

EXPOSING CHILDREN TO PORNOGRAPHY

Introduction

The sexual abuse of children occurs in various forms, which may differ in type and intensity but not in its effects on children. Exposing children to pornography is one form of *non-contact sexual abuse of children*.

. This paper deals with the offence of displaying or showing pornographic images and descriptions to children. This paper does not deal with the offence of the creation, production, distribution or possession of child pornography, provided for in section 27 of the *Films and Publications Act*, as amended but with exposing children to pornography. "Pornography", for the purpose of this paper, means visual presentations or descriptions of explicit sexual conduct

Exposing children to pornographic images is not just a moral issue. Recent research on the effects of pornographic images on the brain¹ showed that pornographic images bypass certain safety centers in the brain. While photographic images, unlike real-life images, pass through a center in the brain that allows individuals to decide whether the image is real and should be stored as such or discarded, pornographic images shortcut this center and are stored in the brain like a real-life experience. This has a dramatic impact on the behaviour of people exposed to pornographic images and often remains embedded in their memories for long periods. Pornography is harmful to children.

¹ See, for instance, *The Psychopharmacology of Pictorial Pornography Restructuring Brain, Mind & Memory* by Dr Judith A Reisman, The Institute for Media Education and The "Doctors For Life" affidavit in the Tasco de Reuck case

(a) *Exposure to pornography and children as victims of sexual violence*

Research studies² suggest that exposure of children under 14 to pornography is related to greater involvement in deviant sexual practice, particularly rape. Slightly more than a third of the child molesters in the study by W L Marshall (footnote 2), claimed to have been incited to commit an offense by exposure to pornography and 53% of them deliberately used the stimuli of pornography as they prepared to commit their crimes.

In a study of convicted child molesters³, 77% of those who molested boys and 87% of those who molested girls admitted to the habitual use of pornography, using pornographic images to demonstrate to their victims what they wanted them to do, as well as to lower a child's inhibitions ("grooming") and communicate to the child-victim that a particular sexual activity is normal and okay for them.

(b) *Exposure to pornography leads to sexual illness and unplanned pregnancies*

"As more and more children are exposed not only to soft-core pornography, but also to explicit deviant sexual material, they are learning an extremely dangerous message from pornographers : *sex without responsibility is acceptable and desirable*. Because

² For instance, *The Use of Sexually-Explicit Stimuli by Rapists, Child Molesters and Nonoffenders* by W L Marshall in *The Journal of Sex Research* 25, No. 2, May 1988; Neil M Malamuth and Edward Donnerstein, eds *Pornography and Sexual Aggression*, Academic Press, 1984

³ *Take Action Manual*, Washington, D.C. : Enough is Enough, 1995-96

pornography encourages sexual expression without responsibility, it endangers children's health.

"One of the grimmer consequences of adult-like sexual activity among children has been a steady increase in the extent to which youth are afflicted with venereal disease.....More children contract sexually transmitted diseases each year than all the victims of polio in its eleven-year epidemic 1942-1953. Another obvious result is the increased rate of pregnancy among teenagers."⁴

(c) Exposure to pornography and children's imitative behaviour

Children often imitate⁵ what they see, read or hear. The potential for children exposed to pornography to act out sexually against younger, smaller and more vulnerable children is real, as some studies have suggested. According to experts in the field of childhood sexual abuse, any premature sexual activity in children always suggests two possible stimulants : experience and exposure. "This means that the sexually deviant child may have been molested or simply exposed to sexuality through pornography".⁶

⁴ *Kids Online : Protecting Your Children in Cyberspace* by Donna Rice Hughes, Revell. 1998

⁵ See, for instance, Professor Huesmann, *Imitation and the Effects of Observing Media Violence on Behaviour*, to appear in S Hurley and N Chatter (Eds. 2004), *Perspectives on Imitation : From Cognitive Neuroscience to Social Science*, MIT Press, with thanks to Prof Huesmann for an advanced copy of the paper. See, also, Susan Blackmore's *The Meme Machine*, OUP (1999)

