

# Before the Film and Publication Review Board

Held in Johannesburg

1/2009

In the matter between:

Out in Africa: South African Gay and

Lesbian Film Festival

Appellant

and

The Film and Publication Board

Respondent

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*In re: Appeal in respect of the film: XXY*

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Professor K. Govender

(Chairperson)

## **BACKGROUND**

- 1) The appellant, a not-for-profit Section 21 company, seeks to serve the interests of the lesbian, gay, bisexual, transgender, and intersex community in South Africa. As part of its activities, it hosts an annual film festival called "*Out in Africa: South African Gay & Lesbian Film Festival*". The most recent festival was held from 4 to 21 September 2008 in Johannesburg and Cape Town. The appellant sought to screen the film *XXY*, along with others at the festival, and made application to the Board for an exemption in terms of Sections 22 and 23 of the Films and Publications Act 65 of 1996 (as amended). At the request of the Board, the appellant delivered copies of two films on DVD, including

XXY, for review by a panel of examiners. There is some dispute about exactly when the Board responded to the application. The appellant alleges that the Board was tardy in its response, and that messages seeking a decision and clarification were not returned. The Board claims that its decision was communicated to the appellant in an e-mail dated 25 August 2008.

- 2) Not much turns on this dispute. The Board was of the view that “the title XXY contains scenes of sexual conduct involving a person under the age of 18 years and therefore amounts to child pornography in terms of the Films and Publications Act 1996”<sup>1</sup>. The e-mail from Mr I. Chetty, the acting CEO at the time, goes on to state: “In terms of the Act, possession, distribution or exhibition of this title would constitute a criminal offence. The title has been ‘Refused Classification’ and all copies should be destroyed or surrendered to the police for destruction.”
- 3) In a report dated 25 August 2008, Mr T. Couzens, a Chief Examiner with the Board, wrestled with the conundrum of assessing a film that is a bona fide artistic dramatic work but that contains a scene depicting simulated sex between minors. He acknowledged that there is no portrayal of explicit sex, and that the scene portrays implied sex (with some female nudity) between consenting minors. He concluded that, as the scene portrays simulated sexual intercourse between minors, he had no option but to deem the scene to be child pornography as defined in the Act. Mr Couzens based his reasoning, as he is obliged to do, on the provisions of the Films and Publications Act.
- 4) Mr Chetty’s e-mail to the appellants on behalf of the Board made it clear that all copies had either to be destroyed or to be surrendered to the police to be destroyed. An appeal was lodged by the appellant, and the matter was scheduled to be heard on 10 September 2008. At the

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<sup>1</sup> . E-mail from Mr I. Chetty, dated 25/8/2008.

hearing, it became apparent to us that the issues were involved and complex. Because the appellants had no legal representation, they were advised to secure it. On 27 February the appeal was finally heard. The appellant was represented by Mr Steven Budlender, instructed by the Freedom of Expression Institute, and the Board was represented by Mr P. Maserumule of Maserumule Inc. Mr Chetty, the former acting CEO of the Board, also requested and was granted permission to make representations. We are indebted to all the lawyers for the assistance rendered to us in this matter.

## **DESCRIPTION OF THE FILM XXY**

5) As we stated in our initial award:

It was apparent that this is a film of considerable artistic merit which treats the issue of intolerance towards intersex persons in a sensitive and meaningful manner. It is also a superbly crafted film with riveting performances by the lead characters.

6) The film explores the confusion and relationship challenges between parents and their teenaged intersex child, Alex. Alex is born with both male and female genitalia, and her parents attempt to protect and isolate her until she is able to make a decision about her gender identity. An eminent plastic surgeon is invited to stay with the family to assist them with their decision. The parents have been preparing Alex for a life as a female. However, a sexual attraction develops between Alex and Alvaro, the teenaged son of the surgeon. The scene that has led to the present dispute over the film involves a sexual encounter between the two, during which Alex apparently penetrates Alvaro anally.

