullying Research Centre estimates that there are '2000 revenge porn web sites worldwide.'<sup>928</sup> Facebook states that it has a 'zero tolerance towards child exploitation imagery' and that it takes 'proactive and aggressive measures to protect . . . young users from predators'.<sup>929</sup> However, up until recently social media companies have argued that they are merely conduits and therefore not responsible for content on their platforms.<sup>930</sup> While it is true that in terms of section 78 the Electronic Communications and Transactions Act 25 of 2002 there is no obligation on ISPs that perform the services in the Act to monitor data which it transmits or stores, or actively seeks facts or circumstances

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<sup>923</sup> UNISA BMR Seminar "Top three social challenges faced by children in SA" (2017).

<sup>924</sup> Geldenhuys "The link between teenage alcohol abuse, sexting & suicide" 17.

<sup>925</sup> Mashable.com website "Revenge Porn" available at <https://mashable.com/category/revenge-porn/> Accessed on 11 July 2018.

<sup>926</sup> Legalbrief ELaw 30 November 2018 reported that in spite of a zero tolerance policy in respect of child sexual exploitation and abuse 'Tumblr's app has been removed from Apple's App Store because the company found child pornography had been slipping past its filters'. The manner in which material which may not seem to be exploitative or abusive is dealt with is unclear. Legalbrief ELaw "Tumblr's app has been removed" available at <http://legalbrief.co.za/diary/elaw-management/story/tumblrs-app-has-been-removed/> accessed 30 November 2018.

<sup>927</sup> Hill Cyber-Misogyny: Should 'Revenge Porn' be regulated in Scotland, and if so, how? 121.

<sup>928</sup> Hinduja S 'Revenge Porn Research, Laws, and Help for Victims' Cyberbullying Research Centre 14 July 2016 <http://cyberbullying.org/revenge-porn-research-laws-help-victims> 19 December 2016.

<sup>929</sup> Safety at Facebook booklet.

<sup>930</sup> Legalbrief Cyberlaw & Technology Watch 17 January 2018 Issue no: 1715.

indicating an unlawful activity,<sup>931</sup> section 27A of the FPA requires ISPs to take all reasonable steps to prevent their servers from being used for the hosting or distribution of child pornography. Users of these platforms are no longer satisfied that these global businesses are sidestepping protecting user's rights on their platforms.<sup>932</sup> A 14 year old schoolgirl in Northern Ireland has sued Facebook over the inclusion of a naked/explicit photo of herself on a so-called 'shame page'. She claimed that the image was obtained through blackmail and published as revenge pornography. The lawsuit became subject to a confidential settlement before it could be properly ventilated and tried.<sup>933</sup> Although platform owners have required user reporting before acting, Facebook has already demonstrated that it has an algorithm to remove naked images, after it took down the image of the nine-year-old Vietnamese girl Kim Phuc running away from an American napalm attack in 1972.<sup>934</sup> An algorithm essentially identified the picture and censored it demonstrating the ability of the network to filter such images.<sup>935</sup> Facebook also recently notified police that Messenger users were sharing a video of two teens under 15 years of age who were having sex, violating laws against the distribution of indecent images of children. Authorities in turn relayed the report to Europol leading to Danish police charging 1004 young people (some under 18) with this crime. In Denmark the penalty for this crime is 20 days or less in prison and being added to the offender register for the next 10 years.<sup>936</sup>

4.199 In terms of establishing liability it is important to note that section 30B of the FPA contains certain presumptions 'that messages or images placed on the Internet or any computer via a network, have been so placed by the registered subscriber or user unless there is evidence to the contrary and that if access was gained or an attempt was made to gain child pornography on a distributed network, including the internet, that such access was gained or attempted by the registered subscriber or user, unless there is evidence to the contrary.'<sup>937</sup> While section 30B may relieve the evidentiary burden on the prosecution, it also means that security measures around computers and computer networks will have to be stepped up to avoid unnecessary liability for subscribers and owners of networks.<sup>938</sup> It is

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<sup>931</sup> Nel "Child Pornography and the Internet – A Comparative Perspective" 238.

<sup>932</sup> UNICEF The Global Compact and Save the Children 'Children's Rights and Business Principles' 2014 available at [www.unicef.org/csr](http://www.unicef.org/csr). This document expositis the framework for understanding and addressing the impact of business on the rights and well-being of children. Legalbrief eLaw Cyberlaw & Technology Watch 17 January 2018.

<sup>933</sup>

<sup>934</sup> Ibid.

<sup>935</sup> Ibid.

<sup>936</sup> Fingas J "Danish police charge 1,000 people following Facebook sex video: Facebook notified police of the illegal clip" *Engadget* website available at <https://www.engadget.com/2018/01/16/facebook-messenger-sex-video-leads-to-1004-charges/> Accessed on 16 January 2018.

<sup>937</sup> Nel "Child Pornography and the Internet – A Comparative Perspective" 240.

<sup>938</sup> Opcit 241.

however argued that due to the private nature of the messages and the application of end-to-end encryption it may be tricky to detect sharing of consensual child sexual abuse material by certain children.<sup>939</sup> It would mostly be initiated by someone in the sharing chain deciding to report the offending material.<sup>940</sup> By way of explanation in web chat rooms, many people can be found, at any one time, openly discussing and exchanging objectionable material. Peer-to-peer file sharing, which was primarily used to provide free access to music on the web, enables people to download objectionable material from computers anywhere around the world without ever meeting or knowing the persons they trade with. Peer-to-peer technology does not require an ISP or web host to store objectionable material on their servers because the images can be transferred directly from one person's computer to another.<sup>941</sup> However it is reported that in the United Kingdom the police have the technical capability to monitor the number of people exchanging child abuse images over Peer2Peer networks. And they have been using it.<sup>942</sup> The British police revealed that their estimate of the number of people involved in exchanging child abuse images over Peer2Peer networks in the UK is 50,000 to 60,000.<sup>943</sup>

4.200 The increasing availability of digital cameras and web cameras has made it relatively easy for a person to produce pornographic images, legal and otherwise. Some of the child sexual abuse material circulating on the internet consists of scanned images of magazine photographs produced legally in countries that have not outlawed child sexual abuse material. However, it is relatively easy to create new images, and these images may be circulated to thousands of anonymous viewers and collectors. Furthermore, digital images

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<sup>939</sup> Guicic GPEN Webinar January 2019.

<sup>940</sup> Fingas "Danish police charge 1,000 people following Facebook sex video".

<sup>941</sup> Wilson *Social Policy Journal*.

<sup>942</sup> The acumen of both the South African Police Service and their UK counterparts is evidenced by a Timeslive report referred to in Legalbrief Cyberlaw & Technology Watch (9 August 2017) Issue No:1695 where it is reported that '[A] a South Coast woman wept while her 39-year-old son pleaded guilty in the Port Shepstone Regional Court last week to molesting his five-year-old daughter and snapping a gallery of lurid pictures of the assault. It was reported that he was arrested after officers from the police's electronic crimes investigation unit linked him to a 'paedophile' who was arrested in the UK. Police discovered 277 explicit images of children, aged between 3 and 15 years old, on the man's computer and on his cell phone during the swoop. A further 25 explicit images of his own children, as well as seven images of him touching one of them inappropriately were found'; Wicks J "Mum weeps while paedophile son pleads guilty to molesting grandchildren" (1 August 2017) Sunday Times TimesLIVE available at <https://www.timeslive.co.za/news/south-africa/2017-08-01-mum-weeps-while-paedophile-son-pleads-guilty-to-molesting-grandchildren/> Accessed on 9 August 2017.

<sup>943</sup> Carr J "The unbelievable truth about child pornography in the UK" (16 December 2012) Huffingtonpost available at [http://www.huffingtonpost.co.uk/john-carr/child-pornography-the-unbelievable-truth-ab\\_b\\_1970969.html](http://www.huffingtonpost.co.uk/john-carr/child-pornography-the-unbelievable-truth-ab_b_1970969.html) Accessed on 06 October 2016.

do not deteriorate as they are copied (unlike photographs and video tapes) and can be easily distributed around the world through the internet.<sup>944</sup>

4.201 Due to the rise in suicides Facebook has embarked on an approach that uses pattern recognition technology to help identify posts and live streams as likely to be expressing thoughts of suicide,' said company spokesperson Guy Rosen. A report on the Fin24 site notes that Facebook is also rolling out the artificial intelligence tool outside the US and plans to eventually make it available everywhere except in EU countries, where data usage is restricted by privacy regulations.<sup>945</sup> The Commission however provisionally supports the recommendation made by the SAPS that all child sexual abuse material should be blocked or filtered. The Commission recognises SAPS's caution that it should be borne in mind that internet based crimes are difficult to address effectively. Even if legislation prohibits certain forms of conduct, it does not mean that action can immediately be taken against a perpetrator for the contravention of the legal provisions. The perpetrator is often outside the jurisdiction of a specific law enforcement entity, and before action can be taken against the perpetrator, onerous and mutual legal assistance procedures have to be followed. These procedures are complicated and time consuming.

#### **d. *The United Kingdom***

4.202 The United Kingdom has enacted a specific offence which became effective on 13 April 2015<sup>946</sup> of disclosing private sexual photographs or films without the consent of an individual who appears in them and with intent to cause that individual distress.<sup>947</sup> The Crown Prosecution Service claims that the law is having an impact in the fight against a large volume of cases in which potential victims range from 11 years of age to pensioners.<sup>948</sup> Previously offenders had to be prosecuted under copyright or harassment laws and victims often found it difficult to have images taken down.<sup>949</sup> The offence covers anyone who re-tweets or forwards without consent, a private sexual photograph or film, if the purpose, or one of the purposes, was to cause distress to the individual depicted in the photograph or

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<sup>944</sup> Wilson *Social Policy Journal*.

<sup>945</sup> Fin24 Tech blog "Facebook trains AI to help prevent suicides" (28 November 2017) available at <https://www.fin24.com/Tech/facebook-trains-ai-to-help-prevent-suicides-20171128-2> Accessed on 11 July 2018.

<sup>946</sup> Legalbrief eLaw & Management "The dark side of the surge in online porn" 5 April 2017.

<sup>947</sup> Section 33 of the Criminal Justice and Courts Act 2015.

<sup>948</sup> Sky News New Revenge Porn Laws Are 'Having An Impact' United Kingdom 7 August 2015. Available at <http://news.sky.com/story/1531730/new-revenge-porn-laws-are-having-an-impact> Accessed on 17 September 2015.

<sup>949</sup> Legalbrief eLaw & Management "The dark side of the surge in online porn" 5 April 2017.

film, who had not consented to the disclosure. Hill however argues that 'revenge pornography' is not only disseminated in the context of 'revenge' where the perpetrator intends to cause the victim harm.<sup>950</sup> She explains that perpetrators may be driven by 'a multitude of varying motivations: for money, entertainment, sexual gratification, notoriety, or even for no particular reason.'<sup>951</sup> For example, anyone who sends the message only because he or she thought it was funny would not be committing the offence. For this reason Hill argues that the term 'revenge pornography' does not accurately reflect the motive behind the behaviour.

4.203 The UK Guidelines on Prosecuting the Offence of Disclosing Private Sexual Photographs and Films provides that one factor that may warrant particular consideration is the involvement of younger or immature perpetrators.<sup>952</sup> The Guidelines state that children may not appreciate the potential harm and seriousness of their communications and as such the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18. The Guidelines caution that where the images may have been taken when the victim was under 18, additional offences may be applicable including offences under section 1 of the Protection of Children Act 1978 (taking, distributing, possessing or publishing indecent photographs of a child) or under section 160 of the Criminal Justice Act 1988 (possession of an indecent photograph of a child). It further notes that where an act of revenge pornography is carried out prior to 13 April 2015, consideration should be given to 'whether the communication in question is grossly offensive, indecent, obscene or false, and may therefore be prosecuted under one of the Communications Acts offences'.<sup>953</sup>

4.204 Various defences to charges of committing the offence of disclosing private sexual photographs and films are available. They are as follows:

1. Section 33(2): It is not an offence to disclose the photograph or film to the individual who appears in the photograph or film (mentioned in Section 33(1) (a) and (b)).
2. Section 33(3): It is a defence if the defendant reasonably believed that the disclosure was necessary for the investigation, prevention or detection of crime.
3. Section 33(4): It is a defence where a person discloses material in the course of or with a view to the publication of journalistic material so long as the person concerned reasonably believed that the publication in question was or would be in the public interest.

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<sup>950</sup> Hill Cyber-Misogyny: Should 'Revenge Porn' be regulated in Scotland, and if so, how? 131.

<sup>951</sup> Ibid.

<sup>952</sup> Crown Prosecution Service *UK Guidelines on Prosecuting the Offence of Disclosing Private Sexual Photographs and Films* available at [http://www.cps.gov.uk/legal/p\\_to\\_r/revenge\\_pornography/](http://www.cps.gov.uk/legal/p_to_r/revenge_pornography/).

<sup>953</sup> Ibid.

4. Section 33(5): It is a defence where the defendant reasonably believed that the material was previously disclosed for reward e.g. commercial photography and had no reason to believe that the previous disclosure for reward was made without the consent of the individual.
5. Section 33(8): A person charged with an offence is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.<sup>954</sup>

4.205 Hill argues that in respect of the above defences the burden of proof is shifted to the victim.<sup>955</sup> She further argues that the emphasis should rather be on the lack of consent, placing the burden of proof on to the perpetrator instead. It is important to note that the offence is drafted so that it only applies to material which looks photographic and which originates from an original photograph or film recording. This is because the harm intended to be tackled by the offence is the misuse of intimate photographs or films.<sup>956</sup> In terms of the Guidelines the offence will still apply to an image which appears photographic and originated from a photograph or film even if the original has been altered in some way or where two or more photographed or filmed images are combined. But the offence does not apply if it is only because of the alteration or combination that the film or photograph has become private and sexual or if the intended victim is only depicted in a sexual way as a result of the alteration or combination.<sup>957</sup> For example, a person who has without consent disclosed an explicit image of his or her former partner in order to cause that person distress will not be able to avoid liability for the offence by digitally changing the colour of the victim's hair. However, a person who simply transposes the head of a former partner onto an explicit image of another person will not commit the offence.<sup>958</sup> Images which are completely computer generated but made to look like a photograph or film will also not be covered by the offence.<sup>959</sup> In the United Kingdom this conduct may also constitute stalking or be prosecuted as a malicious communication.<sup>960</sup>

4.206 The Guidelines explains that in circumstances where material is posted on a website hosted abroad, the court would need to be satisfied that it was in substance an offence committed within the jurisdiction. For example, if the perpetrator was physically located in England or Wales it would be possible for the offence to be committed. In *R v Smith*<sup>961</sup> the Court held that an English court has jurisdiction to try a substantive offence if 'substantial

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<sup>954</sup>

Ibid.

<sup>955</sup>

Hill Cyber-Misogyny: Should 'Revenge Porn' be regulated in Scotland, and if so, how? 132.

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CPS UK Guidelines Prosecuting the Offence of Disclosing Private Sexual Photographs and Films.

<sup>957</sup>

Ibid.

<sup>958</sup>

Ibid.

<sup>959</sup>

Ibid.

<sup>960</sup>

Ibid.

<sup>961</sup>

*R v Smith (Wallace Duncan)* (No.4) [2004] EWCA Crim 631 [2004] QB 1418.



activities constituting [the] crime take place in England’; or ‘a substantial part of the crime was committed here’. This approach ‘requires the crime to have a substantial connection with this jurisdiction’. It should be noted that there is no single verbal formula that must be applied: it is a question of substance, not form.<sup>962</sup>

4.207 Under the latest guidance by the United Kingdom Government, technology companies will be required to publish an annual report on how complaints are handled, the reported abuse that is deleted and the extent of their efforts to moderate bullying or offensive content.<sup>963</sup> Following on this, Twitter has stated that it has decided to take a more aggressive stance on its role and how to enforce violation of its terms of service. It is said to be introducing new rules on inter alia unwanted sexual advances and ‘non-consensual nudity’, including suspending the account from which the original post was made if the posting was intended to harm.<sup>964</sup> Twitter defines ‘non-consensual nudity’ as including ‘content like upskirt imagery, “creep shots”, and hidden camera content’.<sup>965</sup>

4.208 In the United Kingdom cases involving ‘revenge pornography’ may fall to be considered under the social media guidelines and under the following legislation:

- Stalking and harassment offences under sections 2, 2a, 4, and 4a of the Protection from Harassment Act 1997;
- Sending a communication that is grossly offensive, indecent, obscene, menacing or false under section 127 of the Communications Act 2003;
- Sending a communication that is grossly offensive, indecent, obscene, conveys a threat or is false, with intent to cause distress or anxiety, under section 1 of the Malicious Communications Act 1988;
- Offences under section 1 of the Protection of Children Act 1978 (where the image was taken before the subject turned 18);
- Unauthorised access to computer material under Section 1 of the Computer Misuse Act 1990 (where the images have been obtained through computer hacking); and or
- Blackmail.<sup>966</sup>

4.209 Damages for the psychological harm caused by sending explicit self-images have been awarded in a case where a girl in a special needs school was encouraged to text

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<sup>962</sup> CPS UK Guidelines Prosecuting the Offence of Disclosing Private Sexual Photographs and Films.

<sup>963</sup> Legalbrief eLaw – Sex, lies and surveillance tapes Cyberlaw & Technology Watch 18 October 2017.

<sup>964</sup> Ibid.

<sup>965</sup> Ibid.

<sup>966</sup> Ibid.

sexually explicit photographs of herself to a teacher.<sup>967</sup> The court found that anyone involved in ‘sexting’ another person needs to be sure that person is psychologically robust, is not vulnerable and is consenting to the exchange of messages and images.<sup>968</sup> The United Kingdom has also put harsh penalties in place for offenders who set up fake social media profiles or websites to amplify the embarrassment of their targets and for revenge pornography offenders who repeatedly re-post explicit material after it has been taken offline.<sup>969</sup> It is reported that in 2016/17, there were 465 prosecutions over revenge porn allegations in England and Wales.<sup>970</sup> In July 2018 the Sentencing Council published new definitive guidelines for judges and magistrates when sentencing those found guilty of a range of ‘intimidatory’ offences.<sup>971</sup> Legalbrief Today reports that the section on disclosing private sexual images lists factors that would indicate higher culpability, therefore raising the possibility of a punishment at the higher end of the scale.<sup>972</sup> The guideline also makes clear that revenge pornography perpetrators should be dealt with more severely if they make ‘repeated efforts to keep images available for viewing’. Harassment, stalking, controlling and coercive behaviour and threats to kill are also covered by the new guidance. These guidelines were set to come into operation on 1 October 2018.

4.210 Hill argues that non-consensual pornography could be incorporated into and criminalised in terms of harassment laws if it is done without the subject’s consent and under circumstances that are likely to degrade or humiliate the person.<sup>973</sup> Penalties include five years imprisonment coupled to civil liability. Hill identifies the only drawback of this approach to be that an offender would be classed as a sexual offender and face registration as a sex offender.<sup>974</sup>

**e. *The need for accurate, accessible and age-appropriate information and empowerment on life skills, self-protection and specific risks***

4.211 Article 19.1 of the UNCRC provides that:

‘States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

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<sup>967</sup> Titheradge N “Damages awarded in ‘sexting’ case for the first time” (30 November 2015) BBC News available at <https://www.bbc.com/uk-34716852> Accessed on 25 June 2018.

<sup>968</sup> Ibid.

<sup>969</sup> Legalbrief Today Legal Watch News (6 July 2018) Issue no 4496.

<sup>970</sup> Ibid.

<sup>971</sup> Ibid.

<sup>972</sup> Ibid.

<sup>973</sup> Hill Cyber-Misogyny: Should ‘Revenge Porn’ be regulated in Scotland, and if so, how? 136.

<sup>974</sup> Opcit 137.

violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.’

4.212 The UNCRC Committee expanded Article 19 to include ‘psychological bullying and hazing by adults and other children, as well as acts committed via ICTs, such as mobile phones and the internet’.<sup>975</sup> Badenhorst flags the recommendation of the UNCRC Committee to illustrate the need for accurate, accessible and age-appropriate information and empowerment on life skills, self-protection and specific risks – including those related to ICTs and how to develop positive peer relationships – in the school curriculum and otherwise.<sup>976</sup> The need for parents and caregiver guidance in respect of a child’s debut into dating and romantic relationships and the risks involved is evident. The role of parents has been highlighted with the UNCRC Committee noting that parents should assist children respond appropriately, prevent violence and should not follow a punitive approach in order to effect redress.

4.213 Badenhorst suggests that the SOA and the FPA should be amended to ensure that the impact of the law on children in conflict with the law is not unduly harsh. She particularly recommends that:

- ‘All role players in the Criminal Justice System be educated and sensitised regarding online sexual offences committed by children;
- Arrest and charging of children who engage in online sexual offences should only be used as a measure of last resort;
- Options of diversion and programmes addressing this phenomenon should be explored;
- Restorative justice approaches should where applicable be the first solution;
- The media should be encouraged to raise awareness of the consequences of this behaviour and how to avoid it;
- Responsible online behaviour should form part of the school curriculum and the Department of Basic Education should ensure that schools have clear policies on how to deal with such incidents;
- Companies that generate and host social networking sites should face more accountability and should explore funding prevention and diversion programmes;
- Teachers should be equipped on how to respond to such cases; and
- Parents, caregivers and children should be educated on the prevalence of the behaviour and how to prevent it and how to report it.’<sup>977</sup>

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<sup>975</sup> CJCP Issue Paper No.10 Badenhorst C Legal responses to cyber bullying and sexting in South Africa August 2011 4

<sup>976</sup> Ibid.

<sup>977</sup> Opcit17.

## f. *United States of America*

4.214 According to the Cyberbullying Research Centre, 34 states in the United States of America have laws against non-consensual pornography and six have pending legislation.<sup>978</sup> In Illinois the punishment for a conviction of distributing non-consensual child sexual abuse material is 3 years in prison and a fine of up to \$25 000. A conviction is further coupled to restitution to victims and requires the perpetrator to forfeit any profits derived from the distribution of the material.<sup>979</sup> California however views this behaviour as disorderly conduct and as a misdemeanor and therefore metes out what could be considered a slap on the wrist as punishment.<sup>980</sup> Nevada views this behaviour as a category D Felony, whereas Texas differentiates between intentional and non-intentional behaviour and provides for a temporary restraining order.

4.215 Humback argues that although 'revenge pornography' causes individualized harm, the Constitution assumes that there would be even greater harm in criminalizing the free flow of information concerning the activities that it reveals.<sup>981</sup> He is of the view that:

'given the stringent standards of proof of harm applicable to speech restrictions that discriminate based on content, it does not seem likely that revenge porn statutes of the kinds recently enacted or proposed would be able to survive strict scrutiny.'<sup>982</sup>

4.216 He explains his stance based on the protection of the right to free speech given by the United States Supreme Court in respect of 'animal fighting and cruelty films, violent video games, private data about doctors' prescribing habits and virtual child pornography to name a few.<sup>983</sup> The category of exceptions to the reach of the First Amendment protections are:

- 'Defamation
- Obscenity
- Incitement (to imminent unlawful action)
- Speech integral to criminal conduct
- True threats
- Fraud
- "Fighting words"
- Child pornography

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<sup>978</sup> Hinduja *Revenge Porn Research, Laws, and Help for Victims*.

<sup>979</sup> Hill Cyber-Misogyny: Should 'Revenge Porn' be regulated in Scotland, and if so, how? 135.

<sup>980</sup> Hinduja *Revenge Porn Research, Laws, and Help for Victims*.

<sup>981</sup> Humback John A *The Constitution and Revenge Porn*, 35 Pace L. Rev.215 (2014) available at <http://digitalcommons.pace.edu/plr/vol35/iss1/8> 234.

<sup>982</sup> Ibid.

<sup>983</sup> Opcit 235.

- Grave and imminent threats to national security.<sup>984</sup>

4.217 With the exception of ‘child pornography’ which would arguably include consensual child sexual abuse material by certain children, the distribution of non-consensual explicit images of and by adults is not contained in the list. Humberg argues that restrictions to the right to freedom of expression based on the intention to cause harm and non-consent to distribution of disclosures may also not pass constitutional muster.<sup>985</sup> He likens obtaining permission before being able to speak or post information on sensitive topics to advance censorship or prior restraint which is a legal requirement to obtaining ‘consent’ before communicating.<sup>986</sup> He is of the view that a prohibition against revenge pornography would need to be framed in such a way that it qualifies under the rule permitting ‘incidental burdens’ on speech.<sup>987</sup>

4.218 The view expressed by Humberg accords with the Constitutional Court judgement in the *De Reuck v DPP*<sup>988</sup> case which held that although the constitutionally protected freedom of expression is content-neutral and encompasses pornography 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>989</sup> Humberg suggests framing the offence in such a way that the act of posting revenge pornography is causally linked to intentional or attempted harm. MMA is of the view that the longer the material stays in circulation the more harm is done and that the potential for harm is also most keenly felt by those who are poor and marginalised.<sup>990</sup> Although a take-down notice may be issued for consensual child sexual abuse material by certain children, this same material may be uplifted and made available on dodgy news sites, thereby causing further harm.<sup>991</sup> MMA warns that identifying the websites or causing the hosting companies to issue a further take down notice may prove to be time consuming.<sup>992</sup>

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<sup>984</sup> Opcit 236.

<sup>985</sup> Opcit 247.

<sup>986</sup> Opcit 248.

<sup>987</sup> Opcit 249.

<sup>988</sup> *De Reuck v DPP (WLD)* 2004 (1) SA 406 (CC) as referred to in the SALRC Sexual Offences Issue Paper (2015) para 3.32.

<sup>989</sup> *De Reuck* as quoted in Currie I & De Waal J *The Bill of Rights Handbook* Fifth Edition Juta & Co, Ltd 2005 p382.

<sup>990</sup> MMA Report on Online Regulation One Year On: What's changed? 2017.

<sup>991</sup> Opcit 16.

<sup>992</sup> Opcit 18.

### **g. *Parallel legislative developments in South Africa***

4.219 As alluded to in Chapter one, a raft of parallel legislative initiatives relevant to the Commission's current investigation into sexual offences have been tabled in Parliament before the Portfolio Committee on Justice and Correctional Services and the Portfolio Committee on Communications. Clauses in both the Films and Publications Amendment Bill and the Cybercrimes Bill<sup>993</sup>(in its proposed amendment of the SOA) seek to prohibit non-consensual distribution of privately generated explicit images and the distribution of such images to cause harm i.e. revenge pornography.

4.220 Clause 18F of the FPA Amendment Bill prohibits the exposure and distribution of private sexual photographs and films in certain circumstances. It is not a blanket ban, seemingly allowing distribution of private sexual photographs and films where there is either consent from the person(s) in the photograph or film and where the intention is not to have caused harm. The prohibition seems to seek to address revenge pornography or non-consensual distribution of sexual images in so far as it causes harm and not in respect of a broader category including coercion, extortion or as a joke (albeit misplaced). It however does not differentiate between children or adults or provide an age limitation, choosing to use the term 'person' which could be interpreted to mean children and adults. However as 'child pornography' i.e. 'pornography' of anyone under the age of 18 which would arguably currently include consensual child sexual abuse material by certain children, is considered 'refused content' and is expressly criminalised in terms of the section 24B of the FPA, clause 18F could be interpreted to prohibit the consensual and non-consensual distribution of child sexual abuse material which falls within the definition of 'child pornography' by children. This is unclear though and it could also be interpreted to allow for distribution of such photographs or films if there is consent and no harm was intended. Clause 18 further expressly provides that the non-consensual distribution of private sexual photographs and films is allowed where it is necessary for the purposes of preventing, detecting or investigating crime. The text of clause 18F provides as follows:

#### **'Prohibition against distribution of private sexual photographs and films**

18F (1) No person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made –  
(a) without the consent of the individual or individuals who appear in the photograph or film; and  
(b) with the intention of causing that individual harm.

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<sup>993</sup> Previously the Cybercrimes and Cybersecurity Bill.

(2) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(3) The prohibition referred to in subsection (1) shall apply notwithstanding that the individual who appears in the photograph or film might have consented to the original creation of such photograph or film.

(4) For the purposes of this section and section 24E a photograph or film is “private” if, judging from the context in which the photograph or film is taken or made, it was not intended by any individual in the photograph or film to be seen by others.

(5) For the purposes of this section a photograph or film is “sexual” if such photograph or film-

(a) it shows all or part of an individual’s exposed female breasts, anus, genitals or pubic area;

(b) it shows something that a reasonable person would consider to be sexual because of its nature; or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

(6) For the purposes of this section and sections 24E, 24F and 24G, the internet service provider shall be compelled to furnish the Board or a member of the South African Police Services with information of the identity of the person who published the private sexual photograph or film.’

4.221 The Bill further inserts clause 24E into the FPA. This clause essentially duplicates the prohibition in clause 18F in a simplified form coupled to a substantial penalty. The two crimes contained in this clause link distribution to the lack of consent and the intention to harm the individual<sup>994</sup> or where the individual is identified or identifiable in the image.<sup>995</sup> It is unclear why essentially the same crimes are contained in clause 18F and 24E unless clause 24E is intended to be a standalone penalty clause. It would also seem that if there is consent, or no harm was intended or the person is not identifiable in the photograph or film that it would be legal to distribute such material, thereby legalizing the distribution of explicit self-images online. The age of the recipients of such images is not mentioned in these clauses. The Bill also inserts clause 18G into the FPA. This clause seeks to prohibit filming and distribution of films and photographs depicting sexual violence and violence against children. The term ‘sexual violence’ is defined in the FPA as:

‘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 of psychological trauma in a victim’.

4.222 The definition of ‘sexual conduct’ in turn includes a range of penetrative and non-penetrative acts and display of genitals similar to the definitions of ‘sexual penetration’ and ‘sexual violation’ in the SOA. For the purpose of clause 18G these depictions would need to be accompanied by force or coercion. Sub-clause 18G(2)(c) however provides with

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<sup>994</sup> Clause 24E (1).

<sup>995</sup> Clause 24E (2).

reference to the prohibition in sub-clause (1) and oddly to itself i.e. sub-clause (2) which does not contain a prohibition that:

‘(c) The prohibition in subsections (1) and (2) shall apply despite that the individual who appears in the photograph or film might have consented to the original creation of such photograph or film.’

4.223 Sub-clause 2(c) could be meant to address material where children are engaging in sado-masochism or physical violence (if common parlance is used to interpret the expression ‘violence against children’). As consent is mostly not evident from photographs and films, this would exclude violent sexual behaviour and violent behaviour in general even if the child consented to it. The converse would then be true in that this prohibition would not apply to films and photographs of children that are taken with the child’s consent where there is no evidence of violence or coercion and could therefore be interpreted to allow creation, production and distribution of films and photographs of children engaging in sexual conduct in circumstances where there is no depiction of force, coercion, induction of fear that causes psychological trauma. These circumstances could include situations where children are groomed, are paid for the images or just do it for fun. No differentiation is made in terms of age either which if read on its own would mean that an adult could create, produce and distribute images of a child if there is no violence depicted. Similar to the relationship between clause 18F and clause 24E, it would seem that clause 18G is paired with clause 24F. However in this case the headings differ slightly but significantly as the term ‘sexual assault’ is substituted for the term ‘sexual violence’. However the term ‘sexual assault’ is not defined in the FPA or the FPA Bill. This may be as a result of incorrect referencing i.e. it was intended to have been ‘sexual violence’. It should be noted though that the offence of ‘sexual assault’ in the SOA (which includes what was previously referred to as indecent assault) only refers to acts of ‘sexual violation’ as defined in SOA and therefore only applies to non-penetrative acts where consent is not present. However, although the definition of ‘child pornography’ is incorporated, these definitions and offences have not been incorporated into the FPA Bill and would not be applicable. Consequently it is unclear why there is a difference in wording and what the intention is. The interpretation given to clause 18G would however contradict the amended section 24B of the Act which prohibits child pornography as defined in SOA. It is also pertinent to note that the intended aim of the Bill is to provide victims of online revenge pornography with legal recourse.<sup>996</sup> During the public hearings held on this Bill the view was proffered that ‘while nude photographs, videos and photoshopped images remain prevalent . . . that the law should not only apply when the

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<sup>996</sup> Hansard Films and Publications Bill 6 March 2018 53.