⁶ Stephen J Kavanagh, *Protecting Children in Cyberspace*, 1997

(d) Exposure to pornography and the shaping of attitudes and values

".....caring, responsible parents want to instill in children personal values about relationships, sex, intimacy, love and marriage. Unfortunately, the powerful irresponsible messages of pornography may be educating our children on these very important life issues. Just as thirty-second commercials can influence whether or not we choose one popular soft drink over another, exposure to pornography shapes our attitudes and values and, often, our behaviour.

"Photographs, videos, magazines, virtual games and Internet pornography that depict rape and the dehumanization of females in sexual scenes constitute powerful but deforming tools of sex education. *The danger to children stems at least partly from the disturbing changes in attitudes that are facilitated by pornography.*"⁷

(e) Exposure to pornography and the development of the child

According to developmental psychologists, during critical periods of childhood, a child's brain is being programmed for sexual orientation. During this period, the mind appears to be developing a "hardwire" for what the person will be aroused by or attracted to. "Exposure to healthy sexual norms and attitudes during this critical period can result in the child developing a healthy sexual orientation. In contrast, if there is exposure to pornography during this period,

⁷ Donna Rice Hughes (ibid) and, see, also, Edward Donnerstein, Luis T Garcia, Zillman, Neil Malamuth and J Contii

sexual deviance may become imprinted on the child's "hard drive" to become a permanent part of his or her sexual orientation."⁸

The law in South Africa

The child is the only category of persons specifically referred to in the Bill of Rights in the South African *Constitution*. While all other sections refer to "everyone" or "persons", section 28 of the *Constitution* specifically refers to "every child". Section 28(1)(d) provides that *every child has the right to be protected from maltreatment, neglect, abuse or degradation*, while section 28(2) affirms the paramountcy of the *best interests of the child* in every matter concerning the child⁹.

Exposing a child to pornography, whether visual or descriptive, would, therefore, violate both sections 28(1)(d) and 28(2) of the *Constitution* to the same extent as the use of children in pornography.¹⁰ Children have a *constitutional* right to protection from maltreatment, neglect, abuse or degradation. The *Films and Publications Act*¹¹, as amended by the *Films and Publications Amendment Act*¹², (the "Act") specifically makes the protection of

⁸ Kavanagh, *Protecting Children in Cyberspace*

⁹ It should be noted that, while section 28 sets out a range of special rights, children enjoy the same protection in the Bill of Rights as adults, with few specific restrictions. See *The Bill of Rights Handbook*, de Waal, Currie and Erasmus Juta 2001, pages 455 ff

¹⁰ I am talking here about a child's right to protection from maltreatment, abuse, neglect and degradation and not to the degree or nature of the harm. There may be a difference in the degree and nature of the harm between using a child *in* pornography and exposing a child *to* pornography.

¹¹ Act No. 65 of 1996

¹² Act No. 34 of 1999

children from either being used in, or being exposed to, pornography, its core objective. To that extent, the Act is a response to sections 28(1)(d) and 28(2) of the *Constitution*.

Offences involving exposing children to pornography in publications

- 1 The Act provides for the regulation of films, computer games and publications by means of classification, the imposition of age restrictions and the giving of consumer information "...with due regard to the protection of children against sexual exploitation or degradation...and make the exploitative use of children in pornographic publications, films or on the Internet punishable."¹³

Offences involving the distribution of classified publications :

- 2 **Sections 25(a)** of the Act make it an offence to knowingly distribute a publication which has been classified and gazetted "XX", while **section 25(b)** makes it an offence to knowingly distribute a publication classified and gazetted X18.

