

**REPORTING NEWS OR DISTRIBUTING CHILD PORNOGRAPHY?
Comments on the report "Cape's Child Porn Ring" in the
Daily Voice of Saturday 10 March 2007**

The *Daily Voice* of Saturday, 10 March 2007, has provoked angry responses from several members of the public for its alleged insensitivity to society, and particularly children who have been sexually abused and traumatised, in publishing, on its front page and on pages 6, 7 and 11 of images which may amount to child pornography and bestiality. Several members of the public, including S.T.O.P (Standing Together to Oppose Pornography) have either laid complaints with the police or have called for the prosecution of the *Daily Voice* for distributing child pornography in terms of section 27(1)(a)(iv) of the *Films and Publications Act, 1996* (the Act).

The front page of the paper, and I used the word "paper" advisedly, depicts one large and two smaller photographs of females who appear to be under the age of 18 years. Only their eyes and the obviously exposed breast of the female in the larger photograph have been covered. On page 6 is a black-and-white photograph of a full-frontal naked female. While her eyes are covered, her breasts and genital area are exposed in a sexually-suggestive pose. Page 7 contains 14 images of females appearing to be under the age of 18 years. The first image is that of the female who appears on the front page. Only the eyes of the females have been covered. Included among the images are at least three which depict obvious explicit sexual conduct. On page 11, accompanying a report on a man having sexual intercourse with a dog, are three photographs of a naked man with a dog, with the dog's tail clearly seen between the man's

thighs. Although the photographs are slightly blurred, there is no disguising what is being depicted.

The covering of the eyes of the females in all the images is obviously intended to prevent recognition or identification of the females in the photographs. It does nothing to protect members of the public, and especially children, from being exposed to what many would regard as offensive and obscene, as well as to what constitutes the essence of child pornography. Child pornography is defined with reference to *sexual conduct and parts of the body in a manner or circumstances which, within context, amounts to sexual exploitation.....or capable of being used for the purpose of sexual exploitation.* The eyes, or even the face, of a person under the age of 18 years is not part of the definition of child pornography. What this newspaper did, therefore, is to try and protect itself from any action that may be based on the recognition of the identity of the person in the photographs. It had no intention to manipulate the photographs in such a way as to ensure that members of the public would not see the photographs for what they really are – depictions of persons engaged in sexual conduct.

There are two related issues involved. *First*, do the photographs, or some of them, constitute child pornography as defined in the Act?

Child pornography is defined in section 1 of the Act as including *any image of a person who is actually under the age of 18 years or who is depicted as being under the age of 18 years, engaged in sexual conduct and showing parts of the body in such a way as to amount to sexual exploitation.* The question is do the photographs published in the *Daily Voice* fall within the definition of child pornography? In the opinion of those who have complained about the photographs, the answer is an unambiguous "yes".

However, public opinion, no matter how strongly felt and expressed, is not determinative of the issue and cannot be interpreted as fact or objective truth. But that should not mean that public opinion may be ignored. Public opinion may, in certain circumstances, form the basis for appropriate criminal action, leaving the court to decide whether or not the evidence supports a finding that an offence has been committed. Child pornography, and the exposure of inappropriate materials to children, is, apart from constituting criminal offences, also a matter of great public interest and concern. The protection of children is not just a legal or constitutional obligation on law enforcement agencies and governments but an obligation imposed, by the very nature of "being children" and of the relationship between children and adults, on society in general. Where there is strong and unambiguously expressed public opinion that something poses a reasonable risk of harm to children or something amounts to expressions of child pornography, the response of the relevant authorities cannot be one of silence and non-action. Silence in the face of the sexual abuse and exploitation of children is a betrayal of children.

The *second* issue is whether or not the provision in section 22(3) of the Act that a newspaper published by a member of the Newspaper Press Union of South Africa *shall not be subject to the provisions of the Act* exempts such newspapers from the criminal provisions of section 27(1)(a) of the Act. Section 27(1)(a) of Act, by making the possession, creation, production, distribution, broadcasting, accessing, export and import of child pornography criminal offences confirms Parliament's intention of making the prohibition of child pornography absolute. It may be noted that the offences of *possession, creation, production, importation and accessing* of child pornography are not qualified by the requirement that such acts should be committed "*knowingly*".

Ignoring for the moment the reference to the Newspaper Press Union of South Africa, the question is: does section 22(3) of the Act allow newspapers to distribute, by publishing, images of child pornography, even if it is disguised as an accompaniment to a purported news report?