'sexual parts' of a victim are exposed.<sup>997</sup> Essentially submitting that any violation or offence to the sexual integrity or dignity of the person, even if sexual parts are not visible, should be regarded an offence, e.g. suggestive poses.<sup>998</sup> This category of conduct does however not seem to be catered for.

4.224 Clause 19 of the Cybercrimes Bill prohibits the distribution of a data message<sup>999</sup> of an intimate image. The clause provides as follows:

- '18. (1) Any person ("A") who unlawfully and intentionally makes available, broadcasts or distributes, by means of a computer system, a data message of an intimate image of a person ("B") without the consent of B is guilty of an offence.
- (2) For purposes of subsection (1)
- (a) "B" means-
- (i) the person who can be identified as being displayed in the data message;
  - (ii) any person who is described as being displayed in the data message, irrespective of the fact that he or she cannot be identified as being displayed in the data message; or
  - (iii) any person who can be identified from other information as being displayed in the data message; and
- (b) "intimate image" means a depiction of a person –
- (i) real or simulated and made by any means in which –
    - (aa) B is nude, or his or her genital organs or anal region, or if B is a female, her breasts are displayed; or
    - (bb) the covered genital or anal region of B, or if B is a female, her covered breasts, are displayed in a manner that violates or offends the sexual integrity or dignity of B; and
  - (ii) in respect of B so displayed retains a reasonable expectation of privacy at the time that the data message was made.'

4.225 This clause read on its own does not proscribe the creation of intimate images and the making available, broadcasting or distribution thereof by the person who has made the image if it is a self-image or if someone else has made it with the person's consent. As with the FPA Bill, there is no indication of or restriction of age linked to this prohibition or the concomitant allowance for distribution where consent is involved. This offence only requires the absence of consent. However, as with the amendment to the FPA, it could be argued that the clause should be read together with the definition of 'child pornography' in the SOA i.e. 'pornography' of anyone under the age of 18 which is considered 'refused content' in terms of the FPA and is expressly criminalised in terms of section 24B of the FPA and sections 19 and 20 of the SOA. If it were to be argued that this clause allows children to

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<sup>997</sup> Pillay "SA looks to criminalise revenge porn".

<sup>998</sup> Ibid.

<sup>999</sup> 'data message' is defined in the Bill as 'data generated, sent, received or stored by electronic means, where any output of the data is in an intelligible form'.

distribute consensual child sexual abuse material (currently defined as child pornography) to each other or to adults or vice versa if they are in an intimate relationship, it is unclear what the criteria for 'consent' would be, for example attaining the age of sexual consent i.e. 12 years of age or if adults are involved 16 years of age and to whom these images may be distributed to. However, if it is read with the prohibition against 'child pornography' in the SOA and the FPA children would not be allowed to send consensual child sexual abuse material. The schedule to the Cybercrimes Bill further amends the SOA by inserting clause 10A 'Harmful disclosure of pornography' into this Act. The definition of what constitutes pornography in the SOA is left unchanged and applies to this offence. This clause clearly criminalises the distribution of pornography of a person older than 18 i.e. adult explicit sexual material, where such a person has not consented to disclosure and where harm is caused – similar to clause 18F of the FPA Bill. On the flipside an offence is not committed where the criteria are not met, i.e. disclosure by a person older than 18, with or without the consent of the person in the image where no harm is caused. Arguably other civil remedies could be resorted to by the person in the image. This offence would only be relevant to the current topic if the person harmfully disclosing the pornography is a child. This clause provides as follows:

**'Harmful disclosure of pornography**

10A. (1) A person ("A") who unlawfully and intentionally discloses or causes the disclosure of pornography in which a person 18 years or older ("B") appears or is described and such disclosure –

- (a) takes place without the consent of B; and
- (b) causes any harm, including mental, psychological, physical, social or economic harm, to B or any member of the family of B or any other person in a close relationship to B,

Is guilty of the offence of harmful disclosure of pornography.'

4.226 This clause additionally criminalises anyone threatening to make a harmful disclosure and criminalises anyone engaging in extortion relating to the harmful disclosure. It does not make provision for disclosure of self-generated explicit images by children. The Bill introduces an innovative remedy akin to the protection order provided for in the Protection from Harassment Act 17 of 2011. If granted the order could be used to prohibit the intended or further harmful disclosure of pornography and could be used to order an electronic communications service provider or person in control of a computer system to remove or disable access to the pornography in question. Failing to comply with such an order constitutes an offence. This clause further provides that irrespective of whether the accused is found guilty or acquitted of an offence in terms of this clause, if there is evidence that proves that the person engaged in or attempted to harass the complainant as provided for in the Protection of Harassment Act, that a protection order may be ordered by the trial court.

Furthermore following conviction of the accused a court must place an injunction on the accused to refrain from distribution or further distribution; that the message and any copies are to be destroyed or that an electronic communications service provider or person in control of a computer system must remove or disable access to the data message in question.

4.227 The need for the proposed protection order should however be evaluated in light of the recent judgment and remedy provided for in *KS v AM*<sup>1000</sup> which provides a similar if not identical remedy to that which is proposed above. The applicant in this matter was granted a protection order in terms of the Domestic Violence Act 116 of 1998 against the respondent (a former intimate partner who had uploaded intimate video material of her without her consent to Facebook and made threats of violence against her) essentially barring him from engaging in certain acts of domestic violence and directing him:

‘to hand over and place in the temporary custody of the sheriff ...all digital devices under his control in order for a forensic expert appointed by the applicant’s attorneys to identify and permanently remove from any such devices any photograph, video, audio and/or records relating to the applicant.’

4.228 Judge Molalehi agreed with the finding in *Prinsloo v RCP Media Ltd t/a Rapport*<sup>1001</sup> that continued possession of unauthorised material could amount to an ‘ongoing violation or at least a continuing threat of violation of one’s privacy.’ He further held:

‘It is evidently clear that the materials are of a private nature. They remain so even if the appellant had consented to their production. In this respect it seems to me on the facts and the circumstances of this case that the existence and possession of the materials depended on the continued relationship between the parties. The reasonable inference to draw, assuming that the appellant consented to the production of the materials in question, is that they remained private, in that they were meant for the entertainment and enjoyment of both parties while the relationship lasted. It could never have been their intention that the other would retain them when the relationship was terminated and use them as a weapon to attack and undermine the dignity and integrity of the other...’<sup>1002</sup>

4.229 The court held that leaving the material in the hands of the respondent leaves the appellant at the mercy of the respondent and places her privacy and dignity at risk. It also found that:

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<sup>1000</sup> *KS v AM* 2018(1)SACR 240 (GJ).

<sup>1001</sup> 2003 (4) SA 456 (T) at 468G-H.

<sup>1002</sup> *KS v AM* 2018(1)SACR 240 (GJ) 250.

'The appellant should not be expected, in the circumstances of this case, to rely on the responsibility and decency (which have already proved lacking) of the respondent not to commit a repeat violation.'<sup>1003</sup>

4.230 The order however falls short of ensuring that any material that has already been distributed or uploaded onto the internet is removed. It would seem that separate take-down notices would need to be applied for. The remedy in the proposed clause 10A is therefore already available through an affordable process provided for in the Domestic Violence Act or the Protection from Harassment Act 17 of 2011 or through civil litigation in the High Court which although initially costly may be paid for by the respondent if the application is successful and an order in respect of costs is made in favour of the applicant. This remedy would be available to children and adults.

4.231 However making non-consensual harmful distribution of intimate images a crime for adults recognizes the seriousness of this conduct and would mean that the victim would not have to file a criminal complaint for what might be considered a lesser offence. However whether the provision for a protection order is included in the offence or not, a victim of this crime would still have access to a civil remedy in the form of a protection order in terms of the Protection from Harassment Act 17 of 2011. The proposed crime would ensure that in addition to filing a criminal complaint, the complainant would be able to apply for a protection order (a civil remedy) coupled to a suspended warrant of arrest placing the offending person on clear terms in respect of their conduct and contact of the complainant. As the proposed offence only relates to adult 'legal' pornography and does not extend to non-consensual distribution of explicit self-images by children, the child in the material would be able to use the remedy contained in the Protection from Harassment Act and the perpetrator (adult or child) could be charged for distribution of child pornography in contravention of SOA and the FPA. The question would be whether this remedy would be seen to sufficiently recognize youthful indiscretions and the need to address the harm caused and act as a deterrent against the proliferation of images which could have unintended consequences for the child in question.

4.232 The Commission is of the view that the possession and distribution or further distribution by a child of child sexual abuse material without the consent of the child in the image or to an unwilling recipient should be criminally actionable irrespective of the motive i.e. whether it is done out of spite or as a prank. The Commission endorses the view held in the unanimous Constitutional Court judgement *Mlungwana and Others v The State and*

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<sup>1003</sup> At 252.

*Another*<sup>1004</sup> confirming other judgements<sup>1005</sup> that exposing children to the criminal justice system, even if diverted under the Child Justice Act 75 of 2008 is traumatic and must be a measure of last resort. For this reason the Commission is of the view that there should be a distinction between adult offenders and children in conflict with the law and the offences they may be charged with. This stance is supported by Siljeur who endorses the sentiment that in order for children to develop into rational, autonomous adults, who are capable of making their own decisions, children should initially be protected against their irrational actions.<sup>1006</sup> According to Badenhorst the Child Justice Act 75 of 2008 and the remedies it provides seem sufficient to address the best interests of the child in conflict with the law under these circumstances. The offenders name would not automatically be included in the Register for Sex Offenders. Section 50(2)(c) of the SOA provides that the particulars of a child at the time of the commission of the sexual offence concerned, may only be included in the National Register for Sex Offenders after –

- (a) the prosecutor has made an application to the court for such an order;
- (b) the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of the person concerned committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future; and
- (c) the person concerned has been given the opportunity to address the court as to why his or her particulars should not be included in the Register.

Furthermore, the child depicted in an image that is distributed without consent would additionally still be able to claim for damages using civil remedies against the child in conflict with the law. If mental, psychological, physical or economic harm is proved the child in the image or someone on his or her behalf would also be able to apply for a protection order in terms of the Protection from Harassment Act.

4.233 The Commission is mindful that if a child is charged in terms of section 19 of the SOA i.e. exposure or display of or causing exposure or display of child pornography to children, this charge will fall under Schedule 3 of the Child Justice Act. Offences listed in this schedule are considered to be serious offences and provide for the arrest of children facing a charge under this schedule. The child will face the same charge an adult would. This

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<sup>1004</sup> *Mlungwana and Others v The State and Another* [2018] ZACC 45 at para 89.

<sup>1005</sup> *S v M* [2007] ZACC 18; 2008 (3)SA 232 (CC); 2007 (12) BCLR 1312 (CC) at fn 20; *Mpofu v Minister for Justice and Constitutional Development* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 1.

<sup>1006</sup> Siljeur "Protecting children against cyber-sex in South Africa" 97.

means that prior to appearing at a preliminary enquiry the child may be remanded in detention or be released on bail under the care of parents or caregivers. If the child was rather charged with a lesser offence, for example non-consensual disclosure of consensual child sexual abuse material by certain children, a summons or written warning would be issued for the child to appear at the preliminary hearing. Diversion would be a consideration depending on the charges the child faces, the child taking responsibility for the offence and acknowledging the wrongfulness of the behaviour. The decision to charge or divert or not would still lie with the prosecutor as each case is evaluated on its own merits and circumstances.

4.234 In chapter three above the Commission recommends the amendment of section 56 of the SOA to provide a defence to certain children who create images of consensual child sexual abuse material by certain children. As soon as consent is not present there would be no defence. With regards to the non-consensual distribution of consensual child sexual abuse material by certain children the Commission agrees with Hill that there should be sufficiently harsh penalties, destruction of the offending images and forfeiture of profits from perpetrators. While an offence of non-consensual distribution could be included in the SOA as a sexual offence, it is unclear whether it should be drafted as a lesser offence to that of distribution or exposure of children to images that constitute child sexual abuse material (child pornography).

2.235 In order to emphasise the seriousness of this behaviour the Commission reiterates its provisional recommendation that once a child turns 18 there will be no defence for the continued possession or distribution of the material. This means that distribution of an image of consensual child sexual abuse by certain children by a person older than 18 would still constitute distribution of child sexual abuse material. The Commission provisionally does not agree that the offence of non-consensual distribution should be coupled to the motive of revenge as there may be a number of reasons other than revenge for the non-consensual distribution of these images i.e. financial gain or as a prank which could have equally deleterious results.

## **11 Creation of explicit content (not of themselves) by children**

4.236 Globally the creation of explicit content of children (not of themselves) by children is proving to be a problem. Six young men in Nova Scotia, Canada, have been reported to have treated the sexual integrity of girls as young as 13 like 'bartering chips or baseball

cards' when they shared intimate images of them without their consent.<sup>1007</sup> They formed a private Facebook group where they decided to exchange photos of at least 20 girls, ranging in age from 13 to 17, without their consent. Penalties proposed by the Crown in Canada included that the young men should be prohibited from using social media sites like Twitter, Facebook and Snapchat.<sup>1008</sup>

4.237 In reports closer to home there seems to be a disturbing trend of child sexual exploiters, bystanders and accomplices taking footage of sexual crimes such as rape of children. Chetty refers to the filming of the alleged rape and sexual violation of a 16 year old female learner by four schoolboys from Northmead Secondary School aged 15 and two adult men.<sup>1009</sup> The case was however withdrawn as the video footage was argued to show consensual sex. For reasons only known to the prosecution the boys were also not charged with possession of child pornography. This incident is unfortunately one of a growing number of such incidents. For example teachers at a Durban school recently alerted the police to a sex video of a 15 year old girl which resulted in the arrest of 15 boys from the school and the community.<sup>1010</sup>

4.238 Jacobs reports that in the City of New York mobile phones have been prohibited in schools since 2005 and in Cyprus since 2008.<sup>1011</sup> The prohibition in New York has been upheld in court as reasonable as mobile phones were found to be disruptive, used to cheat on tests, take pictures and videos in locker rooms, crank call teachers and gather support during fights.<sup>1012</sup> Further that in 2008 Japan requested manufacturers of mobile phones to make phones with only the talking function and GPS to protect children from cyber-criminals. Jacobs also reports that the Education Ministry of the Czech Republic allows school headmasters to discipline students who use mobile phones to film other students being bullied or to blackmail teachers.<sup>1013</sup>

4.239 The Commission is provisionally of the view that the creation of child sexual abuse material (not of themselves) by other children without the consent of the child in the image,

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<sup>1007</sup> Legalbrief Cyberlaw & Technology Watch 9 August 2017.

<sup>1008</sup> Ibid.

<sup>1009</sup> Chetty I "Sexting" of revealing images of children is the distribution child pornography (2017); Nair N "Teen sex video: NPA next stop" (20 March 2009) Times Live available at <https://www.timeslive.co.za/news/south-africa/2009-03-20-teen-sex-video-npa-next-stop/> Accessed on 16 July 2018.

<sup>1010</sup> Masuku S "The Citizen Sex video rocks Durban school" (5 February 2016) available at <https://citizen.co.za/category/news/south-africa> Accessed on 16 July 2018.

<sup>1011</sup> Jacobs *Teen Cyberbullying Investigated* 85.

<sup>1012</sup> Ibid.

<sup>1013</sup> Opcit 84.

particularly where a crime like sexual assault or rape has occurred, should be dealt with in terms of the existing law criminalizing the creation, possession and distribution of child sexual abuse material. The Child Justice Act will find application in certain circumstances. The Commission believes that creation of child sexual abuse material by children is substantially different from the non-consensual distribution or possession of consensual child sexual abuse material by certain children. The Commission is of the view that the offence of creating child sexual abuse material by children is already addressed by section 20 of the SOA. Although child perpetrators are criminalised in the same manner that adults are, the Child Justice Act may find application.

## 12 Online sexual coercion and extortion

4.240 Many children and young adults have been educated on how to manage their digital footprint in order to manage their own online reputation and that they should treat others online with respect. Despite this knowledge or through the lack of application of common sense a growing number of children are still making and posting revealing or sexual pictures of themselves.<sup>1014</sup> The reason behind this seems to increasingly be peer pressure or coercion by a partner, which has been reported as being more traumatizing than being pressured into having physical sex.<sup>1015</sup> This coercion has been likened to a new form of intimate partner violence.<sup>1016</sup> Aside from the emotional and psychological impact that the distribution of material to strangers and third parties has on the child in the material, the result is the recent development in online crime, where sexual photos or videos of a person are obtained and made available in an online space and used against such person to blackmail them. This behaviour constitutes online sexual coercion and extortion.

4.241 Although online sexual coercion and extortion can include a number of scenarios ranging from 'dating scams' to 'webcam blackmail' the European Cybercrime Centre has identified key elements that are necessary to commit this crime.<sup>1017</sup> These are:

- 'Material – any material (information, photo or video) the victim seeks to keep private. This may be recorded consensually by the victim or obtained by the offender deceptively, through grooming, theft of private information or in exchange for payment.

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<sup>1014</sup> Dewey C "The sexting scandal no one sees, besides kids themselves" (5 May 2015) Pretoria News Lifestyle Verve 8.

<sup>1015</sup> Ibid.

<sup>1016</sup> Drouin M "Sexting: A new, digital vehicle for intimate partner aggression? Computers in Human Behaviour" vol 50, Sept 2015 197 – 204.

<sup>1017</sup> Europol EC3.



- Threat – what a victim would like to prevent from happening, in most cases the release of material that victim seeks to keep private. This includes threatening to post sexual content online, specifically for family and friends to see, threatening to hurt or sexually assault the child or family members, to create fake profiles, to create sexual content involving the child by using digital editing tools.
- Value – what the perpetrator demands from a victim.<sup>1018</sup> The majority of demands are for child sexual exploitation material but may include money which is sent via an online money transfer service or credit card. It may include access to a child’s peer group’.<sup>1019</sup>

4.242 According to the European Cybercrime Centre it is necessary to define this behaviour correctly and to identify how this crime intersects with other crimes.<sup>1020</sup> It explains that it is critical to understand these crimes and how they intersect so as to develop suitable reporting mechanisms, legislative and preventive strategies or implementing interventions that meaningfully respond to the needs of the victim, perpetrator and other stakeholder populations.<sup>1021</sup> Some of the focus areas identified are whether the material was created consensually or as a result of coercion; the need to identify profiles of risk and vulnerability in children’s online behaviour which may render them susceptible to online sexual coercion and exploitation; and the growing intersection between consensually produced material and contact forms of online and real time exploitation. The IWF uses the terminology ‘commercial child sexual abuse material’ to refer to “imagery which was apparently produced or is being used for the purposes of financial gain by the distributor”.<sup>1022</sup> It includes the use of virtual currency such as bitcoin payments.<sup>1023</sup>

4.243 The European Cybercrime Centre documents that offenders of online sexual coercion and extortion appear to commit this crime with one of three primary objectives:

- ‘to acquire increasingly more explicit sexual content (photos/videos) of the child (78% of reports);
- to have sex with the child (5%); or
- to obtain money or goods from the child (7%).’<sup>1024</sup>

4.244 It would however seem that although children are not the primary targets of financially motivated perpetrators they do fall victim to this exploitation.<sup>1025</sup> Where this does happen perpetrators are more likely to operate as part of a criminal group and to operate

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1018 Opcit 9.  
 1019 Opcit13.  
 1020 Opcit 10.  
 1021 Ibid.  
 1022 IWF Annual Report 2016 17.  
 1023 Opcit 18.  
 1024 Europol EC3 10.  
 1025 Ibid.

between countries with a common language.<sup>1026</sup> The European Cybercrime Centre has found that any platform frequented by a high volume of young people i.e. social media; chat applications; webcam or online games<sup>1027</sup> provides an opportunity for abuse.<sup>1028</sup> However it notes that globally popular services are likely to give rise to more internationally complex cases.<sup>1029</sup> Further that the use of gaming platforms that allows the user to communicate with many other players with similar interests has a strong potential for abuse, including coercion and extortion.<sup>1030</sup> It has also observed differences in targeting of potential victims i.e. organized crime groups target a broad spectrum of individuals, and send out bulk requests. Sexually motivated perpetrators use social engineering methods and apply tactics aimed at establishing individual relationships and to obtain lists of their victim's contacts to target other victims.<sup>1031</sup> Regardless of the motivation of the perpetrators (financial or sexual) the online environment presents a number of opportunities to perpetrators in that there is:

- 'perceived anonymity and use of manipulative techniques;
- elimination of geographical barriers – opportunity for abuser to receive funds regardless of location;
- high number of potential victims;
- management – in terms of actions to be performed, such as creation of sexual material, photos or videos, participation in tailor made live-streaming of child abuse;
- lowering risk – in terms of prohibiting disclosure or discovery of engagement;
- level of threat to victims – ease of distribution of material.<sup>1032</sup>

4.245 The European Cybercrime Centre report gives insight into the scale of the perpetrator profile. It makes mention of two 2014 Interpol coordinated operations in the Philippines where a few criminal groups were operating on an almost industrial scale from call centre-style offices.<sup>1033</sup> The 'cyber-blackmail agents' were provided with training and offered bonus incentives for reaching financial targets.<sup>1034</sup> In summary these offenders were found to be of both genders; operated in teams in developing countries; acted at both international and national level; and targeted unknown victims to obtain money.<sup>1035</sup>

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Opcit 11.

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Endorsed by the findings of Susan McLean that Instagram, Facebook, Viber; online games like Minecraft and streaming apps are popular among paedophiles as reported in Reynolds "GNOC (Get Naked on Cam): The secret world of Australia's paedophiles".

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Europol EC3 11.

1029

Guicic GPEN Webinar January 2019.

1030

Europol EC3 11.

1031

Ibid.

1032

Opcit 12.

1033

Opcit 17.

1034

Ibid.

1035

Ibid.

4.246 It would seem that just as there is no ‘typical’ profile of a child who engages in ‘sexting’ there is no ‘typical’ victim of sexual coercion and extortion.<sup>1036</sup> Essentially it is any person whose sexual material could be acquired by a perpetrator.<sup>1037</sup> Luke Lampbrecht of the Teddy Bear Clinic is of the view that children in wealthy private schools and in desperate poverty in the township of Alexandra face the same risks.<sup>1038</sup> He is however of the view that the response to a child who is involved in ‘sexting’ or becomes the victim of sexual coercion and extortion is however glaringly different depending on the status of the child, leaving vulnerable children at greater risk.<sup>1039</sup>

4.247 Experts identified by the European Cybercrime Centre point out the following characteristics of children vulnerable to online sexual coercion and extortion:

- ‘naivety of the victims, either on a relational level or on a technical level;
- Absence of parental control;
- Willingness to share self-generated sexual content;
- Significant amount of time spent online each day;
- Use of social networks and other ways of online communication, especially through mobile devices;
- Befriending strangers (unknowns);
- Sexualised conversations with strangers;
- Lack of technical knowledge.<sup>1040</sup>

4.248 Lack of parental control combined with a child’s low self-esteem, experiencing difficulties at school or with friends or family were identified as contributory causative factors.<sup>1041</sup> Parental control is defined as meaningful parental engagement including open communication regarding online concerns. The mere physical presence of a parent or caregiver is not sufficient.

4.249 The European Cybercrime Centre recommends the promotion of the use of proper terminology that exhaustively reflects the nature of online sexual coercion and extortion of children.<sup>1042</sup> This recommendation flows from the use of the expression ‘sextortion’ which is

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<sup>1036</sup> Ibid.

<sup>1037</sup> Ibid.

<sup>1038</sup> Keynote speaker at the 2017 Conference “New Trans-Disciplinary Horizons in the Criminal Justice System” hosted by the University of Johannesburg Faculty of Law and Department of Strategic Communication and UNISA College of Law hosted on 6 & 7 September 2017.

<sup>1039</sup> Luke Lampbrecht of the Teddy Bear Clinic Keynote speaker at the University of Johannesburg Faculty of Law and Department of Strategic Communication and UNISA College of Law Conference “New Trans-Disciplinary Horizons in the Criminal Justice System” 6 & 7 September 2017.

<sup>1040</sup> Europol EC3 18.

<sup>1041</sup> Opcit 18.

<sup>1042</sup> Opcit 18 Key Recommendation 3.

commonly used in public discourse. The European Cybercrime Centre has found that this expression is however open to different interpretations and understanding of how this crime affects children.<sup>1043</sup> It also implies that this offence equates with the same offence being committed against adults, although there are more complex and nuanced features of the crime affecting children and its grave consequences for them.<sup>1044</sup> The crime of extortion in legislation is inextricably linked to the taking of money and property through use of violence and threats, but does not extend to obtaining child sexual abuse material or sexual favours.<sup>1045</sup> Both the Lanzerote Convention and the EU directive use the word ‘coercion’ but not ‘extortion’. Coercion may therefore be a more apt descriptor in certain circumstances and in others deception. Another consideration relates to the use of the word ‘sexual’. Sometimes the primary motivation is not sexual but financial or malicious. The following definition is suggested:

‘the targeting and commoditization of a child, or the visual depiction of that child, by technological means, using sexual images and/or videos depicting that child through coercion or extortion for the purposes of sexual gain (for example for new CSEM or a sexual encounter), financial gain or other personal gain (such as psychological gain, e.g. popularity or malicious satisfaction).’<sup>1046</sup>

4.250 Based only on the viewing of child sexual abuse material it is difficult and in some instances not possible to discern whether the image is consensual child sexual abuse material by certain children or not and if it is consensual child sexual abuse material by certain children whether it has been distributed by or with the child’s ‘consent’ or not. The child him- or herself may not be aware that they have been exploited or compromised due to deceptive solicitation strategies or a lack of awareness of what they are doing. The European Cybercrime Centre has identified gaps in available research which limits the capacity to develop evidence-based policies and interventions, whether at the level of identifying new instances of the crime, developing suitable reporting mechanisms, legislative and preventive strategies or implementing interventions that meaningfully respond to the needs of the victim, perpetrator and other stakeholder populations.<sup>1047</sup> It has flagged the need for platform providers and the private sector to continue efforts in enhancing detection, preventive intervention and to introduce reporting mechanisms through their own services;<sup>1048</sup> for awareness programmes explaining the characteristics and offences of online sexual coercion and extortion of children; to conduct in-depth research, especially in terms of

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1043 Opcit 6.  
1044 Ibid.  
1045 Opcit 15.  
1046 Opcit 15.  
1047 Opcit 6.  
1048 Opcit 7.

victim and perpetrator characteristics, the offence process and the supporting victim-perpetrator interrelationship; and to conduct research to understand the factors at play that render young people vulnerable to financial exploitation.<sup>1049</sup>

4.251 While the focus above has been on children as the targets of exploitation and extortion it is necessary to recognize that children may also use technology to blackmail, coerce or bully other children or even adults. It is reported that two 16 year old boys posing as adults in the USA tricked a teacher into sending naked photos which they shared with other students.<sup>1050</sup> It is important to bear the recommendation of the UNCRC Committee to South Africa in mind i.e. to review its criminal law to ‘differentiate between adult and child offenders of child pornography and ensure that the child offenders are treated in a manner consistent with the promotion of the child’s sense of dignity and in full conformity with the provisions of the Convention on the Rights of the Child and the Optional Protocol...’.

4.252 Section 20 of the SOA criminalises using children for or benefiting from child pornography. However although it criminalises creating, making or producing child pornography, it does not criminalise the distribution thereof. And although it criminalises a person who may gain financially or in any form from the commission of these acts as benefiting from ‘child pornography’, it does not specifically criminalise the act of coercion or deception to obtain the images or material. The offence of grooming of children found in section 18 of the SOA also does not seem to include this behaviour.

4.253 The Commission proposes that one option could be to insert a clause into section 20 to include the act of coercion as described by the European Cybercrime Centre. Another option would be to enact a standalone offence. As the perpetrators could be children or adults it is suggested that the offence be drafted in an inclusive manner. The proposed amendment reads as follows:

The substitution of section 20 for the following, by the addition of the following section:

“(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] sexual abuse material, is guilty of the**

<sup>1049</sup>

Opcit 6.

<sup>1050</sup>

Geldenhuis “Sexting in schools” 21.

offence of using a child for child **[pornography]** sexual abuse material.

(2) A [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]** sexual abuse material.

(3) A person ('A') who unlawfully and intentionally recruits, coerces or deceives a child complainant ('B'), with or without the consent of B, whether for financial or other reward, favour or compensation to B or a third person ('C') or not, for purposes of –

(a) being used as described in subsection(1); or

(b) participating in a live performance involving child sexual abuse material is guilty of the offence of recruiting a child for child sexual abuse material.

(4) A person ('A') who unlawfully and intentionally coerces or deceives a child ('B') through whatever means to provide child sexual abuse material of him or herself in any manner whatsoever is guilty of the offence of coercing or deceiving a child to provide child sexual abuse material .

### 13 Application of the law: the need for non-legislative intervention

4.254 The Commission notes the comment by some respondents that the implementation of the law and regulations to the FPA are problematic. The Commission suggests that the DoC consider the inconsistencies between the 2014 FPA Regulations and the FPA that have been identified by the Commission in its issue paper, namely that:

- In terms of subsection 19(1)(a) of the 2014 Regulations the 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.<sup>1051</sup>
- What amounts to ‘child pornography’ (banned content) in section 19(1)(a) does not seem consistent with the definitions contained in the SOA and the 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 SAPS for investigation and prosecution.’<sup>1052</sup>

<sup>1051</sup> SALRC Sexual Offences Issue Paper (2015) para 3.11.

<sup>1052</sup> Opcit para 3.121.

- 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 sexual abuse material 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.<sup>1053</sup>
- 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.<sup>1054</sup>

4.255 The Commission is however mindful that legislative change alone would not be apposite to address this problem. The Commission is also of the view that no country would be able to prosecute itself out of this phenomenon. Different levels of intervention are necessary. Training, monitoring and evaluation of the application of the law would be a starting point. Sections 62 to 65 of the SOA already provides for the adoption of a national policy framework by the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions relating to all matters in the SOA which includes child sexual abuse material. This includes the issuing of specific directives and instructions. The Commission supports the call made by Simon Mason,<sup>1055</sup> presenting at the UNICEF National Conference on Child Online Protection<sup>1056</sup> that as a start there is a need for capacity building to address the threat to children.

4.256 The Commission provisionally recommends the inclusion of the Department of Basic Education in sections 62 to 65 of the SOA as it is ideally positioned to play a key role in addressing the scourge of child sexual abuse material and related offences.

4.257 The Commission is of the view that on a primary preventive level evidence-based policies and initiatives need to be developed and supported to end the supply and demand for

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<sup>1053</sup> Opcit para 3.122.

<sup>1054</sup> Opcit para 3.123.

<sup>1055</sup> United Kingdom, National Crime Agency CEOP Command.

<sup>1056</sup> UNICEF National Conference.

the sexual abuse and exploitation of children, including: materials that sexually exploit children, commercial opportunities that profit from creating and disseminating such materials, and the ability of sexually abusive or exploitative groups and networks to operate and share materials that sexually exploit children.<sup>1057</sup> Society needs to be educated on how to interrupt the demand for child sexual abuse material and ending the hyper-sexualized treatment and portrayal of children.<sup>1058</sup> Individuals and businesses which profit from the portrayal of children in this manner need to be held accountable. There is a growing realisation that respecting and supporting children's rights requires business to both prevent harm and actively safeguard children's interests.<sup>1059</sup> Creative multidisciplinary and grassroots collaborations to align resources that will foster successful prevention initiatives should also be promoted. Together with this there needs to be an acknowledgement that child sexual abuse & exploitation is a public health problem, without which there would be a diminishing repository of child sexual abuse material. Perpetration of child sexual abuse and exploitation is the result of a combination of individual, relationship, community and societal factors—all of which need to be addressed to effectively prevent child sexual abuse and exploitation. Risks and protective factors related to victimization and perpetration need to be identified and evidence-based intervention strategies to help those who have been abused

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<sup>1057</sup> In *R v Land* [1998] 1 Cr. App. R. 301, the Court of Appeal described the legislation in the United Kingdom in this area as follows:  
"[Its] object is to protect children from exploitation and degradation. Potential damage to the child occurs when he or she is posed or pictured indecently, and whenever such an event occurs the child is being exploited. It is the demand for such material which leads to the exploitation of children and the purposes of the [legislation] is to reduce, indeed as far as possible to eliminate, trade in or possession of it. At the same time statutory defences provide a framework protecting from conviction those whose possession of such material is not prurient". It is however clear that a legislative and non-legislative approach used in tandem is the only way to successfully disrupt the demand for such material.