2.1 "Distribute", for the purpose of sections 25(a) and (b), has a meaning wider than its ordinary usage and includes.... "to hand or to display to a person under the

¹³ Section 2 of the Act

age of 18 years".¹⁴ In other words, the mere display of a publication classified XX or X18 to a person under the age of 18 years will constitute a section 25(a) or (b) offence.

2.2 While it is an offence to distribute any publication classified XX to any person, whether under or over 18 years, publications classified X18 may be distributed to adults (18 years and older) if the distributor is the holder of a licence to conduct the business of adult premises and such distribution takes place within licensed premises.

2.3 It should be noted that it is not the content of a publication but the fact of its **classification** as "XX" or "X18" by the Board that constitutes a section 25(a) or (b) offence.

3 ***Distribution of unclassified publications:***

Publications are either classified only when a complaint is lodged with the Board that a particular publication be referred to a classification committee for examination and classification¹⁵ or when they fall within section 17(4) of the Act as "submittable" publications. In terms of section 17(4), any publication with contents falling within Schedules 1 or 2 must be submitted to the Board for classification prior to distribution.

¹⁴ Section 1 of the Act

¹⁵ Section 16(1) of the Act

3.1 **Section 28(1)** of the Act, makes it an offence to knowingly **distribute** a publication which contains visual presentations of-

- explicit violent sexual conduct
- bestiality
- rape
- incest
- explicit sexual conduct which degrades a person and which constitutes incitement to cause harm
- the explicit infliction of extreme violence which constitutes incitement to cause harm, or
- the explicit effects of extreme violence which constitutes incitement to cause harm.

3.2 **Section 28(2)** creates the offence of knowingly **distributing** a publication containing :

- visual presentations, real or simulated, of explicit sexual conduct¹⁶ which, in the case of sexual intercourse, includes an explicit visual presentation of genitals, or
- predominant and explicit descriptions of the matters listed in 3.1 above.

¹⁶ "Sexual conduct" is defined in section 1

3.3 Since sections 28(1) and (2) deal with publications which have not been classified by the Board, it is the **content** of such publications and not the fact of whether or not they have been classified X18 or XX that will constitute the offence. In other words, the distribution to children of any publication **classified X18 or XX**, regardless of its content, is a section 25 offence. A section 28 offence, on the other hand, is committed if the **content** of the publication falls within Schedules 1 or 2.

3.4 There is a difference between sections 28(1) and (2) : a section 24 exemption applies only to section 28(2).

The application of sections 25 and 28

4 *Difference between sections 25 and 28*

Both sections deal with prohibitions on the *distribution* of publications containing visual presentations and/or descriptions of content described in Schedules 1 and 2. The similarity ends there.

4.1 Both sections refer to content which fall within either Schedule 1 - the "XX" category – or Schedule 2 – the "X18" category. However, sections 25(a) and (b) are triggered only where the publication has already been classified and gazetted as "XX" or "X18", whereas a section 28(1) or (2) offence is committed when the content of the publication falls within either Schedules 1

or 2 and is not saved by the application of Schedule 5, which provides for exemptions from "XX" or "X18" classifications for *bona fide* scientific, documentary, literary or, except with respect to child pornography, artistic publications. It should be noted that section 24 exempts the holder of a licence to conduct the business of adult premises from the provisions of section 28(2), but not section 28(1). (See below for a discussion of the section 24 provisions. Note also that while section 28 requires a "certificate" from the Board, section 25 does not – see below for a discussion of this issue.)

4.2 Why does the Act include two sections dealing with similar content ?

4.2.1 Section 25 is triggered only when the publication has been classified and gazetted as either "XX" or "X18". The contents of such a publication is not material – what is material is the fact of its classification and *gazetting*.¹⁷ Section 25 is concerned with publications which have been classified and gazetted and is, therefore, in the nature of a *strict liability* offence. Since the offence is based on the fact of classification and *gazetting*, the Schedule 5 exemptions do not apply. (Schedule 5 would have already been referred to in the classification process.) It

¹⁷ Since a section 25 offence is based on the fact of the classification and *gazetting* of a publication, and not its contents, can the contents be put into issue?

should also be noted that the wider definition of *distribute* applies to section 25.

