

CHAPTER 12

THE PROTECTION OF CHILDREN AS CONSUMERS

12.1 Introduction

Children are significant consumers¹ of goods and services.² Markets in toys, fast food, entertainment and clothes are directed explicitly at children.³ Older children often have direct spending power from pocket money and their own earnings. In addition, children have an indirect effect on the marketplace through the influence they have on the way their parents and other adults spend money.

Some older children are relatively sophisticated consumers. However, many children, especially those of primary school age, may make uninformed purchases or be particularly susceptible to aggressive selling techniques.

This Chapter considers the appropriateness and effectiveness of the legal process in protecting children as consumers. Obviously any discussion in this regard has to take into account the provisions of the Age of Majority Act 57 of 1972 and the reader is referred to Chapter 4 above. The key legal processes that affect children as consumers are those relating to trade practices and consumer protection, financial services, advertising and the media.

12.2 Comments and submissions received

The protection of children as consumers was not a specific focus of Issue Paper 13. The following question, however, was posed:

1 Consumers are generally defined as those who purchase goods and services for personal or household use. Individuals using government services are also regarded as consumers.

2 From about seven or eight years of age, about 80% of middle-class South African children get between R50 and R100 in pocket money a month. They spend this on luxury items such as stickers and tattoos, sweets, chips and cooldrinks. Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 73.

3 Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 71: 'Marketers understand the universal law that happy children make happy parents. Fast food marketers understand a more refined version of this law: children who are happy *and* eating make the happiest parents. Of course, happy parents stay longer and spend more money'.

Question 29: Should the current legislative provisions governing matters such as the ownership of firearms, the sale of solvents, liquor and tobacco to children, and related matters be revisited in order to better protect children?

The question was a loaded one and perhaps the reference to ownership of firearms biased the responses. In any event, the majority of the respondents answered the question in the affirmative.⁴

The NICC stated that there is most definitely a need for such revisitation. It said allowing children aged 16 years to own a firearm is unacceptable. This was also the view of Mrs J Smith. The National Council of Women of South Africa, acknowledging its unfamiliarity with the respective legal provisions, considered that these measures should be as stringent as possible. Both the Durban Committee and the Cape Law Society supported any measures which might protect children, stating that the appropriate authority should be consulted in this respect.

The Natal Society of Advocates answered the question in the negative. It was their view that children younger than the prescribed age limits who wished to indulge in these activities (smoking, drinking, sniffing, etc) do so anyway notwithstanding the age limit imposed.

What the children said:

In the child participation process, children indicated that upon attaining majority status, persons (and therefor adults) should have the right to carry licensed firearms, to vote, to enter into contracts, to use alcohol, to have sex, and to drive a car.⁵

4 Professor C J Davel, Mr D S Rothman, Disabled People South Africa, the SA National Council for Child and Family Welfare and the Johannesburg Institute of Social Services.

5 See also the discussion in Chapter 4 above.

12.3 **Protecting and Informing Child Consumers**

The major barrier to children exercising their consumer rights is that they generally do not know they have those rights. Even if they do know they have rights, children may not understand how to enforce them or may not feel confident about pursuing a remedy. Children, and perhaps consumers in general, find it very difficult to seek redress for poor treatment by service providers. It is therefore essential that complaints mechanisms are complemented by regulatory requirements and educational initiatives that effectively safeguard child consumers' well-being.

Accordingly it is recommended that national child consumer education strategies should be developed for implementation in all primary and secondary schools by the Department of Education in consultation with the Department of Trade and Industry.

12.4 **Enforcing children's contracts**

Commerce often involves consumers in contractual arrangements. At common law, generally⁶ a minor cannot incur contractual liability if he or she is not assisted by his or her guardian when the contract is made.⁷ The minor can, however, enter into a contract without such assistance if such contract will improve the minor's position without imposing any duties on him or her.⁸ A minor can enforce a contract against the other party but the contract cannot be enforced against the minor. This is one of the consequences of children's historical classification as persons under a legal disability.

