

## CHAPTER 8

### CYBER OBSCENITY

#### 8.1 INTRODUCTION

When one considers cyber obscenity actions such as cyber stalking and online harassment comes to mind.<sup>1</sup> Pornography is also widely distributed through the Internet<sup>2</sup> and a concern is that the Internet has been publicised to be a key tool and facilitator in the distribution of online child pornography.<sup>3</sup> Information networks and computers are instrumental in the creation, possession and distribution of child pornography.

#### 8.2 CHILD PORNOGRAPHY

##### 8.2.1 International responses to child pornography

The Convention on Cybercrime deals with offences relating to child pornography<sup>4</sup> and provides that the signatory countries should criminalise the following conduct:

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<sup>1</sup> See Debbie Collier *Criminal law and the Internet* in Buys(ed) *Cyberlaw @ SA II* (2004) 324 – 325. For a detailed discussion on cyber stalking see Adv B Gordon *Cyber Stalking – The old culprit with a new jacket* March (2002) *Servamus* 36 *et seq.*

<sup>2</sup> Michael Hirst *Cyberobsenity and the Ambit of English Criminal Law* (2002) *Computers & Law* Vol. 13 Issue 2 25.

<sup>3</sup> Adv B Gordon *Child Pornography – The silent corrupter of morals* (2002) June *Servamus* 32 .

<sup>4</sup> See Hirst (footnote 2 *supra*) 28. In general see Sanette Nel *Freedom of expression and the Internet* in Buys(ed) *Cyberlaw @ SA II* (2004) 216 and Katherine S Williams *Controlling Internet Child Pornography and Protecting the Child* (2003) *Information & Technology Law* Vol. 12 No. 1 3 *et seq.*

- Producing child pornography for the purpose of distributing same through a computer system;
- Offering or making available child pornography through a computer system;
- Distributing or transmitting child pornography through a computer system;
- Procuring child pornography through a computer system for oneself or another;
- Possessing child pornography in a computer system or on a computer data storage medium such as diskettes or compact disks.<sup>5</sup>

Child pornography is defined and will include instances where a minor, or a person appearing to be a minor or realistic images representing a minor, is engaged in sexually explicit conduct.<sup>6</sup> Provision is made for pseudo child pornography. The Convention recommends that a minor will include all persons under the age of 18 years and provides that a lower age limit may be required by a country but that it may not be less than 16 years.<sup>7</sup>

### 8.2.1 South African responses

The Constitution of South Africa protects the rights of children under the age of 18 years and *inter alia* provides that a child should be protected from degradation.<sup>8</sup> In South Africa the criminalisation of child

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<sup>5</sup> Article 9 Paragraph 1 of the Convention on Cybercrime.

<sup>6</sup> Article 9 Paragraph 2 of the Convention on Cybercrime.

<sup>7</sup> Article 9 Paragraph 3 of the Convention on Cybercrime.

<sup>8</sup> Section 28 of the Constitution of the Republic of South Africa 108 of 1996.

pornography is governed by the Films and Publications Act<sup>9, 10</sup> Section 27(1)(a) of the Films and Publications Act provides that a person shall be guilty of an offence if he or she knowingly creates, produces, imports or is in possession of a *publication* that contains a visual representation of child pornography. Section 27(1)(b) of the Act provides that a person that knowingly creates, distributes, produces, imports or is in possession of a *film* that contains a scene of child pornography shall be guilty of an offence.

The constitutionality of section 27(1) of the Act was challenged in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and others*<sup>11</sup>. It was contended that the provisions of section 27(1) limited the constitutionally entrenched rights to privacy<sup>12</sup>, freedom of expression<sup>13</sup> and equality<sup>14</sup>. The Court found that the provisions of the Act are not unconstitutional and *inter alia* stated:

“Although possession and consumption of child pornography often takes place in the inner sanctum of the house, the legislative purposes identified above remain of great importance. It should not be overlooked that many of the resultant acts of abuse against children take place in private. In other words, where the reasonable risk of harm to children is likely to materialise in private, some intrusion by the law into the private domain is justified. Moreover, since child pornography

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<sup>9</sup> Act 65 of 1996.

<sup>10</sup> In general see Adv B Gordon *Child Pornography – The silent corrupter of morals* June (2002) 32 *et seq.*; Barrie Gordon *Internet Criminal Law* in Buys(ed) *Cyberlaw @ SA* (2000) 438 *et seq.*; Sanette Nel *Freedom of expression and the Internet* in Buys (ed) *Cyberlaw @ SA II* (2004) 216 *et seq.*

<sup>11</sup> 2003 (2) SACR 445 (CC).

<sup>12</sup> Section 14 of Act 108 of 1996.

<sup>13</sup> Section 16 of Act 108 of 1996.