- 4.2.2 Section 28 is concerned with publications which have not been classified and the offence arises only where the contents fall within either Schedules 1 or 2 and are not saved by the exemptions in Schedule 5. (Note that there is no “artistic” exemption with respect to child pornography.) The expanded definition of *distribute* does not apply to a section 28 offence. However, the ordinary meaning of *distribute* would cover *handing* such a publication to a person younger than 18 years, though it may be argued that its mere *display* would not constitute distribution. (But see the discussion on *indecent assault*)

5 The effect of section 24 on sections 25 and 28

Section 24 of the Act provides for exemption from the offence provisions of **sections 25(b), 26(b) and 28(2)** to the holder of a licence to conduct the business of adult premises, issued in terms of Item 2(h) of Schedule 1 of the *Business Act, 1991*, provided the distribution takes place from within premises forming part of a building, and is not younger than 18 years. The exemption is with respect only to the distribution of publications classified “X18” or referred to in Schedule 2. The exemption does not extend to materials falling within either Schedules 1 or 6. Section 24 therefore does not operate to

exempt any person from the offence provisions of the Act with respect to the distribution of “XX” materials. **Sections 25(a), 26(a) and 28(1) are not covered by section 24.**

The following scenarios may better illustrate the effect of section 24 on sections 25 and 28:

- (i) Mr Y distributes or advertises for distribution a publication classified “XX”. This is a **section 25(a)** offence. Period. The age of the “recipient” of the publication is not material. Section 24 does not apply.
- (ii) Mr Y distributes a publication which, though not classified, contains **visual presentations referred to in Schedule 1(1)** or a **description referred to in Schedule 1(2)**. This is a **section 28(1)** offence unless it is saved by reference to Schedule 5, i.e. it is a *bona fide* scientific, documentary, literary or, except with respect to child pornography, artistic publication. Again, the age of the “recipient” is not material. Section 24 does not apply.
- (iii) Mr Y distributes a publication classified “X18”. If the “recipient” is a person younger than 18 years, then this would be a **section 25(b)** offence. If the “recipient” is older than 18 years, then section 24 is triggered. If the distributor is the holder of a licence to conduct the business of adult premises, and the distribution took place from within premises forming part of a building, then there is no offence. Absent the section 24 conditions, this would be a section

25(b) offence, even if the “recipient” was older than 18 years. Section 24 does apply.

- (iv) Mr Y distributes a publication which contains a visual presentation referred to in **Schedule 2(1)** or **descriptions referred to in Schedule 2(2)**, i.e. descriptions referred to in Schedule 1(b) – (e). This is a **section 28(2)** offence unless it is saved by reference to Schedule 5 or section 24. The age of the “recipient” is not material. Section 24 does apply.
- (v) Mr Y **hands or displays** a publication classified as “XX” or “X18” to a person younger than 18 years. This is a section 25(a) (for the “XX”) or 25(b) (for the “X18”) offence, read with the definition of *distribute*. Section 24 does not apply.

Offences involving the distribution of films (films include videos, DVDs and interactive computer games)

6 *Distribution or exhibition of unclassified films*

- 6.1 In terms of **section 26(1)(a)**, it is an offence to distribute or exhibit in public any film which has not been classified by the Board. Period. Neither the age of the “recipient” nor the contents of the film is material. What is material is the fact that the film was not classified.

6.2 The expanded definition of “*distribute*” applies to section 26(1)(a), so that merely handing or displaying a film, which has not been classified, to a person younger than 18 years is sufficient to constitute a section 26(1)(a) offence.