<sup>1058</sup> An example in point of society playing its role is captured in a report in the Daily Wire quoted in Legalbrief Cyberlaw & Technology Watch 9 August 2017 where a 'young US pre-school teacher saved two young children from being sexually abused when she saw a man in front of her on an airplane texting his girlfriend about sexually molesting the children she was babysitting. A report on the Daily Wire site notes that the teacher was on a Southwest Airlines flight from Seattle to San Jose on 31 July when she noticed a 56-year-old Washington resident sitting in front of her, texting his girlfriend. The teacher took pictures from behind the suspect without him noticing and then alerted the flight crew. FBI agents and police later detained him'; Berrien H "Pre-School Teacher Saves Children From Sexual Abuse After Seeing Passenger On Plane Texting Babysitter" (7 August 2017) Daily Wire available at [https://www.dailywire.com/news/19434/pre-school-teacher-saves-children-sexual-abuse-hank-berrien?utm\\_source=facebook&utm\\_medium=social&utm\\_content=062316-news&utm\\_campaign=benshapiro](https://www.dailywire.com/news/19434/pre-school-teacher-saves-children-sexual-abuse-hank-berrien?utm_source=facebook&utm_medium=social&utm_content=062316-news&utm_campaign=benshapiro). Accessed on 9 August 2017; Journal of American College of Pediatricians 'The Impact of Pornography and Children' June 2016.

<sup>1059</sup> UNICEF Children's Rights and Business Principles 3. General Assembly Human Rights Council Thirty-first session *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Agenda Item 3 Rights of the child: information and communications technologies and child sexual exploitation 23 March 2016. A/HRC/31/L.9/Rev.1 [3].



need to be developed. Child sexual abuse and exploitation is not a problem that can, or should, be addressed only through the criminal justice system or after an offense has been committed. Primary prevention holds more benefits for society than secondary intervention. In South Africa the prevalence of poverty, unemployment and inequality are also contributory socio-economic factors that should be recognized as factors that impact on the added vulnerability of children and the non-reporting of offences involving child sexual abuse material. Lieutenant-General Mothiba emphasized that in South Africa poverty is interwoven with the sexual exploitation of children. He explains that the online space is used to recruit persons for trafficking and smuggling which may turn into trafficking at the end point. The end destination is invariably sexual exploitation which may include use in pornographic activities. Further that South Africa is a source, transit and destination country.<sup>1060</sup> He further warns that all these factors impact directly on victims and survivors. There is limited access to basic necessities such as safety, food, hygiene and medical care; physical and psychological care with a real risk of suicide.<sup>1061</sup>

4.258 On a technical level the suggested way forward is to create a best working practice, predictive streaming, improving the quality of referrals, identifying an authoritative international hash repository; balancing protection and privacy; equipping children and adults in a constantly changing internet driven world. Best practice will be discussed further in Chapter 6 below.

4.259 Child Helpline International documents innovative and collaborative partnerships with industry partners such as telecommunications providers focusing on protecting children from online child sexual abuse material. It refers to the Mobile Alliance Against Child Sexual Abuse Content which was founded by an international group of mobile operators with the GSM Association<sup>1062</sup> to work collectively on obstructing the use of the mobile environment by individuals or organisations wishing to consume or profit from child sexual abuse material.<sup>1063</sup> Some of the collaborative efforts include free calls to the national child helplines and the use of SMS messaging to raise awareness of the services offered by national helpline partners.<sup>1064</sup> In November 2013 Google announced that 100,000 blacklisted search terms would no longer give any results, while 13 000 would produce a warning message.<sup>1065</sup>

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<sup>1060</sup> LtGnl Mothiba, Acting National Commissioner SAPS Keynote speaker UJ & UNISA Conference 2017.

<sup>1061</sup> Ibid.

<sup>1062</sup> The GSM Association or GSMA is a trade body that represents the interests of mobile network operators worldwide.

<sup>1063</sup> UNICEF Child Helplines Report 2018 9 28.

<sup>1064</sup> Ibid.

<sup>1065</sup> Ibid.

Social media companies are however reported as increasingly being fingered as being 'shamefully far' from tackling illegal and dangerous content. The Home Affairs Committee in the United Kingdom strongly criticized social media companies for either not taking down or not viewing illegal or dangerous content as seriously as it should.<sup>1066</sup> It has gone as far as suggesting that failure to remove illegal material could in itself be a crime and if not that the law should be strengthened. Further that the United Kingdom Government should also consult around a system of escalating sanctions to include meaningful fines for social media companies which fail to remove illegal content within a strict timeframe.<sup>1067</sup> Specific findings of the Home Affairs Committee in the United Kingdom include that social media companies who fail to proactively search for and remove illegal material should pay towards costs of the police doing so instead and that social media companies should publish regular reports on their safeguarding activity including the number of staff, complaints and action taken.<sup>1068</sup> The Committee had pertinently found repeated examples of failure to take down material including material encouraging child abuse or sexual images of children, even after being reported by journalists.<sup>1069</sup> A case in point is that of the mother of a murdered schoolboy who appeared before the Independent Inquiry into Child Sexual Abuse (IICSA) to give evidence as part of its investigation how she feared his killer had escaped from jail when he posted menacing blogs from behind bars. Daynes was sentenced to life with a minimum of 25 years in 2015 – but managed to taunt his victim's mother via two blogs he published. Breck's mother, told the hearing that efforts to get them removed were then rebuffed by Google, which said she should contact her son's killer directly, the hearing was told. He had apparently been able to publish the pieces by using software that disguised his location, LaFave said. 'I felt like I wanted the police once again to be able to help but they didn't have the tools and the power that they needed to be able to do that,' said LaFave.<sup>1070</sup>

4.260 It also found that the interpretation and implementation of community standards in practice is often too slow and haphazard. Social media companies should review with the utmost urgency their community standards and the way in which they are being interpreted and implemented, including the training and seniority of those who are making decisions on content moderation, and the way in which the context of the material is examined.<sup>1071</sup> The

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<sup>1066</sup> UK Parliament "UK Social media companies 'shamefully far' from tackling illegal and dangerous content" (1 May 2017) available at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affa...> Accessed on 2 May 2017.

<sup>1067</sup> Ibid.

<sup>1068</sup> Ibid.

<sup>1069</sup> Ibid.

<sup>1070</sup> Legalbrief Today Legal News Watch (24 January 2018) Issue no 4384.

<sup>1071</sup> UK Parliament "UK Social media companies 'shamefully far' from tackling illegal and dangerous content".

Commission believes that the findings of the Home Affairs Committee should be considered in respect of the response of social media companies in South Africa. It should be noted though that social media is simply a platform for human beings to behave or misbehave. It is not about the medium, but about the offence.<sup>1072</sup> In debating offensive online behaviour the House of Lords Communications Committee were not persuaded that it is necessary to create a new set of offences specifically for acts committed through the medium of social media or any other information technology.<sup>1073</sup>

4.261 Chetty proposes an integrated national strategy.<sup>1074</sup> He notes that the 1999 International Conference on Combating Child Pornography on the Internet held in Vienna called for the worldwide criminalisation of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child sexual abuse material and stressed the importance of closer cooperation and partnership between Governments and the internet industry.<sup>1075</sup> In his view the starting point for any strategy for combating the child sexual abuse material and exploitation of children is existing laws and government policies. This National Strategy is based on the following principles:

- The need for a proper understanding of the laws related to computer-facilitated offences against children;
- The need for an in-depth understanding of the nature of the technology and how it is used to abuse and exploit children;
- The need for enhancing international cooperation and joining the global fight against the online sexual abuse and exploitation of children in recognition of the globalisation of the trade in child pornography;
- The need to ensure the cooperation and participation of internet and wireless service providers and financial institutions in the fight against child pornography;
- The need to encourage the cooperation of civil society, especially educators, parents and child care-givers, in the protection of children from sexual abuse and exploitation through awareness programmes; and

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<sup>1072</sup> House of Lords – Social Media and criminal offences – Communications Committee Chapter 2: Social Media and the Law par 12.

<sup>1073</sup> Ibid.

<sup>1074</sup> Chetty I “National Strategy for making South Africa safe for children by combating sexual abuse and exploitation crimes against children” (Undated paper distributed within the SA Law Reform Commission advisory committee).

<sup>1075</sup> The preamble to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, entered into force on 18 January 2002.

- The need to ensure that police and prosecutors involved in the investigation and prosecution of child abuse and exploitation cases are adequately trained in all critical aspects of computer-facilitated offences against children.

4.262 The Commission further wishes to flag the innovative and practical interventions proposed by Dr Elmarie Malek of Parent Infant and Child Health and Wellness.<sup>1076</sup> They are as follows:

- a. Propose compulsory warning messages for ALL buyers on ANY transaction related to internet access – similar to the health warnings legislated on cigarettes packaging, etc.
- b. Propose parental advice centres at all related sales outlets to provide parental orientation (hand outs with key messages to parents).
- c. Propose national investment to include related key alert messages in generic parenting messaging kits for parents before and after all baby births and at all service sites – e.g. health care clinics, schools.
- d. Propose a social media messaging platform for parents (similar to MomConnect for pregnant women) – and for these alert messages to form part of generic parenting messages.
- e. Propose an intergovernmental collaborative to provide parents-to-be with parenting support programmes/information.
- f. Propose national investment in providing parent support (knowledge, skills, training) from the onset of conception through to adolescence – especially during pregnancy and early years of life (collaborative partnerships between Dept of Health, Early Childhood Development (DSD), and NGO's (parenting support organisations).
- g. Propose routine (or compulsory) provision of healthy parenting/supportive conversations as part of family wellness services at primary health care services (before and after birth) and at schools to promote healthy and safe outcomes for children.
- h. Propose national investment in budgeting for accessible skilled parental mental health/counselling services (placing community-focused clinical psychologists at local clinics/community health care centres) to provide counselling training and support to clinic staff, community mental health care nurses and community based health care workers.'

Comment is sought on whether these proposals are practicable and implementable.

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<sup>1076</sup> PICH (Parent Infant and Child Health and Wellness) Chairperson Dr Elmarie Malek.

# CHAPTER 5: GROOMING OF A CHILD AND OTHER SEXUAL CRIMES ASSOCIATED WITH OR WHICH ARE FACILITATED BY PORNOGRAPHY

## A. Introduction and background

5.1 Although the focus of this paper is on the child it is important to take note of the context in which grooming sometimes takes place and hence the complexity thereof. The process of grooming may progress over time or quite quickly. In some cases the grooming of a child may start with the grooming of the child's family or friends'. Some offenders may groom a parent before or while grooming their child – the parent may be lulled into a false sense of the child's safety by the groomer's expressed good intentions and apparent positive motivations in respect of the child. This process may start with the child exploiter starting a relationship with a single or divorced mother or even a family who has children. Neither the family nor the child would be aware of the intentions of the child exploiter or even be aware of the fact that they are being groomed until they reach a point where they start feeling uncomfortable and trapped or have engaged in sexual acts which they mistakenly believe were consensual as they did not initially resist. Grooming of children has been made easier and less conspicuous through the use of modern technology, but may occur as much online as offline. The ICMEC<sup>1077</sup> reports that online grooming can be connected with a variety of different forms of sexual exploitation of children, such as the creation of child sexual abuse material and sexual assault. Online grooming occurs over a plethora of platforms including email, instant messaging apps, social networking sites, chatrooms, online gaming sites, photo sharing sites, and dating apps, which can be accessed through any device with internet access such as personal computers and laptops, tablets, and mobile phones.<sup>1078</sup> The preferred platform however seems to be social networking sites.<sup>1079</sup> Children are particularly susceptible to online grooming as they use social media and networking sites as a way to meet new people and are open to interacting with strangers.<sup>1080</sup> However this is closely followed by interaction through online gaming which can include internet access, messaging platforms, voice, photo and video sharing, allowing people from around the world to communicate and play games in real-time. The common interest provided by an online game provides an ideal meeting place for child sexual exploiters in an environment where

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<sup>1077</sup> ICMEC Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017 1.  
<sup>1078</sup> Opcit 2.  
<sup>1079</sup> Opcit 3.  
<sup>1080</sup> Ibid.

there is little or no adult supervision.<sup>1081</sup> The ICMEC reports that existing laws predominantly require that communication with the child be followed by a meeting or a clear plan to meet as an element of grooming. But the online grooming process includes sexual conversation and exposure to pornography and or child sexual abuse material intended to pressurize the child into creating and sharing child sexual abuse material often with little intention to have a physical meeting. The ICMEC further reports that the process of grooming a child online may only take a few minutes, highlighting the need to act preventively.<sup>1082</sup>

5.2 Explicit sexual material created by a child as a result of grooming is categorized by the European Cybercrime Centre as child sexual exploitation material.<sup>1083</sup> It agrees with the sentiment expressed in chapter three above that the making available of this material may put the child at risk of secondary victimisation due to the online posting. It may trigger the attention of people who are sexually interested in children and in grooming or online solicitation. It may even trigger the commercial distribution of the material and give rise to blackmail.<sup>1084</sup>

5.3 In *S v Mugridge*<sup>1085</sup> the Supreme Court of Appeal incorporates by way of reference the definition of sexual grooming used by Duncan Brown<sup>1086</sup> used in the matter of *S v M*<sup>1087</sup>, being that:

‘Grooming . . . is explained as an ongoing process aimed at the child accepting sexual activities . . . It “is generally seen as a cycle of abuse, and can include for example befriending a potential victim to allow the child to acquiesce to sexual activity.” The grooming aspect involves an aspect of deceptive trust created by the offender and manipulation of the child by the adult. It is the fact that one of the parties to the relationship is in such a position of power over the other that renders such sexual activity morally wrong and punishable within the realms of the criminal law.’

5.4 According to Holleley<sup>1088</sup> online grooming is the enticement and entrapment of children using the same techniques and behaviours as seduction and manipulation offline. The United Nations General Assembly defines grooming as ‘online contact with children’ which ‘involves premeditated behaviour intended to secure their trust and cooperation with

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<sup>1081</sup> ICMEC Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017 4.

<sup>1082</sup> Opcit 5.

<sup>1083</sup> Europol EC3 11.

<sup>1084</sup> Ibid.

<sup>1085</sup> *S v Mugridge* 2013 JDR 0658 (SA).

<sup>1086</sup> Brown D (JD) ‘Developing strategies for collecting and preventing grooming evidence in a high tech world’ (2001) 14 American Prosecutors’ Research Institute: National Centre for Prosecution of Child Abuse Update No.11.

<sup>1087</sup> *S v M* 2007 (2) SACR 60 (W) para 35.

<sup>1088</sup> Ms Karren Holleley, UNICEF National Conference.

the intention of engaging in sexual conduct.’<sup>1089</sup> Holleley comments that child exploiters make a positive emotional investment in potential victims. They create a normal and non-threatening environment which allows the offender to control the child and protects offenders from being caught. Holleley submits that in South Africa vulnerable children are ‘cheap’. She explains that many South African children have so little and face so many socio-economic challenges. The groomer gains entrance into the child’s life by finding out what the child needs. The usual *modus operandi* is identifying a child, forming a friendship, forming a relationship, moving to the molestation stage, reinforcement and maintaining the victim stage.<sup>1090</sup> The ‘molestation’ stage is comprised of a child being asked to engage in sexual activities or sexual talk or to give personal sexual information or material.<sup>1091</sup>

5.5 This chapter looks at the current legislative framework applicable to grooming of a child and other sexual crimes associated with or which are facilitated by exposure to online pornography and or child sexual abuse material as part of the process of grooming. It commences with a short overview of the issue paper and the current law applicable to this conduct, followed by an exposition of submissions made in response to the questions posed in the issue paper. It concludes with a discussion of local and comparative law and the Commission’s provisional recommendations. In this chapter the Commission provisionally recommends the retention of section 18 of the SOA as it currently stands. In keeping with the Commission’s recommendation on the need to change terminology it provisionally recommends changing the term ‘child pornography’ to ‘child sexual abuse material’ in section 18. Given the nature of the process of grooming the Commission does not recommend a standalone offence to criminalise the participation of parents in the grooming process. If their actions meet the elements of the crime they may be prosecuted accordingly. The Commission furthermore recommends that police officials be provided with the relevant tools to act proactively before further harm is done. In so doing it provisionally recommends the insertion of a defence in section 56 of the SOA to allow undercover police officials to intercept child sexual exploiters without a ‘real’ child being compromised.

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<sup>1089</sup> United Nations General Assembly Sixty-ninth session Annual report of the Special Representative of the Secretary-General on Violence against Children A/69/264 (6 August 2014) [19].

<sup>1090</sup> Ms Karren Holleley, UNICEF National Conference.

<sup>1091</sup> Chang FC, Chiu CH, Miao NF, Chen PH, Lee CM and Chiang JT “Predictors of unwanted exposure to online pornography and online sexual solicitation of youth” *Journal of Health Psychology* published online 31 August 2014 available at <http://hpq.sagepub.com/>.

## B. Overview of the issue paper

5.6 The issue paper notes that grooming may take place through online sexual talk and display of sexual images and adult content.<sup>1092</sup> The trust between the child and the groomer and the manipulation leading to ostensibly consensual engagement in sexual activity gives the groomer a particularly complex power over the child. Not only is the child exposed to pornography and child sexual abuse material but the child may become the initiator and seemingly willing partner in the production of child sexual abuse material or real time sexual abuse. The ostensible consent on the part of the child may ensure that the child remains captured in a web of deceit, fear and shame. The issue paper highlights the increased use of technology by offenders (mostly adult) to engage with and build a rapport with children with a view to normalising sexual conduct with adults or harmful sexual practices between children through exposing children to such material; obtaining explicit sexual material which falls within the definition of child sexual abuse material; to meet with the child to engage in sexual activity; to extort funds or favours from the child to avoid exposure or any number of disturbing outcomes.<sup>1093</sup>

5.7 Currently grooming is criminalised in terms of sections 18 and 20 of the SOA. The relevant sections in the SOA 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;

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<sup>1092</sup> SALRC Sexual Offences Issue Paper (2015) 42.  
<sup>1093</sup> Ibid.



- (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.

5.8 The issue paper posed two questions with regards to the crime of grooming i.e. whether section 18 of the SOA sufficiently defines the crime of promoting the sexual

grooming of children; and whether the offence of sexual grooming of a child, by way of exposure to pornography or for the purposes of creating child sexual abuse material, is clearly and adequately criminalised in the SOA. These questions will be discussed below followed by a general discussion and the preliminary recommendation of the Commission.

## C. Submissions

### 1 Does section 18 in the SOA sufficiently define the crime of sexual grooming of children?

5.9 While some respondents are of the view that section 18 of SOA sufficiently defines the crime of promoting the sexual grooming of children,<sup>1094</sup> others are of the view that it does not.<sup>1095</sup> CWSA comments that it would be in the best interests of the child to establish the role and accountability of the media in its exposure of children to pornography and child sexual abuse material through its reporting on such crimes. CWSA submits that some media houses have been irresponsible in this regard and have consequently exposed children to pornographic material thereby perpetuating the abuse.

5.10 Google South Africa however submits that section 18 of the SOA does not define the concept of 'sexual grooming' with any degree of particularity and instead renders it an offence for a person to engage in specified activities which are intended to facilitate a sexual act with a child.<sup>1096</sup> Christel Long submits that the test for this offence should be objective and not subjective, for example that a man exposed himself (the intention is irrelevant).<sup>1097</sup> WMACA further submits that the mere display or exposure to child sexual abuse material to an adult or child (which could be considered grooming) is already actionable in terms of section 10 or 19(a) of the SOA.

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<sup>1094</sup> Louie Claasen, UNISA; Kimberley workshop participant; Prof T Zabow; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications; National Prosecuting Authority; - Minister Albert Fritz (Adv), Ministry for Social Development, WC; National Training Manager, Child Welfare South Africa.

<sup>1095</sup> Google South Africa; South African Police Service; WMACA; Daine Snyders; Carol Hinrichsen; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Sidhartha Philander; Christel Long, Crystal Clear Ministries International.

<sup>1096</sup> Endorsed by Sidhartha Philander.

<sup>1097</sup> Christel Long, Crystal Clear Ministries International.

5.11 The National Training Manager, CWSA submits that there should be ‘a standardized mandatory minimum sentence as the penalties are generalised and should be more explicit’.<sup>1098</sup>

## **2 Is ‘grooming’, by way of exposure to pornography or for the purposes of creating pornography, clear and adequately criminalised?**

5.12 Some respondents believe that grooming of a child by way of exposing a child to pornography or for the purpose of creating child sexual abuse material is adequately criminalised.<sup>1099</sup> Other respondents are however of the view that it is not.<sup>1100</sup> A few respondents hold the view that the description of the crime is very complicated and should be re-defined.<sup>1101</sup> Charlotte Schultz submits that attention needs to be given to children between the ages of 12 and 16 who create images as a result of social pressure. While some respondents suggest that provision should be made to hold parents accountable for grooming their children<sup>1102</sup> or allowing their children to be groomed, some respondents caution that teenagers may be groomed without their parents’ knowledge.<sup>1103</sup> Nomagugu Nzomane avers that some children are not even aware themselves that they are being groomed. She submits that due to poverty and HIV/AIDS related diseases some children engage in whatever they can to make a living and are unaware at that point in time as to what the long term consequences of this behaviour is.

5.13 Rev Anderson submits that while the crime is defined sufficiently the problem lies with little or no enforcement. He argues that those who groom children should be exposed, fined or imprisoned.<sup>1104</sup> WMACA in turn submits that offenders should be charged,

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<sup>1098</sup> Endorsed by Sidhartha Philander.

<sup>1099</sup> Cause for Justice; Khayaletu Rutsha, Department of Communications; National Prosecuting Authority; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Riki van Deventer; Louie Claasen, UNISA; Kimberley workshop participant; Peter Anderson Rev United Congregational church of Southern Africa; Google South Africa; Daine Snyders; National Training Manager, Child Welfare South Africa.

<sup>1100</sup> Cathy McLean, Child Welfare Tshwane; Robynne Alexander; Carol Hinrichsen; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Filo Mooney; Natale Scheckle, Loreto Convent; Schultz, Charlotte, Snail Attorneys; Prof T Zabow; WMACA; Cherry Hochfelden; Sidhartha Philander; Christel Long, Crystal Clear Ministries International.

<sup>1101</sup> Louie Claasen, UNISA; Natale Scheckle, Loreto Convent; Schultz, Charlotte, Snail Attorneys; Prof T Zabow; Filo Mooney.

<sup>1102</sup> Natale Scheckle, Loreto Convent; Schultz, Charlotte, Snail Attorneys.

<sup>1103</sup> Schultz, Charlotte, Snail Attorneys; Nomagugu Nzomane.

<sup>1104</sup> Peter Anderson Rev United Congregational church of Southern Africa; Daine Snyders.; Christel Long, Crystal Clear Ministries International; National Training Manager, Child Welfare South Africa.

sentenced and convicted of all relevant crimes e.g. grooming, creation and possession of child pornography and not only of grooming.

## D. Discussion and preliminary recommendations

5.14 The criminalisation of grooming in the SOA accords with the stance of the United Nations Human Rights Council. In 2016 the Human Rights Council<sup>1105</sup> made a call on all states to ensure the legal protection of children from all online sexual abuse and exploitation, including grooming and to criminalise this conduct, with the aim of preventing<sup>1106</sup> or at least interrupting the grooming process before a child is sexually abused either through a physical meeting or solely online.<sup>1107</sup> Although a number of jurisdictions have laws that criminalise the online solicitation or grooming of young people,<sup>1108</sup> 133 countries have no legislation aimed at combating online grooming of children for sexual purposes.<sup>1109</sup>

5.15 Since the promulgation of the SOA in 2007 section 18 of the SOA has criminalised two distinct categories of offences pertinent to grooming, firstly behaviour constituting 'promoting the sexual grooming of a child' and secondly the actual behaviour of 'sexual grooming of a child'. In addition to section 18, section 19 criminalises exposing a child to child sexual abuse material and pornography and section 20 criminalises amongst others the use of a child to create, make or produce child sexual abuse material. The offences are applicable online and offline. The SOA meets the 5 key criteria listed by the ICMEC's model legislation for online grooming of children for sexual purposes i.e. it provides for a specific crime addressing online grooming; the offence defines grooming; the offence includes grooming with and without the intent of meeting the child; and showing pornography to the child.<sup>1110</sup> South Africa is only one of a handful of countries that meets these criteria.

5.16 The proposed comprehensive criteria by the ICMEC for model legislation includes:

- Criminalising the process of online grooming;
- Criminalising online grooming with the intent to meet the child;
- Criminalise online grooming regardless of the intent to meet the child;

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<sup>1105</sup> General Assembly HRC (2016).

<sup>1106</sup> Ibid.

<sup>1107</sup> ICMEC Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017 4.

<sup>1108</sup> Bulger et al Where policy and practice collide 2017 3.

<sup>1109</sup> GPEN Newsletter Online Grooming of Children October 2017.

<sup>1110</sup> ICMEC Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017 53.

- Criminalise the act of showing pornography to a child;
- Punish parents/legal guardians who participate in the grooming of a child under their care;
- Punish online grooming as a standalone offence;
- Children must not be held criminally liable for any involvement with online grooming offenders;
- Mental health and medical treatment and other services should be provided for child victims;
- Provide extraterritorial jurisdiction for sexual offences committed against children;
- Protect child victims acting as witnesses in judicial proceedings;
- Establish minimum penalties for online groomers; and
- Enhance penalties for repeat offenders for aggravating factors.

5.17 If the above criteria are used as a benchmark it is clear from the framing of the offences contained in section 18 of the SOA that a child who produces, possesses or distributes child sexual abuse material as a result of being groomed and even where the child is over the age of 16 engages in a sexual act as a result of the grooming he or she is not criminalised in terms of section 18. Due to the calculated exploitation involved in this behaviour the SOA extends protection to all children under the age of 18 irrespective of the fact that certain children can unreservedly consent to sexual acts from the age of 16. The behaviour of the groomer negates the ostensible consent of the child thereby removing any culpability on the part of the child. The Commission notes the comment made by WMACA in respect of section 10 and 19(a) of the SOA which makes exposure of child sexual abuse material and pornography to a child a crime. The Commission is of the view that while it is true that these offences are similar and may occur simultaneously the nuance difference in the offence of grooming, which constitutes a calculated process, is that the exposure to this material is used as a vehicle to further exploit the child. The intention of the child sexual exploiter is revealed by the behaviour he or she objectively engages in to trap the child. In this regard the offences contained in section 18 have both a subjective and objective element. The Commission therefore disagrees with Christel Long in that without the subjective intention of the child exploiter forming a part of these offences, the offence of grooming would not be committed but instead would constitute one of a range of other sexual offences. Where the grooming process has been intercepted before a sexual act has occurred or before the child has responded by distributing child sexual abuse material the behaviour of the child exploiter will remain actionable in terms of the criminal law. Unfortunately it appears that from the available case law in South Africa that the criminal

justice system only seems to become involved after the child has been sexually exploited either physically and or through the generation of child sexual abuse material. This is may be due to the belief by the child that he or she will not be believed and/or believes that he or she is just as much to blame as the child exploiter for the ostensible 'consensual' sexual acts or due to the vulnerable position the child is in. A case in point is the matter of *S v Mugridge*<sup>1111</sup> where a church pastor was found guilty of grooming and sexually exploiting his 14 year old adopted daughter. His behaviour included recording the child from a hidden camera in the bathroom, plying her with gifts, drugs and alcohol and exposing her to pornographic videos. The court of first instance held that 'any perceived acquiescence could not be construed as consent, as the appellant had "slowly groomed (the complainant)" to ensure that she ultimately submitted.' The Supreme Court of Appeal importantly further held that submission to engaging in sexual behaviour does not equate to consent,<sup>1112</sup> and that 'in the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny.'<sup>1113</sup> A similar approach was followed in *S v F*<sup>1114</sup> where the convicted child exploiter initiated sexual touch and progressed to the point where he would exchange airtime for sexual intercourse.<sup>1115</sup> In *S v Dos Santos*<sup>1116</sup> the Gauteng High Court convicted the accused of a number of offences relating to trafficking for a sexual purpose. From the record of the case it is clear that the vulnerability and financial despair of the young girls made them susceptible to a promise of work and further study. A number of sexual offences were committed in this process i.e. forced intake of drugs and sexual intercourse with men during their captivity in a brothel; and grooming in contravention of section 18(2) by showing them pornographic videos and demonstrating how to perform sexual intercourse. However, as the forced prostitution had occurred prior to the exposure to pornography and sexual demonstration it would seem that the NPA made a decision to charge the accused with the offences of trafficking and associated crimes. On the facts it would have been actionable under section 18 of the SOA.

5.18 The SOA does not contain a standalone offence to punish parents/legal guardians who participate in the grooming of a child under their care. Complicity in the commission of

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<sup>1111</sup> *S v Mugridge* 2013 JDR 0658 (SA).

<sup>1112</sup> At para 41.

<sup>1113</sup> At para 42. Specific reference was made to *Marx v S* (2005) 4 All SA 267 (SCA) in which Cameron (then) JA held that 'the child's vulnerability and resultant openness to manipulation is deserving of heightened scrutiny.'

<sup>1114</sup> *S v F* 2018 (1) SACR 377 (WCC).

<sup>1115</sup> In this matter though the child sexual exploiter (aged 43) was acquitted of the charges of exposing a child (aged 14) to pornographic images in contravention of section 19(a) due to a technicality i.e. the mobile phone it was sent to was a device shared by the child and her mother and it could not be proved that the pornography was sent to the child and not to the mother.

<sup>1116</sup> *S v Dos Santos* 2018 (1) SACR 20(GP).

any of the sexual offences against children contained in the SOA by parents, guardians or trusted adults would serve as an aggravating factor.

5.19 As some reports relating to child sexual abuse material and the sexual abuse of children, especially of very young children, point to the direct or indirect involvement of a parent, guardian or trusted adult the Commission has considered the desirability of a specific offence, but is of the view that their involvement would be considered an aggravating circumstance for the purpose of sentencing and that consequently a standalone offence is not required. However as this is a proposal made in the ICMEC model legislation the Commission has decided to include a clause similar to the crime provided for in Article 170 of the Canadian Criminal Code as an option for consideration.<sup>1117</sup> The Commission requests comment on whether such a crime should be included in the SOA.

**Parent or guardian procuring sexual acts**

Any parent, guardian or adult ('A') in a position of authority over a child ('B') who facilitates access to B or procures another person ('C') to obtain access to B in whatever manner for the purposes of a sexual act, including the exposure of the child to child sexual abuse material or to pornography or for the creation or viewing by B or C of child sexual abuse material is guilty of the crime of procuration by a parent or guardian of a child for sexual acts.

5.20 One of the areas the Global Prosecutors E-Crime Network (GPEN) highlights is the need for legislation to allow for the use of online undercover operations to combat online grooming. This would necessitate providing that a real child need not be involved. GPEN reports that Canada, Greece and New Zealand are among a handful of countries which have updated their legislation to ensure that online undercover operations used to apprehend online offenders are admissible in court proceedings.

5.21 Article 172.1(1) of the Canadian Criminal Code<sup>1118</sup> frames the offence of 'luring a child' in such a way that the target of the luring could be a virtual child i.e. 'a person who is, or who the accused believes is . . .'. This opens the door to undercover law enforcement officials being able to intercept child sexual exploiters without a 'real' child being compromised in anyway. The Criminal Code also expressly provides that in respect of a sexual offence against a child it is not a defence 'that the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer' or 'that if the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer,

<sup>1117</sup> Criminal Code, R.S.C., 1985, c. C-46, Article 170.

<sup>1118</sup> Canadian Criminal Code, R.S.C., 1985, c. C-46

the person referred to . . . did not exist.<sup>1119</sup> Currently if a law enforcement officer were to try to intercept child exploiters by using a virtual child a defence of entrapment may be raised. The suspected child exploiter could say that he or she had been induced by the police to commit the offence.<sup>1120</sup> However section 252A of the CPA<sup>1121</sup> specifically allows law enforcement officers to use traps in the detection, investigation and uncovering of offences. Burchell reflects that evidence obtained by way of a trap would be automatically admissible if the conduct of the person concerned does not go further than providing an opportunity to commit the offence. If it is alleged that the trap went further than providing an opportunity to commit the offence the court would be enjoined to engage in a factual enquiry into how the evidence was obtained and the impact of the admission of the evidence on the fairness of the trial and the administration of justice before making a finding on whether the evidence could be admitted or not.<sup>1122</sup> In the United Kingdom section 1B was inserted in the Protection of Children Act, 1978 to provide for exceptions in criminal proceedings and investigations.<sup>1123</sup> The section reads as follows:

'1B Exception for criminal proceedings, investigations etc.

