

## Protecting Children from Exposure to Pornography in South Africa

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**Abstract:** *The paper looks at the use of online media which is being used to create and distribute child pornography in South Africa. It is argued that the lack of parental supervision on the use of cellphones by their children perpetuates child pornography. The paper further looks at the mandate of the Films and Publication Board which is at the forefront campaigning against child pornography. The paper also looks at the rights of the children and freedom of expression and how these rights either complement or contradict each other and argues that the best interest of the child are of paramount importance in every matter. This does not insinuate that these rights supersede all rights in the Constitution. There is a need to strike a balance between freedom of expression and the rights of children. The paper concludes that child pornography has some form of negative effects on children and recommends that legislations prohibiting child pornography should be implemented effectively as child pornography offence is rife in South Africa.*

**Keywords:** Pornography, best interest of the child, cyberspace, internet, mobile devices

### Introduction

South Africa has become one of the world's largest distributors of child pornography and has also become a popular sex tourism destination for pedophiles (Hughes, 1999). South Africa is listed as one of the top five countries that legislate meaningfully on child pornography. Other countries include Australia, Belgium, the United States of America and France (O'Donnell and Milner, 2007). However legally declaring the practice of child pornography as an offence that is punishable in South Africa seems to fall on deaf ears of the perpetrators as this practice remains rife in the country. At the center of all this is the modern technology which is the ultimate distributor of child pornography in South Africa (Boyd *et al.* 2009). The concern is that most children are well acquainted with the use of technology and social networks which are rapidly becoming a way of life in the modern world. As a result of this, children are exposed to different information on the internet some of which are very destructive and promote sex trade and trafficking (Holloway and Valentine, 2003).

In South Africa, the internet could be accessed principally through different devices including mobile phones which are very popular and the wireless infrastructure as they are available to a lot of people (Ally, 2005). The number of internet users in South Africa rose to 8.9 million in 2011, nearly twice the 4.6 million total in 2008 (Gillwald *et al.* 2013). Whilst this shows how technology is being used for communication purposes, it is also unfortunately being used to perpetuate child pornography (Weckert and Dalgarno 2006). Access to cyber-space and mobile phones by young people and children in particular, have led to an increased risk and exposure of children to potentially undesirable and explicit content that may be inappropriate for children of certain ages and place them at risk of abuse (Badenhorst, 2011).

The Films and Publication Board Act 65 of (1996) (FPB, 1996) is at the forefront of promoting the need for parents to protect and inform children of the dangers of child pornography and the responsible use of cyber-space as well as the new media platforms (Jenkins, 2003). This body is concerned with the classification of materials (films, publications and games), and protection of consumers, in particular children. This body engages in various campaigns involving the media, school visits, community outreach programmes and social media networks to advocate against child pornography.

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Whilst these campaigns have proven to be successful in some way, children however still remain exposed to child pornography and adult content directly or indirectly (Koen, 2007). The number of incidents where children themselves have been involved in the creation and distribution of child pornography within schools and in communities are alarming (FSB, 1996:12). Equally, there is the continuous threat of adults who, masquerading as children, use social networking sites to lure children into forwarding them images and videos of their private parts in sexually compromising positions for sexual arousal (FSB, 1996:12). This shows how the online media dominates these practices. The following question therefore becomes relevant: what measures can be put in place in order to regulate social networks in South Africa? What are the impacts of child pornography? And whether there is proper implementation of legislations criminalising child pornography or whether such legislations need to be amended?

### **Online media (social networks)**

The advantage of modern technology is that children are able to access information about the world at large without difficulty (Morville and Rosenfeld, 2008). Social networks are designed for convenient communications between individuals but if not well-managed or monitored it can lead children astray (O'Kane, 2004). The Internet and advances in digital technology "have provided fertile ground for offenders to obtain child pornography, share child pornography, produce child pornography, advertise child pornography, and sell child pornography" (Wortley and Smallbone 2012). The Internet has also allowed offenders to form online communities with global membership not only with the intention to facilitate the trading and collection of these images, but also to facilitate contact (with each other and children) and to create support networks among offenders (Quayle and Taylor, 2002).

Rather than simply downloading or uploading images of child pornography from and onto the Internet respectively, offenders also use modern technologies such as face book, Skype, twitter and so on to talk about their sexual interest in children, to post or exchange comments about the abuse depicted in particular images even as images are shared real-time to validate each other's behavior, share experiences, and images of themselves abusing children (Wolak et al. 2010).

According to Mawere (2013), social networks that are popular among the youth include twitter, facebook, mxit, whatsapp, mySpace, flicker and friendste. Mawere indicated that most times, these social networks are being utilized without parental supervision and this is where children become vulnerable as they connect with different people all over the world, believing they have good intentions without actually knowing who they really are (Mawere, 2013).