7 *Distribution and/or exhibition of films classified “XX”*

7.1 In terms of **section 26(1)(a)**, it is an offence to distribute or exhibit in public any film which has been classified and gazetted “XX”. Again, neither the age of the “recipient” nor the contents of the film is material. Only the fact that the film was classified and *gazetted* as “XX” is material.

7.2 The wider definition of “*distribute*” applies, so that the mere handing or displaying of such a film to a person younger than 18 years would constitute the offence.

8 *Distribution and/or exhibition of films classified “X18”*

8.1 In terms of **section 26(1)(b)**, it is an offence to distribute or exhibit in public any film classified and *gazetted* “X18”.

8.2 The wider definition of “*distribute*” applies, so that the mere handing or displaying of such a film to a person younger than 18 years would constitute the offence.

8.3 However, section 24 applies so that, where the “recipient” is older than 18 years, and the distributor or exhibitor is the holder of a licence issued in terms of Item 2(h) of Schedule 1 of the *Business Act, 1991*, and the

distribution or exhibition takes place from within premises forming part of a building, section 26(1)(b) will not apply.

Does Schedule 5 provide a loophole to a section 28 offence ?

9 Since publications are not classified prior to distribution, it is likely that most cases of exposure of children to pornography will have to be dealt with under section 28. Both sections 28(1) and (2) require reference to Schedule 5. Schedule 5 provides for exemptions from "XX" or "X18" classification for *bona fide* scientific, documentary, literary or, except in the case of child pornography, an artistic publication ..."*which judged within context, is of such a nature.*" Will a *bona fide* Schedule 5 publication be a defence to a charge of exposing children to pornography ?

9.1 A publication which contains material referred to in Schedules 1 or 2 must be classified "XX" or "X18", respectively, thus restricting its distribution. However, if the material, judged within the context of the publication, is of a *bona fide* work of a scientific, documentary, literary or, except in the case of child pornography, artistic nature, then the "XX" or "X18" classification will not apply. (The publication may still, of course, be classified in terms of Schedule 3 but not with an "X" restriction.)

9.2 It seems to me that the critical phrase is "*judged within context*". For the purpose of determining whether or not a publication should be classified either "XX" or "X18" on the basis of its *bona fide* nature, any visual presentation

or description must be *judged within the context* of the publication as a whole (or part of the publication).

To take a simple example : an article on *sex education* in an educational journal may contain visual presentations of female and male genitalia, as well as, possibly, illustrations of explicitly sexual acts. Either Schedule 1 or 2 would apply – the journal must be classified as either "XX" or "X18". However, the article is a work of a *bona fide* scientific nature and the illustrations are, within the context of the article, *bona fide*. Therefore Schedule 5 would apply to "save" the journal from being classified "XX" or "X18". (Though, of course, the publication may yet be "age restricted" in terms of Schedule 3.)

9.3 However, exposing a child to the illustrations of explicit sexual acts in the article, without reference to, or outside the context of, the article itself, should not trigger any reference to Schedule 5. The illustrations are not being used within the context of the article, as part of the article itself. It should be argued, in such circumstances, that the illustrations should not be *judged within context* because they are being used *without context*. In other words, the illustrations are being used for purposes of the sexual exploitation of the child.

Exposing children to pornography : “Indecent assault” as an alternative count

- 10 While the Act is fairly clear about what elements constitute the offence of child pornography, it is not nearly as helpful with respect to acts involving the deliberate exposure of children to pornography. Sections 25 and 28 deal with *prohibitions on the distribution of certain publications*, whether to children or adults, and, while either of these provisions may be used in appropriate circumstances, it is not directed at what is part of the process of “grooming” children for sexual exploitation. It is well known that paedophiles use pictures and stories to seduce children into accepting such sexual activities as “normal”. (“Showing”, in addition to being part of the “grooming” process, is, in fact, also a paedophilic act.¹⁸)

Exposing children to pornography as a form of non-contact sexual abuse

- 11 A number of practitioners¹⁹ concerned with the welfare of children, including UNICEF, have made persuasive arguments that exposing children to pornography is a form of