<sup>14</sup> Section 9 of Act 108 of 1996.

is frequently being imported via the internet and possessed on computers, the ease with which such possessors may become distributors at the touch of a button, as it were, should be taken into account<sup>15</sup>. This exacerbates the risk of harm and further justifies the intrusion of the Act into the private sphere.”<sup>16</sup>

It was subsequently reported that *De Reuck* pleaded guilty to two counts of possession of child pornography and was fined R 24 000 of which half was conditionally suspended.<sup>17</sup> *De Reuck* stated in court documents that he wanted to use the child pornography images for a documentary on the *availability of such material on the Internet*.<sup>18</sup>

Section 28(1) of the Act prohibits the *distribution* of a *publication* that contains a visual presentation or a description referred to in Schedule 1 of the Act. Child pornography is included in Schedule 1 and the distribution thereof is an offence.

Child pornography is defined 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.”<sup>19</sup>

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<sup>15</sup> My underlining

<sup>16</sup> *De Reuck* (footnote 11 *supra*) at page 478 *et seq.*

<sup>17</sup> R 24 000 fine for child porn The Citizen 30/04/2004 page 4.

<sup>18</sup> Footnote 17 *supra*.

<sup>19</sup> Section 1 of Act 65 of 1996.

The definition of child pornography in the Act is much narrower than the ordinary dictionary meaning of child pornography.<sup>20</sup> The use of the words *any image...depicting* would exclude instances where such acts are described in written format.<sup>21</sup> Child pornography, however, is still widely defined and will include instances of *pseudo child pornography* where pornographic images involving adults are digitally altered to represent children.<sup>22</sup> Computers are used to create images of pseudo child pornography. It may be argued that an actual child was not exploited in the creation of pseudo child pornography and should therefore not be criminalised. Gordon points out that it would have been very difficult for the State to prove that an actual child has been exploited and that it is sometimes very difficult to distinguish between a real image and a pseudo image.<sup>23</sup> The possession or distribution of pseudo child pornography is a crime in South Africa. An aspect that bears further scrutiny is the part of the definition that relates to a person under the age of 18 years or who is shown as being under the age of 18 years. According to Gordon the impression that the image create is vital and it may be argued that if an older person is portrayed as a person under the age of 18 years it may still constitute child pornography.<sup>24</sup> To ascertain whether an image depicts child pornography an objective test based on the perspective of the reasonable viewer (preferred over the subjective state of mind of the creator or possessor) is followed.<sup>25</sup>

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<sup>20</sup> *De Reuck* (footnote 11 *supra*) at page 461.

<sup>21</sup> *De Reuck* (footnote 11 *supra*) at page 461

<sup>22</sup> For instance a girl's head is digitally placed on an adult woman's body. See B Gordon (footnote 10 *supra*) 32; Barrie Gordon (footnote 10 *supra*) 439.

<sup>23</sup> B Gordon (footnote 10 *supra*) 32.

<sup>24</sup> B Gordon (footnote 10 *supra*) 33.

<sup>25</sup> *De Reuck* (footnote 11 *supra*) at page 461.

The term *publication* is defined as *inter alia* computer software which is not a film and “any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet”.<sup>26</sup> The term *film* is defined as:

- “(a) any sequence of visual images recorded on any substance, whether a film, magnetic tape, disc or any other material, in such manner that by using such substance such images will be capable of being seen as a moving picture;
- (b) .....
- (c) any picture intended for exhibition through the medium of any mechanical, electronic or other device”.<sup>27</sup>

Large information networks such as the Internet are instrumental in the distribution of child pornography. These images are downloaded and kept on discs and computers. The Internet has explicitly been included in the definition of *publications* and all forms of child pornography on the Internet will constitute criminal offences. Section 25(a) of the Act prohibits the distribution of a publication containing child pornography.<sup>28</sup> The exhibition in public or the distribution of a film containing child pornography constitutes an offence.<sup>29</sup> Upon conviction a perpetrator may be sentenced to a fine or imprisonment for a period not exceeding 5 years

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<sup>26</sup> Section 1 of Act 65 of 1996.

<sup>27</sup> Section 1 of Act 65 of 1996.

<sup>28</sup> See B Gordon (footnote 10 *supra*) 440.

<sup>29</sup> Section 26(a) of Act 65 of 1996.

or to both such fine and imprisonment where the court finds that aggravating factors are predominant.<sup>30</sup>

The Film and Publication Amendment Bill was introduced in early 2004.<sup>31</sup> It is reported that some of the provisions in the bill will allow Government to monitor Internet traffic with the aid of Internet Service Providers.<sup>32</sup>

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<sup>30</sup> Section 30(1) of Act 65 of 1996. Also see M M Watney *Die strafregtelike en prosedurele middele ter bekamping van kubermisdaad (deel 1)* (2003) 1 TSAR 64; B Gordon (footnote 10 *supra*) 33; Barrie Gordon (footnote 10 *supra*) 440.

<sup>31</sup> In general see Thomas Mabasa *Bill tackles child porn* The Citizen 23 February 2004 page 3.

<sup>32</sup> Footnote 31 *supra*.