What effects does social network have on society? More often than not, the FPB reported that in all communities and schools visited during campaigns, members of the public and learners cited cases where they themselves or people they knew or have heard of, had been either victims of child pornography or had seen others carry or receive pornographic content mostly on their mobile phones (FPB, 2011:6). Mobile Internet access makes it easier for South African young people to become exposed to sexual contents online (Kreutzer, 2009).

By virtue of section 14 of the South African Constitution, privacy is one of the fundamental rights in the Constitution. The right to privacy includes the right not to have communications infringed (Olinger *et al.* 2007). However, with the development of smart phones, social networking sites and mobile networks have created applications that track the location of mobile users and are often able to view the

communications of others users without their consent (Fling, 2009). It is against the backdrop of this exposure that privacy has become difficult to maintain in the digital sphere (Solove, 2004). This is an alarming reality. The question that needs to be asked is whether there are no laws that govern social networks so as to ensure that these social networks are not used to expose children to undesirable contents (Mitchell et al. 2003). If such laws do exist, the cardinal question is whether these laws are implemented effectively to curb the usage of social networks as medium perpetuating child pornography. We opine that such laws do exist, as it would be discussed more in detail below, but the implementation of these laws is the challenge which the FPB and other law enforcement agencies are grappling with.

### **What is child pornography?**

Defining child pornography has never been an easy task. The Films and Publication Act 65 of 1996 defines child pornography in section 1(a) as:

Any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children.

The Constitutional Court in *De Reuck v Director of Public Prosecutions (De Reuck) 2004(1) SA 406 (CC)* looked at the general definition of pornography from the New Shorter Oxford English Dictionary where pornography was defined 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; literature etc in a manner intended to stimulate erotic rather than aesthetic feeling.

The Constitutional Court used the definition above as a useful guide and added that erotic and aesthetic feelings are not mutually exclusive from the definition. The Court however stated that where the aesthetic element is predominant, the image will not constitute pornography. Accordingly child pornography bears a corresponding meaning.

The Constitutional Court defined child pornography, by excluding material that is substantially aesthetic. The Court observed that:

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.

According to Mills (2003:195), “the constitutionality of prohibiting the possession of child pornography has indeed been challenged in the case of *De Reuk* case in that Mr Tascoe De Reuck, a former TV presenter, arrested on charges of possession of child pornography, argued that with reference to section 16 of the Constitution (freedom of expression) it is not constitutionally justifiable to prosecute researchers who would require possession of child pornography for purposes of their research, or producers of film dramas and documentaries who would be recording scenes which could, judged without reference to context, amount to creation or production of child pornography.” In *De Reuk* case, the court ruled that:

the fact that the Constitution regards a child's best interests of paramount importance must be emphasised. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to, inter alia, protection from

maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people, and ultimately, the Court which is the upper guardian of all children.

As was the case in *R v Sharpe* (2001) 194 DLR (4th), the South African Court placed particular emphasis on executing the right of the child to be protected from abuse and degradation, in this way enforcing section 28(2) of the Constitution.

According to Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, child pornography

means any image, however created, or any description or presentation of a person, real or stimulated, 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) display any form of stimulation of a sexual nature of such person's 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; and
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse.

The Definition of child pornography as defined in the Act only amounts to child pornography where the scene is interpreted in context and where the erotic element is dominant (Taylor and Quayle, 2003). It is axiomatic that where the scene is interpreted in context and where the aesthetic element is dominant the scene would not amount to child pornography (FPAB, 2013).

Child Pornography is evidence of the commission of a serious crime against a child (Leary, 2007). Apart from the child-victim, parents and relatives are victimized as they suffer the knowledge of the abuse of their child, which is captured forever in time (FPAB, 2013). The following can be deduced from child pornography,

- lack of parental supervision on the use of internet by a child,
- lack of awareness of the illegality of creating and distributing of child pornography amongst the youth and
- the lack of proper regulation of online media to prevent the spread of child pornography.

One may perhaps argue that they have a right to access to child pornography as encompassed by the Constitution by virtue of section 32 which provides that everyone has the right of access to information (Morehead and Haworth, 1995). It is submitted that there are certain materials that cannot be distributed, even though it may be possessed for personal and private use. This includes materials containing bestiality (sex with animals), incest, rape or explicit infliction of extreme violence, section 36 of the constitution restricts the rights especially if it is justifiable (Jacobs, 1984). Pursuant to this, the possession or distribution of materials containing child pornography remains prohibited (Ost, 2002).