7) At a more profound level, the film is about respect, tolerance, and understanding. It carries the important message that premature decisions made at the birth of an intersex child can have seriously prejudicial and agonizingly tragic consequences for the child as s/he matures. Alex's father is totally accepting of her, while her mother yearns for the normality of a child with a clear sexual identity. Alex

reluctantly takes the drug Corticoid, supplied to suppress her masculine development and to foster her femininity. Both parents love her, but each seeks to resolve the issue differently. While the mother favours an operation, the father deems her to be perfect as she is. The film deals with the attitudes, anxieties, and responses of the parents in a non-judgmental fashion. We are invited into their private world, and witness their anxieties and confusion. Alex is comfortable with her own body, but – notwithstanding the protective isolation of her surroundings – she is exposed to the excesses of prejudice. At heart, the film represents a plea for tolerance and understanding.

### **AN ASSESSMENT OF THE FILM IN CONTEXT**

- 8) There was unanimity on the part of the Board and the appellants that this is neither a film about child pornography, nor a devious attempt to offer child pornography masquerading as a serious and thoughtful film. These concessions were correctly made, and it is important to understand that we are considering a serious and important film that contains a scene that may or may not fall within the legal definition of child pornography in the Act. At the risk of being tautological, on any objective assessment *XXY* cannot be deemed to be a means of conveying images of child pornography. The film has been distributed in many parts of the world, and in some instances has garnered critical acclaim. If we had assessed this film solely on the basis of logic and common sense, we could have easily disposed of this matter by finding that this is not child pornography. It is important to emphasise this point, because nothing in this award should be perceived as favouring the freedom of expression over the best interests of the child.

### **ANALYSIS OF THE LEGAL ARGUMENTS MADE AND THE CONCLUSIONS REACHED IN RESPECT OF THE SUBMISSIONS**

- 9) Despite Mr Chetty's protestations to the contrary, the decision of the Board not to grant an exemption to *XXY* effectively amounted to a

banning of the film. His e-mail requiring that copies of XXY be destroyed does not permit any other interpretation.

As stated earlier, the appellant applied for an exemption in terms of Sections 22(1) and 23 of the Act.

Section 22(1) of the Act provides:

The executive committee may, on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from section 25, 27, and 28 if it has good reason to believe that bona fide purposes will be served by such an exemption.

Section 23(2) provides:

The provisions of section 26(1)(a) and (b) shall not prohibit the exhibition of any film to any person in the course of his or her business as a distributor of films, or to the representative of such distributor acting for the purposes of such business

Had the applicants been successful in securing the exemption, it would have been exempted from the provisions of Sections 25, 26, 27, and 28. These sections prohibit the distribution of publications contrary to classifications; prohibit the exhibition, distribution, or advertisement of certain films; prohibit the possession of certain films and publications; and prohibit the distribution of certain publications, respectively. The sections require the executive committee to exercise its mind in terms of Sections 22 and 23 and to determine whether an exemption should be granted. This is an instance where the classifiers do not make the final decision. We shall assume, in favour of the Board, that the report drawn up by Mr Couzens amounted to a recommendation, and that the final decision was made by the Executive Committee. The e-mail sent by Mr Chetty appears to confirm that the decision was endorsed by the Executive Committee. The reason for refusing the exemption was that the sexual scene between Alex and Alvaro fell within the definition of child pornography in the Films and Publications Act.

10)The appeal before us against the Board's decision presented an opportunity to analyse fully the meaning of child pornography, and to provide effective assistance to examiners who have to apply this definition. Section 19 of the Act provides:

The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for a decision and classification in terms of section 17 and any person who applies for a classification of a film, or the reclassification of a film or publication, or for a permit, exemption or licence, or who is the publisher of a publication which is the subject of an application for classification, or whose financial interests could be detrimentally affected by a decision of the Board on such application, or with regard to an exemption or permit, the withdrawal of which is being considered, or who appeals to the Review Board against a decision with regard to such an application, shall have the right –

(a) to appear in person before the executive committee, classification committee or Review Board, or to be represented or assisted by a legal practitioner or by any other person of his or her choice, to adduce oral or written evidence and, subject to a reasonable time-limit imposed by the chairperson concerned, to address that committee or board, in the language of his or her choice...