¹⁸ See, for instance, Paul Bebbington, *Sexual disorders* in Essentials of Postgraduate Psychiatry, London, 1979

¹⁹ See, for instance, S K Araji, *Sexually aggressive children*, Sage Publications (1997); Gill and Johnson, *Sexualised children*, Launch Press (1993); T C Johnson, *Childhood sexuality : Sexualised children : Assessment and treatment of sexualised children and children who molest*, Launch Press (1993); S K Hewitt, *Assessing allegations of sexual abuse in preschool children*, Sage Publications (1999) and J Myers, *A mother’s nightmare – incest*, Sage Publications (1997)

sexual abuse – *non-contact sexual abuse* – and constitutes the offence of indecent assault.

- 11.1 According to Araji (1997), the sexual behavioural problems of many children may be traced to their own sexual abuse and exposure to excessive sexual stimulation. *“Part of the sexual stimulation is watching television shows and pornographic material or observing sexual activities in their environment.”* Dr Renee Potgieter²⁰ observes that an excess of sexual stimulation often causes children to start behaving in a sexualised way, especially towards other children...*“as well as oppositional and behavioural problems in children. Such compulsive sexualised behaviour inhibits their normal development and functioning....children with sexually abusive behaviour should in all cases be evaluated for the possibility of having viewed sexually explicit material.”*

- 11.2 Young children are not neurologically ready to process sexually stimulating information. Gill and Johnson (1993) conclude that exposure of children to pornography can traumatize them to such an extent that they cannot fully comprehend or assimilate the material....

“.....a frightened four-year old who is forced to observe or be part of sexual intercourse between two adults cannot fully understand what is happening...(his) memory of the event may not be intact, yet he may suddenly repeat

²⁰ *The relationship Between Pornography and the Sexual Abuse of Children : View from Literature and Personal Experience* (2002)

phrases he heard during the experience, have intrusive flashbacks...may suddenly become terrified in the presence of a male adult or may refuse to go to bed, remembering on some level what occurred in bed...These are ways in which children re-experience fragmented aspects of trauma through behaviour, sleep disturbances, or post-traumatic stress symptoms such as intrusive flashbacks. This is a very typical reaction of children who have been exposed to pornography."

11.3 Hewitt (1999) believes that it is important in all cases of child sexual abuse to also screen for the possibility that the child was exposed to pornographic material ..*"as this exposure in itself can cause the same impact on a child as sexual abuse."*

11.4 Myers (1997) is in no doubt that the exposure of children to pornography in itself constitutes sexual abuse. *"Sexual touching is not the only kind of child sexual abuse. It is abuse to intentionally expose a child to pornography."*

11.5 Two case-studies, among many, may provide a more persuasive argument, if one is still not convinced that exposure of children to pornography is harmful and should be seen as indecent assault :

11.5.1 Gill and Johnson (1993) describe the case of the father who subscribed to three pornographic magazines for his eight-year old son. *"When they (the magazines), the*

father would sit with his child (as if he was one of his peers) and read him the latest of sexual explicit material while drinking ale. Ultimately, the eight-year old boy orally copulated a six-year old girl, covering her mouth with tape so her screams could not be heard. Although he was never overtly sexually abused by his father, he was over-stimulated by sexually explicit themes that often merge sex and violence.; he was subtly encouraged to behave in the ways depicted in the magazines and videotapes. At the same time, he was never provided with any guidelines or limits concerning his sexual responses, thoughts and fantasies or behaviours. The boy was conditioned to obtain sexual arousal through the use of force with the understanding and acceptance that men regularly behave in violent ways towards women."

