

REPORTING CHILD PORNOGRAPHY

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South African Law on Child Pornography

1 South African anti-child pornography-specific laws are contained in the *Films and Publications Act, 1996*, and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007* (usually referred to as the *Sexual Offences Act*).

What is “child pornography”?

2 “Child pornography” is legally defined¹ as any image, regardless of the manner of its creation², or any description, of an act or conduct of a sexual nature which involves or includes in that image or description, a person under the age of 18 years, whether or not the person is real or a figment of one’s imagination, or an image or description of the body or parts of the body of a person under the age of 18 years which amounts to sexual exploitation or is capable of being used for sexual exploitation. Images or descriptions which are neither sexual in nature nor capable of being used for the purpose of sexual exploitation would not amount to child pornography.³

2.1 The legal definition of “child pornography”, however, does not adequately describe the stark reality and horror of child pornography. Children have been abused, brutalised, tortured and even murdered⁴ in the creation of child pornography. *“Child pornography/abuse depicts the actual sexual abuse, and sometimes also the torture and/or murder, of real infants and children. Many of these children are killed after the making of the pornography. There are strong links between the child trafficking and child pornography industries”*⁵.

¹ Note that, following the decision of the Constitutional Court in the case of *Tascoe Luc De Reuck, CCT 5/03*, the definition of “child pornography” in the *Sexual Offences Act* makes it clear that, in so far as child pornography is concerned, it does not matter whether or not the image or description arouses erotic or aesthetic feelings. [The Constitutional Court had held 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.”]

² See *Ashcroft v Free Speech Coalition*, Iyavar Chetty at www.fpbprochild.org.za

³ See sections 1 of the *Films and Publications Act* and the *Sexual Offences Act* for definitions of child pornography

⁴ “In my broadcast of October 7, 2000, I told you about a child-pornography ring that kidnapped Russian children and then made videos of them being raped, sexually tortured and killed. Wealthy perverts in the West buy these videos, paying as much as US\$20,000 for the videos in which a child actually is killed.” Dr William Pierce, *Child Porn, Ecstasy, and Pardons*. See, also, *British link to ‘snuff’ videos*, *The Observer*, Sunday October 1, 2000.....“Britain is a key link in the biggest ever international investigation into the production and supply of paedophile ‘snuff’ movies – in which children are murdered on film – an *Observer* investigation can reveal.” www.guardianunlimited.co.uk/Archive/Article/0,4273,4070446,00.html. See, also, *Jewish Gangsters Raped, Killed Children As Young As 2 On Films*, www.ety.com/HRP/jewishstudies/snuffpom.htm. Recall, also, the tragedy of Thea Pumbroek who had appeared in a number of child pornographic videos and died from an overdose of cocaine while being filmed in another pornographic video. Thea was only 6 years old. See *Child Pornography: An Internet Crime*, Max Taylor and Ethel Quayle

⁵ Mary Flaherty, www.carl.ie. See also, *One Step Forward, Two Steps Back*, Iyavar Chetty at www.fpbprochild.org.za and *Child Pornography or Child Abuse Materials?* Iyavar Chetty, unpublished paper

Offences involving child pornography and child sexual exploitation

The Sexual Offences Act

3 Specific anti-child pornography and child sexual exploitation⁶ offences in terms of the ***Sexual Offences Act*** include-

- **Section 10** : Exposing or displaying, or causing the exposure or display of, child pornography to persons 18 years or older
- **Section 18(1)(c)(ii)** : Supplying, exposing or displaying child pornography or pornography to a third person with the intention to encourage, enable, instruct or persuade that person to perform a sexual act with a child
- **Section 18(2)(a)(ii)** : Supplying, exposing or displaying child pornography or pornography to a child with the intention to encourage, enable, instruct or persuade that child to perform a sexual act
- **Section 19** : Exposing or displaying, or causing the exposure or display of, child pornography or pornography to children
- **Section 20** : Using children for or benefitting from child pornography
- **Section 24(1)(a)(ii)** : Supplying, exposing or displaying child pornography to a third person with the intention to encourage, enable, instruct or persuade that person to perform a sexual act with a mentally disabled person
- **Section 24(2)(a)(ii)** : Supplying, exposing or displaying child pornography or pornography to a mentally disabled person with the intention to encourage, enable, instruct or persuade that person to perform a sexual act
- **Section 25** : Exposing or displaying, or causing the exposure or display of, child pornography or pornography to persons who are mentally disabled

⁶ The exposure or display of child pornography or pornography to a child would amount to the sexual exploitation of that child

- **Section 26** : Using mentally disabled persons for pornographic purposes or benefitting therefrom.