Section 22(3) must be interpreted within the context of the Act, which is an Act of national application. The objectives of the Act, as set out in section 2, are to *regulate the creation, production, possession and distribution of films and publications with due regard to the protection of children from sexual exploitation or degradation and make the exploitative use of children in pornography punishable*. The Act also establishes, in section 3(1)(a), the Film and Publication Board (the Board) to carry out and exercise the functions and powers to achieve the objectives of the Act. The Board, therefore, has a *regulatory* and not a *law enforcement* function. The Act does not invest the Board with any powers or authority to investigate criminal offences, including criminal offences created by the Act itself. The Board is a statutory body and makes decisions in terms of an Act of national application. The Board, therefore, makes administrative decisions. Creators, producers and distributors of films and publications are subject to the *regulatory regime* of the Act and administrative decisions of the Board. Offences created in terms of the Act are matters for investigation and prosecution by law enforcement agencies and not the Board.

The Act specifies the powers, functions and duties of the Board in sections 10(1), 14, 15, 16, 17, 18, 22(1), 23(2), 24(2), 30(4) and 31(2). These sections are not concerned with criminal offences but with powers and duties related to the making of administrative decisions to achieve the *regulatory* objective of the Act. The Act does provide for criminal offences. It is important to understand that there are two categories of criminal offences provided for in the Act.

First, there are those criminal offences based on non-compliance with decisions of the Board. Sections 25(a), (b), (c) and 26(1)(aA), (b), (c) and (f) are offences based on non-compliance with decisions of the Board. *Second*, there are offences which are in the nature of “stand-alone” offences and are not based on non-compliance with decisions of the Board. These are offences in terms of the Act itself. The offences created by sections 27(1)(a), (2), (3), 28 (1), (2) and 29 are offences which are independent of any decision of the Board. In fact, section 29(7) specifically states that, with respect to the offences provided for in sections 29(1) and (2), a decision of the Board *shall not be a defence* to a charge of contravening subsections (1) and (2) of section 29.

Criminal offences created by Acts of national application must, necessarily, apply equally to all persons within the jurisdiction of South Africa and only the National Prosecuting Authority has the authority to decide whether or not to initiate prosecution against a particular person. Of course, it is the court which will decide whether or not a person is guilty as charged and prosecuted. Administrative-decision making bodies do not enjoy any authority to exempt any person from any criminal offence. And it stands to reason that an administrative-decision making enabling Act cannot exempt any person from any criminal offence *not based on any administrative decision*. However, such an Act may provide for exemption of persons from the *administrative regulatory regime* created by that Act. That, in my opinion, is the context within which section 22(3), which exempts newspapers from the provisions of the Act, should be interpreted. **Section 22(3) of the Act should be interpreted to mean that newspapers are exempt from only those provisions of the Act which relate to the exercise of powers, functions and duties by the Board and do not extend to the criminal “stand-alone” offences provisions of the Act.**

Courts should, therefore, read section 22(3) as exempting newspapers only from the *regulatory function* of the Board that newspapers are not subject to decisions of the Board. Any other interpretation of section 22(3), especially a “literal” interpretation, would be, in my opinion, be inconsistent with Parliament’s expressed intention to make the prohibitions on child pornography absolute. **It cannot have been Parliament’s intention to prohibit the distribution of child pornography by every person except the publishers of newspapers.**

In so far as the anti-child pornography provisions of the Act are concerned – section 27(1)(a) of the Act – there is only one affirmative defence provided for in subsection 1(b) which provides that subsection (1)(a) of section 27 does not apply to a person who is in *possession* of a film or publication containing child pornography if such possession is necessary for the performance of any function in terms of “this” Act. **It should be noted that the affirmative defence is only with respect to possession and not to creation, production or distribution which are also offences under subsection (1)(a).** A literal interpretation would see a conflict in subsection (1)(b) since it provides an affirmative defence with respect to subsection (1)(a) but specifically refers only to *possession*, which is a subsection (1)(a)(i) offence. The proper interpretation of subsection (1)(b) is that it is an affirmative defence only with respect to *possession* because the only necessary function related to films and publications in terms of the Act is *the examination and classification of films and publications*. There is no function related to the creation, production or distribution of films and publications imposed on the Board. Members of the Board must necessarily be in *possession* of a film or publication for performing the classification function imposed on the Board in terms of the Act. ***The Act, therefore, provides an affirmative defence only with respect to section 27(1)(a)(i) although the wording of section 27(1)(b) might suggest otherwise***