There are statutory exceptions to the rule that a minor cannot incur contractual liability where he or

6 There are statutory exceptions to this general rule: See Van Heerden et al **Boberg's Law of Persons and the Family** (second edition) 781 - 786.

7 Voet 26.8.2, 3, 4; Van Leeuwen **Censura Forensis** 1.1.17.10; 1.4.3.2; Rooms-Hollands-Regt 1.16.8; 4.2.3; Van der Linden 1.4.1; Grotius 1.8.5; 3.1.26; 3.6.9; 3.48.10; Van der Keesel **Theses Selectae** 128. The courts have also confirmed this principle many times - see eg **Dhanabakium v Subramanian** 1943 AD 160; **Edelstein v Edelstein** 1952 (3) SA 1 (A).

8 Van Heerden et al **Boberg's Law of Persons and the Family** (second edition) p. 798 calls it a "limping" transaction: for the minor an unassisted contract creates only a natural obligation; for the other party it creates a legal one. See also Cronjé **Barnard, Cronje & Olivier's The South African Law of Persons and Family Law** (third edition), p. 80.

she has not been assisted by his or guardian.⁹ These exceptions are:

⁹ Van Heerden et al **Boberg's Law of Persons and the Family** (second edition), p. 781 et seq; Cronjé **Barnard, Cronje & Olivier's The South African Law of Persons and Family Law** (third edition), p. 82.

- Minors who have attained the age of 18 years may, without the consent of their guardians, insure their own lives, pay any premium due under the policy, and undertake and maintain the policy for a stipulated period, ceding their earnings as security.¹⁰
- Minors over the age of 16 years may be depositors with a bank, and may without the assistance of their guardians execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against and generally deal with the deposit as they think fit.¹¹
- Minors over the age of 16 years may be members of or depositors with a mutual bank, and may without the assistance of their guardians execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against and generally deal with the share or deposit as they see fit.¹²
- Deposits in the Post Office Savings Bank made by or for the benefit of a minor, and any National Savings Certificate issued in favour of a minor, may be repaid to the minor when he or she has attained the age of seven years (or such other age above seven years as may be determined by regulation in respect of any particular kind of deposit or account) in every respect as if the minor were of full age.¹³
- Minors may be members of a friendly society if its rules so provide, and minors who have attained the age of 16 years may 'execute all necessary documents and give all necessary

10 Section 37(1) of the Insurance Act 27 of 1943.

11 Section 87(1) of the Banks Act 94 of 1990.

12 Section 88(1) of the Mutual Banks Act 124 of 1993.

13 Section 54(a) of the Post Office Act 44 of 1958.

acquittances', though they may not manage the affairs or be a principal officer of the society.¹⁴

14 Section 16 of the Friendly Societies Act 25 of 1956. A member under the age of 16 years is required to act 'by his parent or guardian'.

- Minors may be members of a registered medical scheme if its rules so provide, and minors who have attained the age of 16 years may 'execute all necessary documents and give all necessary acquittances' without assistance, but they may not manage the affairs or be the principal officer of the scheme.¹⁵
- Minors over the age of 18 years may, without the consent of their guardians, consent to the performance of any 'operation' upon themselves. Minors over the age of 14 years are competent to consent, without the assistance of their guardians, to the performance of any 'medical treatment' upon themselves or their children.¹⁶

Some 16 and 17 year old children are in full time employment and living independently. These young people in particular should have greater contractual capacity, including the ability to enter credit contracts.

In New South Wales, the Minors (Property and Contracts) Act 1970 (NSW) reverses the general principle that a contract is not binding on a minor. It provides that where a minor participates in a civil act (including a contract) for his or her own benefit that act is presumptively binding on the child provided he or she has the necessary understanding to participate in it. The Australian Law Reform Commission¹⁷ has subsequently recommended that legislation based on this model should be adopted nationally for young people aged 16 and 17.