11)As is apparent from Section 19, an appeal against a refusal by the Executive Committee to grant an exemption can be lodged with the Review Board. The respondent correctly submitted that a decision in terms of Sections 22 and 23 of the Act is 'administrative action' as defined in terms of Section 1 of the Promotion of Administrative Justice Act (PAJA)<sup>2</sup>. Similarly, the decision of the Review Board in this matter is also 'administrative action' and is thus subject to the provisions of PAJA. However, notwithstanding its name, the Review Board is an administrative appeals tribunal, and when an appeal is lodged, the Review Board must determine whether the correct decision has been made. It has the power, among others, to 'give such decision as the Board or executive committee should in its view have given...'<sup>3</sup>. Thus the Review Board can, in this instance, either affirm the decision of the

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<sup>2</sup> . Act 3 of 2000.

<sup>3</sup> . Section 20 (3) of the Act.

Executive Committee, or decide that an exemption should have been granted, and make an appropriate order to that effect.

12) The central issue in this matter is whether the contested scene (identified in paragraph 6 above) amounts to child pornography as defined in the Act. 'Child pornography' is defined in Section 1 of the Act as follows:

“‘child pornography’ includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years –

- (i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in sexual conduct; or
- (iii) showing or describing the body or parts of the body of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.

“**Sexual conduct**” includes –

- (i) male genitals in a state of arousal or stimulation;
- (ii) the undue display of genitals or of the anal region;
- (iii) masturbation;
- (iv) bestiality;
- (v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
- (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
- (vii) the penetration of a vagina or anus with any object;
- (viii) oral genital contact; or
- (ix) oral anal contact;

13) It was correctly submitted by the respondent that the film depicted persons under the age of eighteen engaging in simulated anal sexual intercourse. This was not contested by the appellant. While both actors were older than eighteen, they portrayed characters who were under the age of 18, and thus they depicted 'children' in terms of the Act. The

scene, while not explicit, portrays children having simulated anal sexual intercourse. Alex's breasts are exposed during this scene.

- 14) The respondent argued that the purpose of the 2004 amendment to the Act was to widen the definition of child pornography and to restrict its possession and distribution as much as possible. Most responsible legislatures are concerned about the scourge of child pornography, and many are taking drastic action to protect children against exploitation and degradation. In *De Reuck v Director of Public Prosecution and Others*,<sup>4</sup> the Constitutional Court dealt exhaustively with the pre-2004 definition of child pornography.
- 15) The issue before us in this case is whether the 2004 amendment effectively over-ruled the definition laid down in the *De Reuck* case. Given some of the comments made in argument, it is necessary to state that public functionaries like the Executive Committee, the Examiners, and the Review Board are bound by decisions of the Constitutional Court and other courts, and must exercise their discretion in a manner that is consistent with the decisions of courts. Once the court has spoken, its decisions must be enforced. The fact that senior functionaries might regard the decision as incorrect is wholly irrelevant.
- 16) The appellant contended that changes in the law occasioned by the 2004 amendment did not materially impact on the reasoning and relevance of the *De Reuck* judgment. In contrast, the respondent was of the view that the amendments rendered the findings in *De Reuck* distinguishable and inapplicable. I propose to consider the reasoning in *De Reuck* as comprehensively as possible, and then consider whether the 2004 amendment renders the findings of the court distinguishable and inapplicable, or whether we continue to be bound by them.
- 17) The pre-2004 definition provided:

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<sup>4</sup> . *De Reuck v Director of Public Prosecutions* 2004 (1)SA 406 (CC)



Child 'pornography' includes 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.

De Reuck was charged under Section 27(1) of the Act for possessing child pornography. He questioned the constitutionality of certain provisions of the Act upon which the charges were based. His primary challenge was that Section 27(1), read with the definition of 'child pornography', was unconstitutional in that they unjustifiably violated rights to privacy, freedom of expression, and equality. His arguments were that the definition of child pornography was not only overbroad, but also vague. It was thus imperative that the court considered the meaning of 'child pornography'. The interpretation adopted by the court enabled it to conclude that the Section was not unconstitutional.