In 2008, 'Out in Africa' (OIA South African Gay and Lesbian Film Festival) submitted to the Films and Publication Board (FPB) an application for a certificate of exemption in terms of section 22 and section 23 of the Films and Publication Act 65 of 1996 in respect of a film called XXY which contained certain

scenes where teenagers under 18 years of age engaged in simulated sexual intercourse. The film was due to be screened at the festival in 2008, but was refused certificate of exemption on the grounds that it constituted child pornography. It therefore could not be shown at the festival and OIA appealed the decision of the Board (FXI, 2013).

The Appeal Board delivered a judgment in favour of OIA and reaffirmed the fact that the decision of the De Reuck was still applicable to the definition of child pornography contained in the Act even though it had been changed slightly since the De Reuck judgment and that "...on any objective assessment XXX cannot be deemed to be a means of conveying images of child pornography".

The lack of consistency by the Board in interpreting and making decisions on matters pertaining to child pornography would appear to be a worrying factor. The question that begs to be answered is whether this inconsistency is based on an element of intolerance and discrimination against the gay, lesbian, intersex community in respect of their right to freely express themselves on matters fundamental to their human nature (FXI, 2013).

### **The mandate of the Films Publication Board (FPB)**

Any organ of State derives its powers from a particular legislation (Kelsen, 2007). The legislations provide guidelines and the legal framework within which these organs of State should operate under so as to avoid the latter from exceeding its powers (Hayek, 2012). The FPB is also an organ of State and it derives its mandate from the Films and Publications Act (Act 65, 1996), amended in 2004 and 2009. This Act is the enabling legislative framework and thus outlines the key functions, powers and duties conferred to the Board.

According to Section 2 of Films and publication Amendment Act 2008, The Films and Publication Board has a mandate to regulate the creation, production, possession and distribution of films, games and certain publications in order to:

- provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;
- protect children from exposure to disturbing, harmful materials and from premature exposure to adult experiences; and
- make the use of children in and the exposure of children to pornography punishable.

In order to achieve its mandate the Board is empowered in terms of Section 10 of Films and Publication Amendment Act 2008 to appoint Classification Committees as may be prescribed. In terms of Section 16(4) of Films and Publication Amendment Act 2008 the classification committee has a duty to examine any publication that has been referred to it by the Board; in this regard the latter shall do the following:

- (a) classify that publication as a refused classification "if the publication contains-
  - (i) child pornography, propaganda for war or incitement of imminent violence; or 16
  - (ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;
- (b) classify the publication as —XX if it contains —
  - (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person; (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;
  - (iii) a conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
  - (iv) an explicit infliction of sexual or domestic violence; or
  - (v) explicit visual presentations of extreme violence, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a

- publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified X18□ or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;
- (c) classify the publication as —X18 if it contains explicit sexual conduct, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials; or
- (d) if the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.

Section 10 of the Films and Publications Amendment Act, 2008 states that the decisions of the Classification Committee shall be taken by a majority of votes, provided that where there is an equality of vote, the Board shall appoint an additional member to such committee so as to enable the committee to come to a majority decision. A decision of the Classification Committee shall for the purposes of this Act be deemed to be the decision of the Board.

Classification Committee must ensure that the decision that is being taken promotes the enshrined rights in the Constitution and that it is in line with the objectives of the Films and publications Act. Should the classification decision deviate from the Constitution and the Films and publication Act, it is likely that the decision would be flawed and accordingly overturned. There is no single yardstick to determine whether a publication should be classified. In the premise, by virtue of section 16(1) of the Film and Publication Act, the classification committee must consider the following during their classification process:

- The right to freedom of expression within the law;
- The right of access to information within the law;
- The right of children to be protected from materials that are harmful to their well-being;
- The right of the public to be protected from unsolicited exposure to materials that some may find offensive and
- The principle that classification decision takes into account the human rights values enshrined in the Constitution, especially with the regard of the right of everyone to have their dignity respected and protected.

### **Striking the balance between the children's rights and freedom of expression**

There are various statutes that provide adequate protection of children's rights. The most important legislation is the Constitution which is the supreme law of the country which defines a child as a person under the age of 18 years. The Constitution provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation. By virtue of section 28 of the Constitution, a child should also not be required or permitted to perform work or provide services that-

- are inappropriate for a person of that child's age; or
- place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

The Constitution requires that the best interest of the child should be of paramount importance in every matter concerning the child (Goldstein et al. 1986). The protection of children's rights includes the protection against sexual exploitation or degradation in publications, films and on the internet (Kierkegaard, 2008).

In De Reuck the Constitutional Court held that:

Children merit special protection by the state and must be protected by legislation which guards and enforces their rights and liberties. This is recognised in section 28 of our Constitution. Children's dignity rights are of special importance. The degradation of children through child pornography is a serious offence which impairs their dignity and contributes to a culture which devalues their worth.