15 Section 20A(1) of the Medical Schemes Act 72 of 1967.

16 Section 39(4) of the Child Care Act 74 of 1983. See also Van Heerden et al **Boberg's Law of Persons and the Family** (second edition) 784, footnote 76 for a discussion of the questions as to who is liable for the fees arising from the operation or medical treatment and whether s 39(4) of the Child Care Act empower unassisted minors to incur contractual liability for fees arising from the operation or medical treatment to which they have consented.

17 **Report No 84: Seen and Heard: Priority for Children in the Legal Process**, September 1997, p. 222. (Hereinafter **Report No 84**).

12.5 Trade practices and consumer protection

In South Africa trade practices and consumer affairs are regulated by the Consumer Affairs (Unfair Business Practices) Act 71 of 1988.¹⁸ This Act provides for the prohibition or control of certain business practices. The Act does not differentiate between adult and child consumers,¹⁹ and provides for the establishment of Consumer Affairs Committee²⁰ which is tasked with the function to make known information on current policy in relation to business practices in general and unfair business practices in particular, to serve as general guidelines for the persons affected thereby, to receive and dispose of representations, and to conduct investigations into any unfair business practices which allegedly exists or may come into existence.²¹ The Committee reports the result of any investigation to the Minister of Trade and Industry who may then, provided the Minister is of the opinion that a unfair business practice exists or may come into existence and provided the Minister is not satisfied that the unfair business practice is justified in the public interest, declare the said unfair business practice to be unlawful and take the steps necessary to ensure the discontinuance or prevention of the unfair business practice.²²

The Businesses Act 71 of 1991 provides for the licensing and carrying on of businesses, and shop hours. In terms of Item 2 of Schedule 1 to the Act, the following businesses require licences to operate:

The carrying on of business by -

(a) - (c)

4. keeping three or more mechanical, electronic or electrical contrivances, instruments, apparatus or devices which are designed or used for the purpose of the playing of any

18 Although the Consumer Affairs (Unfair Business Practices) Act, 1988 repeals the Trade Practices Act 76 of 1976, certain sections of this latter Act dealing with the prohibition of certain false and misleading advertisements, statements, communications, descriptions and indications (section 9) and giving false or misleading indications in respect of prices of goods or the rendering of services (section 13) remain in force.

19 See the definitions of 'consumer' and 'business practice' in section 1. In terms of the latter definition, 'business practice' inter alia includes 'any agreement, accord, arrangement, understanding or undertaking, **whether legally enforceable or not**, between two or more persons'.

20 Section 2 of the Consumer Affairs (Unfair Business Practices) Act, 1988.

21 Ibid, section 4.

22 Ibid, section 12(1)(b). See also sections 12(1)(c) and (d) of the Consumer Affairs (Unfair Business Practices) Act, 1988.

game or for the purpose of recreation or amusement, and the operation of which involves the payment of any valuable consideration, either by the insertion of a coin, token coin or disc or in an appliance attached thereto or in any other manner;

5. keeping three or more snooker or billiard tables;
6. keeping or conducting a night club or discothèque;
7. keeping or conducting a cinema or theatre;

Children frequent some of these places.

Australia has federal and State and Territory consumer protection regimes. Parts IV and V of the Trade Practices Act 1974 (Cth) (Trade Practices Act) provides protections for consumers who conduct transactions with corporations or the Commonwealth.²³ All Australian States and Territories have mirrored many of the consumer protection provisions in the Trade Practices Act in their fair trading legislation.²⁴

A person who suffers loss or damage as a result of a breach of the consumer protection provisions of the Trade Practices Act may recover damages for that loss.²⁵ In certain circumstances where a breach of the legislation is established, the Australian Competition and Consumer Commission (ACCC) may negotiate with a corporation on behalf of a consumer to resolve a dispute. If the ACCC declines to pursue a complaint on behalf of a child consumer, he or she has the option of pursuing a private action under the Trade Practices Act by way of a guardian *ad litem* in the Federal Court. However, there is a significant lack of awareness of consumer rights in Australia as was noted by the Australian Law Reform Commission in its 1994 inquiry into compliance with the Trade Practices Act.²⁶

23 The federal consumer protection law is of limited scope because of constitutional restrictions on the legislative power of the Commonwealth. See Australian Law Reform Commission **Report No 84**, p 223.