18) Both the pre-2004 and post-2004 definitions of child pornography begin with the word '*includes*'. In *De Reuck*, the court had to consider the significance of the word 'includes' in the definition. It considered two options: (1) it could mean that the list of images in the definition is exhaustive of what constitutes child pornography, or alternatively (2) 'includes' suggests that the list extends the meaning of the term being defined, and the true meaning has to be ascertained from the context in which it is used.<sup>5</sup> The court finally held:<sup>6</sup>

Pornography is notoriously difficult to define and child pornography no less so. For this reason alone, it is unlikely that the legislature intended merely to add meanings to the term on the assumption that its primary meaning was not in need of definition. Rather the purpose of the list would seem to be to give the word a more precise meaning. That this is in fact the legislative intention is suggested by the contrast between the definition of 'child pornography' and some of the other definitions in section 1, which provide that a term 'includes' certain things

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<sup>5</sup> . Para 17 ff of the *De Reuck* judgment.

<sup>6</sup> . Para 19 of the judgment.

‘without derogating from the ordinary meaning of that word’. Although the legislature could have avoided ambiguity by stating that child pornography ‘means’ only the images listed, the use of ‘includes’ in the definition is consistent with an intention that the list should define, and thus be coloured by, the primary meaning of child pornography.

19) It is instructive that the post-2004 definition follows a very similar structure. It is a recognised principle that the legislature is deemed to know the law. It was thus open for the legislature, when drafting the 2004 amendment, to define child pornography exhaustively rather than retaining the word ‘includes’. This would have unequivocally indicated that it was distancing itself from the reasoning in *De Reuck*. Knowing of the Constitutional Court’s reasoning and decision in *De Reuck*, the legislature retained the very word that was considered to be particularly important in the analysis of the court in concluding that the definition is not exhaustive. This is a strong indication that the post-2004 definition was not intended to depart materially from the definition given in the *De Reuck* case.

20) In the definition section of the Act, words like ‘film’ and ‘publication’ are defined exhaustively. The fact that the legislature choose to retain ‘includes’ in the definition of child pornography suggest that the list is not exhaustive. One option open to the legislature was to adopt the approach that was subsequently adopted in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007. The Sexual Offences and Related Matters Act defines ‘child pornography’ as follows:

**“child pornography”** means any image, however created, or any description or presentation of a person, real or simulated, 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) displaying 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;  
(j) engaged in any conduct or activity characteristically associated with sexual intercourse;  
(k) showing or describing such person—  
(i) participating in, or assisting or facilitating another person to participate in; or  
(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or  
(l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons;

21) As is apparent from this definition, there was a clear intent on the part of those who drafted it to depart from the reasoning of the court in *De Reuck*. The word 'includes' is omitted, and the requirement that the film or publication be objectively deemed to appeal to the erotic as opposed to the aesthetic – the gravamen of the *De Reuck* reasoning – is expressly excluded. In contrast, the post-2004 definition in the Films and Publications Act is materially and substantially similar to the definition that was considered in the *De Reuck* matter.

22) In *De Reuck*, the Court concludes that the primary meaning related to material that involved the stimulation of erotic feelings rather than aesthetic feelings. Referring to the dictionary definition of child pornography, the court provides the following primary definition of 'child pornography'<sup>7</sup>:

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<sup>7</sup>. para 20 of the *De Reuck* judgment.

According to *The New Shorter Oxford English Dictionary*, 'pornography' means:

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. containing this.

This is a useful guide. I would observe, however, that erotic and aesthetic feelings are not mutually exclusive. Some form of pornography may contain an aesthetic element. Where, however, the aesthetic element is predominant, the image will not constitute pornography. With this qualification, the dictionary definition above fairly represents the primary meaning of 'pornography'. 'Child pornography' bears a corresponding primary meaning where the sexual activity described or exhibited involves children. In my view, the section 1 definition is narrower than this primary meaning of child pornography.