(1) In proceedings for an offence under section 1(1)(a) of making an indecent photograph or pseudo-photograph of a child, the defendant is not guilty of the offence if he proves that—

(a) it was necessary for him to make the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world,

(b) at the time of the offence charged he was a member of the Security Service, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any of the functions of the Service, or

(c) at the time of the offence charged he was a member of GCHQ, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any of the functions of GCHQ. . .'

5.22 The Commission is of the view that providing police officials with the relevant tools to act proactively before further harm is done is a valid goal. The Commission is of the view that the modus operandi engaged in by child exploiters to groom a child necessitates a leading and active role on the part of the child exploiter which would arguably make any defence of entrapment hard to prove. The Commission provisionally recommends the insertion of an additional sub-clause in section 56 of the SOA i.e.

<sup>1119</sup> Article 172.2(1) of the Canadian Criminal Code.

<sup>1120</sup> Burchell J *Principles of Criminal Law* 5 ed (Juta 2016) 238.

<sup>1121</sup> Criminal Procedure Act 51 of 1977.

<sup>1122</sup> Burchell *Principles of Criminal Law*.

<sup>1123</sup> ACPO Good Practice Guide for Digital Evidence. Further see the Sexual Offences Act 2003 (<http://www.legislation.gov.uk/ukpga/2003/42/contents>).



- (10) It is not a valid defence to a charge under section 18 –
- (a) that the accused person ('A') believed that the person with whom A agreed or made an arrangement was a police official or a person acting under the written direction of a police official; or
  - (b) that if the person with whom the accused agreed or made an arrangement was a police official or a person acting under the written direction of a police official, the person referred to did not exist.

The Commission invites comment on the feasibility of including these clauses in section 56 of the SOA or whether it is a matter of general application to be considered for inclusion in the CPA.

5.23 The Commission is of the view that in addition to the provisional recommendations above the only changes necessary to section 18 would be to substitute the term 'child pornography' with 'child sexual abuse material' as discussed above.

5.24 The Commission has flagged CWSA's concern around the accessing of evidence containing child sexual abuse material by the media during trials and will particularly deal with the safekeeping of child sexual abuse material handed in as evidence in chapter 6. The exposure of children to pornography and child sexual abuse material without the intention to groom is dealt with above in chapters 2, 3 and 4. Suffice it to say that the media are obliged to engage with this material with the greatest circumspection and that if they are found to have breached the law should be charged and held accountable. The Commission agrees with CWSA that the role of the media and particularly social media warrants closer scrutiny. The Commission is of the view that the harnessing of social media applications to groom children is particularly problematic.<sup>1124</sup>

5.25 Grooming over social media is happening in open view and may be facilitated through services masquerading as dating sites. For example Facebook hosts a 'Blesser and Blessee Finder South Africa' page and the website 'BlesserFinder' has received over 8000 likes of the page.<sup>1125</sup> These pages promote accessibility to financial gain particularly for girls and young women who are materially vulnerable in some way. One of the hashtags of this phenomenon is '#morals must fall'.<sup>1126</sup> These pages are disguised as providing support but according to Davis co-create meanings that promote moral decline.<sup>1127</sup> The terms used i.e. blesser/blessing trivialise the actions which are in fact criminal i.e. luring or grooming

<sup>1124</sup> Davis C and Sitto K UJ & UNISA Conference 2017.

<sup>1125</sup> Ibid.

<sup>1126</sup> The aim is to lure a person into thinking that their morals are holding them back from upward mobility and that if they hold onto morals they will be missing out on the luxury which is displayed on this page.

<sup>1127</sup> Davis C and Sitto K UJ & UNISA Conference 2017.

children for sexual exploitation.<sup>1128</sup> It could be argued that the concept of ‘blessing’ or being lured into a sexual relationship with a ‘blesser’ in exchange for having economic needs and wants met is a form of grooming particularly when the groomer is an adult and the person being lured is a child. If these ‘blessers’ were merely philanthropists wanting to ‘bless’ the financially less fortunate they would not be seeking sexual engagement in return for their benevolence. While this arrangement may provide financial benefit to the child it also reinforces the child’s subordination in a hierarchical relationship. The hierarchical relationship underpins grooming.<sup>1129</sup>

5.26 YouTube has in terms of its internal policies against videos or comments that sexualise or exploit children removed 150 000 videos of children, even if they were not illegal, after lewd comments about them were posted by viewers, as the Google-owned platform sought to reassure advertisers that their advertisements would be kept out of compromising situations.<sup>1130</sup>

5.27 In the United Kingdom The Telegraph reports that social media giants deemed to be uncooperative in taking down extremist material online could be threatened with tax hikes.<sup>1131</sup> While this warning applies to extremist material a similar argument could be made in respect of material used to groom a child. Examples of grooming from around the world are plentiful. A middle-aged woman was recently charged in Michigan USA for enticing two teenage boys with naked pictures of herself sent via Snapchat.<sup>1132</sup> A convicted child exploiter in London who was found guilty of inciting a girl under 13 to engage in sexual activity, and breaching a Sexual Harm Prevention Order was jailed for four years for grooming a nine-year old girl to expose herself over the popular livestreaming App Live.Me.<sup>1133</sup> The Live.Me App is reported to be one of the fastest-growing of its type worldwide and unlike websites such as Facebook, users have little control over who views their posts.<sup>1134</sup> The Sexual Harm Prevention Order that the child exploiter was subject to prohibited him from communicating with anyone under the age of 18 through social media or the internet, among other conditions. But throughout May 2017, an intelligence-led operation revealed that he was

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<sup>1128</sup> An illustration in point is that of the News24 report that a 42 year old man, knowing that a girl was still at school, promised to buy her a car and an expensive cellphone. Both were charged with sexual offences relating to the manufacturing, distribution and possession of child pornography, after they sent naked pictures as well as videos of sex acts to each other by cellphone. News 24 archives “Girl, 16, sends naked pics to man, 42” (3 April 2013) available at <https://www.news24.com>. Accessed on 4 July 2018.

<sup>1129</sup> Davis C and Sitto K UJ & UNISA Conference 2017.

<sup>1130</sup> Legalbrief Cyberlaw and Technology Watch 6 December 2017.

<sup>1131</sup> Legalbrief Cyberlaw & Technology Watch (10 January 2018) Issue no:1714.

<sup>1132</sup> Legalbrief Cyberlaw & Technology Watch (16 August 2017) Issue no:1696.

<sup>1133</sup> Ibid.

<sup>1134</sup> Ibid.

heavily involved, along with other users, in encouraging the nine-year-old child to expose her private parts to them. The video the girl posted online which proved his incitement of her was viewed by almost 300 users and remained available to watch until its removal by Live.Me following a police request.

5.28 According to Fong-Ching Chang the incidence rate of both unwanted online sexual solicitation and perpetration of online sexual solicitation among students was higher for males and was more prevalent among students with lower academic performance.<sup>1135</sup> Chang et al found that having psychological problems seemed to be a factor in sexual solicitation, victimization and perpetration e.g. poor academic performance, smoking, and depressive symptomology and involvement in offline victimization and perpetration.<sup>1136</sup> The consequences for the child victim of grooming are listed as numerous. Chang et al further posits that ‘the online solicitation of youth has been associated with higher depressive symptomatology and psychological problems.’<sup>1137</sup>

5.29 Chetty reports that with more children having unsupervised access to mobile phones, the internet and social networking sites, child exploiters have shifted their attention to mobile phones as the medium of choice not only for the distribution of sexually explicit materials but also for targeting child victims.<sup>1138</sup> The integration of location based services (GPS) into mobile phone services has significantly increased the risk of offline contact as child exploiters may now be able to determine the location of a child.<sup>1139</sup> The Namibian Children’s Parliament also identifies a number of factors that contribute to the vulnerability of children, one of them being that parents are authoritative but indulgent, therefore allowing children unrestrained access to the internet.<sup>1140</sup> Chetty is of the view that the digital world we live in makes it easier to apply offline grooming techniques online.<sup>1141</sup> Offenders are able to build a large range of contacts and express shared interests with children who are increasingly used to having the world as their audience in online forums. Online activities are free from the constraints of physical proximity and spatial immobility.<sup>1142</sup>

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<sup>1135</sup> Chang et al “Predictors of unwanted exposure to online pornography and online sexual solicitation of youth” 6.

<sup>1136</sup> Opcit10.

<sup>1137</sup> Ibid; Endorsed by the JACP “The Impact of Pornography and Children”.

<sup>1138</sup> Chetty I “Sexting” of revealing images of children is the distribution child pornography (2017).

<sup>1139</sup> Ibid.

<sup>1140</sup> UNICEF National Conference.

<sup>1141</sup> Chetty I “Sexting” of revealing images of children is the distribution child pornography (2017) para 5.3.2.

<sup>1142</sup> Ibid.

5.30 The ICMEC notes that in light of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the first international instrument to specifically address online grooming (solicitation of children for sexual purposes) and the Directive 2011/93/EU of the European Parliament and the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (the first regional instrument to specifically address the issue of online grooming and related criminal behaviours) a multi-jurisdictional approach should be embarked on to provide a coordinated global response to this crime against children.<sup>1143</sup>

5.31 The ICMEC is of the view that collaboration is at the heart of addressing child sexual abuse; it underscores the importance of establishing global networks of experts across disciplines to find effective solutions. Cross-sector and cross-border collaboration are necessary to address the borderless and multi-jurisdictional nature of crimes such as online grooming, and to ensure that child sexual exploiters do not exploit the differences between national laws regarding the legality of their actions and available penalties.<sup>1144</sup>

5.32 The ICMEC highlights that a three prong approach is necessary for successful intervention:

1. Adoption and implementation of national legislation;
2. Creation of a national scheme to combat online grooming, including national programs and public policies; and
3. Law enforcement and judicial training to promote understanding and enforcement of these laws.

5.33 Grooming is a sexual offence in terms of the SOA. A national policy framework dealing with the required response by identified departments towards sexual offences in the SOA is provided for in sections 62 to 65 of the SOA. In terms of section 62 the Ministries of Justice and Correctional Services; Police; Social Development and Health and the NDPP<sup>1145</sup> are enjoined to adopt a national policy framework, relating to all matters dealt with in this Act, to –

- (a) ensure a uniform and co-ordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences;

<sup>1143</sup> ICMEC Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review 2017 21.

<sup>1144</sup> Opcit 26.

<sup>1145</sup> The broadening of membership of the Inter-sectoral Committee and their tasks is addressed in Chapter 6 below.

- (b) guide the implementation, enforcement and administration of this Act; and
- (c) enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources.<sup>1146</sup>

The Commission endorses this approach.

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<sup>1146</sup> Section 62(1)(a) – (c).

# CHAPTER 6: INVESTIGATION, PROCEDURAL MATTERS AND SENTENCING

## A. Introduction and background

6.1 As reflected in chapter one this discussion paper has, as a result of further research and comment received by way of formal submissions and during the workshops held on the issue paper, retained the initial four areas of concern that were identified and expanded on them to include the focal area of investigation, procedural matters and sentencing.<sup>1147</sup> This chapter will reflect on comment received in this regard with a view to making provisional recommendations on aspects which include the need to ensure anonymity of the child depicted in the child sexual abuse material in the criminal justice system; safe custody of child sexual abuse material; access to child sexual abuse material by the defence; data preservation, access by SAPS and suspension of access to child sexual abuse material by ECSPs; forfeiture and disposal of child sexual abuse material and recommendations on the amendment of clauses relating to the issuing of national instructions and directives on key departments in the SOA pertaining to the national strategy for making South Africa safe for children. . This approach aligns with the expanded mandate of the umbrella project on sexual offences i.e. to encourage action by the appropriate government structures and to galvanise communities to participate in the fight against sexual violence. The recommendation by the Commission in its Report on Sexual Offences<sup>1148</sup> for the establishment of a national strategy for multi-disciplinary intervention relating to sexual offences was legislated for in sections 62 to 65 of the SOA which provides for a national policy framework. In terms of section 62 the Ministries of Justice and Correctional Services; Police; Social Development and Health and the NDPP are enjoined to adopt a national policy framework, relating to all matters dealt with in the SOA, to –

- (a) ensure a uniform and co-ordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences;
- (b) guide the implementation, enforcement and administration of this Act; and
- (c) enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources.<sup>1149</sup>

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<sup>1147</sup> See para 1.5 above.

<sup>1148</sup> 2002 para 9.2.1 at p300.

<sup>1149</sup> Section 62(1)(a) – (c).

## B. Overview of the issue paper

6.2 The issue paper raises the point that although there seems to be a number of laws and codes of good practice aimed at regulating consumption of or exposure to 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.<sup>1150</sup> The issue paper further notes that law enforcement agencies consistently complain about frustrations they face when investigating cases of child sexual abuse material. This is either due to a lack of legislation specific to child sexual abuse material or the lack of harmonisation of legislation dealing with child sexual abuse material, as well as sentencing policies, for offences which are of a global nature.<sup>1151</sup> Questions posed in the issue paper relevant to this chapter and the submissions received in response thereto are dealt with below.

## C. Submissions

### 1 Does the existence of different legal definitions complicate law enforcements responses to crimes involving children and pornography?

6.3 As reflected in the chapters above the majority of the respondents are of the opinion that the existence of different legal definitions complicates law enforcement responses to crimes involving children and pornography.<sup>1152</sup> In summary the option preferred by the majority of respondents to the issue paper is that there should be one definition<sup>1153</sup> in one statute<sup>1154</sup> and that this definition should be easy to understand.<sup>1155</sup> However, while the NPA

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<sup>1150</sup> SALRC Sexual Offences Issue Paper (2015) para 4.32.

<sup>1151</sup> Opcit 31.

<sup>1152</sup> Cathy McLean, Child Welfare Tshwane; Kimberley workshop participant; Prof T Zabow; John Blacklaws; Carol Hinrichsen; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Rob Schultz; Riki van Deventer; Daine Snyders; Christel Long, Crystal Clear Ministries International; Louie Claasen, UNISA; Benita Nel; Peter Anderson Rev United Congregational church of Southern Africa; Cause for Justice; Khayaletu Rutsha, Department of Communications; National Prosecuting Authority; Family Policy Institute; South African Police Service; Sidhartha Philander; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS.

<sup>1153</sup> Daine Snyders; Minister Fritz submits that if two Acts are retained provision should be made to either have the same definition or just a referral to the other definition.

<sup>1154</sup> National Prosecuting Authority.

<sup>1155</sup> Peter Anderson Rev United Congregational Church of Southern Africa.

agrees that legislation pertaining to child sexual abuse material should be consolidated in the SOA so as to erase the possibility of confusion or different interpretations there are differences of opinion within the NPA as to whether the current existence of multiple definitions complicates the law enforcement response. The Family Policy Institute however submits that having different definitions opens up the possibility for defence attorneys to find loopholes or technical irregularities which may result in an acquittal of a child exploiter. WMACA adds that not having uniformity in law results in not having uniformity in punishing child exploiters and cites a matter where a plea bargain was agreed on without prescribed penalties allowing the child exploiter to receive a light sentence in comparison with a minimum of 30 years if he had been extradited to stand trial in the USA. As the Commission has already recommended above that all offences relating to child sexual abuse material should be legislated for in the SOA and that the definition of 'child pornography' in the SOA should be incorporated in the FPA by reference this item will not be explored further in this chapter.

## **2 Would the consolidating of all offences relating to child sexual abuse material in one piece of legislation enhance the criminal law response to these crimes?**

6.4 A number of respondents believe that consolidating all offences relating to child pornography (child abuse material) in one piece of legislation will enhance the criminal law response to these crimes.

6.5 While some respondents believe that one Act would simplify the criminal justice response and prevent conflicting interpretations, the concern was raised that centralising all the crimes in one Act may become confusing as the crimes deal with different aspects of child sexual abuse material. Daine Snyders however believes that one document with one, all-encompassing definition would help law enforcers and make 'playing with the law' through interpretation quite difficult. CWSA agrees and comments that 'a speedy response' in respect of criminalisation, penalties and sentencing would enable swift action to be taken. It would in its view also prevent grooming and trafficking of children and prevent criminals from seeking refuge in countries not aligned to these laws.

6.6 While Cause for Justice believes that the consolidating of scattered criminal law provisions into a single piece of legislation may enhance the implementation of the law, it warns that implementation depends to a large extent on the efficiency and excellence (will power) of public administration, which a consolidated act of Parliament is unlikely to give



effect to. Reverend Anderson states that the focus should be on implementation of the law as opposed to changing it. As is noted in the point above the Commission has already evaluated, discussed and recommended that all offences relating to child sexual abuse material should be legislated for in the SOA. This matter will therefore not be explored further in this chapter.

### **3 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?**

6.7 A number of respondents are of the view that the provision on extra-territorial jurisdiction in the FPA is sufficient to cater for the international reach of the internet and for anomalies such as different ages of consent in different countries.<sup>1156</sup> Some respondents are of the view that it is not sufficient in this regard.<sup>1157</sup> Superintendent Arthur Lopes explains that search engines exist that permit the user to trench beneath the ‘policed’ regions of the internet. A number of respondents are unsure and suggest that this be specified.<sup>1158</sup> The NPA submits that some officials are of the opinion that the provision is sufficient, and others think that it is not and should be amplified.

### **4 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 sexual abuse material and ‘viewing’ it. How should this problem be remedied?**

6.8 Some respondents are of the view that section 27 of the FPA needs to be amended to allow for better cooperation between the police and service providers<sup>1159</sup> and that a service provider should be able to keep an account active for police intervention before suspending access.<sup>1160</sup> This would need to be done to allow authorities to track a person

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<sup>1156</sup> Kimberley workshop participant; Minister Albert Fritz (Adv), Ministry for Social Development, WC; Daine Snyders.

<sup>1157</sup> Khayaletu Rutsha, Department of Communications; WMACA; Sidhartha Philander; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>1158</sup> Cause for Justice; Prof T Zabow; Ronald Muthambi; Peter Anderson Rev United Congregational church of Southern Africa; WMACA; Sidhartha Philander; Christel Long, Crystal Clear Ministries International.

<sup>1159</sup> K Rutsha, Department of Communications (Durban); Kimberley workshop participant; Prof T Zabow; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>1160</sup> Louie Claasen, UNISA; Ronald Muthambi; Cherry Hochfelden.

accessing child sexual abuse material and needs to be done in a timely manner.<sup>1161</sup> The view is also held that where access is suspended the service providers need to keep the records safely.<sup>1162</sup> Sidhartha Philander submits that section 27(2) and (3) of the FPA already states that it is the responsibility of the service provider to maintain evidence for the police to allow further investigation of the crime.<sup>1163</sup>

6.9 The NPA cautions that accidental access should not be a possibility under these circumstances.<sup>1164</sup> In its view access to these sites should be subject to specific requirements that clearly indicate the modus operandi and intention of the alleged offender. The service provider must inform the police immediately once such a site is detected or accessed before suspension is effected. It states that the FPA does not provide for an inter-sectoral approach between relevant stakeholders. Therefore it does not highlight the importance of cooperation in relation to child sexual abuse material between relevant stakeholders. According to the NPA the inter-sectoral relationship required in terms of section 63 of the SOA between relevant stakeholders has proven to be successful in relation to all matters regarding sexual offences. The NPA therefore argues that if all these offences in the FPA are covered in the SOA it will ensure essential cooperation between relevant stakeholders in relation to child sexual abuse material matters.

6.10 The Family Policy Institute notes that the finding of child sexual abuse material, unless done in a controlled environment by law enforcement officials, is mainly for the purposes of viewing it. It suggests that what could be done is that those monitoring access could alert police to anyone searching for child sexual abuse material and allow the police reasonable time to investigate the matter before access is restricted. If however the police do not respond within a reasonable time, the service provider must suspend the access pending the investigation. If however the police are of the opinion that the suspension should go ahead immediately, that should then be implemented. The Family Policy Institute further suggests that if a situation occurs where the viewer is indeed viewing child sexual abuse material, the service should be suspended immediately and a record of analytics relating to such offence should be kept for investigation purposes.<sup>1165</sup> The WMACA endorses cooperation between service providers and designated police officials.

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<sup>1161</sup> Louie Claasen, UNISA.

<sup>1162</sup> Khayalethu Rutsha, Department of Communications.

<sup>1163</sup> Endorsed by Cherry Hochfelden.

<sup>1164</sup> Endorsed by Daine Snyders who emphasises that children must be protected from finding the material.

<sup>1165</sup> Endorsed by Peter Anderson Rev United Congregational church of Southern Africa; Daine Snyders.

6.11 Daine Snyders and Carol Hinrichsen caution that the child used to produce the material still remains the victim and should remain the priority. One respondent questions whether a 'police warning' could be attached to the service provider's site? When someone tries to access it the wording 'under investigation' that is visible to the person trying to access but not to the provider would pop up?<sup>1166</sup>

## **5 Comment on whether in your view a child used to create child pornography (child sexual abuse material) is adequately protected by criminal justice role players**

6.12 A number of respondents are of the view that the child used to create the child sexual abuse material is not adequately protected by criminal justice role players.<sup>1167</sup> Prof Zabow comments that the legislation to protect these children is in place but that implementation thereof is problematic. The SAPS agrees that the law currently provides for adequate provisions to safeguard children from exploitation. It however points out that technology is not sufficiently utilized in the criminal justice system to ensure successful tracking and prosecution of perpetrators.

6.13 The NPA submits that current legislation provides for various protective measures, i.e. Sections 153, 154, 158 and 170A of the CPA. It explains that the Thuthuzela Care Centres which are spread nationally are specifically geared towards a victim centred approach specifically focussing on psycho-social care. It further explains that in practice in court, images of child sexual abuse material are not printed, but downloaded on a DVD or CD. The defence does not receive the actual images but merely reference to the image and its history. During disclosure, the State allows the images to be viewed and notes to be taken. The images are handed into court on a DVD/CD and not as printed copies to protect the integrity and identity of the child in line with the Constitution and the Children's Act. It however notes that relevant role players are not necessarily adequately sensitised in relation to available protective measures for children but that the SOA makes provision for social context training, which will alleviate this challenge as it is currently included in the NPA training curriculum.

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<sup>1166</sup> Christel Long, Crystal Clear Ministries International.

<sup>1167</sup> Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Cathy McLean, Child Welfare Tshwane; Carol Hinrichsen; Louie Claasen, UNISA; Peter Anderson Rev United Congregational church of Southern Africa; WMACA; John Blacklaws; Daine Snyders.

6.14 WMACA submits that in its view there seems to be very little concern for the victims and finding them does not seem to be the priority of our criminal justice system which should be supporting and cooperating with international law enforcers in finding the victims. It argues that cases should not be concluded on prosecution of the suspects alone but only when the victims and their welfare, if still alive, are confirmed. WMACA bemoan the fact that our law enforcers do not have the resources and technology at their disposal to identify victims and their whereabouts from the child sexual abuse material found in exploiters' possession – they are reliant on independent service provider's assistance but mostly on international law enforcers to do so. Louie Claasen submits when these children are found they are exposed to high levels of secondary trauma through the criminal justice process. Daine Snyders supports the view that these children should not have to relive the trauma they were subjected to.

6.15 The view is also expressed that adequate protection is only available provided the children in the material are over 18 years of age.<sup>1168</sup> Sidhartha Philander points out that the biggest need is for prevention and the rehabilitation afterwards. In his view if there is no effort for prevention the rectification will cost more emotionally, financially and psychologically.

## **6 In your view is the management of child sexual abuse material adequately governed in the criminal justice system; if not, is legislative change needed to assist these role players to protect children?**

6.16 The majority of the respondents submit that the management of child sexual abuse material is not adequately governed by the criminal justice system.<sup>1169</sup> They support legislative change to assist, equip and train these role-players to protect children.<sup>1170</sup>

6.17 The NPA comments that the management of child sexual abuse material cases in the criminal justice system can be dealt with by applying section 66 of the SOA regarding directives, regulations, instructions and policies. In its view the application of section 66 will

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<sup>1168</sup> Khayaletu Rutsha, Department of Communications; Sidhartha Philander.

<sup>1169</sup> Cathy McLean, Child Welfare Tshwane; Khayaletu Rutsha, Department of Communications; Sidhartha Philander; Robynne Alexander; Carol Hinrichsen; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Louie Claasen, UNISA; Miranda Mhlanga; Child Welfare South Africa; National Prosecuting Authority; Family Policy Institute; WMACA; John Blacklaws; Christel Long, Crystal Clear Ministries International; Filo Mooney.

<sup>1170</sup> Robynne Alexander; Louie Claasen, UNISA.; Miranda Mhlanga; Child Welfare South Africa; National Prosecuting Authority; WMACA; Christel Long, Crystal Clear Ministries International

address the legislative reform necessary to assist role players in the protection of children. The NPA motivates that bringing about this change would allow for procedures on how this material should be preserved and ultimately destroyed; to what extent it becomes part of a public document when handed into court; how this material should be presented in court without further violating the integrity of the child (although the victim may never be found each exposure of such an image violates that child's dignity) who may be present; to address issues relating to media and publication; to provide for penalties for failure to safeguard these images. It adds that although covered in broad terms through interpretation even prosecutors who take these cases to the tea room and show them to other colleagues are distributing them and should be liable. Some respondents<sup>1171</sup> question whether current directives are adhered to and confirm the need for procedures to be put in place and highlight critical areas needing attention i.e. the need to keep this material locked away in a safe when not in use; and that after the initial viewing only one person should have possession of the material (as opposed to all involved).

6.18 Respondents comment that a lot can be learnt from how first world countries manage sexual offences and how they legislate in this regard.<sup>1172</sup> The need for specialisation of such role-players and affording additional protection to children is also identified.<sup>1173</sup>

6.19 Miranda Mhlanga suggests that management of these cases can be improved by:

- regulating exposure to secondary victimisation on the caseload management of child sexual abuse material in the docket and in court testifying;
- having intermediaries or court preparatory officers available in all courts for sexual offences; and
- strengthening NGOs who provide psychosocial programmes to enable them to increase their services in surrounding areas.

6.20 CWSA suggests that embedded software and mandatory child friendly devices could be used to determine whether child sexual abuse material is 'found' or is 'viewed out of choice'. It submits that prosecution of offences relating to pornography and children should be dealt with at different levels and that the impact on the victim's needs should be adequately addressed when penalties are imposed, which in its view currently does not appear to be the case. It comments that in the FPA convictions on pornography relate to

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<sup>1171</sup> Filo Mooney; Daine Snyders.

<sup>1172</sup> Sidhartha Philander.

<sup>1173</sup> Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

'USE and NOT ABUSE'. The outcome is that those convicted are not automatically put on the Sexual Offences Register. It emphasises that this must be addressed.

6.21 Reverend Anderson is of the opinion that all that is needed is enforcement of the current laws and Prof Zabow identifies the need to review the regulations and not the law. The Family Policy Institute agrees and states that what is needed is practical ways of implementing existing legislation. It identifies the need for practical tools to combat children being exposed to pornography and being used in child sexual abuse material i.e. dedicated IT criminal intelligence teams capable of handling these issues. It also identifies poor policing and prosecutions as a gap in management by the criminal justice system that needs to be addressed by appointing specific task teams to tackle these issues.

6.22 WMACA comments that legislation must:

- 'be specific to child sexual abuse material and not dependent on general pornography or obscenity laws;
- provide a clear definition of child sexual abuse material – in its view 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 sexual abuse materials, as well as the use of computer-facilities for making financial transactions related to child sexual abuse material and the grooming and luring of children for sexual gratification;
- criminalise the possession of child sexual 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 sexual abuse material; and
- require ISP's to report suspected child sexual abuse material to law enforcement or to some other mandated agency – as the internet is the preferred medium for the trade in child abuse material.'

## **7 Should defence attorneys be provided with copies of child sexual abuse material forming the subject matter of a prosecution?**

6.23 Most of the respondents are of the opinion that defence attorneys should not be provided with copies of the child sexual abuse material forming the subject matter of a prosecution.<sup>1174</sup> They are however mindful that the attorneys should have access to it to prepare their defence and under conditions that do not prejudice the defence. The view is held that the material is confiscated evidence and that while the defence can access it, it

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<sup>1174</sup> Cathy McLean, Child Welfare Tshwane; Robynne Alexander; Carol Hinrichsen; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Khayaletu Rutsha, Department of Communications; National Prosecuting Authority; South African Police Service; Daine Snyders; Sidhartha Philander.

should remain in the custody of the relevant law enforcement official for safekeeping.<sup>1175</sup> The SAPS submits that access should only be permitted by means of a court order, and access under those circumstances should take place under the supervision of the police official responsible for the investigation of the case. While it agrees that it must be possible for defence attorneys to view exhibits in order to prepare for defence of their clients, it does not agree that they should be provided with copies of such exhibits.<sup>1176</sup> WMACA states that access to the material is essential to avoid lengthy delays where the defence needs to view the material to ascertain for example whether rape occurred. Louie Claasen<sup>1177</sup> questions whether the making of a copy doesn't constitute distribution and cautions that this evidence should be treated confidentially so as to minimize exposure of the children involved. Prof Zabow agrees that distribution of this material should be limited. Christel Long<sup>1178</sup>, states that this material should be destroyed in the presence of a witness at the conclusion of proceedings.

6.24 From the perspective of the defence, Amanda Vilakazi of LSSA<sup>1179</sup> submits that defence lawyers should be provided with copies of the child sexual abuse material forming the subject matter of the prosecution in order to prepare the defence. She however adds that the defence would have to be burdened with a duty not to distribute the content further and that if it is distributed that the person responsible should be charged.<sup>1180</sup> Minister Fritz<sup>1181</sup> is of the view that:

'at the heart of this question is the accused person's right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it, to adduce and challenge evidence and to have full access to the documentation in the possession of the State before the trial. He argues that unless the State can argue that access to the child pornography is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the child pornography would lead to the disclosure of the identity of an informer or State secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice proper ends of justice, the State cannot resist a claim by a defence attorney on behalf of his or her client for access to the child pornography.'

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<sup>1175</sup> Sidhartha Philander.

<sup>1176</sup> Endorsed by WMACA; Daine Snyders.

<sup>1177</sup> Louie Claasen, UNISA; Christel Long, Crystal Clear Ministries International.

<sup>1178</sup> Christel Long, Crystal Clear Ministries International.

<sup>1179</sup> Endorsed by Peter Anderson Rev United Congregational church of Southern Africa; John Blacklaws; Cause for Justice.

<sup>1180</sup> Endorsed by Ronald Muthambi.

<sup>1181</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC.

6.25 He further argues that the situation is slightly different where the accused is a suspect in a criminal investigation or where access is required for purposes of a bail application. He avers that a suspect, who is asked by investigating officials to respond to allegations based on information contained in the police docket, is not entitled to have access to the docket. He states that the defence does not have extensive rights of access at the bail stage and quotes section 60(14) of the CPA which provides that '[n]otwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in or forms part of a police docket . . . unless the prosecutor otherwise directs . . .'. Further that there is also a proviso to the effect that this subsection 'shall not be construed as denying an accused access to any information, record or document to which he . . . may be entitled for purposes of his . . . trial.'

## **8 Explain whether in your view the law allows for appropriate searches and seizures**

6.26 The NPA is of the view that the current law adequately provides for search and seizures.<sup>1182</sup> The SAPS agrees and states that the powers granted by the CPA to search and seize are adequate. Minister Fritz<sup>1183</sup> is also in agreement and explains that powers to enter and search are given in two distinct areas, first in the context of the investigation of an offence or suspected offence, and secondly in the context of the administration of a regulatory law. He is of the view that the current law provides for both instances.as follows:

'In terms of the CPA the State may seize anything (article) –

- Which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
- Which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- Which is intended to be used or is on reasonable grounds believed to or intended to be used in the commission of an offence. '

and that,

'The Films and Publications Act 1996 (Act 65 of 1996) only allows for regulatory inspections. In this regard section 15A(1) provides for a compliance officer to enter any premises, with the consent of the person in charge of such premises on or in

<sup>1182</sup> Endorsed by Prof T Zabow; Peter Anderson Rev United Congregational church of Southern Africa; Ronald Muthambi; WMACA; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Sidhartha Philander; Amanda Vilakazi LSSA.