24 Fair Trading Act 1987 (NSW); Fair Trading Act 1989 (Qld); Fair Trading Act 1987 (SA); Fair Trading Act 1990 (Tas); Fair Trading Act 1985 (Vic); Fair Trading Act 1987 (WA); Consumer Affairs and Fair Trading Act 1990 (NT); Fair Trading Act 1992 (ACT).

25 There are also other remedies available under the Trade Practices Act, such as injunctions and orders to disclose information or publish advertisements.

26 Australian Law Reform Commission **Report No 68 Compliance with the Trade Practices Act 1974** (1994). See also Australian Law Reform Commission **Report No 84**, p 223 - 224.

12.6 The sale of dangerous goods to children and safety standards

Statistics from the Poison Information Centre²⁷ from 1992 - 1997 indicate that the majority of out- and in-patients at hospitals are treated for medicines poisoning (49% of all admissions) followed by paraffin poisoning (25 %). The Medical Research Council estimates that paraffin poisoning affects 15000 children a year.²⁸ Most of these 'accidental' injuries to children could have been prevented. Following a workshop during National Child Protection Injury Prevention Week in August 1999, the Office on the Rights of the Child within the NPA has formulated a child accident prevention plan and facilitated the establishment of a coordinating body as part of the NPA.²⁹

The Child Care Act, 1983 does not contain provisions specifically designed to ensure that certain goods meet particular standards and that dangerous goods are not sold to children. However, provisions prohibiting the sale of dangerous goods to children are found in various other enactments.

In terms of section 3(1) of the Arms and Ammunition Act 75 of 1969, for instance, a person under the age of 16 years may not apply for a licence to possess a firearm.³⁰ In terms of section 4 of the Tobacco Products Control Act 83 of 1993 no person shall sell or supply any tobacco product to any person under the age of 16 years, 'whether for his personal use or not'. Section 5 of the Tobacco Products Control Act 83 of 1993 also provides that the sale of tobacco products from vending machines shall be restricted to places in which such machines are inaccessible to persons under the age of sixteen years. Section 45(1)(a) of the Liquor Act 27 of 1989 prohibits the sale or supply of liquor on licenced premises to any person under the age of 18 years. Indeed, a person under the age of 18 years is not even allowed to be in any restricted part of such premises.³¹ Access by children to

27 Department of Paediatrics and Child Health, Institute for Child Health, UCT and the Red Cross War Memorial Children's Hospital.

28 S Giese, V Mathambo, T Guthrie and P Proudlock **Child Health Policy Institute Working Document: Child Health in South Africa**, UCT, 1999.

29 **Children in 2001 - A Report on the State of the Nation's Children**, National Programme of Action for Children in South Africa, the Presidency, p. 79.

30 See also section 37 of the Arms and Ammunition Act 75 of 1969 which provides that 'no person shall permit or enable a juvenile under the age of sixteen years to be in possession of an arm or ammunition'. Whenever such juvenile is in possession of any arm or ammunition, it may be seized.

31 Section 45(1)(b) of the Liquor Act 27 of 1989.

places of gambling is regulated by provincial legislation.

Although some toy manufactures do place warnings³² on their products as is prescribed by the SABS or some (European) safety standards, the obligation to ensure the safe use of that product remains with the parent. Some feel this obligation is misplaced and that manufacturers of toys and other goods for children should assume responsibility for ensuring that their products (and their packaging) are safe for children to use.

In order to comply with the vision of a single comprehensive children's statute, it is recommended that a complete audit of national and provincial legislation and municipal bye-laws be undertaken by the Department of Trade and Industry of the various prohibitions on the sale of dangerous goods to children, that such provisions then be incorporated in the new children's statute. The provisions incorporated can then be repealed in the various other statutes.