11.5.2 Dr Renee Potgeiter (2001) is the Director of the RP Clinic and the RP Training Institute and describes the following case handled at the RP Clinic :

"[A fourteen-year old boy} confessed to the rape of a three-year old girl. He finally, very reluctantly, disclosed that he had viewed pornographic material with explicit information regarding penetration of the

penis into the vagina and he was so sexually stimulated by it that he kept on fantasizing about this information and finally decided to test it on the little girl. This boy finally also disclosed that he was sexually abused at the age of four years when he had been anally penetrated by an adult male."

Dr Potgeiter : *"The overall picture that emerges is that, whatever the position taken, the effects of children watching pornography are closely related to and overlap with the effect of contact sexual abuse and very often cause sexual behavioural problems in the child."*

- 12 In the recent case of S v J McNeil (No. 24/904/01, Magistrate's Court, Cape Town), the accused was found guilty of indecent assault for engaging in sexual activities with a woman who had her one-year old child with her at the time. The child was suckling at her mother's breast and playing with a sex toy but the accused did not touch the child in any way. The Court found as follows :

"...Although...the accused does not touch the child, neither does the child touch the accused, there is no doubt in the Court's mind from what is observed and heard on the video, that the accused both overtly and directly participated in involving the child in the sexual, activities between himself

and the female, and also intentionally exposed the child to sexual acts and objects. (My own emphasis)

"Having decided this, the Court has to finally ascertain whether the accused's actions constituted an assault of an indecent character on the child. From the evidence accepted and mentioned above, the Court finds that the accused did in fact actively manipulate and coerced sexual conduct with the child, by the female. The Court rules out the possibility of such contact being a natural mother/child relationship.

"The child was enticed into performing unnatural sexual acts with the mother, the female, and further exposed to sexual activities and sexual objects, clearly with a view to grooming the child.

"This type of behaviour is clearly contra bonos mores and frowned at by society, and the Court has no hesitation in finding that it constituted an assault of an indecent character upon the child, and therefore the accused is also found guilty of indecent assault." (Pages 324-325 of transcript of court proceedings in S v J McNeil)

- 13 The McNeil case, of course, does not enjoy the persuasive status of a decision of a superior court. However, it is not without significance. The inclusion of indecent assault as an additional, or even an alternative, to a section 25 or a section 26(1) charge would not be misplaced. There is, certainly, sufficient expert testimony to the effect that the act of

exposing children to pornography is a paedophilic act and, therefore, an assault of an indecent nature.

Summary of offences involving child pornography

The Tascoe Luc de Reuck case (High Court Case No. 2000/27709) has generated some discussions around sections 27 and 28 of the *Films and Publications Act*. Charged under section 27 of the Act for possession of child pornography, de Reuck is challenging the constitutionality of section 27 on the grounds that it does not provide exemptions from prosecution for possession of child pornography for *bona fide* purposes, specifically, in his case, legitimate research for a documentary. The details of his challenge are not relevant – unless, of course, he succeeds in persuading the Constitutional Court that section 27 is, to the extent that it does not provide for exemptions from prosecution for *bona fide* purposes, unconstitutional. What I am concerned about, the *de Reuck* matter notwithstanding, is the proper application of sections 25, 26, 27 and 28 as currently formulated with respect to offences involving child pornography :

14 Section 27 is the only section that deals specifically with the offence of the creation, production, importation or possession of child pornography in publications, and the creation, distribution, production, importation or possession of films containing child pornography. However, section 27 does not deal with the distribution of publications with visual presentations of child pornography, which is left to section 28(1).

15 Section 28(1) does not deal specifically with the distribution of child pornography in publications in the way that section 27 does with respect to films. Section 28 criminalises the distribution of a publication which contains a visual presentation or a description referred to in Schedule 1, read with Schedule 5. Schedule 5 provides for exclusion from the “XX” or “X18” category of classification for a *bona fide* work of a scientific, documentary, literary or, except in the case of child pornography, artistic nature. Child pornography is one of several elements referred to in Schedule 1. Section 28(1) makes it an offence to distribute, unless saved by the application of Schedule 5, visual presentations of :

- child pornography
- explicit violent sexual conduct
- bestiality
- explicit sexual conduct which degrades a person and which constitutes incitement to cause harm, or
- the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm, and
- descriptions of child pornography.