<sup>1183</sup> Minister Albert Fritz (Adv), Ministry for Social Development, WC.



which the business of the sale, hire or exhibition of films or games being conducted. When performing any function in terms of section 15A, a compliance officer may request the assistance of a police official of the South African Police Services. The Act does not empower the compliance officer to seize any undesirable property. An article shall be seized only by virtue of a search warrant issued by a magistrate or a judge. A police officer may without a search warrant search any person or container or premises for the purposes of seizing any article referred to in section 20 if there is consent or if the police officer on reasonable grounds believes that a search warrant will be issued to him/her if he/she applies and that the delay in obtaining such warrant would defeat the object of the search.’

6.27 While the NPA recognises the law as adequate it identifies the use of and application of the law i.e. expertise and experience needed in relation to the implementation thereof, specifically in relation to child sexual abuse material, as a challenge. It highlights the need for specialised investigative capacity and the need for forensic development in this field. It likens the intricacy of such an investigation to that of forensic analysis of DNA. It emphasises that ‘[C]hild abuse material exchange via the internet is not an ignorant game and offenders partaking in this criminal network, are equipped to find creative means to do so.’

6.28 Some respondents are however of the view that the current law does not allow for appropriate searches and seizures in respect of matters of this nature but do not expand on the reason for their view.<sup>1184</sup> Louie Claasen comments that in seeking to extend the law it must however balance the rights of innocent people not to be harassed. Khayaletu Rutsha<sup>1185</sup> submits that the (then) Cybercrime and Cyber Security Bill will address this shortfall.

## **9 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**

6.29 Some respondents submit that it is necessary to include penalty clauses in the FPA,<sup>1186</sup> either to provide guidelines for sentencing,<sup>1187</sup> to act as a deterrent,<sup>1188</sup> to oblige

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<sup>1184</sup> Louie Claasen, UNISA; Carol Hinrichsen; Riki van Deventer;

<sup>1185</sup> Department of Communications.

<sup>1186</sup> WMACA; Cathy McLean, Child Welfare Tshwane; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; Daine Snyders; John Blacklaws; Carol Hinrichsen; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>1187</sup> Cathy McLean, Child Welfare Tshwane; Prof T Zabow; K Rutsha, Department of Communications (Nelspruit).

<sup>1188</sup> Cathy McLean, Child Welfare Tshwane; John Blacklaws.

presiding officers to mete our appropriate sentences,<sup>1189</sup> and to avoid inconsistency in sentencing.<sup>1190</sup>

6.30 The views on what the appropriate sentence<sup>1191</sup> should be include that the appropriate minimum sentence should be 10 years,<sup>1192</sup> a sentence of 15 years in jail with no option of a fine,<sup>1193</sup> 'a fine and prison and public exposure',<sup>1194</sup> jail time with no fine.<sup>1195</sup> The NPA argues that the appropriate sentence for creating, possessing, distributing and any other additional offences of child sexual abuse material should be comparable to the sentences given for rape as is currently the position in the Minimum Sentences Act.<sup>1196</sup> It also recommends that section 18 of the CPA (dealing with prescription) should be amended to include child sexual abuse material offences. Sidhartha Philander argues that the 'Miller test' should be incorporated and also to research articles regarding cases in the UK and the USA. He argues that the law in Africa is not properly aligned with foreign laws on trafficking and the international law of sexual offences. He submits that these are two avenues that need high quality attention because the internet is ever growing and also diverging with information that is freely available to all people. Daine Snyders submits that the highest sentence possible should be reserved for the person/people producing or distributing child sexual abuse material as they are abusing people involved in the making of the material and those viewing the material and it takes away the innocence of those involved and those viewing (viewing by accident or on purpose). Snyders adds that '[T]hose viewing/purchasing child pornography should get the same sentence as they get pleasure from watching it – rape by the eyes'. While supporting minimum sentencing, Louie Claasen submits that these sentences must relate to the range of offences linked to child sexual abuse material. In her view:

'Those that produce and those that consume should not be given the same minimum sentence as in my opinion producing is where the actual trauma and abuse of the child occurs and should thus have a higher minimum sentence.'

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<sup>1189</sup> Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS.

<sup>1190</sup> K Rutsha, Department of Communications; John Blacklaws; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality.

<sup>1191</sup> In some cases it is not clear in which legislation the penalties should be, but the submissions are clear in respect of the need for minimum sentences particularly pertaining to child pornography.

<sup>1192</sup> Rob Schultz.

<sup>1193</sup> Carol Hinrichsen.

<sup>1194</sup> Peter Anderson Rev United Congregational church of Southern Africa.

<sup>1195</sup> Daine Snyders.

<sup>1196</sup> Endorsed by Daine Snyders; Caren Mortlock, NPA.

6.31 Minister Fritz argues that the Adjustment of Fines Act, 1991 (Act 101 of 1991) is applicable where the fines are not specifically prescribed, but only the period of imprisonment. He is of the view though that section 30(4) of the FPA should be deleted as it is not tenable to have administrative fines for such serious offences.

6.32 Although the NPA endorses the use of minimum sentences, particularly in respect of child sexual abuse material, to ensure that the sentences are commensurate with the nature and prevalence of such crimes in a modern society, it is important to note that it does not state that these offences and penalties should be in the FPA. This is in line with its submission in support of the SOA dealing with offences pertaining to children sexual abuse material.<sup>1197</sup> The NPA comments that the courts need to be reminded that offences relating to child sexual abuse material are not victimless crimes and that it should not be regarded as a mitigating factor where the victim is not identifiable. In this regard Amanda Vilakazi of LSSA submits that there is a need for a minimum sentence clause coupled to sections 18, 19 and 20 of the SOA.<sup>1198</sup> She argues that in these matters where sentencing is left to a presiding officer's discretion, this may result in a suspended sentence being granted. She is of the view that presiding officers tend to think that distributing and possessing child porn material might not be that serious hence the lighter sentence. The National Training Manager, CWSA in turn submits that mandatory sentencing would be a deterrent if it was severe and costly enough. The Family Policy Institute submits that:

'There should be hefty fines and imprisonment imposed on any person who is involved in the process of creating, possessing or distributing child pornography. Each of these issues should be dealt with separately and should have their own criminal sanction attached. Ultimately what you are dealing with is supply and demand. The state is limited in its ability to stop the demand but can take steps in the right direction in an attempt to avoid the next generation of being as perverse as this one is, one being protecting the next generation from the harmful effects of pornography at a young age. The state can therefore focus more of its efforts towards combating the supply of child pornography, effective law enforcement and prosecutions'.

6.33 Cause for Justice holds a contrary view i.e. that prescribed penalty clauses for the offences in the FPA are not necessary.<sup>1199</sup> Cause for Justice argues that judicial officers should be given the discretion to decide on the appropriate sentence in each case.

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<sup>1197</sup> Endorsed by WMACA.

<sup>1198</sup> Amanda Vilakazi LSSA.

<sup>1199</sup> Ronald Muthambi; Cause for Justice; WMACA.

6.34 In respect of children in conflict with the law, Ngwenya Orlan does not support penalties for child sexual abuse material related offences committed by children or the criminalisation of their actions. Orlan submits that diversion programs should be used to ensure that children know that there is a punishment and that firm action will be taken. Orlan reasons that children who lack family support get this support outside of the family unit and may commit these crimes due to feeling vulnerable, lacking confidence or self-worth.

## 10 Should a sentencing clause be added to the FPA?

6.35 While some of the respondents submit that a sentencing clause should be added to the FPA,<sup>1200</sup> others submit that it should not.<sup>1201</sup> Individual respondents submit that this should only be the case where the crime is related to contravention of the classification clauses;<sup>1202</sup> depending on the circumstances of the crime;<sup>1203</sup> and should be limited to criminal offences.<sup>1204</sup>

6.36 Those opposed to the inclusion of a sentencing clause submit that argument around sentencing should be left to the legal teams,<sup>1205</sup> that sentencing should be done through cross reference to the SOA;<sup>1206</sup> and that these offences and sentences should preferably be placed in the SOA.<sup>1207</sup> WMACA in turn submits that '[B]ail and sentencing clauses should be added to the FPA and the SOA or to a new dedicated single legislation.

6.37 The child protection organisation and NGO Green Hearts submits that presiding officers need to be aware of the following when sentencing child exploiters:

- 'All forms of child abuse material, including possession have extremely serious and harmful effects on children and normalises sexual exploitation of children.

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<sup>1200</sup> Robynne Alexander; Louie Claasen, UNISA; John Blacklaws; Daine Snyders; Carol Hinrichsen; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Rob Schultz; Riki van Deventer; Capt K V Gounder, Project Leader: Operation Spiderweb, SAPS; Sidhartha Philander; Filo Mooney; Benita Nel; National Training Manager, Child Welfare South Africa; Christel Long, Crystal Clear Ministries International; WMACA.

<sup>1201</sup> Kimberley workshop participant; Ronald Muthambi; Peter Anderson Rev United Congregational church of Southern Africa; Khayaletu Rutsha, Department of Communications.

<sup>1202</sup> K Rutsha, Department of Communications (Nelspruit).

<sup>1203</sup> Cathy McLean, Child Welfare Tshwane.

<sup>1204</sup> Prof T Zabow.

<sup>1205</sup> Peter Anderson Rev United Congregational church of Southern Africa.

<sup>1206</sup> Khayaletu Rutsha, Department of Communications.

<sup>1207</sup> National Prosecuting Authority.

- Children are not only harmed during production of images, but are being harmed perpetually as these images are constantly distributed and redistributed. Which is more devastating, the death of a child or a child who has been exploited sexually?
- Images on the internet are almost impossible to delete
- There is a constant demand for new and more gruesome images of child abuse material that results in constant production to satisfy this market’.

6.38 The Green Hearts submit that presiding officers should be mindful that in defence of their actions, perpetrators who have been caught accessing Child Abuse Material Websites claim that they accidentally landed on the website. IT specialists say that this is impossible for the ordinary internet user to accidentally ‘land’ on such a website. The IT specialists also say that it is impossible for anyone with IT knowledge to accidentally access such sites as they either have specific software installed on their computers or have perfect knowledge of exactly what they are looking for. The Green Hearts have submitted extracts from a letter written by Chief Inspector Tim van Eester of the Antwerpen police who is the case manager in the world wide Cloud 9 Operation involved in arresting the first South African child exploiter in which he states that:

‘[O]ne of the characteristics that are always present in the mind of the offender is simple: They lie. After being caught they will show a played remorse and express their sorry, saying that arrest finally showed them they were wrong, immediately smoothening the real nature of the crime: horrible child, baby and toddler torture and sexual abuse. When questioned for reasons why they didn’t search for professional help before they were caught are not answered.’

6.39 The Green Hearts submits that viewing, possessing and distributing child sexual abuse material is hands-on abuse by proxy and should be punished accordingly. It further submits that a mere sentence to pay a fine and to walk free, is counter-productive and creates the wrong idea i.e. that by paying an amount of money, these crimes can be committed and be excused by settling with cash. It supports heavy sentences linked to treatment and monitoring, likening the behaviour of child exploiters to an addiction, where like alcohol addiction they need to be taught steps to control their addiction and need to be monitored to ensure that they do not regress. The Green Hearts recommends that this intervention be court ordered and the costs thereof should be borne by the child exploiter.

6.40 The Green Hearts reports that the Department of Basic Education has been in discussion since 2012 to implement protective behaviours as part of the curriculum. However it further reports that to date it has not materialised.<sup>1208</sup>

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<sup>1208</sup> Schools in support of the Green Hearts for the need for child protection to form part of the Department of Basic Education’s curriculum include the schools in the Bitou: Formosa

## 11 Is there a need to enhance the criminal law response to the creation, possession and distribution of child pornography (child sexual abuse material)?

6.41 All but one of the respondents who responded to this question agree that there is a need to enhance the criminal law response to the creation, possession and distribution of child sexual abuse material.<sup>1209</sup> Respondents in favour of a change to the criminal law response make reference to the:

- increase in creation, possession and distribution of child sexual abuse material;<sup>1210</sup>
- the perception that the current law and penalties are not enough of a deterrent;<sup>1211</sup>
- fact that the laws governing the protection of children from adult content regarding sex, violence, S&M and other devious acts need to adjust to govern protection from online exposure;<sup>1212</sup>
- need for legal certainty;<sup>1213</sup>
- need for one piece of legislation to govern these matters in the SOA;<sup>1214</sup>
- value of establishing a specialised multi-disciplinary unit that specifically deals with all matters related to child sexual abuse material;<sup>1215</sup>
- need to criminalise the viewing without downloading of pornography and child sexual abuse material;<sup>1216</sup>
- need to place affected children's names on the child protection register and that these names and the sentences they were given should be accessible to the public so that there is public knowledge of the effectiveness of the laws governing the abuse of children and that it is seen in a serious light.<sup>1217</sup>

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Primary, Kranshoek Primary, Phakamisani Primary, Murray High, Plettenberg Bay Primary, Plettenberg Bay Secondary, The Craggs Primary, Wittedrift High School, Wittedrift Primary, Harkeville Primary and Greenwood Bay College.

<sup>1209</sup> Robynne Alexander; Cathy McLean, Child Welfare Tshwane; Khayaletu Rutsha, Department of Communications; Ronald Muthambi; Superintendent Arthur Lopes, Buffalo City Metropolitan Municipality; Rob Schultz; Riki van Deventer; Sidhartha Philander; Carol Hinrichsen; Louie Claasen, UNISA; Kimberley workshop participant; Prof T Zabow; National Prosecuting Authority; Family Policy Institute; WMACA; Minister Albert Fritz (Adv), Ministry for Social Development, WC; WMACA; John Blacklaws; Daine Snyders; Filo Mooney; PICH (Parent Infant and Child Health and Wellness) Chairperson Dr Elmarie Malek; National Training Manager, Child Welfare South Africa.

<sup>1210</sup> Louie Claasen, UNISA; Minister Albert Fritz (Adv), Ministry for Social Development, WC.

<sup>1211</sup> John Blacklaws, endorsed by National Training Manager, Child Welfare South Africa.

<sup>1212</sup> Sidhartha Philander; John Blacklaws.

<sup>1213</sup> Kimberley workshop participant; Prof T Zabow; Daine Snyders.

<sup>1214</sup> National Prosecuting Authority.

<sup>1215</sup> Ibid.

<sup>1216</sup> WMACA.

<sup>1217</sup> National Training Manager, Child Welfare South Africa.

6.42 One respondent indicates that in his view it would not be necessary to enhance the criminal justice response. He states that successful prosecutions are needed to improve the criminal justice response.<sup>1218</sup> Cause for Justice comments that:

‘Enhancing the criminal law response may in any event not be the most effective measure to achieve the desired reduction. The answer may lie in measures designed to strengthen the moral fibre of our society.’

## **D. Discussion and preliminary recommendations**

6.43 There is a firm commitment by government and civil society to protect children from the harm of being exposed to pornography and to protect children from being used for or exposed to child sexual abuse material or from engaging in the creation and distribution of this material themselves. The current law, in the form of the FPA and SOA, has been applauded internationally and found to meet all of the ICMEC model law criteria. In addition to these laws, related criminal law provides for various protective measures for all children in the criminal justice system e.g. sections 153, 154, 158 and 170A of the CPA. Furthermore the Bills (the FPA Amendment Bill and the Cybercrimes Bill) that are currently in Parliament bear testimony to government striving to better the legislative framework. Yet it would seem that there is no clear implementation strategy for inclusively dealing with child sexual abuse material or children being exposed to pornography or child sexual abuse material on a primary preventative level or on a secondary, protective level. As was found in the Commission’s Report on Sexual Offences (2002)<sup>1219</sup> there is no guarantee that a victim of such a sexual offence entering the criminal justice system will be dealt with in terms of acceptable procedures or be protected from secondary or further harm. The Commission will address some of the pertinent aspects identified by submissions below, but is mindful that there may be other aspects requiring attention. Comment is invited on the following proposals.

### **1 Management of children and offences relating to pornography and child sexual abuse material by the criminal justice system**

6.44 The effective management by the criminal justice system of children and offences relating to pornography and sexual abuse material can only occur through a fully coordinated

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<sup>1218</sup> Peter Anderson Rev United Congregational church of Southern Africa.  
<sup>1219</sup> South African Law Commission Sexual Offences (Project 107) Report (2002) 300.

and integrated framework to deliver services which are prompt, sensitive, effective and dependable and designed to prevent secondary trauma. Although sections 62 to 66 of the SOA provides for a national policy framework to provide for an inter-sectoral approach to guide implementation and service delivery in respect of sexual offences, this is only applicable to offences contained in the SOA. The proposed consolidation of offences, previously found in both the SOA and FPA, pertaining to child sexual abuse material and exposure of children to pornography and related offences in the SOA will amongst other things ensure that these offences are dealt with in terms of the national policy framework.

6.45 Before final recommendations can be made, it is necessary to identify existing prescripts, protocols, regulations and training material, including standard practice, when it comes to dealing with child sexual abuse material, gaps and suggested best practice. Pertinent stages of investigation and prosecution include:

- The seizure and handling of child sexual abuse material or of equipment (computers, mobile phones, etc.) containing possible child sexual abuse material;
- The handling of equipment when investigating or search for (possible) child sexual abuse material;
- The storage of child sexual abuse material;
- The handling of case dockets containing child sexual abuse material and related evidence;
- The handling of child sexual abuse material and related evidence prior to prosecutorial decision or trial;
- The handling of child sexual abuse material and related evidence in court when presenting the evidence, including any copies made available for court purposes. Pertinent questions are whether proceedings are held in camera; who is allowed to be present; are hard copies made; who is given copies; what happens to these copies after the evidence has been presented and after the verdict;
- The handling of child sexual abuse material when handed in as a court exhibit, and the further handling thereof by the magistrate or clerk of the court, pending the trial outcome;
- The handling and storage of the child sexual abuse material as exhibits and part of the court record (including the evidentiary material stored in electronic format e.g. on a memory stick or CD) after the verdict has been handed down;
- The making of court orders pertaining to the forfeiture of equipment;
- The storage of the police docket containing the child sexual abuse material after trial;



- In the event of an appeal, the handling of the child sexual abuse material in any form for purposes of preparing the court records and the manner in which the court records are forwarded to the relevant High Courts;
- The handling of the court records at the office of the Registrar and thereafter by the Judges who will preside in the appeal and, once the appeal has been finalised, the further handling or storage of the record if it includes child sexual abuse material in any form by the Registrar, prosecution and defense counsel;
- In the event of a (further) appeal to the Supreme Court of Appeal, the handling thereof for purposes of preparing the court records for the appeal and the manner the court records are forwarded to the Supreme Court of Appeal;
- Any relevant prescripts pertaining to the handling of the records that include child sexual abuse material in any form in the Supreme Court of Appeal prior to and after the appeal has been finalised; and
- Any relevant prescripts/protocols pertaining to the handling of appeal records that include child sexual abuse material in any form by both prosecution and defence counsel.

6.46 Some of the issues that have been identified as needing specific attention include the need for procedures on how this material should be preserved and ultimately destroyed; to what extent it becomes part of a public document when handed into court; how this material should be presented in court without further violating the integrity of the child (although the victim may never be found each exposure of such an image violates that child's dignity) who may be present during the trial; issues relating to media and publication; and the need for penalties for failure to safeguard these images.

**a. *Anonymity and protection of the child depicted in the child sexual abuse material***

6.47 From the outset there is a need for a clear and effective reporting and support mechanism for children, their caregivers, ECSP's and any other concerned person with regard to these offences. They need to understand where to turn to for assistance and how to do it.<sup>1220</sup> The primary focus should be on identifying the child in the material in order to, where necessary, ensure that the police stops the child sexual abuse. In this regard the Commission recommends that SAPS fast track the establishment of their Victim identification Data Base and that this data base should be linked to Interpol's International

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<sup>1220</sup> Europol EC3.

Child Sexual Exploitation Image Database. The Commission takes note that often the focus is on the prosecution of these matters and not on the needs of the child. Most often these crimes are discovered without the child knowing and not due to reporting. The protection of the identity of the child and the nature of the crimes committed by or against the child is an important aspect warranting attention. It is agreed that there should be some recommendations around the administrative process to be followed especially with regard to the initial and subsequent contact with the child. These measures could be included in non-legislative recommendations aimed at specific role-players.

6.48 Anonymity of children is the default position within the criminal justice system. Section 154(3) of the Criminal Procedure Act 51 of 1977 protects the anonymity of children in the criminal justice system by providing that:

‘No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.’

6.49 The Centre for Child Law argued in its heads of argument in the matter of Centre for Child Law and others v Media 24 Limited and others that ‘[C]hildren who are victims, witnesses, or perpetrators of crime are in an acutely vulnerable position. If their identities are revealed in the media or in other public forums, they face severe and life-long harms.’<sup>1221</sup> The relief being sought in this matter is to confirm the protection of children provided for in terms of section 154(3) of the CPA not to be identified by the media or anyone else; and to extend this protection after the child turns 18. The Constitutional Court is currently seized with this matter.

6.50 The consequences of children’s actions or experiences receive protection under section 28 of the Constitution even after a child has become an adult. The matter of *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) confirmed this where the Constitutional Court struck down a provision of the SOA which required the compulsory inclusion of children who committed sexual offences on the National Register for sex offenders without affording courts a discretion. Ongoing protection of children is therefore explicitly affirmed in our case law. The protection is linked to when the actions or events occurred and not when the consequences are meted out. Child offenders are protected

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<sup>1221</sup> *Centre for Child Law and others v Media 24 Limited and others*, Case no 23871/15 Applicants’ Heads of Argument para 1.

because they are deemed to be more impressionable and have a greater capacity for development and healing. The argument is that this should be the same for victims and witnesses of crimes committed against them or in their presence.<sup>1222</sup> Statutes in Canada, New Zealand, New South Wales, and the United Kingdom demonstrate that other open and democratic societies with a similar commitment to freedom of expression and open justice have accepted the need for automatic anonymity protections for child victims.<sup>1223</sup>

**b. Identification of the child and details of offences through public court records**

6.51 However regardless of these protective measures it would appear that intimate, graphic and identifying information of the event and surrounding circumstances (which in and of itself may constitute child sexual abuse material in the written word) is available as a public document in the form of a section 105A plea agreement. Although the child is spared the harrowing experience of testifying against the child exploiter, a detailed exposition of the child sexual abuse is documented in the plea agreement. Once the magistrate is satisfied therewith, it forms part of the court record and the magistrate need not give any further or even a reasoned judgment, there not being any other facts to refer to.<sup>1224</sup> Access to plea bargains as part of the public record needs attention.

6.52 From the comment received on the issue paper this challenge permeates through all records that form part of the criminal justice process. The name of the child (where known) will appear with reference to child sexual abuse material in the charge sheet. The current procedure is to fully describe what is seen i.e. the written description of child sexual abuse material. Furthermore court records are not protected; and copies of court records are made available to the prosecution, defence and presiding officers with no restriction or warning as to content and no prescript seems to exist regarding the manner in which this documentary evidence should be disposed of or by whom.

**c. Safe custody of child sexual abuse material evidence**

6.53 The Commission is of the view that procedures in SAPS and the NPA should include keeping child sexual abuse material locked in a safe when not in use as is currently provided for in the NPA directives; and that after the initial viewing only one person should have

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<sup>1222</sup> Opcit para 113.2.

<sup>1223</sup> Opcit para 221.

<sup>1224</sup> *S v Knoop* Case number SS/90/2016 DPP Ref Number 10/2/11/1-81/2016.

possession of the material (as opposed to all involved). As information describing a sexual offence against a child may fall in the definition of child sexual abuse material, access to any material of this nature should also be closely managed and restricted to only those persons who need access to it for purposes of the investigation or prosecution.

6.54 The Commission believes that it would provide greater protection to provide legislatively for the handling of child sexual abuse material and the children involved therein. For example the Criminal Procedure Act 1986 (New South Wales) specifically criminalises the unauthorized copying or circulation of sensitive images. The following sections in the aforementioned Act are pertinent:

‘ **281B Sensitive evidence—meaning**

(1) For the purposes of this Part, anything that contains or displays an image of a person (the **protected person**) is **sensitive evidence** if:

- (a) the image is obscene or indecent, or
- (b) providing a copy of the image to another person without the protected person’s consent would interfere with the protected person’s privacy, or
- (c) the image was taken after the death of the protected person.

(2) Without limiting subsection (1), the following are examples of sensitive evidence:

- (a) a photograph of an alleged sexual assault victim, taken in connection with a criminal investigation or criminal proceedings, that shows the person’s genitalia or otherwise shows the person in a state of undress,
- (b) a video, held or seized by a prosecuting authority, showing a person committing a sexual offence,
- (c) a computer hard drive, held or seized by a prosecuting authority, containing images of child pornography or child abuse material (within the meaning of Division 15A of Part 3 of the *Crimes Act 1900*),
- (d) a photograph of a deceased person taken in connection with a post mortem examination,
- (e) a photograph of a deceased person taken at a crime scene.

(3) In determining whether a thing is obscene or indecent, the fact that the thing was brought into existence, or is in the possession of a prosecuting authority, for the purpose of providing evidence of an offence is to be disregarded.

**281C Accused person not entitled to copy of sensitive evidence**

(1) A prosecuting authority is not required and cannot be required (whether by subpoena or any other procedure), in or in connection with any criminal investigation or criminal proceedings, to give an accused person a copy of anything the prosecuting authority reasonably considers to be sensitive evidence.

(2) This section applies despite anything to the contrary in this or any other Act, or any other law.

**281D Procedures for giving access to sensitive evidence to accused person**

(1) If, but for this Part, a prosecuting authority would be required, in or in connection with any criminal investigation or criminal proceedings, to provide a copy of a thing to an accused person, and the prosecuting authority does not give a copy of the thing to the accused person as a result of this Part, the prosecuting authority must give the accused person a written notice (a **sensitive evidence notice**) that complies with this section.

- (2) The sensitive evidence notice must:
- (a) describe the thing that the prosecuting authority considers to be sensitive evidence, and
  - (b) indicate that, as the prosecuting authority considers the thing to be sensitive evidence, the prosecuting authority is not required to give the accused person a copy of the thing, and
  - (c) indicate that the accused person will not be given a copy of the thing, and
  - (d) contain information to the effect that the accused person is entitled to view the thing at a place nominated by the prosecuting authority and under the supervision of the prosecuting authority, and
  - (e) set out the name and contact details of the person who is responsible for arranging such a viewing on behalf of the prosecuting authority.
- (3) After receiving a sensitive evidence notice, the accused person may give the prosecuting authority a written notice (an **access request notice**) that indicates that the accused person requires access to the thing.
- (4) The prosecuting authority must, as soon as practicable after receiving an access request notice, give the accused person, and any other person who has been engaged to assist with the accused person's case, reasonable access to the thing so as to enable them to view (but not copy) the thing. This may require access to be given on more than one occasion.
- (5) The prosecuting authority may require any such access to take place subject to such conditions as the prosecuting authority considers appropriate to ensure that there is no unauthorised reproduction or circulation of the thing and that the integrity of the thing is protected.
- (6) Without limiting subsection (5), the prosecuting authority may require any such access to take place under the supervision of the prosecuting authority or a person assisting the prosecuting authority.
- (7) A person who is given access to a thing by a prosecuting authority under this section must not, without the authority of the prosecuting authority:
- (a) copy, or permit a person to copy, the thing, or
  - (b) give the thing to another person, or
  - (c) remove the thing from the custody of the prosecuting authority.
- Maximum penalty: 100 penalty units, or 2 years imprisonment, or both.
- (8) The Attorney General may approve the form of any notice to be used for the purposes of this section.

### **281E Prosecuting authority entitled to retain possession of sensitive evidence**

(1) If during any criminal proceedings an accused person is given sensitive evidence, or a copy of sensitive evidence, by the prosecuting authority in the proceedings, the court must, on application by the prosecuting authority, direct the accused person to return the sensitive evidence or copy to the custody of the prosecuting authority at or before the end of each day during which the proceedings are heard.

(2) At the completion of any criminal proceedings in which sensitive evidence is tendered by the prosecuting authority, or sensitive evidence given to the accused person by the prosecuting authority is tendered by the accused person, the court must, on application by the prosecuting authority, direct that the sensitive evidence, and any copies of the sensitive evidence made for the purposes of the proceedings, be returned to the custody of the prosecuting authority.

### **281F Improper copying or circulation of sensitive evidence**

(1) A person who has possession of sensitive evidence that is prosecution evidence must not copy, or permit a person to copy, the sensitive evidence, or give possession of the sensitive evidence to another person, except:

(a) for the legitimate purposes of a criminal investigation or criminal proceedings, or  
(b) if the person is a public official, in the proper exercise of the person's public official functions (including any functions relating to education or training).

Maximum penalty: 100 penalty units, or 2 years imprisonment, or both.

(2) For the purposes of this section, any sensitive evidence in the possession of a person is **prosecution evidence** if:

(a) the person was given possession of the sensitive evidence by a prosecuting authority in or in connection with a criminal investigation or criminal proceedings, or

(b) the person is a public official who created, or obtained possession of, the sensitive evidence in the exercise of, or as a result of an opportunity that arose in the exercise of, public official functions in or in connection with a criminal investigation or criminal proceedings.

(3) In this section: public official has the same meaning as in the Independent Commission Against Corruption Act 1988.'

6.55 The Commission provisionally recommends the insertion after section 61 of the SOA of the following clause:

**“61A Management of Child Sexual Abuse Material and Pornography**

(1) Police and court officials having access to images or sequences of images, descriptions, or portrayals of child sexual abuse material or pornography may not reproduce any such material without a court having made a reproduction order.

(2) Police and court officials having access to images or sequences of images, descriptions, or portrayals of child sexual abuse material or pornography, shall take all reasonable steps to prevent access thereto by anyone not having a right of access.

(5) A reproduction order referred to in subsection (1) shall only be made in the presence of substantial and compelling circumstances and shall be accompanied by directives regards the manner in which the material is to be managed including the period for which it may be held and the date upon which it shall be returned to the investigating officer.

(6) Any person who fails to comply with the provisions of subclauses (1) or (2) or the directives of a reproduction order shall be guilty of an offence and liable upon conviction to a fine or 2 years` imprisonment or to both such fine and imprisonment”

**d. Access to child sexual abuse material by the defence**

6.56 In terms of the UK Crown Prosecution Service Legal Guidelines on Indecent Images, in order to ensure a fair trial, the legal representative (defence team) of a person accused of child exploitation should be allowed to view the child sexual abuse material or examine the

accused's hard drive.<sup>1225</sup> This should not be construed as a blanket right to access the material. It is noted that suitable and reasonable access to the relevant material would suffice.<sup>1226</sup> The Crown Prosecution Service Guidelines suggest that whenever possible, such access should take place either on police premises, or at the offices of either the defendant's solicitors or the offices of the defence or prosecution expert.<sup>1227</sup> The view is further held that the accused should only be permitted access to the material while in the company of his or her legal representative. This view accords with the judgment in *Crown Prosecution Service v LR* where it was found that:

'Prosecutors should remember that defence solicitors have a duty to defend their clients properly, whilst law enforcement agencies have a duty to ensure that they do not unnecessarily create more indecent images of children or compromise sensitive confidential material.'<sup>1228</sup>

6.57 The Guidelines explain that it will not always be the case that the defence need full access to a forensic computer image. Likewise it may not always be appropriate for law enforcement agencies to deny access to a forensic computer image.<sup>1229</sup> Guidelines on how to deal with indecent images in the United Kingdom suggest that child sexual abuse material should be viewed on the police officer's laptop or other computer equipment at a mutually agreeable location. These Guidelines provide that a CD-ROM (or other media) containing child sexual abuse material should not be inserted into any Crown Prosecution Service computer or laptop and the prosecutor should not take possession of this material in any way.<sup>1230</sup> However if it is deemed necessary to do so, such exhibits have to be dealt with as sensitive material, i.e. as having a protective marking of 'Official Sensitive', they should be kept in a safe and a log should be maintained recording dates accessed, by whom, length of time and the reason accessed.<sup>1231</sup>

6.58 The Crown Prosecution Service Guidelines suggests that when dealing with the issue of access to child sexual abuse material, in order to decide whether or not to release such material, the following approach should be adopted:

1. 'In cases involving a request for a technical examination of the evidence, a meeting should take place between defence and prosecution technical experts in order to

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<sup>1225</sup> UK Crown Prosecution Service Legal Guidelines on Indecent Images available online at <https://www.cps.gov.uk/legal-guidance/indecnt-images-children-ioc>.