32 Such as 'Contains small parts. Not fit for children under 3 years of age!'

In Australia, the Trade Practices Act requires that minimum conditions and warranties are met in transactions.³³ A person who is injured or whose property is damaged by a defective product has a right to claim compensation against the manufacturer of the product. Legislation in each Australian State and Territory prescribes product information and safety standards that complement the product liability provisions in the Trade Practices Act.³⁴

Subject to their inability to litigate directly, children in Australia have access to the same remedies under the Trade Practices Act for defective goods as adult consumers. Safety standards that are effective in protecting child consumers from harm are equally as important as this statutory remedy for loss. The Consumer Affairs Division of the Department of Industry, Science and Tourism oversees the enforcement of safety standards declared under the Trade Practices Act. Mandatory safety standards can only be introduced when a product has been shown to be dangerous. Currently, there are mandatory safety standards for toys for children aged under 3 years,³⁵ flotation toys and swimming aids³⁶ and children's nightclothes.³⁷ This regime has been criticized for being reactive

33 These conditions include that goods and services be of merchantable quality and fit for their purpose.

34 Eg Fair trading Act 1987 (NSW), Part 4; Fair Trading Act 1989 (Qld), Part 4; Sale of hazardous Goods Act 1977 (Tas); Goods (Trade Descriptions) Act 1971 (Tas), Consumer Affairs Act 1972 (Vic), Part IV; Consumer Affairs and Fair Trading Act 1990 (NT), Part IV; Consumer Affairs Act 1973 (ACT), Part IIIA; Manufacturers' Warranties Act 1974 (SA).

35 This standard has been in place since 1989: Federal Bureau of Consumer Affairs **Safety Standard for Children's Toys** AGPS Canberra 1994. See also the **Toys and Children's Products Safety Ordinance** 1993 (Hong Kong).

36 This standard has been in place since 1986: Federal Bureau of Consumer Affairs **Safety Standard for Children's Floatation Toys and Swimming Aids** AGPS Canberra 1992.

rather than pro-active.

37 A standard has been in place since 1978: Federal Bureau of Consumer Affairs **Safety Standards for Children's Nightclothes** AGPS Canberra 1994.

The European Union product safety model is cited as appropriate to adopt because it requires manufacturers to ensure that all children's toys meet essential safety requirements before being placed on the market. The European Union system is one of presumed compliance. It involves manufacturers certifying that their product complies with the law by placing a 'Communauté Européenne' (CE) label on the toy. The European Union Directive establishes safety standards for all toys designed for use by children under 14 years of age.³⁸ It stipulates general principles and particular risks as criteria against which a toy's safety is measured. For example, toys and their parts and the packaging in which they are contained for retail sale must not present a risk of strangulation or suffocation.

The European Union model has been in force since 1990 and is reportedly working well.³⁹ **It is therefore recommended that the European Union product safety model should be evaluated by the Department of Trade and Industry to determine whether it would provide more effective protection for children from injury caused by defective or dangerous products than the current South African system.**

12.7 The sale of solvents and other harmful substances to children

Substance abuse, in particular of alcohol and illicit drugs, is recognised as one of the greatest health and social problems in South Africa today.⁴⁰ A South African National Drug Master Plan, approved by Cabinet in 1998, was developed as a response to drug abuse and its related harmful consequences. Youth are a priority focus of the plan. Objectives of the plan include provision of counselling, treatment and rehabilitation services for young people who are at risk of misuse or drug dependency. National policy is also being drafted for the Health Promoting Schools Initiative aimed at preventing and reducing consumption of tobacco products and other drugs by youth.⁴¹

38 Council Directive 88/378/EEC (OJ 1988 L187/1), articles 1, 3.

39 X Lewis 'The protection of consumers in European Community Law' (1992) 12 *Yearbook of European Law* 139.

40 **Children in 2001 - A Report on the State of the Nation's Children**, p. 83.