23) If the primary meaning has been retained after the 2004 amendment, then the scene under consideration cannot amount to child pornography. The respondent argued that reliance on the *De Reuck* judgment was misplaced. Mr Maserumule contended that the pre-2004 definition emphasised sexual exploitation and child degradation as a purpose in child pornography. This, according to Mr Maserumule, is what led the court to find that consideration of context must be read into the definition. He contended that it was necessary to have regard to context in order to determine whether the activity amounted to sexual exploitation or child degradation.

24) He argued further that the current definition of child pornography is broken up into (i) sexual conduct; (ii) participating or assisting another person to participate in sexual conduct; or (iii) showing or describing the body or parts of the body. He argued that only item (iii) of the definition retains reference to sexual exploitation and degradation. He therefore concluded that in respect of categories (i) and (ii), the legislature did not intend that context be considered, but that context is only relevant when category (iii) is in issue.

25) I am not convinced by the submissions made by the respondent. The previous definition was tautological, and the court in *De Reuck* held that 'disentangling the description of each from the syntax of the definition is a task of some difficulty'.<sup>8</sup> The change in the definition was simply to clarify and simplify an unnecessarily wordy subsection. The reason why categories (i) and (ii) no longer include reference to sexual exploitation and degradation is that it is unnecessary to make such reference. If the scene depicts a child engaging in sexual conduct or participating or assisting another person to participate in sexual conduct, then that, without exception, amounts to sexual exploitation and sexual degradation. By retaining reference to sexual exploitation in respect of category (iii), the legislature conveyed the message that not all depictions or descriptions of the body or parts of the body of a child will amount to child pornography. Thus a nude picture of a child in a bath taken by a parent may not be child pornography if it does not amount to sexual exploitation. The purpose of the qualification, therefore, was to deal only with those portraying pictures or images of children with the nefarious intent of sexual exploitation or degradation.

26) The *De Reuck* judgment held that "it is not possible to determine whether an image as a whole amounts to child pornography without regard to the context"<sup>9</sup>. The court went on to hold:

It is probable that other parts of the film or publication alleged to contain child pornography may indicate whether the predominant purpose of the material, objectively construed, is to stimulate sexual arousal amongst its target viewers.

27) The requirement that the context be considered is not inextricably linked in the judgment to the definitional requirements that the image must amount to sexual exploitation or degradation of children. The court required context to be considered in order to determine the broader question: whether the film is aimed at the stimulation of the erotic as opposed to that of the aesthetic. In any event, it is inherently

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<sup>8</sup> . Paragraph 24 of the judgment.

<sup>9</sup> . Paragraph 33 of the judgment.

sensible to have regard to the context when engaging in any classification decision, as it enables a more informed decision to be made. There is no reason in principle why context should not be considered in order to reach a fairer and more accurate decision.

28) In our view, the 2004 amendments do not render the reasoning and decision of the court in *De Reuck* inapplicable. The amendments do not materially impact on the definition of child pornography laid down by the Constitutional Court. The court concluded as follows:

I now summarise my approach to the question whether an image constitutes child pornography for the purposes of section 27(1). The overarching enquiry, objectively viewed, is whether the purpose of the image is to stimulate sexual arousal in the target audience. This entails considering the context of the publication or film in which the image occurs as a visual presentation or scene. The court conducts the enquiry from the perspective of the reasonable viewer. The image will not be child pornography unless one or more of the four prohibited acts listed below is explicitly depicted for this purpose. The person 'who is shown as being under the age of eighteen years' in the image may be real or imaginary. The prohibited acts are:

- (a) a child engaged in sexual conduct;
- (b) a child engaged in a display of genitals;
- (c) a child participating in sexual conduct; and
- (d) a child assisting another person to engage in sexual conduct.

29) I am of the opinion that this definition of child pornography is not just applicable but binding on, among others, the Executive Committee, the Examiners, and the Review Board.