<sup>1226</sup> Ibid.

<sup>1227</sup> Ibid.

<sup>1228</sup> See the case of *Crown Prosecution Service v LR* [2010] EWCA Crim 924.

<sup>1229</sup> CPS Legal Guidelines on Indecent Images.

<sup>1230</sup> Ibid.

<sup>1231</sup> Ibid.

agree what should be supplied. If it is necessary, the defence technical witness may be given private (or controlled) facilities to examine the images at law enforcement premises at reasonable hours.

2. If the person in charge of the investigation considers it necessary, then the work may take place other than at police premises if the defence technical witness signs an appropriate undertaking.
3. If the defence team cannot for good reason view the indecent images at a police station, for example in cases where the defendant is in custody, the prosecution should correspond with the defence in order to agree in respect of access to the indecent images by the defence team. Such access can be at an appropriate venue for example a court, the defence solicitor's office or counsel's chambers etc.
4. In situations (1), (2) and (3) above, where no agreement is reached, the case should be referred to the court to hear argument and, if necessary, issue appropriate directions.
5. If the court directs that copies of the indecent images should be supplied to the defence solicitor or counsel, prosecutors should ensure that the order contains a proviso that the material is to be released only upon the solicitor or counsel signing an undertaking as to the safe custody and control of the image etc.<sup>1232</sup>

6.59 In the case of a technical witness, Crown Prosecutors should ensure that the order contains a proviso that the material is to be released only upon the technical witness signing an undertaking as to the safe custody and control of the image etc. Breach of the undertaking may leave the signatory open to prosecution and disciplinary action from their professional body.<sup>1233</sup>

6.60 Based on the expert evidence provided by its advisory committee and engagement with police officials and prosecutors during workshops on the issue paper, the Commission is of the view that a defence attorney should not be provided with copies of the child sexual abuse material forming the subject matter of a prosecution. The Commission is of the view that there is a need to formalize procedures around viewing of evidence which includes child sexual abuse material.

6.61 The judgment in *Du Toit v Ntshinghila*<sup>1234</sup> in which the Supreme Court of Appeal agreed that copies need not be given to the defence is welcomed. The Supreme Court of Appeal endorsed the ruling by the lower court that the arrangement proposed by the prosecutor instead of producing copies, namely a disclosure by private viewing to the accused, his legal representatives and any expert for the defence (to view the images at an office at either the local police station or the court) was adequate. The Court found 'that the prosecution had properly exercised its discretion, consistent with contemporary principles and values, to refuse to make the images available to the defence.' The Supreme Court of

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<sup>1232</sup>

Ibid.

<sup>1233</sup>

CPS Legal Guidelines on Indecent Images.

<sup>1234</sup>

*Du Toit v Ntshinghila* (733/2015) [2016] ZASCA 15 (11 March 2016).



Appeal noted the judgment of the Supreme Court of Canada in the matter of *R v Stinchcombe* where it held that the constitutional entitlement of an accused to full disclosure of the prosecutor's case does not require production of documentary originals. The constitutional obligation may be answered, *inter alia*, by permitting inspection of originals. It further noted and recommended the content of the NDPP Prosecution Policy Directive (Part 24: Sexual Offences)<sup>1235</sup> which provides:

'7. With regards to dockets that contain visual images of child pornography, prosecutors need only allow the defence access thereto and should not provide copies thereof unless so ordered by court. Dockets containing child pornography must at all times be kept at the official workplace and stored in a secure locked location.'

6.62 It is notable that in the United Kingdom the 2007 Criminal Procedure Rules applicable to the Crown Prosecution Service were amended in 2015 to allow for multiple incident counts.<sup>1236</sup> This approach removes the need to provide example images of individual images, separately particularised in stand-alone counts. It further removes the need (where there is no issue raised) to draft separate counts for each of the devices found.<sup>1237</sup> Consolidating various images in a single charge appears to be a salient approach which may serve to simplify the prosecution process

#### **e. Search and seizure**

6.63 The Commission has decided not to interrogate issues relating to search and seizure and not to make recommendations in this regard as officials in the criminal justice system, notably SAPS and NPA, have reported that the powers they have been granted in terms of the CPA to search and seize are adequate.

#### **f. Data preservation, access by SAPS and suspension of access to child sexual abuse material by ECSP**

6.64 Section 24C(2) of the FPA provides that any person who provides child-oriented services, including chatrooms, on or through mobile cellular telephones or the internet, must take all reasonable steps to preserve such evidence for purposes of investigation and

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<sup>1235</sup> Tabled in Parliament on 23 September 2010 and, made available on the National Prosecuting Authority website under Resources, Library, Prosecution Policy and Policy Directives.

<sup>1236</sup> United Kingdom Criminal Procedure Rules 10.2 - and rule 10.A.10 of the Criminal Practice Directions Division II 2015).

<sup>1237</sup> CPS Legal Guidelines on Indecent Images.

prosecution by the relevant authorities. Subsection (3) requires ISPs to provide the police with particulars of users who gained or attempted to gain access to an Internet address that contains child pornography. And in terms of subsection (4) failure to comply with the above obligations will constitute an offence. Section 27A of the FPA places an obligation on ISPs to take all reasonable steps to prevent the hosting or distribution of child sexual abuse material through its services and contains obligations on reporting, restriction of access and preservation of evidence for purposes of investigation and prosecution. The draft Bill included in this discussion paper recommends the repeal of section 27A and in its place recommends the enactment of clause 54A(2) which places similar obligations on electronic communication service providers with the addition of allowing SAPS reasonable time to investigate the matter before access is restricted. Data retention and preservation provisions have increasingly become a point of discussion in the sphere of child protection online. These provisions help ensure that digital evidence is available to law enforcement when needed for the investigation and prosecution of illicit online activity.<sup>1238</sup> If however the police do not respond within a reasonable time, the service provider must suspend the access pending the investigation. If however the police are of the opinion that the suspension should go ahead immediately, that should then be implemented. This recommendation is contained in chapter two.

#### ***g. Viewing of child sexual abuse material in court***

6.65 The view is held that as it is illegal to access, distribute and view child sexual abuse material in terms of the FPA, this material may not be viewed in open court. Objectively this material is of a child (whether the identity of the child is known or not) who is sexually abused and for this reason section 153 of the CPA is applicable. Section 153(1) of the CPA provides for a discretionary direction by the court in the interests of justice or public morals. It should be argued that it is in the interests of justice and in the best interest of the child (whether identified or not) and in the interest of children in general that this material not be viewed in open court. Section 153(3) may also be applicable. Child sexual abuse material is considered evidence of a sexual offence and even though the child does not testify him- or herself, the images are testimony of child sexual abuse and the prosecutor has a duty to apply to court for the material not to be viewed in open court.

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<sup>1238</sup> ICMEC Child Pornography: Model Legislation & Global Review 2016.

#### **h. Evidence of age of child depicted in child sexual abuse material**

6.66 As the age of the child depicted in the child sexual abuse material may be disputed by the defence there may be a need for judicial cognisance in such matters. In borderline situations, a prosecution might simply be declined. However, defence counsel more often than not places age in dispute. For instance, in the matter of *S v Fourie RC 14/1218/2014*, a matter pending in the Pretoria Regional Court, a medical doctor testified for weeks on the age of the child in 418 images, some of which were clearly of a child younger than 5. Section 212(4) of the CPA provides for a fact to be established by any examination or process requiring any skill in *inter alia* biology or anatomy or human behavioural sciences. Whilst it could be argued that section 212(4) in any event finds application, this is not very clear since the skill is applied to an image and can therefore not be a fact per se. It has therefore become practice to call medical doctors to testify as to the age of the children/persons in the images. This in turn leads to avoidable delays in proceedings. Section 212(13) of the CPA provides that the section does not exclude certificates as evidence allowed by any other law. The Commission proposes a clause allowing for the court to take judicial cognisance of the fact that a child is under the age of 18 and, in the event of a dispute, for evidence by way of certificate as prima facie proof of age.

6.67 The proposed insertion after section 59 of the SOA reads as follows:

##### **Section 59 A Evidence of age of child depicted in child sexual abuse material**

(1) In criminal proceedings involving child sexual abuse material, the court may take judicial cognisance of the fact that the child in the child sexual abuse material is, or is depicted as being, under the age of 18

(2) Where it is disputed that the child in the child sexual abuse material is, or is depicted as being, under the age of 18, an affidavit or certificate issued pursuant to section 212(4)(a) of the Criminal Procedure Act, 51 of 1977, shall with the changes required, serve as prima facie proof of such fact and the provisions of section 212 (12) shall find application.

#### **i. Forfeiture and disposal of child sexual abuse material**

6.68 One of the challenges facing law enforcement is how to deal with the disposal of child sexual abuse material. A court may order that the material should be returned to the investigating officer to be destroyed. However if the material is destroyed and the case has been withdrawn and the defence launches an appeal thereafter the child exploiter may have the case overturned for lack of evidence. Where the hard drive of a device has been

removed or destroyed to prevent reconstruction, the evidence that would be necessary to defend an appeal would be inaccessible. The Commission is of the view that the fate of such evidence should depend on both the crime and the circumstances. In order to address this challenge the Commission suggests that where there has not been a conviction and the NPA elect not to appeal the finding in the matter an order should be sought to forfeit and destroy all child sexual abuse material. However where there has been no arrest or trial, the evidence should only be destroyed after the statute of limitations for filing a case has passed as an arrest may still be imminent. Of course, since there is no statute of limitations on murder and certain sexual crimes, this will mean that any child sexual abuse material in which a child is murdered etc could theoretically be kept forever. An appropriate order should be sought to forfeit and destroy this material, unless there is a pressing reason not to. Where there has been a conviction, the evidence should only be destroyed after the final date to file an appeal has passed (if appeals are not filed) or after the appeal process has run its course. Once the appropriate time(s) have passed, then anything that is illegal should be forfeited and destroyed and any legal material should be returned to its lawful owner.

6.69 Deskins argues that prosecutors in the USA should always request forfeiture of indecent images of children using s.143 of the Powers of Criminal Courts (Sentencing) Act 2000 following conviction. The section allows a court to make a deprivation order, where:

- The Court is satisfied that any property (seized from him or in his possession) has been used for the purpose of committing or facilitating the commission of any offences. (143 (1)).
- The court is satisfied that the offence [being sentenced or taken into consideration upon sentence], consists of unlawful possession of property which was in his possession or under his control at the time when he was apprehended (section 143 (2)(b)).

6.70 Deskins<sup>1239</sup> further suggests that where offences of making indecent images have been charged an application under subsection one should be made. If the indictment contains charges of possessing indecent images an application can be made under subsection two. She explains that in the USA prosecutors are encouraged to take a robust approach to such applications. In the first instance it may be appropriate to seek a deprivation order for the complete hard drives of any device. It may however be argued by

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<sup>1239</sup> Deskins A "Internet Use and Sex-Crimes Convicts: Preserving the First Amendment Rights of Sexual Offenders Through the Framework of United States v Albertson." 91 U.Det.Mercy L.Rev. 29, 52 (2014).

the defendant that there are specific reasons why a comprehensive order has a particular financial or other effect (see section 143(5)). In her view such disputes should be settled on a case by case basis. Deskins argues that any suggestion that a compromise position should be adopted and that the police can delete certain images and return the remainder of the hard drive should be avoided. This process has huge time and resource implications for the police. She further explains in addition to the process available upon conviction, an additional procedure exists for seeking forfeiture. Section 5 of the Protection of Children Act 1978 and Schedule One to the same Act (as amended by section 39 of the Police and Justice Act 2006) provides a mechanism to allow police to forfeit indecent photographs of children following any lawful seizure. Having given all interested parties notice, the property is treated as forfeited if it remains 'unclaimed'. If the defendant contests the notice of intended forfeiture there may be a hearing to determine the issue. Such proceedings are civil and are litigated in the magistrates' court. This process may be used to forfeit images in cases where the prosecutor at court has forgotten to ask for forfeiture of the images or where there is no conviction: for example where a caution has been given or charges dropped. This process allows forfeiture of articles that are impossible to separate from legal data on a computer hard drive. It allows police to forfeit articles they believe are likely to be or contain indecent images of children. For example this will allow police to forfeit a vast collection of discs/videos without having to go through every single item, as long as they have reasonable grounds to believe they were or contained such images.

6.71 The Commission flags this concern for comment and provisionally recommends the insertion of the following clause after section 61:

**61B Orders to seize, forfeit, dispose of and destroy**

(1) The court that convicts or acquits a person of any offence in terms of this Act that involves child sexual abuse material must order the seizure of all such material and any device that may allow access to child sexual abuse material if not yet seized, and the confiscation and forfeiture of all such material or devices and, to the extent necessary, the future handling, seizure, forfeiture, disposal and or destruction thereof.

(2) Where, following an investigation for any offence in terms of this Act that involves child sexual abuse material, no prosecution is instituted a court may, upon application by a prosecutor, order the confiscation, forfeiture, disposal and destruction of all such material and of any device that may allow access to child sexual abuse material.

***j. Prescription***

6.72 When dealing with prescription and child sexual abuse material it is necessary to take note of the Constitutional Court judgment in *Levenstein and others v the Estate of the Late Sidney Lewis Frankel and others*.<sup>1240</sup> The Constitutional Court held that the declaration of constitutional invalidity of section 18 of the CPA made by the High Court of South Africa, Gauteng Local Division, Johannesburg is confirmed. Prior to this judgment section 18 of the CPA provided that the right to institute a prosecution lapses after a period of 20 years from the time that an offence was committed unless it is an offence referred to in paragraphs (a) to (i) of this section. A prosecution, in terms of section 18 could therefore be instituted after a period of 20 years has lapsed only in the case of the following offences: murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing; rape or compelled rape as contemplated in sections 3 or 4 of the SOA; genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002; offences as provided for in sections 4, 5 and 7 or involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013; and using a child or person who is mentally disabled for pornographic purposes as contemplated in section 20(1) and 26(1) of the Sexual Offences Act. The Constitutional Court added the following words to section 18(f) of the CPA: ‘and all other sexual offences whether in terms of common law or statute’ after the words ‘the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively’. This in effect means that all offences involving child sexual abuse material do not prescribe.

## **2 National Strategy for making South Africa safe for children by combating sexual abuse and exploitation crimes against children**

6.73 The Commission aims to engage with relevant role-players in the criminal justice system during the workshop phase of this discussion paper with a view to determining best practice or guidelines for the investigation and prosecution of offences pertaining to children and pornography and or child sexual abuse material. The Commission is mindful that certain protocols and standing operating procedures are and should remain internal documents. The Commission is of the view that in as far as any of the instructions or processes may call for confidentiality they need not be published in the Gazette. This may include the circumstances under which an ISP may be instructed to preserve access to

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<sup>1240</sup> *Levenstein and others v the Estate of the Late Sidney Lewis Frankel and others* Case CCT 170/17.

certain material and also processes relating to undercover operations which might be sensitive.

6.74 As a starting point the Commission endorses an inter-sectoral approach to the management of investigations relating to child sexual abuse material and exposure to pornography. Section 62 to 65 of the SOA already lays the foundation for a national strategy against sexual offences (including the combating of sexual abuse material against children) at a local level. While recognizing that there may be an overlap in respect of certain steps in the process, the Commission will address issues pertinent to the relevant role-players individually and where necessary to avoid duplication collectively below.

6.75 For the safety of children in South Africa and elsewhere, it is important that South Africa should be known as a hostile place for criminals to create, distribute or host content of child sexual abuse. Due to the global nature of online offences and the fact that these offences against children are not contained by physical borders, it is critical that a national strategy includes the critical element of international engagement. As this discussion paper includes the recommendation that all child sexual abuse material and related offences should be contained in the SOA section 61 of the SOA regulating the application of extra-territoriality will be applicable to these provisions if the proposal to house them in the SOA is supported. The Commission is provisionally of the view that the provision for extra-territorial application in terms of section 61 is wide enough to allow for prosecution where an ESCP has an office (including a satellite office) in South Africa and on this understanding does not make any recommendation. For successful investigations and prosecutions it may be necessary for multiple law enforcement agencies to work together to detect, investigate, arrest, prosecute and sentence child exploiters in their respective jurisdictions.<sup>1241</sup> One of

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<sup>1241</sup>

ABC News reported that Spanish police broke up an international 'child porn chat network' that allegedly distributed child pornography via popular online chat application WhatsApp. It resulted in the arrests of over three dozen people in 10 countries. The network is said to have operated some 100 chat groups with 135 identified users in Europe, Central and South America. Files retrieved during an investigation conducted in coordination with Interpol and Europol depicted images of children up to 8 years old being brutally abused. Steven Wilson, head of Europol's European Cybercrime Center, told the Associated Press that Spanish police discovered a group of individuals using closed groups in the chat application to distribute the pornographic material. Police are reported to have intercepted 360,000 files so far. available at ABC News "Spain police break international child porn chat network". ABC News "Spain police break international child porn chat network" (10 November 2016) available at <http://abcnews.go.com/International/wireStory/spain-police-break-international-child-porn-chat-network-46859081> Accessed on 17 February 2019; DW.Com "Police break up child pornography ring in Spain" (10 November 2016) available at <https://www.dw.com/en/police-break-up-child-pornography-ring-in-spain/a-36343105> Accessed on 17 February 2019; DW Com "German police uncover child porn ring at campsite" (30 January 2019) available at <https://www.dw.com/en/german-police-uncover-child-porn-ring-at-campsite/a-47292735> Accessed on 17 February 2019; DW Com "Canada

the ways in which to do this is to engage with the network of law enforcement agencies established by the Internet Watch Foundation (IWF). IWF seeks to bring together law enforcement and industry to facilitate the removal of webpages containing child sexual abuse imagery.<sup>1242</sup> The IWF has been identified as a critical player in the WePROTECT Global Alliance to end child sexual exploitation online.<sup>1243</sup> IWF reporting portals are based in 16 countries;<sup>1244</sup> collaboration has been established with 51 hotlines in 45 countries, and law enforcement partners globally;<sup>1245</sup> and importantly includes international internet companies. IWF reports that new analysts go through a specially developed training program to help them mentally process and cope with exposure to abusive images. During the working day, all analysts take regular, timetabled breaks. Every month, they attend compulsory individual counseling sessions. All employees who see content have an annual full psychological assessment and receive counseling support.<sup>1246</sup> The Commission is of the view that psycho-social assessment and counseling are important elements of working in this field for all role players.

6.76 According to the United Kingdom Crown Prosecution Service legal guidance on indecent images training of police officials and prosecutors should be a key component of a national strategy as cases involving child sexual abuse material involve technical evidence.<sup>1247</sup> The police and prosecutors tasked with these cases should ensure they are familiar with the concepts they are being asked to engage with. Prosecutors should liaise with the investigating officers and any analyst involved if explanation of technical evidence is needed.<sup>1248</sup> As these cases are complex it is also of importance for the prosecutor to ascertain for example whether the complainants or the accused have been groomed or blackmailed in any manner.<sup>1249</sup> Child sexual abuse material could have been generated or obtained by the complainant or the accused in response to online grooming or blackmail and in the case of the accused could be used to threaten exposure to family and friends.<sup>1250</sup> This

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police announce hundreds of arrests in worldwide child porn investigation” (15 November 2013) available at <https://www.dw.com/en/canada-police-announce-hundreds-of-arrests-in-worldwide-child-porn-investigation/a-17229081> Accessed on 17 February 2019.

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IWF Annual Report 2016 2.

1244

The IMF is considered a model of good practice for their own reporting hotlines Home Secretary, The Rt Hon Amber Rudd MP IWF Annual Report 2016 2.

1245

Ibid.

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Opcit 3.

1247

IWF Annual Report 2016 49.

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CPS Legal Guidelines on Indecent Images.

1249

Ibid.

1250

Ibid.  
Ibid.



would leave the victim open to being charged as a child exploiter where they are in fact the victims of a child exploiter.<sup>1251</sup>

6.77 The Commission agrees that national instructions and prosecutorial directives need to be closely examined and if found adequate, closely monitored and enforced. Alternatively clear procedures need to be issued.

6.78 The Commission recommends that a multi-disciplinary approach should be followed and that Directives and National Instructions or Standing Operating Procedures should either be developed or updated with a specific focus on the policing and prosecution of case relating to child sexual abuse material. The Commission recommends that the following aspects should be addressed or receive renewed attention in the national instructions and any directives in respect of all role players:

- 1 All role players must develop suitability or psychometric screening programmes to screen persons applying to be involved in the investigation and management of cases involving cases of child sexual abuse material cases.
- 2 All role players must develop and provide training for first responders and follow-up investigation and management of cases involving child sexual abuse material. Although section 66 of the SOA provides for training (including social context training) and it forms part of the NPA training curriculum it would seem that this aspect needs renewed attention.
- 3 A multi-disciplinary committee must provide for uniformity of data obtained from SAPS and the NPA Sexual Offences and Community Affairs (SOCA). The Commission recommends that record keeping should be standardized and that statistics should be segregated i.e. data on different crimes, according to the section and the Act should be kept separately.
- 4 All role players must develop debriefing programs and provide the service to persons responsible for the investigation and management of cases involving child sexual abuse material. The Commission particularly recommends mandatory support programmes or debriefing for the police and prosecutors dealing with sexual offences. The directives or national instructions should cause any official to engage in debriefing or a support programme at least twice a year and additionally for specific incidences. The Commission recommends that the roleplayers themselves should develop programmes focusing specifically on support/debriefing of members

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<sup>1251</sup> Ibid.

dealing with victims of sexual offences and for members dealing with victims and child sexual abuse material. The Commission recommends the insertion after subparagraph 65(1)(d) of the SOA of the following subparagraph with a view to forming part of the national policy framework guidelines. The proposed insertion reads as follows:

“65(1)(e) ensuring the different organs of state provide for, where relevant, appropriate screening policies and debriefing programs.”

#### a. **SAPS**

6.79 The Commission welcomes the establishment of Serial and Electronic FCS Investigations (SECI), a sub-section of the SAPS Family Violence, Child Protection and Sexual Offences Investigation Service. The Commission has taken note that SAPS is currently in the process of revising its standing orders and national instructions and developing and updating its standard operating procedures for dealing with a number of aspects including the investigation of child sexual abuse material. It flags the need to ensure that the exposure of children to pornography and child sexual abuse material and related offences receives attention in the aforementioned documents.

6.80 With reference to the national instructions the Commission provisionally recommends the inclusion of the Department of Basic Education in section 66(1)(a) as one of the departments the National Commissioner of the South African Police Service should consult with and the insertion of a subclause in section 66(1)(a) to provide for matters proposed in the draft Bill included in this discussion paper. The proposed addition reads as follows:

- (xx) the insertion after subparagraph 66(1)(a)(vi), by the following subparagraph:
- (vii) the manner in which and the expediency with which police officials are to react to the reporting of sexual offences involving child sexual abuse material; the circumstances under which and the manner in which an electronic communications service provider is to be instructed not to take steps to prevent access to the child sexual abuse material by any person; the manner in which these offences are to be investigated including the manner of search and seizure and undercover operations; the steps to be taken to have any child in the child sexual abuse material identified and the manner in which the victim is to be provided protection, whether identified or not; the steps to be taken to protect the child sexual abuse material from unauthorised access including final disposal thereof.

6.81 The Commission recommends that there should be a focus on the policing of cases relating to child sexual abuse material from a proactive and reactive response. Proactive

policing should include roles and responsibilities with a focus on awareness programmes; the media; and protecting the identity of children. Reactive policing should include roles and responsibilities with a focus on cases reported to a SAPS member; police generated investigations and cooperation with other role players. Training on cases reported to a SAPS member should include information on the first report; follow-up investigations; statements; physical evidence (seizure, security, packaging and safekeeping of copies). Cooperation with other role players includes social workers; prosecutors; Interpol and other police agencies and other role players such as the Films and Publications Board and Internet Service Providers.

**b. NDPP**

6.82 With reference to the directives the Commission provisionally recommends the amendment of section 66(2)(a) to include the Department of Basic Education in consultations on relevant directives and recommends the insertion of a subclause in section 66(2)(a) to provide for matters proposed in the draft Bill included in this discussion paper.

6.83 The proposed addition reads as follows:

(xx) the insertion after subparagraph 66(2)(a)(ix), by the following subparagraph:

“(x) the manner in which sexual offences involving child sexual abuse material should be dealt with, the manner in which the victim is to be provided protection, whether identified or not; the steps to be taken to protect the child sexual abuse material from unauthorised access including final disposal thereof; the manner in which a child is to be referred to a probation officer in terms of section 56(9); the criteria to be used and circumstances in which the diversion of a child accused of a sexual offence involving child sexual abuse material or pornography should be considered and the appropriate conditions of diversion.”

**c. Department of Health**

6.84 With reference to the directives the Commission provisionally recommends the amendment of section 66(3)(a) to include the Department of Basic Education and the insertion of a subclause in section 66(3)(a) to provide for matters proposed in the draft Bill included in this discussion paper.

6.85 The proposed addition reads as follows:

(xx) the insertion after subparagraph 66(3)(a)(v), by the following subparagraph:

“(vi) the manner in which assistance in the investigation and prosecution of sexual offences involving child sexual abuse material must be provided, including the determination of age where the material involves unidentified victims or depictions.”

**d. Department of Basic Education**

6.86 With the increased focus on the protection and prevention of child exposure to pornography and child sexual abuse material associated offences and the proposed consolidation of these offences in the SOA the Commission recommends that section 63 of the SOA should be amended to include other key role-players and particularly the Department of Basic Education.

6.87 The Commission provisionally recommends the expansion of section 63(2) to include the Department of Basic Education as a member of the Inter-sectoral Committee. The Commission recommends consequential amendments to section 66(1)(a) to include the Department of Basic Education in the consultation on the development of SAPS national instructions; in section 66(2)(a) in the development of directives by the NDPP; in section 66(3)(a) in the development of directives by the Department of Health and the insertion of subclause 66(3)(A) to place an obligation on the Director-General Basic Education to develop relevant training courses to ensure that in turn adequate training on protective and preventative measures is conducted in institutions of learning. The Commission recommends that specific training or a dedicated curriculum should be developed or updated to focus on matters regarding child sexual abuse material from a proactive and reactive or response approach. The proposed subclause reads as follows:

“(3)(A) The Director-General Basic Education must, in consultation with the Inter-sectoral Committee develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all educators and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of offences, with particular reference, among others to –

- (viii) equipping educators and learners with knowledge on preventative measures;
- (ix) the manner in which reports of sexual offences should be dealt with in general;
- (x) the manner and time limit within which sexual offences are to be reported to the SAPS;
- (xi) the manner the child victim should be protected and referred for other services if necessary,;

- (xii) the manner in which the child in conflict with the law should be dealt with;
- (xiii) the manner in which assistance in the investigation and prosecution of sexual offences generally must be provided; and
- (xiv) the manner in which child sexual abuse material must be dealt with.”

**e. Department of Justice and Constitutional Development**

6.88 The Commission notes that although provision has been made for directives to be issued by the NDPP there is notably no obligation on the Director-General of Justice and Constitutional Development to do the same.

6.89 The Commission recommends the inclusion of such a clause in section 66. The proposal reads as follows:

“(3)(B) The Director-General Justice and Constitutional Development must, in consultation with the Inter-sectoral Committee develop and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons when dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of offences, with particular reference, among others to –

- (iii) the manner court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be dealt with including any copying and distribution thereof at all courts; and
- (iv) the manner in which court records, including charge-sheets and exhibits, containing information pertaining to victims of sexual offences and/or child sexual abuse material or pornography, must be disposed of and destroyed.”

**f. Department of Social Development**

6.90 The Commission notes that although provision is made in section 63 of the SOA for the Director-General Social Development to form part of the Inter-sectoral Committee there is no corresponding obligation to issue or publish directives pertinent to this Act. As new provisions are being proposed, including the insertion of section 56(9) with regard to children in conflict with the law, the Commission is of the view that there is a need for directives to be issued and published.

6.91 The Commission proposes the following insertion in section 66 of the SOA:

“(3)(C)The Director-General Social Development must, in consultation with the Inter-sectoral Committee develop and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all officials and any other relevant persons dealing with sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of offences, with particular reference, among others to –

the manner in which probation officers are to deal with children referred in terms of section 56(9) and any other child in conflict with the law for having committed a sexual offence involving child sexual abuse material;  
the manner in which they are to be assessed; and  
the interventions to be recommended for purposes of determining appropriate conditions of diversion.”

### **g. Department of Correctional Services**

6.92 The Commission notes that similar to the position of the Director-General of Justice and Constitutional Development there is no obligation on the National Commissioner of Correctional Services to issue directives. The Department of Correctional Services may have a considerable role to play for purposes of the proposed prescribed pre-sentence report and the proposed monitoring of any order made subsequent to conviction and sentencing. The Department of Correctional Services may also have a role relating to child sexual abuse material matters regarding parole processes, including where victims may or are called to make submissions to the parole board. The Commission invites comment on whether section 66 should be further amended to include an obligation on the National Commissioner of Correctional Services to issue directives relevant to the SOA and the amendments to the SOA as proposed in the Bill included in this discussion paper and the extent thereto if deemed necessary.

## **3 Sentencing and ancillary orders**

6.93 The Commission agrees with the views of respondents that in respect of sentencing (with the exception of self-generated child sexual abuse material offences) there should be no difference between the person who views child sexual abuse material and the person who creates or distributes them.

6.94 The granting of a number of lenient sentences by courts in South Africa for offences relating to child sexual abuse material is concerning.<sup>1252</sup> Dr van Niekerk, Past President of

<sup>1252</sup> Narsee AJ “Porn Sentence slammed as too lenient” (25 February 2016) The Herald available

the International Society for the Prevention of Child Abuse and Neglect, is of the view that courts are failing to give rehabilitative sentences and only focus on punishment.<sup>1253</sup> She is quoted as saying:

“[The sentence] doesn’t help him with his basic problem which is that he is most likely sexually attracted to children. . . .”<sup>1254</sup>

6.95 Affiliated child rights organisations are also unhappy with the ‘lenient’ sentencing. Germaine Vogel of Women and Men Against Child Abuse is quoted as saying that: ‘[D]irect imprisonment, which includes compulsory rehabilitation programmes, should be handed down by our courts if they are serious about protecting children.’<sup>1255</sup> The NPA has also taken exception to lenient sentences in these matters and have had success in taking some of these matters on review. In *S v Alberts*<sup>1256</sup> the State successfully appealed against the ‘light sentence’ given for possession of 482 child sexual abuse material images and the High Court doubled the prison term and ordered that his name be recorded in the National Register of Sex Offenders.<sup>1257</sup> The two Pretoria High Court judges in this matter criticised the sometimes lenient punishment given to those convicted of possessing child pornography. Judges Baqwa, and Kubushi both found that the Regional Court had misdirected itself by not giving sufficient weight to the aggravating factors in the Alberts case. Judge Baqwa ruled that:

‘Taking into account the nature of the offence, its impact on the 481 victims and their families and the level of depravity of the underlying crimes further perpetrated by the continued publication of the images, the regional court had erred.’

6.96 He further found that the crimes committed on the minor children could not only be described as disgusting and degrading but, as testified by experts, their youth had been taken away and their future tarnished. He further added that there seemed to be a chasm between the public outrage over these type of offences and the manner in which the courts articulated that outrage when sentences were meted out.

6.97 On 1 April 2014 the United Kingdom Sentencing Council issued revised Sentencing Guidelines and Categories of Offences for all sexual offences including those concerning

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at <https://www.pressreader.com/>.

<sup>1253</sup> Ibid.

<sup>1254</sup> Ibid.

<sup>1255</sup> Ibid.

<sup>1256</sup> *DPP North Gauteng v Alberts* Case No A835/14.