41 *Ibid.*

12.7.1 **Comparative review of systems in other countries**

In Ireland, the Child Care Act of 1991 makes it a criminal offence to sell solvents to a person under 18 years of age where there is reasonable cause to suspect that the person will inhale the product. Although it is not an offence to possess solvents, these products can be seized if inhaled by a person under 18.⁴²

Article 2 of the Decree of the Legislative Assembly of the Republic of El Salvador states that the following are considered to be solvents or inhalants: ‘all substances or chemical products which independently of their degree of purity, have effect on the central nervous system and other organic systems of the human body, capable of producing transformations be they of the nature to increase or diminish its functions or modifying the states of conscience and that the undue use of the same cause dependency or physical and psychic subjection’. Article 3 lists the substances and products to which this law is applicable. Article 11 of the Decree makes it obligatory to detail the active substances of the content and the degree of toxicity on the packing, tubes, and pots in which the listed substances and products are commercialized. It is also obligatory that the packing carries the following label mentioning: ‘It is a criminal offense to sell and provide this product to minors under 18 years of age’. In terms of article 12, it is prohibited to sell, procure or facilitate the acquisition by minors under 18 years of the listed substances and products and any contravention is considered as induction or help to the use of drugs.

12.7.2 **Comments received**

Question 8 of the research paper on street children⁴³ asked:

Should a comprehensive children’s statute prohibit the sale or supply of solvents to minors?

42 The information can be accessed at <http://www.mwhb.ie/drug9.htm> .

43 The research paper was prepared for the Commission by Mr Miles Ritchie. The workshop was held in Pretoria on 8 April 1999.

What other alternative measures can be taken to prevent the sale of solvents to minors? Would a prohibition be effective? Should it be contained in a comprehensive children's statute, or in other legislation (eg legislation administered by trade and industry)?

The majority of respondents were in favour of a prohibition on the sale and supply of solvents to minors. It was suggested that public awareness and education campaigns should be used to persuade shop owners not to sell solvents. Further, it was said that solvents should be stored behind counters and not be freely accessible.

The focus group participants suggested that a realistic age limit should be set for the buying of solvents. However, difficulties were foreseen with enforcement, e.g. intimidation and bribery of officials. Strategies suggested for reducing solvent abuse were education programmes, positive role models, recreational facilities, and positive use of peer pressure.

The Growing up in Cities research⁴⁴ explained that substance abuse by street children is not purely done for 'kicks' as is the case with many school children. The research shows that if a child's access to a particular harmful substance is closed by legislation, the child will simply seek something else more readily obtainable. The respondent recommended that the issue of substance abuse should be addressed with regard to children as a whole and not just street children. The respondent rightfully said that even though street children abuse substances openly, the immensely wide and more secret use of substances by all children should not be ignored.

SANCA, Pietermaritzburg submitted that since children as young as eight years are addicted to substances, comprehensive legislation is required which regulates every facet of their treatment such as schooling, parental responsibility, health, and state responsibility. SANCA, Pietermaritzburg said children abusing substances need legislative intervention to -

- formalise placements at places of safety;
- amend admission criteria at schools of industry and reform schools for children addicted to

44 Conducted under the auspices of Street-Wise South Africa.

drugs - they need admission first and then treatment can follow; and
 · establish a specialised court for children to finalise all matters relating to children.

12.7.3 Evaluation and recommendations

Introducing legislation to prevent the sale of certain harmful solvents (such as glue) to children is easy to propose and enact, but difficult, if not impossible, to enforce.⁴⁵ Some children, for instance, may legally own and drive motor vehicles at certain ages. To prohibit the sale of petrol, a potential dangerous inhalant, to such children seems illogical. To ban the manufacture and supply of all products containing scheduled substances⁴⁶ to children also seems impracticable. As these examples illustrate, the problem relates to the endless forms harmful substances can assume, the fact that numerous household goods such as paraffin do have the potential to be abused, and the ease with which most of these substances can be obtained. The problem is therefore not the sale of harmful substances, but their potential abuse, inter alia, by children. Given the practical difficulties in defining harmful substances, **the Commission therefore does not recommend the enactment of a provision in the new children's statute prohibiting the sale of harmful substances to children.**

It must be pointed out, however, that it is already a very serious criminal offence to manufacture and supply certain scheduled substances,⁴⁷ to use and possess any dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances,⁴⁸ or to deal in such substances,⁴⁹ in terms of the Drugs and Drug Trafficking Act 140 of 1992. Listed as 'undesirable dependence-producing substances' are cannabis (dagga) and methaqualone (which includes

45 See also Copeland P 'Recommendation: Ban on solvents to minors' Legal Resource Centre.

46 'Scheduled substances' as per Part II of Schedule 1 of the Drugs and Drug Trafficking Act 140 of 1992 include acetone, an ingredient of most nail polish removers.