by its reference to “paragraph (a)”, which is section 27(1)(a). It is a matter of argument, for instance, that the possession of child pornography by police and prosecutors involved in the investigation and prosecution of child pornography cases is, in fact, a section 27(1)(a)(i) offence since the affirmative defence is only with respect to *possession necessary for the performance of a function in terms of the Films and Publication Act*. “Possession” in section 27(1)(a)(i) is not qualified by “unlawful” – there is no distinction between “lawful” and “unlawful” possession! It may also be noted that the affirmative defence provided for in section 27(1)(b) does not deny the possession of child pornography but provides a reason why such possession does not give rise to criminal liability. The *Daily Voice* offence is that of **distribution** and not possession.

The question of whether journalists or newspaper publishers should be exempted from prosecution when they *intentionally* seek and publish child pornography in reporting news has been debated in many jurisdictions and the consensus is a vigorous “no” – **there is no need either to see or publish such images to report adequately on the subject.**

The prosecution and incarceration of journalist Lawrence Matthews in Washington, D.C. in 2000 is a case in point. Matthews, a freelance journalist, was charged, prosecuted, convicted and sentenced to imprisonment for being in possession of child pornography in the course of his research for an article on child pornography. Commenting on the case, Professor Clay Calvert, Professor of Communications and Law at Pennsylvania State University, stated that the *“Matthews case makes this clear in the U.S Court of Appeals for the Fourth Circuit, and the general line of Supreme Court precedent is that journalists are not exempt from generally applicable laws that apply equally to all citizens. **Clearly child***

pornography statutes are such laws of general applicability, so journalists take a risk today when investigating child pornography....”

Journalists do not have to see child pornography to report on the subject. Newspapers do not have to publish child pornography to report adequately on the subject. As someone once said “any belief that one needs to see child pornography to either report on or understand the subject has all the earmarks of a rubbernecking obsession on the grotesque”. Journalists and the public should trust the descriptions given by courts, law enforcement officials and child protection practitioners as to the nature, scope, extent and effects of child pornography.

Those who argue the need to see or publish child pornography ignore the fact that any viewing or publishing of child pornography prolongs the exploitation of these children because even merely seeing children in such activities victimises children and is a violation of the right of all children to dignity. Journalism is a profession that requires no licensing. Is there not a very real danger that paedophiles could hide behind any exemption to indulge their criminality?

Newspapers are not immune to laws that apply to the public generally simply because they are reporting news. Section 22(3) cannot be interpreted so as to exclude criminal liability for newspapers who break child pornography laws and the motivation for doing so is irrelevant. As the presiding judge in the Matthews case, U. S. District Judge Alexander Williams Jr, observed, public resources, victims and paedophiles could provider as much insight into the scope and nature of child pornography as viewing such images.

The federal *Child Pornography Prevention Act* of the United States makes no exceptions for writers, researchers, anti-pornography crusaders, physicians, journalists or newspapers, any of whom might have an arguable justification for viewing or being in possession *but certainly not for distribution*. I believe that the *Films and Publications Act* also makes no exception, bar the affirmative defence only for possession in section 27(1)(b), for the possession, and more particularly, the **distribution** of child pornography. The publishing of the images in the edition of the *Daily Voice* in question constitutes the offence of **knowingly distributing** child pornography as provided for in section 27(1)(a)(iv). Any interpretation that the exemption provisions in section 22(3) exempts this newspaper from prosecution for such an offence is untenable not only in the context of the Act but also in the context of protecting children from sexual abuse, exploitation and degradation and from Parliament's express purpose of making the prohibitions on child pornography absolute. It is, with respect, absurd that section 22(3) should be interpreted to mean that no person, except newspapers, may distribute child pornography. Section 22(3) is not a licence for newspapers to distribute child pornography.

I am aware that my opinion is based on the assumption that the photographs published by the *Daily Voice* do amount to child pornography as defined in the Act. But the determination as to whether or not the photographs do amount to child pornography is the prerogative of a court. It is my opinion that the publisher(s) and the journalist involved should be charged, *firstly*, under section 27(1)(a)(iv) (*knowingly distributes*) and, *secondly*, if they are still in possession of the photographs, with the section 27(1)(a)(i) offence of *possession*.

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