<sup>1257</sup> The Pretoria East Rekord “Child pornographer’s jail term doubled” (1 July 2016).

indecent images of children. They simplified the images into three categories of seriousness as follows:

- ‘ Category A - Images involving penetrative sexual activity, sexual activity with an animal or sadism.
- Category B - Images involving non-penetrative sexual activity.
- Category C - Indecent images not falling within categories A or B.’<sup>1258</sup>

6.98 From 8 March 2015, the United Kingdom Anti-social Behaviour, Crime and Policing Act 2014 replaced sexual offences prevention orders with sexual harm prevention orders (SHPOs).<sup>1259</sup> A SHPO 'prohibits the defendant from doing anything described in the order'. The Court may make such an order if 'it is satisfied that it is necessary to make a sexual harm prevention order, for the purposes of protecting the public, or any particular members of the public, from sexual harm from the defendant'.<sup>1260</sup> In cases involving indecent images of children there will often need to be a requirement within the order to safeguard the public from further internet based offending. As the internet is a part of all areas of modern life blanket prohibitions on the use of the internet are not permitted. Restrictions on internet usage must be necessary and proportionate, bearing in mind the facts of the particular case and the risk posed by the defendant.<sup>1261</sup>

6.99 The case of *R v Smith (Steven)* [2011] EWCA Crim 1772 remains the leading authority in this area. As was made clear by Hughes LJ - it is 'not a comprehensive guideline for the framing of orders'. Indeed the Court made clear that the cases before them did 'not afford sufficient material for any comprehensive guideline'.<sup>1262</sup>

6.100 Certain key principles have emerged from the leading authority (*R v Smith (Steven)* [2011] EWCA Crim 1772) on these orders. These are central to the proper drafting of such orders. The prohibitions included in SHPOs:

- ‘1. Must be necessary - 'to prevent serious sexual harm'.
2. Can be flexible in their drafting.
3. Must be workable.
4. Should not be vague in their terms.
5. Should not be disproportionately restrictive on ordinary activities.
6. Must be sufficiently clear that defendants understand what is expected of them.
7. Must be sufficiently clear to allow their consistent and proper enforcement.
8. Must seek to avoid risking unintentional breach.

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<sup>1258</sup> The full guidelines can be found at <http://www.sentencingcouncil.org.uk/publications/item/sexual-offences-definitive-guideline/>.

<sup>1259</sup> Ibid.

<sup>1260</sup> Ibid.

<sup>1261</sup> Ibid.

<sup>1262</sup> Ibid.



9. Should not replicate the terms of other regimes such as notification requirements or disqualification from working with children.’<sup>1263</sup>

6.101 Essentially these orders should be tailored to the facts of each case and should allow for some flexibility in the drafting of terms, for example at the time of the drafting technological advances or purchase of new devices cannot be anticipated. Careful thought is needed in every case to establish what particular harm is sought to be prevented and what steps are necessary. Such orders routinely run for periods of five years or more.

6.102 Orders must be drafted as prohibitions. An example of a SHPO contains the following:

‘The defendant is hereby prohibited from:

1. Using any internet enabled device, unless:
  1. The device has the capacity to retain and display the history of internet use.
  2. The defendant has notified his public protection officer that he now possess the particular device.
  3. He makes the device available upon request to a PPU officer in order that:
    - a. The internet history may be examined.
    - b. Risk Management Software may be installed.
2. Deleting some or all of the internet history on any internet enabled device.
3. Deleting or interfering with any Risk Management Software if it is installed upon a device.
4. Installing any additional operating system on any device unless you have requested permission from your PPU Officer and they have authorised you to do so.
5. Using any home broadband router, unless you make the router available for inspection at the request of your PPU Officer.
6. Using any Apple manufactured device to access the internet unless you have made the device available to your PPU officer and the officer has adjusted the settings on the device to prevent the future installation of prohibited software.

If it is known that a particular prohibition is objected to, it may be necessary to call an officer or an expert to give evidence in its support.

6.103 The United States Criminal Code sets out the following factors in section 3553 of the 18 U.S.C which are aimed at directing the sentencing court to consider, among other things,

‘(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide

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<sup>1263</sup>

Ibid.

just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.’

6.104 Section 3583 provides that supervised release conditions should be reasonably related to:

‘(1) the nature and characteristics of the offense and the history and characteristics of the defendant, (2) the deterrence of criminal conduct, (3) the protection of the public from further crimes of the defendant, and (4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.’

6.105 In addition to these criteria, although the United States Criminal Code provides that the conditions of supervised release must not ‘impose any greater deprivation of liberty than is reasonably necessary,’ for sex offences, the sentencing guidelines allow for, and even recommend, a supervised release term of up to life.<sup>1264</sup>

6.106 In the case of *United States v Sullivan*<sup>1265</sup> the court held that there is a strong link between child sexual abuse material and the internet, and that the need to protect the public, particularly children, from sex offenders justifies a range of restrictions including access to the internet only while supervised and prohibiting the possession of or using of a computer with access to any online service at any location without prior approval of the probation officer.<sup>1266</sup> The argument that the internet is a virtually indispensable part of everyday life was dismissed. The court further held that

‘the defendant shall not possess or use a computer that has access to any “online computer service” at any location, including his place or employment, without the prior written approval of the Probation Office. “On-line computer service” includes, but is not limited to, any Internet service provider, bulletin board system, or any other public or private computer network.’<sup>1267</sup>

6.107 Not all courts agree though, with some finding that unannounced inspections of premises and examination stored on a hard drive or removable disks is sufficient restriction.<sup>1268</sup> Deskins argues that with regard to internet restrictions, courts must balance

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<sup>1264</sup> U.S. Sentencing Guide Manual s5D1.2(b) (2009) as found in Deskins A “Internet Use and Sex-Crimes Convicts” 37.

<sup>1265</sup> *United States v Sullivan*, 451 F.3d 884, 895 – 96 (D.C. Cir.2006).

<sup>1266</sup> *United States v Rearden*, 349 F 3d at 621.

<sup>1267</sup> *United States v Sullivan*, 451 F.3d 884, 895 – 96 (D.C. Cir.2006).

<sup>1268</sup> Deskins “Internet Use and Sex-Crimes Convicts” 42.

'(1) protecting citizens from those individuals who may reoffend, and (2) protecting the liberty interests of released individuals.'<sup>1269</sup>

6.108 There are several kinds of software available to monitor the Internet use of a sexual offender, including forensic software, monitoring software, and filtering software. Some software allows for immediate remote access; play-back of computer activity by way of continuous screenshots of the computer system; filtering or blocking of access to predetermined websites. Making such an order presents challenges. A skilled offender may be able to circumvent the software, might use a computer other than the designated computer or access the Internet over Wi-Fi.

6.109 In the matter of the *United States v Albertson*<sup>1270</sup> the United States Court of Appeals, Third Circuit considered what the appropriate conditions are for child pornography offenders in respect of computer-related supervised release. Albertson had been sentenced<sup>1271</sup> to the mandatory minimum sentence of 5 years and 20 years supervised release with eight special conditions which included a restriction on internet access, mandatory computer monitoring and a restriction on his association with minors. The court upheld the overall sentence and conditions with the exception that the conditions on internet restriction and monitoring thereof were to be amended to a more tailored internet restriction. In arriving at a sentence consideration was given to the seriousness of the offence, the goal of deterring Albertson's conduct in the future and the need to protect the public. He contested the following conditions placed on him:

- Associating with children under the age of 18 (with the exception of his children) except in the presence of an adult who has been approved by the Probation Officer;
- From using a computer with access to any 'online computer service' without the prior written approval of the probation officer;
- To submit to an initial inspection, and subsequent inspections, of his computer and to allow the installation of monitoring or filtering software.

6.110 The Third Circuit reviewed the case law on 'supervised release conditions restricting computer and internet usage for child pornography offenders' as provided for in section 3553 of the US Code. The factors relevant to sentencing are found in section 3553(2) of the US Code.<sup>1272</sup> The Court found that taken together the case law yields three themes. Firstly, it

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<sup>1269</sup>

Ibid.

<sup>1270</sup>

*United States of America v. Randy A. Albertson*, Appellant No. 09 – 1049. Decided: May 04, 2001.

<sup>1271</sup>

In terms of section 2252 and 3553 of the United States Code.

<sup>1272</sup>

(2) the need for the sentence imposed—

was found that a complete ban on the use of a computer and internet will rarely be sufficiently tailored to the factors of sentencing. Secondly, a complete ban on internet access, except with prior approval of probation, may be permissibly imposed temporarily on those offenders who have used or have clearly demonstrated a willingness to use the internet as a direct instrument of physical harm e.g. using this platform to solicit or use a webcam. Thirdly where the offences do not involve a 'live' component (that is, direct involvement or communication, including the attempt or demonstrated willingness to have direct involvement or communication, with a putative victim via the internet), the district courts should consider whether a tailored internet limitation is feasible. Where there is not a direct link between the internet and the abuse the Court concluded that a blanket ban was overbroad.

6.111 Based on these three themes the Court proceeded to set out four factors for assessing whether a supervised release condition is overbroad i.e. the scope of the condition; duration; severity of the defendant's criminal conduct and the facts underlying the condition, with a particular focus on whether the defendant used a computer or the internet to solicit or otherwise personally endanger children; and the interplay between prison time and the term of supervised release.

6.112 The Court was mindful that a total internet ban in the words of *United States v Holm*:

'renders modern life – in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website – exceptionally difficult'.<sup>1273</sup>

6.113 The Court consequently tailored internet access and found that:

'where the daily necessities of life and work demand not only internet access but internet fluency, sentencing courts need to select the least restrictive alternative for achieving their sentencing purposes. In this case, the District Court may achieve that purpose through an internet prohibition and monitoring requirement to assure that *Albertson* does not engage in offensive conduct'.<sup>1274</sup>

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- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

<sup>1273</sup>

*United States v Holm*, 326 F.3d 872,878 (7<sup>th</sup> Cir.2003).

<sup>1274</sup>

*United States v Albertson*, 645 F.3d 191, 200 (3d Cir.2011).

6.114 Deskins argues that the approach followed in the Albertson case strikes an appropriate balance between societal interests and the interests of the released offender.<sup>1275</sup> Deskins however points out that it could be argued that a long term or lifetime deprivation of technology and Internet communication is particularly restrictive where the use of technology and internet communication have become the preferred method of communication and in some circumstances indispensable.<sup>1276</sup> The deprivation may be deemed excessive when weighed against the offenders First Amendment rights of freedom of speech and freedom of association and where there are less restrictive means to protect the interests of society. Deskins argues that the approach followed in the Albertson case strikes the appropriate balance between societal interests and the interests of the released offender.<sup>1277</sup>

6.115 As reference is made in the submissions to the ‘Miller’ test, it is apposite to note that in the USA obscenity is not protected by the First Amendment rights of freedom of speech and freedom of association. Speech is protected under these rights if it possesses an aspect of social importance which is not the case with obscene material.<sup>1278</sup> The obscenity doctrine was clarified in the case of *Miller v California*.<sup>1279</sup> Whether material is considered obscene or not is determined as follows:

- (a) whether “the average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest,
- (b) whether it depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
- (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.’<sup>1280</sup>

6.116 It has also been held in the USA courts that the right of privacy does not protect a homeowner’s ability to possess child pornography in his or her home.<sup>1281</sup> In the USA most states have adopted “harmful-to-minors” laws, and these laws are often based on the obscenity test laid out in Miller.<sup>1282</sup> However it is necessary to state that while obscene material and child pornography is not protected, not all pornography or sexual expression constitutes obscene material or child pornography.

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<sup>1275</sup> Deskins “Internet Use and Sex-Crimes Convicts”.

<sup>1276</sup> Ibid.

<sup>1277</sup> Ibid.

<sup>1278</sup> Opcit 35.

<sup>1279</sup> Referenced as *Miller v. California*, 413 U.S. 15,24 (1973) by Deskins “Internet Use and Sex-Crimes Convicts” 35.

<sup>1280</sup> Ibid.

<sup>1281</sup> *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) as referenced in Deskins A “Internet Use and Sex-Crimes Convicts” 36.

<sup>1282</sup> Ibid.

6.117 For purposes of starting a discussion on sentencing provisions the Commission provisionally recommends the insertion of the following subclauses into section 56A of the SOA:

(3) A person convicted of any offence in terms of section 19C is liable upon conviction to a fine or 15 years' imprisonment;

(4) In addition to any sentence imposed on the accused or an order that the name of the accused be placed on the National Register for Sex Offenders, punishment may include any order that the court, subject to a pre-sentence report by a probation officer, may deem appropriate to protect children from a sexual offence being committed against them, to be complied with for such period as may be determined by the court, including any or all of the following orders-

(a) that the accused shall not visit, frequent, or reside in close proximity to any school, premises or places frequented by children;

(b) that the accused shall not access the internet, or that the accused shall have such qualified access as may be determined by the court;

(c) that the accused shall not have access to any device that is able to provide access to the internet, or that the accused may have such qualified access to such device as may be determined by the court;

(d) that the accused shall not employ any child;

(e) that the accused may only be in the presence of any specified child, or in the presence of any child or children in general, when accompanied by another adult person;

(f) that the accused shall submit to supervision and monitoring by a probation officer who may apply any technique to limit access to the internet for purposes of preventing access to children and/or child sexual abuse material;

(g) that the accused shall accede to any reasonable request by a probation officer for purposes of monitoring compliance with any order made; and

(h) that the accused shall undergo such therapeutic interventions as the court may determine appropriate.'

# ANNEXURE A: LIST OF RESPONDENTS TO ISSUE PAPER 30

1. Alexander Robynne, Centurion Vineyard Christian Fellowship
2. Anderson Peter Rev United Congregational church of Southern Africa.
3. Africa Christian Action (Taryn Hodgson)
4. Barter Paul
5. Basson Antoinette, Dr, UNISA Youth Research Unit, Bureau of Market Research
6. Bester Marcelle, FAMSA Highveld Ridge
7. Blacklaws John R
8. Bonoko, Lesibana Silas, SAPS
9. Boshoff Lorna
10. Botha Charmaine, CMR Komatipoort
11. Bremner Jonathan
12. Bremner Lyn
13. Carstens Jack, David & Jonathan Foundation
14. Cause for Justice
15. Child Welfare South Africa (CWSA) (Julie Todd)
16. Chiliza Mr Cebo
17. Chikane Monica (Social Auxillary Worker FAMSA)
18. Claasen Louie, UNISA
19. Clifford, Pastor Colin
20. Crystal Clear Ministries International (Christel Long)
21. Cyber Crime Unit (Mr. L.S.Bonoko)
22. Department of Communications
23. Dutlow Judy
24. Eckard Memory
25. Essop Jameel
26. Family Policy Institute (Errol Naidoo)
27. Fisher Sonja, Ladies Arise
28. Francis Kashiefa, Child Welfare SA, NC
29. Gengan Desiree
30. Giela
31. Gongoma, Lilian, Lerato House

32. Goosen Deon
33. Google (Mgwili-Sibanda, Fortune)
34. Gounder Capt K V(SAPS Project Leader: Operation Spiderweb)
35. Hardwick Marc
36. Haslam Lyndy
37. Hendry Gavin, Centurion Vineyard Christian Fellowship
38. Hochfelden, Mrs C.
39. Human Clive
40. Jackson Russell
41. Jesson Dawn
42. Kimberley Workshop participant (anonymous)
43. Kostlin Nicola
44. Khoury Mark, Virtue Net
45. Lopes Arthur
46. Leppan Monique
47. Linders Petronella, Department of Telecommunications and Postal Services (DTPS)
48. Maggio Santy (Zimbabwe)
49. Makua, Sheryl, Tshwane Leadership Foundation
50. Masalesa Dineo
51. Matabane Lizzy, DTPS
52. Matjokana Mapule Dorothy
53. McLean Cathy, Child Welfare Tshwane
54. Media Monitoring Africa (William Bird)
55. Mhlanga Miranda
56. Mienie Rina
57. Ministry of Social Development, Western Cape (Adv Albert Fritz)
58. Minnaar Pastor Debbie, Church Alive
59. Minnie Wean
60. M-Net and Multichoice
61. Mokone Kgobi
62. Molin Tracie Blank, Africa Textiles
63. Mooney Filo
64. Mortlock Caren, NPA
65. Moses John, Grace Community Church
66. Mthethwa Phumzile
67. Muthambi Ronald
68. Narain Martha



69. National Association of Broadcasters (NAB)
70. National Prosecuting Authority (Adv Pierre Smith)
71. Nel Benita, Dr, Childline
72. Nkatha, N
73. Nkobane, Deborah, Child Welfare
74. Noluvu M Sekelwa
75. Ntakalle Petronella, Tshwane Leadership Foundation
76. Nzomane Nomagugu
77. Orlan Ngwenya
78. Parent Infant and Child Health and Wellness (PICH) (Chairperson Dr Elmarie Malek)
79. Philander Sidhartha
80. Ria
81. Riba Evidence N
82. Rutsha K, Department of Communications (Durban)
83. Scheckle Natale, Loreto Convent
84. Schnaid Barbara
85. Schultz Charlotte, Snail Attorneys
86. Schultz Rob
87. Seitz Ulanda
88. Seymour Lyn Westville KZN
89. Shamien, National Training Manager, Child Welfare South Africa
90. Shelley, Zoë Life
91. Sikhakhane Cindy, CLSA
92. Smith Adv E, DDPP, FS
93. Snyders Daine
94. South African Police Service (Acting National Commissioner: Lt Gen Phahlane)
95. Stephenson Dr Robin
96. Steynberg Vernon B
97. Swanepoel Renee, Loreto Convent School
98. Thabane Amalinelah
99. The Green Hearts
100. Theron Deon
101. Tshisphonga Innocent, Tshwane Leadership Foundation, Inkululeko Community Centre
102. Tolken N
103. Van Deventer Riki
104. Van Heerden Sandra and Chris

105. Vilakazi Amanda LSSA
106. Wain, Lauren, Netclean
107. Women and Men Against Child Abuse (WMACA)
108. Zabow Prof T
109. Zietsman Ria
110. Zulu Goodness, UNISA Youth Research Unit, Bureau of Market Research

## ANNEXURE B: WORKSHOPS

### PRETORIA WORKSHOP 9 NOVEMBER 2015

	<b>Surname</b>	<b>Name/Initials</b>	<b>Organisation</b>
1	Vilakazi	Amanda	Buthelezi Vilakazi Attorneys
2	Coetzee	Carina	NPA
3	Mclean	Cathy	Child Welfare Tshwane
4	Schultz	Charlottee	Snail Attorneys
5	Badenhorst	Charmain	DOJ&CD
6	Labuschagne	Charmaine	Prosecutor, MC Welkom (FS)
7	Long	Christel	Crystal Clear Ministries International
8	Nkobane	Deborah	Child Welfare Tshwane
9	Minnaar	Debra	Church Alive, Assemblies of God
10	Dineo		Inkululeko Community & Day Care Centre
11	Spoering	Frederike	The Potter's House
12	Hendry	Gavin	Centurion Vineyard Christian Fellowship
13	Horowitz	Germaine	Women and Men Against Child Abuse Kidz Clinics
14	Niemand	H	Provincial Unit Commander, FCS Ikhaya Lethemba
15	Mufamadi	H	SAPS
16	Seripe	Innocent	Inkululeko Community & Day Care Centre
17	Wessels	Jakkie	Regional Court Judiciary
18	Bremner	Jonathan	Private interested SA citizen
19	Rutsha	Khaya lethu	Head of Legal Services Department of Communications
20	Gcaleka	Kholeka	NPA
21	Bonoko	Lesley Silas	SAPS
22	Mayephu	Letty	The Potter's House
23	Claasen	Louie	UNISA: Dept of Social Work
24	Bremner	Lyn	Private interested SA citizen
25	Sebopela	Matlhogonolo	Dept of Social Development
26	Mantsho	MJ	CD: Legal Services Health
27	Jokani	Mkhuseli	NPA
28	Moabelo	Micro	CD: Legal Services Health
29	Sebetso	Moekhetsi	DOJ Regional Office Gauteng
30	Nel	Nadine	Magistrates Court: Johannesburg
31	Scheckle	Natale	Loreto Convent School
32	Linders	Petronella	CD: Department of Telecommunications & Postal Services
33	Swanepoel	Renee	Loreto Convent School
34	Alexander	Robynne	Centurion Vineyard Christian Fellowship
35	Muthambi	Ronald	UNISA
36	Loubser	Ruth	Sexual Health Educator
37	Ngobeni	Sandile	Commission for Gender Equality
38	Sheryl		Inkululeko Community & Day Care

			Centre
39	Risiba	Sipho	COO Film and Publication Board
40	Fisher	Sonja	Ladies Arise Volunteer
41	Horne	Stephen	Centurion Vineyard Christian Fellowship
42	Luetjie	Theresa	The Potter's House
43	Singleton	Yolandi	Child Welfare Tshwane
44	Pillay	Valencia	Kempton Community Church
45	Omar	Shaheda	Teddy Bear Clinic
46	Wann	Lauren	Netclean rep
47	Hansongote	Zita	Centre for Child Law
48	Matoor	Lizzy	DTPS
49	De Bruyn	Angela	TTBC
50	Ngobo	Bhekisisa	DTPS
51	Makau	Sheryl	Vana Va Hina
52	Ngugima	Lilian	Lerato House
53	Mtarialle	Petronella	Lerato House
54	Ramesega	Lesego	Inkululeko Community & Day Care Centre
55	Delefer	Jonathan	Sharain
56	Clark	Dellene	SALRC
57	Piennaar	Anneke	SAPS FCS/SALRC
58	Meintjes	Retha	DPP NPA/SALRC
59	Chetty	Iyavar	KINSA/SALRC
60	Moumakwe	Patricia	SALRC
61	Ledwaba	Mpolokeng	SALRC

### CAPE TOWN WORKSHOP 11 NOVEMBER 2015

	<b>Surname</b>	<b>Name/Initials</b>	<b>Organisation</b>
1	Rass	Barbara	Atlantis Women's Movement
2	Naidoo	Errol	Family Policy Institute
3	Adams	Fadlah	SAHRC
4	Cebekhulu	Jabulani	NPA
5	Rutsha	Khayaletu	CD: Legal Services Department of Communications
6	Gobingca	Luyanda	NPA
7	Davin	Michelle	Cause for Justice
8	Nomdo	Christina	RAPCAN
9	Solomons	Patrick	Molo Songololo
10	Burton	Patrick	Centre for Justice and Crime Prevention
11	Philander	Sidhartha	Concerned citizen
12	Zabow	T	Doctors for Life International
13	Gilbert	Vastrohiette	Trauma center for survivors of violence and torture
14	Rass	Wendy	Atlantis Women's Movement
15	Kortje	Evadne	NPA
16	Maaser	Lucas	Partners in Sexual Health (PSH)
17	Iles	W	STOP (Stop Trafficking of People)
18	Titus	Gary	NPA SPP
19	Rass	Russell	Atlantis Women's Movement
20	Son	Daniel	COCT SDEOD
21	Cull	Dominic	ISPA/SALRC

22	Clark	Dellene	SALRC
23	Mavuso	Vusi	SALRC
24	Moledi	Nelisiwe	SALRC

### KIMBERLEY WORKSHOP 16 NOVEMBER 2015

	<b>Surname</b>	<b>Name/Initials</b>	<b>Organisation</b>
1	Davids, Adv	Astrid	Family Advocate
2	Van Wyk	Catherine	Family Advocate
3	Smith, Adv	Elsa	Free State Deputy Director Public Prosecutions
4	Kwenane	IE	Department of Health (Free State)
5	Rosenberg, Adv	J	DDP Office
6	Motloi	Johannes	Angels Brigade
7	Khara	Kabelo	Family Advocate
8	Molaudi, Adv	M	DDP Office
9	Linders	Petronella	CD: Gender, Disability, Youth and Children DTPS
10	Mosala	Phokwane	Department of Health (Free State) Clinical Forensic Medicine
11	Monyobo	Priscilla	Department of Health (Free State)
12	Chesiwe, Adv	Sharon	Family Advocate (Bloemfontein and Welkom)
13	Birch, Adv	Tania	DDPP (Northern Cape, Kimberley)
14	Stevens	Verna	Family Advocate
15	Matobane	Lizzy	DTPS
16	Bester, Adv	Leonie	Family Adv
17	Molt	MC	NPA
18	Moeti	Tshepang	NPA
19	Van der Westhuizen	EMC	Family Advocate (Bloemfontein)
20	Tloome	Naumi	DOH
21	Mokgaetsi	Lebitsa	DOH
22	Khewa	Sipho	SAPS FCS Coordinator
23	Francis	Kashiefa	Child Welfare SA: NC
24	Cull	Dominic	ISPA/SALRC
25	Clark	Dellene	SALRC
26	Krebs	Chantelle	SALRC

### DURBAN WORKSHOP 20 NOVEMBER 2015

	<b>Surname</b>	<b>Name/Initials</b>	<b>Organisation</b>
1	Abro	Susan	Family Law attorney
2	Bux	Zahra	DOJ Regional Office
3	Dancer	Deborah	Zoe Life
4	Essop	Jameel	African Christian Democratic Party
5	Gounder	KV	SAPS Operation Spiderweb
6	Harwick	Marc	The Guardian
7	Khoury	Marc	VirtueNet
8	Linders	Petronella	Chief Directorate: Gender, Disability, Youth and Children – Department of Telecommunications and Postal Services

9	Moodley	Thanusha	Brett Purdon Attorneys
10	Naidoo	Marcus	Stop Human Trafficking Now
11	Peters	Lean	ACDP Kwadukuza
12	Rogers	Shelley	Zoe Life
13	Rutsha	Khayaletu	Department of Communications
14	Singh, Dr	Jerome	CAPRISA
15	Skhakhane	Nolusindiso	Childline South Africa
16	Subramanian	Stephanie	Nation Builders
17	Gengan	Desiree	Nation Builders
18	Todd	Julie	PMB Child and Family Welfare Society
19	Ngcobo	TP	FCS South African Police Service
20	Fleischmann	E	CYPSA
21	Nkatha	N	CYPSA
22	Molome	K	Department of Telecommunications and Postal Services
23	Matabane	L	Department of Telecommunications and Postal Services
24	Van Niekerk	Joan	Childline/SALRC Advisory Committee
25	Clark	Dellene	SALRC
26	Mofoka	Reitumetse	SALRC
27	Ledwaba	Mpolokeng	SALRC

#### NELSPRUIT WORKSHOP 25 NOVEMBER 2015

	<b>Surname</b>	<b>Name/Initials</b>	<b>Organisation</b>
1	Basson, Dr	Antoinette	UNISA Youth Research Unit, Bureau of Market Research
2	Bester	Marcelle	FAMSA Highveld Ridge
3	Matjokana	Mapule	NPA
4	Mortlock	Caren	NPA
5	Mgwenya	Thulani	Meintjies & Khoza Attorneys
6	Mthethwa	Phumzile	Rob Ferreira Hospital
7	Nel, Dr	Benita	Childline
8	Ngomane	Nomagugu	NPA
9	Riba	Evidence	NPA
10	Rutsha	Khayaletu	Department of Communications
11	Sizakele	Shongwe	Rob Ferreira Hospital
12	Thabane	Amalinda	FAMSA Nelspruit
13	Goodness	Zulu	UNISA Youth Research Unit, Bureau of Market Research
14	Msekelwa	Noluvo	NPA
15	Botha	Charmaine	CMR Komatipoort
16	Mooney	Filo	Childline
17	Chikane	Monica	FAMSA Nelspruit
18	Mhlanga	Miranda	DOJ&CD
19	Meintjies	Retha	DPP NPA/SALRC
20	Van Niekerk	Joan	Childline/SALRC Advisory Committee
21	Clark	Dellene	SALRC
22	Prinsloo	Tania	SALRC
23	Moumakwe	Patricia	SALRC

### COMMUNITY BRIEFINGS 4 NOVEMBER 2015

	<b>Surname</b>	<b>Name/Initials</b>	<b>Organisation</b>
1	Mulenga	Kennedy C	Cape Town Baptist Seminary Dean of Students
2	Harold	Godfrey	Cape Town Baptist Seminary Lecturer
3	Hartwig	Paul	Cape Town Baptist Seminary Lecturer
4	Moyo	Sheila	Cape Town Baptist Seminary Student
5	Savage	George	Cape Town Baptist Seminary Staff
6	Williams	Vernon	Cape Town Baptist Seminary Student
7	Rinquest	Linzay	Cape Town Baptist Seminary Principal
8	Jansen	Devarno	Cape Town Baptist Seminary Student
9	White-Phillips	Bernadette	Cape Town Baptist Seminary Student
10	Van der Berg	Margarnda	Cape Town Baptist Seminary Student
11	Maistry	Phillip	Cape Town Baptist Seminary Student
12	Sabwa	Sabin	Cape Town Baptist Seminary Student
13	Jacobs	Bevin	Cape Town Baptist Seminary Student
14	Alexander	Clayton	Cape Town Baptist Seminary Admin Dean
15	Davids	Charmaine	Cape Town Baptist Seminary Student
16	September	Adrian	Cape Town Baptist Seminary Student
17	Goliath	Keaton	Cape Town Baptist Seminary Student
18	Moralack	Leche	Cape Town Baptist Seminary Student
19	Rhesa	Vaughan	Cape Town Baptist Seminary Student
20	Jantjies	Landow	Cape Town Baptist Seminary Student
21	Lengeveldt	Ashley	Cape Town Baptist Seminary Student
22	Townsend	Brandon	Cape Town Baptist Seminary Student
23	Daniels	Megan	Cape Town Baptist Seminary Student
24	Lugg	Matthew	Cape Town Baptist Seminary Student
25	Prosper	H	Cape Town Baptist Seminary Student
26	Abrahams	Naomi	Cape Town Baptist Seminary Student
27	Lunga	Peter	Cape Town Baptist Seminary Student
28	Ntsizi	Phumlani	Cape Town Baptist Seminary Student
29	Madyware	Nkosinathi	Cape Town Baptist Seminary Student
30	Nceba	Simayile	Cape Town Baptist Seminary Student
31	Rabie-Boshoff	A	Cape Town Baptist Seminary Student
32	Nzuwa	McDonald	Cape Town Baptist Seminary Student
33	Van Niekerk	Joan	Childline/SALRC
34	Cull	Dominic	ISPA/SALRC
35	Clark	Dellene	SALRC
36	Rangwato	Ernst	SALRC

### CHILDLINE FOCUS GROUP WITH YOUTH 18 NOVEMBER 2015

	<b>Name</b>	<b>Organisation</b>
1	Kwanele	YMCA
2	Mveli	YMCA
3	Unathi	YMCA
4	Ntando	YMCA
5	Nonhlanhla	YMCA
6	Nokuzola	YMCA
7	Sbani	YMCA
8	Siphomundla	YMCA

9	Sxolile	YMCA		
10	Kjolly	YMCA		
11	Puseletso	YMCA		
12	Andile	YMCA		
13	Zama	YMCA		
14	Ntobe	YMCA		
15	Ntokozo	YMCA		
16	Mbali	YMCA		
17	Zamani	YMCA		
18	Bongela	YMCA		
19	Nonmantla	YMCA		
20	Asa	YMCA		
21	Andile	YMCA		
22	Smangele	YMCA		
23	Bongwe	YMCA		
24	Joan van Niekerk (Facilitator)	Childline/SALRC Member	Advisory	Committee
25	Lutchman Bhauna	Childline		



# ANNEXURE C: CHILD YOUTH WORKSHOPS

## Project 107: Sexual Offences (Pornography and Children) Workshop Summary

*Most of the submissions are from youth who identify as being in the age category 19 – 24. It is however significant that the school grades they reflect range from Grade 5 to 7.*

**1. Have you received any texts, photos, video-clips, internet links of another person's naked body or private parts? Please explain.**

Yes I had a friend request on Facebook and I accepted. And that girl started to send naked pictures of women and I unfriended her sometime.- YMCA Youth 1

Yes a video-clips for a 12 year old girl with sexual intercourse of 10 boys of 15 – 18 years - YMCA Youth 2

Yes – I've received videos, texts and even photos of sexual acts numerous times – YMCA Youth 3

Yes, pictures of private parts in a way to try to seduce me or get me to visit websites – YMCA Youth 4

Yes, a video clip. Four men meet a girl in a bush and one of them being in love with her, because she was expecting something to him. – YMCA Youth 5

Yes – video clips of black Americans having sex – told him to never send this to me – YMCA Youth 6

Yes I received an invite on Facebook and accepted only to get on inbox of a naked man. I didn't know but I did not think he would cause harm until the picture was sent – YMCA Youth 7

No – YMCA Youth 8

Yes: I have received a video-clip from internet that portray private parts – YMCA Youth 9