The Films and Publications Act

4 Offences aimed at the protection of children from exposure to potentially disturbing and harmful materials⁷ in the ***Films and Publications Act*** must be read together with the definitions of “distribute”⁸, “possession”⁹ and “sexual conduct”¹⁰ in the Act-

- **Section 25(a)** : Distributing any publication classified “XX” by the Film and Publication Board
- **Section 25(b)** : Distributing any publication classified “X18” to a person under the age of 18 years, read with the definition of “distribute”
- **Section 26(1)(a)** : Distributing or exhibiting any film that has not been approved for distribution or exhibition through classification
- **Section 26(1)(aA)** : Broadcasting, distributing or exhibiting a film that has been classified “XX” by the Board
- **Section 26(1)(b)** : Distributing or exhibiting a film that has been classified “X18” to a person under the age of 18 years
- **Section 28** : Distributing any publication containing a visual presentation or description of-
 - explicit violent sexual conduct,
 - bestiality, incest or rape,
 - explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm,
 - the explicit infliction or explicit effect of extreme violence which constitutes incitement to cause harm, or
 - explicit sexual conduct.

⁷ It should be noted that the *Films and Publications Act* refers to *explicit sexual conduct* and not *pornography*. “Pornography” is generally understood to mean materials of a sexual nature *that arouses erotic rather than aesthetic feelings*. In so far as children are concerned, the potential for harm from depictions or descriptions of explicit sexual conduct exists regardless of whether or not the depictions or descriptions arouse erotic or aesthetic feelings

⁸ “Distribute”, for the purpose of sections 25, 26(1)(a) and (b) and 28 includes to hand or exhibit a film or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access to such material by children

⁹ “Possession” includes keeping or storing in or on a computer or computer system or computer storage data medium and also having custody, control or supervision of behalf of another person

¹⁰ “Sexual conduct” includes male genitals in a state of arousal or stimulation; the undue display of the genitals or anal region; masturbation, bestiality; sexual intercourse, simulated or real, including anal sexual intercourse; sexual contact involving the direct or indirect fondling or touching of intimate parts of the body, including the breasts, with or without any object; the penetration of the vagina or anus with any object; oral genital or anal contact

4.1 Specific anti-child pornographic offences in the ***Films and Publications Act***-

- **Section 27(1)(a) :**

- (i) possession¹¹
- (ii) creation or production or any contribution to or assistance in the creation or production
- (iii) importation or taking any step to procure, obtain or access, or
- (iv) knowingly exporting, broadcasting or distributing or causing to be exported, broadcast or distributed

of a film or publication which contains child pornography or which advocates, advertises or promotes¹² child pornography or the sexual exploitation of children

- **Section 27(2)(a)(i) :** Failure to report knowledge or suspicion of the commission of a child pornography offence to the police
- **Section 27(2)(a)(ii) :** Failure to provide all particulars of such knowledge or suspicion when requested by the police
- **Section 27(3) :** Failure to take reasonable steps to prevent access to materials described in Schedules 1, 2, 6 and 7 – the “XX” and “X18” categories of films and publications – by a person under the age of 18 years.