## **OTHER LEGAL SUBMISSIONS**

30) Under Schedule 1 of the Act before the 2004 amendments, child pornography was classified as XX. Under the Act in its current form, child pornography is not classifiable.

Section 27 of the Act provides that any person shall be guilty of an offence if he or she –

- (i) is in possession of,

- (ii) creates or produces or in any way contributes to, or assists in, the creation or production of;
- (iii) imports or in any way takes steps to procure, obtain or access; or
- (iv) knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed,

a film or publication which contains child pornography...

31)The current Section 27 is marginally broader in its application than its predecessor. The possession, production, creation, importation, exportation, broadcasting, and distribution of child pornography was, and continues to be, a criminal offence. The changes in this regard do not impact on the definition of child pornography, and in particular do not detract from the definition laid down by the Constitutional Court in *De Reuck*.

32)The Executive Committee, the examiners, and members of the Review Board are empowered by the Films and Publications Act to make decisions. It is a trite principle of law that all these bodies must act within the powers bestowed upon them by the enabling Act. It is clear from the papers that Mr Couzens and the Executive Committee interpreted and applied the definition of child pornography in the Films and Publications Act. That is the definition that is applicable and binding, and that must be applied when discharging responsibilities under the Act. The definition of child pornography in the Sexual Offences and Related Matters Act is not relevant to the discharge of duties in terms of the Films and Publications Act. The definition in the Sexual Offences and Related Matters Act is extremely wide, and quite clearly seeks to adopt an approach that is very different from that adopted by the court in *De Reuck*. Crucially, Section 68(2) of the Sexual Offences and Related Matters Act provides:

The laws specified in the Schedule are repealed or amended to the extent indicated in the 3<sup>rd</sup> column of the Schedule.

33)I have looked through the Schedule to the Sexual Offences Act, and no mention is made of the definition of child pornography in the Films and

Publications Act being repealed. Indeed, no mention at all is made of the Films and Publications Act in the Schedule. I accordingly find that the legislature did not intend to overrule the definition in the Films and Publications Act, and that this definition is still applicable and binding.

#### **FINDING:**

34)The Executive Committee erred in concluding that the film *XXY* contained scenes of child pornography, as it misinterpreted the definition of child pornography in the Act. Accordingly, the requested exemption ought to have been granted. The decision of the Executive Committee is reversed, and the requested exemption is granted in terms of Section 23 of the Act

#### **SUMMARY AND RECOMMENDATION**

35)As issues were comprehensively considered, discussed, and analysed, this appeal presented an opportunity to provide some guidelines to examiners on how to interpret the definition of child pornography in the Act. The following issues must be considered cumulatively:

1. Does the film or publication stimulate erotic rather than aesthetic feelings? If the image is not reasonably capable of stimulating sexual arousal in the target audience, then it is unlikely to fall within the definition of child pornography;
2. The subjective views of the filmmakers are not determinative. The issue is whether a reasonable viewer would deem the purpose of the film or publication to stimulate erotic rather than aesthetic feelings;
3. In making this determination, regard must be had to context. The more sexually explicit the image or scene, the more likely it is to be deemed to appeal to erotic as opposed to aesthetic sensibilities;



4. The image or description must be of a person, real or simulated, who is, or is described as being, under the age of eighteen. The image must be reasonable capable of being perceived as being that of a person under the age of eighteen and
5. The image will not be child pornography unless one or more of the four prohibited acts listed below is depicted for this purpose. The prohibited acts are:
  - (i) a child engaged in sexual conduct;
  - (ii) a child engaged in a display of genitals which amounts to sexual exploitation or in such manner that it is capable of being used for the purposes of exploitation;
  - (iii) a child participating in sexual conduct; and
  - (iv) a child assisting another person to engage in sexual conduct.
6. If the examiners are in doubt about the true nature of the film or publication, it must be referred to the Review Board.

Dated at Durban on the .....of March 2009.

Concurred by:

Adv. R. Lessick

Ms P. Marek

Revd M. McCoy

Mr J. Phalane

Mr A. Verster