Yes I saw it on my friend's phone but I've never received such because I don't download and am not on social network that much – YMCA Youth 10

Yes it was whatsapp group chat then all members began to be bit naughty then started sharing video clip that was 2010 – YMCA Youth 11

Yes I had received any photo and video clips of the person who's naked body from my girlfriend showing me how sexy she is and to be truthworthness (?) I was so happy – YMCA Youth 12

I have received all of the above except internet links. Someone who I am in a relationship with and always she asks before send them to me – YMCA Youth 13

Yes I received a photo on Facebook – YMCA Youth 14

No – YMCA Youth 15

Yes, I had receive it from social networks – YMCA Youth 16

Yes video someone was send not for me because the weather was cold so that he can get horny and the used to say it make the warm – YMCA Youth 17

Yes. I receive a photo of naked people via internet, I was looking for music and there was a naked person – YMCA Youth 18

Yes I received a video from one of my friends when I was in High School - YMCA Youth 19

Yes someone on whatsapp send it to me - YMCA Youth 20

Yes because we busy chatting on internet and we see that things - YMCA Youth 21

Yes I did. I was trying to download music on internet then a sexy girl picture popped out - YMCA Youth 22

Yes I have and I've received a photo of someone's private part that am chatting with on Facebook so he sent it to my inbox - YMCA Youth 23

**2. If so, did you receive this from a friend/someone you know or from someone who is a contact or "friend" who you have not met in person?**

I received it from the person I do not know and I never met her. - YMCA Youth 1

From someone I know because she was also shocked about this video - YMCA Youth 2

From various people, friends, strangers and mere chat mates I have not met in person – YMCA Youth 3

From persons I have a sexual relationship with and from persons I don't know and are marketing pornsites – YMCA Youth 4

I receive to someone I don't know – YMCA Youth 5

Friend – know each other but not that well. – YMCA Youth 6

I received it from a Facebook contact whom I have not met and stays in another country out of Africa – YMCA Youth 7

Yes: I have received a person's naked body and video-clips from a friend of mine – YMCA Youth 9

I saw it on my friend and I know that person – YMCA Youth 10

As I stated it was a group chat on whatsapp some of the members I never knew – YMCA Youth 11

It was my girlfriend as I mentioned above and it was so enjoyable to watch that video-clips – YMCA Youth 12

No the person I received from is someone I know and someone whom I am in a serious relationship with– YMCA Youth 13

I receive from a stranger – YMCA Youth 14; YMCA Youth 16

Some I have not met who is my facebook friend – YMCA Youth 17

I received it from someone have not met him – YMCA Youth 18

I received it from a person that I know when he was my friend at the time - YMCA Youth 19

Yes I met that person because your boyfriend send to me and after we met - YMCA Youth 21

It was just internet picture - YMCA Youth 22

Someone I've never met he is just a contact on Facebook - YMCA Youth 23

### **3. Were the texts, photos, video-clips or internet links of a child or an adult?**

Both child and adult pornography - YMCA Youth 1

They were of both. The adult video was of mutual consent between the participants. The one of a child was clear child abuse – YMCA Youth 3

Only adults – YMCA Youth 4

Adult – YMCA Youth 5; YMCA Youth 7; YMCA Youth 9; YMCA Youth 16; YMCA Youth 20; YMCA Youth 21; YMCA Youth 22; YMCA Youth 23

Adults & a teenager – YMCA Youth 6

None – YMCA Youth 8

It was adult clip and also for the child those were dancing – YMCA Youth 10

Adult which was dancing naked – YMCA Youth 11

It was a video clip of adults - YMCA Youth 19

### **4. How did receiving this text, photo, video-clip or internet link make you feel?**

Irritated, because most of my Facebook friends I work with and some of them have good reputations and the worst think we do not know each other - YMCA Youth 1

With Whatapp- YMCA Youth 2

I normally get irritated because I don't know what my response is supposed to be – YMCA Youth 3

Mostly amused and a little aroused – YMCA Youth 4

I was disappointed – YMCA Youth 5

Angry and sad – YMCA Youth 6

It made me feel angry, disgusted – YMCA Youth 7

I feel embarrassed because I didn't know am I going at her after sending me a photo of herself naked – YMCA Youth 9

I was so shocked more especially for the child clip – YMCA Youth 10

At that age it was funny – YMCA Youth 11

Received from social network specific (Whatsapp) MMM. I felt so happy because it was the first time I saw it and was like I am owning this world – YMCA Youth 12

. . . because its from someone I know and I trust and love it made me feel good – YMCA Youth 13

I was feel angry and I was ask myself that where did this person know to contact me – YMCA Youth 14

I felt very bad and I blocked that person – YMCA Youth 16

That make me feel bad because that was are lack of my respect as an woman – YMCA Youth 17

By receiving this video-clip it make me feel uncomfortable because I never know that person – YMCA Youth 18

I was extremely fascinated - YMCA Youth 19

It makes me feel very unhappy - YMCA Youth 20

I was very happy - YMCA Youth 21

It was like Wow! And entertaining a little - YMCA Youth 22

Mad me feel sad, angry and "pissed" because I didn't see why must he send me his private part whilst he is a stranger - YMCA Youth 23

**5. Have you been asked or have you sent any texts, photos, video-clips, internet links of your own naked body or private parts?**

No! I've never been asked and I never thought of it - YMCA Youth 1

No - YMCA Youth 2; YMCA Youth 16; YMCA Youth 20

Yes I've been asked for a photo – YMCA Youth 3

Yes, my breast – YMCA Youth 4

No, I never asked to do that – YMCA Youth 5

No – laws are there but they are not implemented – YMCA Youth 6

Yes, I have been asked but I have never sent any – YMCA Youth 7

Yes – YMCA Youth 8; YMCA Youth 19; YMCA Youth 21; YMCA Youth 23

No: because I am scared of showing my private parts to anyone – YMCA Youth 9

Yes but not on internet it was someone I didn't know and I don't know where they got my number from – YMCA Youth 10

I never entertained but I have been asked – YMCA Youth 11

Yes I did before due to the unadequately(?) reasons – YMCA Youth 12

Yes only a photo – YMCA Youth 13

Yes I been asked but I was never post that photo – YMCA Youth 14

No I don't do any of this – YMCA Youth 15

Yes because it don't think it something good to do and offered to being exposed – YMCA Youth 17

No I was not ok to send my private parts to anybody because I think it is against my self – YMCA Youth 18

No I'm not likely to be available in social networks all the time - YMCA Youth 22

**6. If so, did you send it to a friend/someone you know or from someone who is a contact or "friend" who you have not met in person?**

I refused to send one - YMCA Youth 2; YMCA Youth 3

To a person I have an intimate relationship with – YMCA Youth 4

No I never do. – YMCA Youth 5; YMCA Youth 18

No I did not send it because I don't have those photos on my phone. I just make naked photos – YMCA Youth 8

No – YMCA Youth 9; YMCA Youth 13; YMCA Youth 16; YMCA Youth 21

No I didn't send it but they not many and I am not that much close to them. We just greet each other nothing much or more – YMCA Youth 10

From above mentioned answer I never entertain – YMCA Youth 11

I sent to a friend – YMCA Youth 12

No – YMCA Youth 15

Someone I know that was my boyfriend – YMCA Youth 17

No I did not send it as I was in complete shock - YMCA Youth 19

I sent to my boyfriend, we were exchanging pics of our nudity - YMCA Youth 23

**7. Do you have online “friends on WhatsApp, Facebook, MXit that you have not met in person?**

Yes many. - YMCA Youth 1

Yes on Whatsapp and Facebook - YMCA Youth 2

Yes, a whole lot of them – YMCA Youth 3

No, I only add people I've met – YMCA Youth 4; – YMCA Youth 12

Yes on Facebook – YMCA Youth 5; YMCA Youth 6; YMCA Youth 11; YMCA Youth 14

Yes I have friends that I have not met – YMCA Youth 7

Yes – YMCA Youth 8; YMCA Youth 9; YMCA Youth 10; YMCA Youth 15; YMCA Youth 16; YMCA Youth 19; YMCA Youth 20; YMCA Youth 21; YMCA Youth 22

No, as Facebook say invite people you know or you may know so I invite only people I have lots of faith with. – YMCA Youth 13

Yes, because I don't want to meet people that I do not know it not well I can be kill or being kidnapped. – YMCA Youth 17

No I'm only using Whatsapp so I have only friends that I know in person – YMCA Youth 18

Yes a lot of them especially on my Facebook - YMCA Youth 23

**8. Do you think that sexting is a problem in South Africa? If so, what is your experience and why is it a problem?**

Yes. Because we get to see cruelty of men abusing children and women abusing male children. And it is because children have access to internet and computers. - YMCA Youth 1

Yes it is because they start communicate on the social network with picture and want to experience it after. - YMCA Youth 2

Yes – it just leads to promiscuity. Many children begin at early ages experimenting intercourse without clear knowledge. – YMCA Youth 3

I don't know, I have no experience or knowledge of it – YMCA Youth 4

Yes is a problem because they start to talk about before they meet. – YMCA Youth 5

Yes – I have encountered a problem where I was going through a child's phone & happened to see these photos. It is a problem because children will start to be sexually active at a very young age. – YMCA Youth 6

No I don't think it's a problem if done responsibly, by legal age people. If done by children I do not think its appropriate as it leads to children being sexually exposed. – YMCA Youth 7

Yes it is a problem because some of adult people they don't do it in private – YMCA Youth 8

Yes: because most of them they going to get pregnant at early stage – YMCA Youth 9

Yes it is a problem to children who send their pictures to people that they don't know and for the adult if they will be responsible – YMCA Youth 10

I did not looked in the view a/tv(?) the relationship, It is increases suicide rates – YMCA Youth 11

Yes because it is illegal and it causes a lot of problem toward to the victim. He/she may commit suicide because of facing reality – YMCA Youth 12

Sexting amongst children in South Africa is a problem. It can lead to teenage pregnancy because children are not well educated about sex and sexting. It increases their sex drive – YMCA Youth 13

Yes – YMCA Youth 15; YMCA Youth 16

Yes because it is a risk for children under age because they will do it and it is illegal – YMCA Youth 18

No - YMCA Youth 19

To me its not a problem but to a child it is not good - YMCA Youth 20

But for me there is no problem but in the child there is because my phone not have passwords - YMCA Youth 21

It is a problem if we involve children but by me I'm fine with it - YMCA Youth 22

To adults I don't think it's a problem but once a child sees this it becomes a problem because they wanna experience and they tend to lose focus on whats important concerning school work - YMCA Youth 23

- 9. In your experience are children**
- a. exposed to naked pictures or video-clips/pornography accidentally or**
  - b. do they look for it specifically, for example by way of a specific internet search or by taking “selfies” and sharing them?**

They do experience it accidentally and some of them they look for it specifically. - YMCA Youth 1

Yes a child I know she took the selfies and sharing them with unknown friend - YMCA Youth 2

a) adverts on the internet – YMCA Youth 3

Mostly a) for example when they visit websites there are commercials with sexual pictures – YMCA Youth 4.

It's accidentally because when your get into internet you found some naked picture whild you are looking something else. – YMCA Youth 5

I think they are exposed to naked pictures – YMCA Youth 6

I think its both ways since you sometimes download music and there is a porn link so you accidentally see it and some children know these sites and share pics on purpose. – YMCA Youth 7

Some they are exposed and by media – YMCA Youth 8

Yes: because most of them they have cellphones and they use internet – YMCA Youth 9

Both because most of the time now on internet when you download something it comes those pictures first and it up to you to view or leave. – YMCA Youth 10

Yes they look for it specifically for example by way of specific internet search or by taking selfies and sharing them – YMCA Youth 12

I think its both but mostly they look for them. Now children have expensive phone and phones that accesses them to pornography sites and they send pics which are pornographic to one another – YMCA Youth 13

Sometimes – YMCA Youth 14

They are exposed because children in nowadays they looking everything on TV – YMCA Youth 15

They are exposed to naked pictures or video clips for example kids watch soapies like Bold and Beautiful where there are naked people – YMCA Youth 16

Exposed because some of them they don't know that they are exposed because of thing we watch on TV or magazines – YMCA Youth 17

Both, some do it deliberately and others it happens accidentally - YMCA Youth 19

I exposed to my boy/lover not other persons - YMCA Youth 21

Most times they look for it specifically due to their conservations with friends - YMCA Youth 22

I think they are exposed, because us adults tend to be careless when we keep these kind of things in our phones and yet we borrow our phones to kids to play games in it. - YMCA Youth 23

## **10. How has pornography affected you or someone you know?**

It has affected me very bad since I work with childline I've seen somethings I should not seen and not knowing when to refer it a problem - YMCA Youth 1

By exposing the naked picture of her on the social network - YMCA Youth 2

A friend is now addicted to pornography and finds no pleasure in intimacy with her partner – YMCA Youth 3



It has got me curious about sex. It has made me aroused and enhanced my sex life. It has sometimes comforted me when I felt lonely – YMCA Youth 4

Some they see some style there and when meet someone loves, want to try that with someone is not comfortable to do that – YMCA Youth 5

My cousin was involved with her father through playing cards (pornography) and they ended up being sexually involved for 3 years and my cousin did not say anything. She almost fell pregnant. – YMCA Youth 6

It has not affected me or anyone I know – YMCA Youth 7; YMCA Youth 14; YMCA Youth 17; YMCA Youth 19

Some people are exposed in a negative way because after that they get addicted – YMCA Youth 8

It never affected me and there is no one I know who was affected – YMCA Youth 10

Shy, as my friend his nude picture on his phone. When asked why is he saving or having such pictures he never replied – YMCA Youth 11

One of my friends has been affected by pornography, he lose self-esteem, self-confidence, try to commit suicide – YMCA Youth 12

Through whatsapp messaging – YMCA Youth 13

It affected by doing something you do not even plan to do – YMCA Youth 15

Pornography does not affect me at all because I'm not interested to the sexting – YMCA Youth 18

Yes makes me happy - YMCA Youth 21

It stimulates sexual behavior and it is addictive - YMCA Youth 22

In a bad way because she ended up quitting school because all she could think about was sex and she mingle with the wrong crowd - YMCA Youth 23

**11. Have you or a child you know experienced “sexorting”(threatened with exposure or harm to provide sexual favours after sending a naked or explicit selfie)**

No. Never experience that. - YMCA Youth 1; YMCA Youth 2; YMCA Youth 3; YMCA Youth 4; YMCA Youth 5; YMCA Youth 6; YMCA Youth 7; YMCA Youth 11; YMCA Youth 12; YMCA Youth 13; YMCA Youth 14; YMCA Youth 15; YMCA Youth 16; YMCA Youth 19; YMCA Youth 20; YMCA Youth 21; YMCA Youth 22; YMCA Youth 23

Yes some they normally do that in social network to each other – YMCA Youth 8

Yes – YMCA Youth 9

No I have never. As much as I have also worked with children, I've never come across that kind of issue – YMCA Youth 10

No because I make sure the children I am closer to them the get no use to it – YMCA Youth 17

**12. Do you feel that the law adequately protects children from exposure to pornography and child pornography?**

No because every site you go to internet the first think will show up are boobs - YMCA Youth 1

Yes the law is protecting a child although they not using it because of some threat - YMCA Youth 2

As much as it is maybe policies written down, it's the execution that lacks and people are not clearly informed – YMCA Youth 3

The internet is very open and it is easy for a child to find porn. The law doesn't protect the children enough against being exposed to porn. – YMCA Youth 4

It is protecting them but they have to be strict if you want to use internet you must put ID no and initial – YMCA Youth 5

No – parents have access and information but do not share these with their children – YMCA Youth 6

No. I do not think that the law protects children from exposure to child pornography. – YMCA Youth 7

No they don't protect them effectively – YMCA Youth 8; YMCA Youth 9; YMCA Youth 17; YMCA Youth 20

No I don't think so because they are some law under Constitution that are not good for children – YMCA Youth 10

I think to protect children must have specifically password for them to be protected as some of the website porn just appear – YMCA Youth 11

No because there is not enough evidence to show that – YMCA Youth 12

The laws do not protect the child but the victim – YMCA Youth 13

No I do not think that law protect children from exposure to pornography – YMCA Youth 14; YMCA Youth 16

Yes – YMCA Youth 15

No because most of the perpetrators get away with it - YMCA Youth 19

No - YMCA Youth 22

**13. If not how do you think the law should be changed to protect children?**

To verify your ID number so it can be approved by the internet and then get access - YMCA Youth 1

The law should upgrade to more advance on internet so that they have a pin to access it. - YMCA Youth 2

Proper meaningful engagement I guess. Do more awareness campaigns. Educate people about the dangers & consequences. – YMCA Youth 3

Stricter filters on websites regarding how commercials are allowed to show – YMCA Youth 4

Where ever you want to use internet you must put your ID no and initials, if you under 18 years you must be blocked – YMCA Youth 5

Porn sites and pictures should not even be seen by children. There should be a log in password and some kind of identification before they access the sites– YMCA Youth 6

The law should be more strict towards internet users – YMCA Youth 7

Yes they have to change – YMCA Youth 8

The law must be fair and firm because at times they turn against parents because of the bad law. – YMCA Youth 10

Yes it should be more stronger. Who can create a website and for what – YMCA Youth 11

Reduce children's rights – YMCA Youth 12

Laws are laws and they can be broken, but what is it that we are doing to protect children in societies? – YMCA Youth 13

The law should be enforced in such a way that when such cases occur, the perpetrators should serve life sentence - YMCA Youth 19

No internet and videos in their cellphones because they destroy the children and other person they get raped because of that videos - YMCA Youth 21

I think there must be age limits on internet for children's sake - YMCA Youth 22

#### **14. Do you have any other suggestion as to how children can be protected?**

To be removed from where he/she stay and put in the better place to be protected - YMCA Youth 2

Limited access to adult sites. Have more strict security measures on the internet – YMCA Youth 3

Talk & teach more about sexual health and rights in school – YMCA Youth 4

Yes technology must create their own internet. – YMCA Youth 5

Parents should not buy cellphones with internet until a child is 18 years. Parents/teachers and community should be aware and create awareness campaigns around this issue. Age limit to certain movies or documentaries – YMCA Youth 6

I think the age of children to have cellphones should be 18. At home children should not have their own computers – YMCA Youth 7

I think the media is the one big thing that expose children to pornography they have to check everything before they allow them to play it on TV. – YMCA Youth 8

I wish we can teach them more and be open about the bad result of sex and sexting – YMCA Youth 10

Not only for children – YMCA Youth 11

We should have project around communities teaching children about the issues that teenagers/children are constantly facing and also activities to keep them doing good all the time – YMCA Youth 13

When parent decide to have computer in their home with internet access they cannot ignore the risk. If the children are old enough to use internet the parent should teach their children about some of the risks – YMCA Youth 14

I would suggest that to stop those people who are putting porn on Internet so that they children won't get the porn even when they search for it. – YMCA Youth 15

By not sending pornographic videos and pictures to kids – YMCA Youth 16

Children can be protected by not having the cellphones and the computer need to have the password in order to stop crime – YMCA Youth 18

They must not have cellphones and also in the house there must be one computer that everyone will have access to - YMCA Youth 19

No cellphone in the child that all - YMCA Youth 21

At least we can do is to educate children more about pornography, have meetings, pamphlets, discuss ways to avoid this kind of behaviour - YMCA Youth 23

**15. Do you think that children who engage in “sexting” or send naked pictures are sending child pornography?**

Yes – YMCA Youth 1; YMCA Youth 2; YMCA Youth 4; YMCA Youth 5; YMCA Youth 11; YMCA Youth 14; YMCA Youth 15; YMCA Youth 19

Because after they fight with that someone she sending picture to the world to expose them to internet with bad text on it - YMCA Youth 2

Yes, but without them knowing. They are unaware. – YMCA Youth 3

It depends on their age. Under 16 or 18 years it should be illegal – YMCA Youth 4

No – they send those videos and naked pictures of Nigerians with large penis – YMCA Youth 6

Yes they are – YMCA Youth 7

Yes because they passed even to the young one as who are under the age of 16. – YMCA Youth 8

Yes because they are sending naked photos and video clips to one another – YMCA Youth 9

Not in all cases but some are sending child pornography – YMCA Youth 10

Yes it is the offence and against the law – YMCA Youth 12

No some childrens are not well educated about sexual activities and pornography. Some they do not know what wrong or right – YMCA Youth 13

Yes because the children you send it to can be exposed to child pornography – YMCA Youth 16

Yes because they are under age of doing that and they are doing it in a way that is wrong for them to do so at their age – YMCA Youth 17

Yes children who engage in sexting are sending pictures of child pornography; children can be affected too, because children want to do it and they end up falling pregnant – YMCA Youth 18

No - YMCA Youth 20

Yes because the children were do sex because of pornography but they did know what they do - YMCA Youth 21

Yes they are distributing it - YMCA Youth 22

Maybe or maybe not because not all of them are aware of what they doing is pornography - YMCA Youth 23

## **16. How should the law deal with children who do this?**

Teach them about pornography because it is clear they were not taught. - YMCA Youth 1

Counsel then motivate them because usually they don't know what the consequence of this was - YMCA Youth 2

Implement programmes that will rehabilitate them – YMCA Youth 3

They should get counseling, rehabilitation – YMCA Youth 4

They need counseling – YMCA Youth 5

The law should create some kind of punishment under the supervision of a parent – YMCA Youth 6

They should be first made to understand what they doing is illegal because some don't know that its illegal and then do some kind of community service or be reformed – YMCA Youth 7

Arrest them but before they do they must introduce the law public teach them even at schools about the law of sexual harassment by sexting – YMCA Youth 8

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They must be taught first 'coz some of them don't know that was pornography but those who knows must be punished – YMCA Youth 10

Educate them on Television during family times – YMCA Youth 11

Punish them – YMCA Youth 12

Before we attack children with law we should teach them what wrong or right – YMCA Youth 13

Must teach them before – YMCA Youth 14

The law have to give those child punishment so that they will learn on their mistakes – YMCA Youth 15

Firstly I think when children send the sexting others they are not aware that is not legal so they need to be warned first – YMCA Youth 16

They must do the bit of counseling and making sure that they have phones that are not easy to get on internet so that they can be reduced – YMCA Youth 17

The law can deal with children by keeping them away from using cellphones but this cannot combat pornography only manage pornography – YMCA Youth 18

The law must educate the children about the implications of sexting - YMCA Youth 19

To going in jail - YMCA Youth 21

They should be motivated and they also need counseling - YMCA Youth 22

Maybe put them in some sort of rehab school where they teach them and discipline them on how to go about this. - YMCA Youth 23

**17. Do you think that service providers protect children enough when they use the internet?**

No, because sex in our days it became a language - YMCA Youth 1

No, it is not enough since the child is easy to go to the internet and get this things easy its should have more strict rules of using internet – YMCA Youth 2

No – they put up legislation & or rather warnings but that doesn't prevent children – YMCA Youth 3

No, especially the commercials – it's too easy for a child to click on a link and come to a porn site – YMCA Youth 4

No, they need their own internet for the children – YMCA Youth 5

No – when downloading a song naked pictures of women appear on your screen that should be closed. Youtube site should have a log in password – YMCA Youth 6

No they don't – YMCA Youth 7; YMCA Youth 15; YMCA Youth 16; YMCA Youth 22

No because in Internet you do whatever you like– YMCA Youth 8

No because children can use internet anywhere and anytime – YMCA Youth 9

No I think they not protecting children enough because when you searching something and you still typing the google do it for you. – YMCA Youth 10

They fail to protect as it easy for porn providers easily able to post porn on accessible web pages not specifically for porn – YMCA Youth 11

No because if you can notice every website has advertisements of pornography – YMCA Youth 12

No when you download or visit some sites there are always pop up photos (nude) saying download or click to get a full video – YMCA Youth 13

Yes – YMCA Youth 17

No it not protect children enough because when a childrens have an older friend it is easy to get that pornography – YMCA Youth 18

No, pornography is easily accessible - YMCA Youth 19

No they don't because if you go on internet and download music on this web (Zamos) there is pics of pornography popping up - YMCA Youth 23

**18. Do your parents/adult supervisor know that they can block information that is not suitable for children?**

No, some of the parents don't have that information - YMCA Youth 1

No, YMCA Youth 2; YMCA Youth 3; YMCA Youth 4; YMCA Youth 5; YMCA Youth 6; YMCA Youth 8; YMCA Youth 9; YMCA Youth 16

Yes – YMCA Youth 7; YMCA Youth 10; YMCA Youth 12; YMCA Youth 14; YMCA Youth 15; YMCA Youth 17; YMCA Youth 19

No as not educated – YMCA Youth 11

No I doubt because if they did know how – this will be happening - YMCA Youth 23

**19. Are your parents/adult supervisor able to block information in this way, and if not, why not?**

No, YMCA Youth 2; – YMCA Youth 11

No they are backward with technology – YMCA Youth 3

I don't know – YMCA Youth 4

No, not educated – YMCA Youth 6

Yes – YMCA Youth 7; YMCA Youth 10; YMCA Youth 12; YMCA Youth 14; YMCA Youth 19

No because they do not have information – YMCA Youth 8

No because they do not know how to block it – YMCA Youth 15

No they can't change the language as it on English only – YMCA Youth 16

No because it is everywhere – YMCA Youth 17

They not technically educated - YMCA Youth 23

**20. Do your parents/adult supervisor block information on your phone or internet that is not suitable for children? If so what do they do?**

Yes, but the children they too clever to block this access – YMCA Youth 2

No – they have no access to my phone, its private – YMCA Youth 3

No – YMCA Youth 4; – YMCA Youth 11

No, parents do not know how to block such information from their children – YMCA Youth 6

No – YMCA Youth 7

No they don't because some of our parents they are not well educated – YMCA Youth 8

No because parents don't even check a child's phone – YMCA Youth 9

If there is a password on the computer they don't give it to children and if they need to use it the supervise them – YMCA Youth 10

No because they don't touch my phone without my permission – YMCA Youth 12

No. I come from a disadvantaged background. They are not well educated about how should they block me from getting such information – YMCA Youth 13

The parent has a right to block information on your phone is not suitable for children because they know that I am not old enough – YMCA Youth 14

No because they do not have information about how to block it. – YMCA Youth 15

No because they are not well educated so they do not know what can harm them on the phone – YMCA Youth 16

Yes. When we watch movies they set the language from vulgar to normal and also one does not watch a programme that is over their age restriction. - YMCA Youth 19

No they don't because even them they don't surf the net so they have no idea what goes on there and they aint interested about how technology works - YMCA Youth 23

**21. Do you know how to or have you reversed this blocking to access pornography?**

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No – none are blocked – YMCA Youth 3;

No – YMCA Youth 4; YMCA Youth 7; YMCA Youth 8; YMCA Youth 11; YMCA Youth 12; YMCA Youth 13; YMCA Youth 15; YMCA Youth 16; YMCA Youth 17; YMCA Youth 18; YMCA Youth 19; YMCA Youth 22; YMCA Youth 23

No – I have no idea but would love to know how to block and also reverse it – YMCA Youth 6

Yes because children know their phone from A to Z – YMCA Youth 9

No I've never because I grow up not having an access on internet and I didn't have the phone until I was 19 years – YMCA Youth 10

From Grade 8 I had a phone but was not access internet. – YMCA Youth 14

**22. Are the instructions for parental control available in multiple languages?**

I have no idea – YMCA Youth 2; YMCA Youth 3; YMCA Youth 4

Yes – we just do not have access or we are ignorant – YMCA Youth 6

No they're not – YMCA Youth 7; YMCA Youth 8; YMCA Youth 10; YMCA Youth 11; YMCA Youth 14; YMCA Youth 19; YMCA Youth 22

Sometimes – YMCA Youth 9

Yes – YMCA Youth 12; YMCA Youth 15

Yes on DSTV Channels parental controls are available – YMCA Youth 13

No they are available only in English and to the parents it is not easy to block what they see as problem when kids can watch it. – YMCA Youth 16

Maybe but I wouldn't know because I myself had no idea about it - YMCA Youth 23

**23. What responsibility and or accountability do or should parents/caregivers have towards their children to protect them from exposure to child pornography and other adult material?**

Teach them to have closure and openness with sexual intercourse give them support – YMCA Youth 2

Be vigilant and supervise your child's access to the net – YMCA Youth 3

Both to monitor their children and try to limit the access to pornography and also to give them tools for critical thinking and saying no if the child is exposed to a situation – YMCA Youth 4

If a child have a homework that need internet, the computer must be here where the parent is so that is gonna see everything you do. – YMCA Youth 5

Lock away magazines, cards & watch children when they are watching something on television – YMCA Youth 6

Inappropriate channels to be blocked. At home there should be one main pc or children must use pc in front of parents in order for parents to monitor them. Parents should not buy cellphones for children at a young age. – YMCA Youth 7

They must not buy those phones – YMCA Youth 8

Parents must always check children's phones everyday – YMCA Youth 9

Some of them do have responsibility because they must supervise the children – YMCA Youth 10

I think parents should teach their children from an early age to protect them from such – YMCA Youth 13

To guide them when they are looking TV and to choose for them the channel they look on TV YMCA Youth 15

They should know what their kids watch and have on their cellphones and its parents responsibility to check the phone of kids everyday. – YMCA Youth 16

They have an responsibility to them about it let them know what they will face when they are doing that and what is wrong about it they must be free to look to their childrens – YMCA Youth 17

Parent must not give the children cellphones – YMCA Youth 18

They must educate them about the dangers of sex and its implications on a young person's life - YMCA Youth 19

I think parents should not buy cellphones which has internet. - YMCA Youth 20

To avoid that do not buy the expensive cellphones - YMCA Youth 21

#### **24. Should children also take responsibility to protect themselves?**

Yes because if they are more responsible for themselves they will make good decisions – YMCA Youth 2

Yes – its more of a self-assessment 1<sup>st</sup>. Then knowing their values, worth and respecting themselves. – YMCA Youth 3

Through school and other education children should develop good self esteem and critical thinking so that they don't put themselves into risky situations and can say no. – YMCA Youth 4

Yes. They have to protect themselves. – YMCA Youth 5; YMCA Youth 9; YMCA Youth 14; YMCA Youth 17

Yes – making sure they do recreational activities and less time on the cellphones and TV's – YMCA Youth 6

Yes they should – YMCA Youth 7; YMCA Youth 8; YMCA Youth 11; YMCA Youth 12; YMCA Youth 19; YMCA Youth 21

Yes they should because it is their lives and they are easy targets – YMCA Youth 10

Yes. After they are taught about pornographic offences they should have that knowledge to protect themselves – YMCA Youth 13

Yes by not allowed everybody to show him/her anything and to not look everything because he/she is child they have to know that - YMCA Youth 15

Yes they should protect themselves because parents are not always with them so they should be responsible for themselves – YMCA Youth 16

Yes, by knowing that internet is not for checking videos - YMCA Youth 20

I think they should do so. Because it is their life we are trying to protect - YMCA Youth 22

Yes because in the end they are the ones getting exposed badly - YMCA Youth 23

## **25. What can children do to protect themselves?**

Just deal with themselves as an individual internal soul search sort of thing – YMCA Youth 2; YMCA Youth 3

Have a good relationship with adults for example in school and other institutions so that they have the support if needed – YMCA Youth 4

By listening to instruction and obeying – YMCA Youth 6

Only use internet for school projects etc. Don't accept anything from strangers or just pornography and don't sent anything of themselves to even friends. – YMCA Youth 7

Avoid social media – YMCA Youth 8

Must always block videos and naked photos from people who keep on sending them – YMCA Youth 9

They must be also responsible and listen to adult – YMCA Youth 10

Watch pornography privately – YMCA Youth 12

Knowledge is power and with knowledge you can protect yourselves – YMCA Youth 13

By choosing right channel when he/she is at home looking for TV - YMCA Youth 15

By not choosing pornographic videos and not sending naked pictures to their friends – YMCA Youth 16.

By not wanting to see this even when others are watching they must not and see also – YMCA Youth 17

Children can protect themselves by keeping themselves away from people using pornography – YMCA Youth 18

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Listen to their parents and teachers and also not allow the bad influence of their peers get the better of them - YMCA Youth 19

I think children should stop involving themselves to internet - YMCA Youth 20

To avoid look internet and videos - YMCA Youth 21

They must report if anyone is trying to engage them with pornography - YMCA Youth 22

Can ask someone they trust about all these pornography and ask maybe a school teacher about it. - YMCA Youth 23

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