Society has recognised that childhood is a special stage in life which is to be treasured and guarded (Fass, 2003). The court said in the case of *De Reuck v Director of Public Prosecutions and others* 2004(1) SA 406 (CC), Para 63, that the state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography.

There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available (Solowey, 2002). The Court observed that the chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.

According to Pretorius (2006), the concept of 'freedom' denotes a right to perform certain acts without fear of hindrance or reprisal. It is this concept that forms the basis of the Bill of Rights in the Constitution. The right to freedom of expression in section 16 of the Constitution includes

- freedom of the press and other media;
- freedom to receive or impart information or ideas;
- freedom of artistic creativity; and
- academic freedom and freedom of scientific research.

Freedom of expression lies at the heart of democracy and this means that tolerance should be exercised not only on expression that are deemed appropriate but also those expressions that are deemed to be inappropriate (Malherbe, 2007).

In the words of Oppenheimer, "Freedom of expression is the cornerstone of a functioning democratic state, since it gives people the opportunity to be exposed to a number of different viewpoints so that they can make informed and legitimate decisions about both their political and private lives."

It has been argued that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, (Ross, 2000) and that section 28(2) of the Constitution trumps other provisions of the Bill of Rights. The Constitutional Court in *De Reuck* put guidelines to this imbalance by reaffirming the approach adopted by the Court itself to the effect that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. The Constitutional Court held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.

### **Legislative framework**

South Africa has ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1995. Article 1 of UNCRC also defines a child as a person under the age of eighteen. Article 19 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 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.

South Africa has adopted a number of statutes that gives adequate protection to children against any form of sexual exposure. The most prominent is the Children's Act 38 of 2005. The Children's Act 38 of 2005 is one of the paramount and primary statutes for the protection of children and young people. It provides for the investigation of cases of alleged abuse, neglect and exploitation of children.

The Sexual Offences and Related Matters Amendment Act 32 of 2007 provides that “a person 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) 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 child
- c) supplies, exposes or displays to a third person:
  - an article which is intended to be used in the performance of a sexual act;
  - child pornography or pornography; or
  - a publication or film,
 with the intention to encourage, enable, instruct, or persuade a third person to perform a sexual act with child ; or
- d) arranges or facilitates a meeting or communication between a third person and child by any means from, to or in any part of the world, with the intention that a third person will perform a sexual act with child, is guilty of the offence of promoting the sexual grooming of a child.

Furthermore a person who unlawfully and intentionally exposes, displays or causes the exposure or display of

- (a) any image, publication, depiction, description or sequence of child pornography or pornography;
- (b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 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 with or without the consent of the child, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

In addition to the above provision the Films and Publications Amendment Act 2009 posits in section 24B that, “any person who unlawfully possesses or creates, produces or in any way contributes to, or assists in the creation or production of any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence.” The form of a publication includes “visual presentation, placed on any distributed network including, but not confined to the Internet.

The Act mandates the FPB to curb child pornography by imposing age restriction if the classification committee or the Review Board is of the opinion that, judged within context, it is necessary to protect children in the relevant age group against harmful or disturbing materials in the film. The interest of the child is paramount in the Act. The Act offers adequate protection of children from exposure to disturbing and harmful materials and it also punishes the use of children to produce pornography.

### Conclusion and recommendations

It is evident that South Africa has profound legislations that are aimed at curbing child pornography. The practice of child pornography seems to persist despite the existing legislation and we opine that Internet Services Providers (ISPs) must do all in their powers and take reasonable steps to prevent their services from being used for illegal processes. The ISPs must further report the internet address that disseminates child pornography to relevant law enforcement agencies. It is further suggested that it would be prudent if the ISPs can prevent access to internet websites on the internet service that distribute, promote and engage in child pornography.

The use of the internet hotline initiative by FPB is welcomed. The internet hotline affords the members of the public with an opportunity to report online, any child pornography or sexual abuse images discovered accidentally on the internet. The internet hotline provides and guarantees a secure and a confidential environment to members of the public when reporting child pornography (FPB, 2013). The hotline staff adheres to the code of ethics (which puts emphasis on confidentiality) as prescribed by National and International Bodies such as the International Association of Internet Hotlines (FPB, 2013).

It is evident that the exposure of children to inappropriate material is as a result of access to internet, cellphones, social networks and chat rooms generally under no parental supervision. It is suggested that the FPB campaigns should also be aimed at educating not only children but also parents to exercise parental supervision of their children when they are on their cell phones.

The number of reported child pornography cases in South Africa is unknown because sexual offence data is not disaggregated (SAGIRCP, 2008). The extent of the problem in South Africa is also not known given the clandestine nature of the crime, however it is safe to conclude that child pornography has some form of negative effect on the children and more measures have to be put in place to identify offenders especially those offenders that also use technology to avoid being identified and caught.

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