16 In so far as the offences relating to child pornography are concerned, the provisions are as follows :

16.1 *Advertising or distributing a publication classified "XX"*

Where a publication has been classified and *gazetted* "XX" because it contains either visual presentations or descriptions of child pornography, the proper charge is under **section 25(a)**. The State needs to merely prove that the publication has been classified and *gazetted* "XX" in terms of a decision of the Board. The age of the "recipient" is not relevant.

16.2 *Exposing a child to "XX" materials*

- (a) If it is a **publication** classified and *gazetted* "XX", the proper charge is under **section 25(a)**, read with the definition of "distribute"; and
- (b) If material is a **film** classified and *gazetted* "XX", the charge will be under **section 26(1)(a)**, read with the definition of "distribute".

The State has to merely establish the fact of the "XX" classification and *gazetting* of the materials forming the subject-matter of the prosecution. The "recipient" must be under the age of 18 years. The difference between 16.1 and 16.2 lies in the fact that, where persons under the age of 18 years are concerned, the word "distribute" has a wider meaning and includes the act of merely handing or displaying or showing such materials to such persons.

16.3 *Creating, producing, importing or possessing a publication which contains visual representations of child pornography*

Regardless of whether or not the publication has been classified and *gazetted*, the charge should be in terms of **section 27(1)(a)**.

16.4 *Distributing an unclassified publication which contains visual representations and/or descriptions referred to in Schedule 1, i.e. "XX" materials, including child pornography*

Unless the materials, judged within context, are of a *bona fide* scientific, documentary, literary or artistic nature, the charge would be under **section 28(1)**. However, if the visuals and/or descriptions are of child pornography, the art exemption does not apply.

16.5 *Creating, distributing, producing, importing or possessing a film with scenes of child pornography*

This is a straight forward **section 27(1)(b)** offence.

Notes on some procedural requirements

17 Section 25(a)

Only where a publication has been **classified and gazetted "XX" by the Board**

18 Section 26(1)(a)

Only where a film has been **classified and gazetted "XX" by the Board**

19 Section 27(1)

- (a) Require written authority of the Director of Public Prosecutions for a search warrant and prosecution
- (b) Must prove that the Board has not given a decision that the film or publication does not contain child pornography

20 Section 28(1)

Must prove that the Board has not given a decision that the publication does not contain "XX" scenes or descriptions

Some additional matters for consideration

21 A charge of **indecent assault** is an option, in appropriate circumstances, as an additional or alternative count to a section 25(a) or a section 28(1) offence of exposing a child to pornographic materials or overt sexual activities. (See *S v J McNeil*)

22 A conviction for making or creating child pornography by the downloading of child abuse images from the Internet was upheld by the UK Court of appeal (Criminal Division)²¹. ("Making" was a more serious offence than simple "possession".) The Court of Appeal upheld the trial judge's ruling that the browsing of the Internet for child pornography amounted to the offence of making child pornography if it resulted in either an *image* being displayed on the computer screen of the browser or the automatic downloading of the *image* to a temporary Internet cache, provided there was the requisite *mens rea*. The logic of the reasoning of the Court of Appeal is consistent with the nature of the Internet. What is transferred over the Internet is not an *image* but *information*

²¹ *R v Graham Westgarth Smith and Mike Jayson* (CA, [2002] EWCA Crim 683, (No. 2001/00251/Y1) 7 March 2002), following *R v Bowden*, [2000] 2 AllER 418

required to *construct* or *make* an image. The *information* is transferred in the form of a “code” and the recipient must use a “decoding” software to *construct* or *make* the *image*. The user who downloads the *picture* has, in effect, constructed or made the image that appears on his screen.

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