4.2 Child pornography offences with respect to Internet service providers in the ***Films and Publications Act***-

- **Section 27A(1)(b) :** Failure to take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography
- **Section 27A(2)(a) :** Failure to take all reasonable steps to prevent access to child pornography by any person
- **Section 27A(2)(b) :** Failure to report the presence of child pornography, and details of the person hosting or maintaining or distributing or contributing to such Internet address, to the police
- **Section 27A(2)(c) :** Failure to take all reasonable steps to preserve evidence of child pornography for purposes of investigation and prosecution

¹¹ Unless such possession is necessary for the performance of any function in terms of the Act

¹² The words “advocates”, “advertises” or “promotes” signify that, when viewed objectively, the material must be seen as actively *inducing or encouraging* the described offences with children

- **Section 27A(3)** : Failure to provide, upon request, particulars of users who gained or attempted to gain access to a site that contains child pornography.

Reporting knowledge or suspicion of child pornography

7 It is essential to understand, clearly, what the legal reporting requirements are in terms of the *Films and Publications Act* to avoid falling foul of the law.

Reporting knowledge or suspicion of the commission of a section 27(1)(a) offence

7.1 Any knowledge, or even suspicion, of the actual commission of a section 27(1)(a)(i) – (iv) offence **must** be reported to the South African Police Services, together with details of the person allegedly committing the offence.

Unsolicited child pornography via “spam” or e-mail

7.2 If a person receives **unsolicited** child pornography via “spam” or e-mail, and has knowledge of the person or source of origin of that “spam” or e-mail, that information must be reported to the police. A person saving child pornography so received **for the purpose of reporting and handing over the evidence to the police** would not be guilty of any child pornography offences in terms of section 27(1)(b) of the Act. Reporting knowledge or suspicion of the commission of a child pornography offence is a not only a necessary function in terms of the Act but a legal obligation. Perhaps, more importantly, a moral obligation – silence in the face of such knowledge or suspicion is a gross betrayal of all children.

7.2.1 **Making copies** of even unsolicited child pornography, except for the purpose of preserving the original evidence, will amount to possession, and possibly, creation of child pornography in terms of section 27(1)(a) of the *Films and Publications Act*.

7.2.2 **Displaying** any such unsolicited child pornography to any other person, except a police officer, would amount to the offence of distribution. **It is important to remember that each time a person views child pornography, that child is victimised over and over again.** It is enough to have viewed it once to understand the stark reality and horror of child pornography.

7.2.3 Re-mailing the “spam” message or e-mail containing the images of child pornography would amount to the distribution of child pornography. Once closed and saved for reporting and hand-over to the police, any subsequent opening and viewing of the image would amount to possession.

Accidental, unsolicited stumbling across child pornography

7.3 A person who **accidentally stumbles** across child pornography or **receives unsolicited** child pornography, without knowledge or suspicion of its source or origin, **should, immediately, delete the images or descriptions**. The time lapse between the opening of the message containing child pornography and its deletion could, if considered unreasonable, be interpreted as *possession*. Not **deleting** the child pornography would amount to the offence of possession. **If the website is known, all the information about the website should be reported to the Film and Publication Board's "hotline", either online at www.fpbprochild.org or telephonically at 0800 148 148**. Reports to the Board's "hotline" may be made anonymously if the person making the report wishes to remain anonymous. **Note the comments in paragraphs 7.2.1, 7.2.2 and 7.2.3 above.**

7.4 **Opening any message or e-mail, knowing that it contains child pornography, would amount to the offence of possession. Such messages or e-mails should be deleted immediately. However, if the sender of the message or e-mail is known, or even suspected, all information necessary to identify and trace the sender should be reported to the police. The child pornography itself should be handed over to the police as evidence.**

Summary of child pornography reporting requirements

7.4 Knowledge or suspicion of the **commission** of a section 27(1)(a) offence **must be reported to the South African Police Services**. Failure to do so is an offence in terms of section 27(2) of the *Films and Publications Act*.

7.5 Information about Internet websites that contain child pornography **should be reported to the Film and Publication Board, online at www.fpbprochild.org.za or to 0800 148 148**.

7.6 An Internet service provider who has knowledge that its services are being used for the hosting or distribution of child pornography, **must report all details, including particulars of the person maintaining or hosting or distributing or contributing to such activities, to the South African Police Services**. Failure to do so is an offence in terms of section 27A(4) of the *Films and Publications Act*.

Posted by VIA Foundation as a public service and contribution to the global fight to eliminate child pornography from the Internet