47 Section 3 of the Drugs and Drug Trafficking Act 140 of 1992.

48 Section 4 of the Drugs and Drug Trafficking Act 140 of 1992. The substances are listed in the Schedules to the Act.

49 Section 5 of the Drugs and Drug Trafficking Act 140 of 1992. 'Deal in' is given a very wide definition in this Act. The definition is strengthened by presumptions. If, for instance, it is proved that an accused was found in possession in or on any school grounds or within a distance of 100 metres from the confines of such school grounds of any dangerous dependence-producing substance, it shall be presumed, until the contrary is proved, that the accused dealt in such substance.

Mandrax). Children found in possession of or dealing with these substance are liable on conviction to a payment of a fine or a period of imprisonment ranging from not more than five years to not more than 25 years.⁵⁰ **The Commission has no hesitation in condemning the sale of cannabis (dagga), Mandrax and other dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances, as defined in the Drugs and Drug Trafficking Act 140 of 1992, to children and adults alike, and to support the existing legislation in this regard. The Commission is further of the view that children who themselves deal in drugs should not expect any mercy from the criminal justice system.**

50 Section 17 of the Drugs and Drug Trafficking Act 140 of 1992.

However, it is realised that children are often dependent on drugs. In order to maintain their drug habits, such children often resort to prostitution, crime or dealing in drugs. In this regard, reference must be made to the Prevention and Treatment of Drug Dependency Act 20 of 1992. This Act provides for a procedure for bringing persons dependent on drugs before a magistrate.⁵¹ The magistrate can then commit a person dependent on drugs to a treatment centre after holding an enquiry.⁵² Such person shall then be detained in the treatment centre until being released on licence or discharged or transferred or returned to any other institution in terms of any provision of the Act.⁵³ The Act also provides for the transfer and retransfer of persons to and from children's homes, schools of industries or reform schools to treatment centres.⁵⁴ **The Commission regards the provisions of the Prevention and Treatment of Drug Dependency Act 20 of 1992, read with sections 255 and 296 of the Criminal Procedure Act 51 of 1977, as adequate in dealing with children dependent on drugs and who do require treatment. The Commission therefore does not recommend the inclusion of such provisions in the new children's statute.**

Legislation alone, however, is not enough to prevent the abuse of harmful substances, drugs and alcohol by children. Awareness campaigns which enlighten children, parents and the public about the danger of substances abuse should be initiated. Education on the dangers of the abuse of harmful substances, drugs and alcohol should be part of the school curriculum. **The Commission therefore supports the Health Promoting Schools Initiative and the National Drug Prevention Strategy.**

51 Section 21 of the Prevention and Treatment of Drug Dependency Act 20 of 1992. See also sections 255 and 296 of the Criminal Procedure Act 51 of 1977.

52 Section 22 of the Prevention and Treatment of Drug Dependency Act 20 of 1992.

53 Section 26 of the Prevention and Treatment of Drug Dependency Act 20 of 1992.

54 Section 30 and 31 of the Prevention and Treatment of Drug Dependency Act 20 of 1992.

12.8 Safety at places of entertainment

In some of the newer legislation, provisions are found which protect the safety of children at places of entertainment. One such example is section 271 of the Ireland Children Bill, 1999.⁵⁵ It reads as follows:

- (1) Where -
- (a) an entertainment for children or any entertainment at which the majority of the persons attending are children is provided,
 - (b) the number of children who attend the entertainment exceeds one hundred, and
 - (c) access to any part of the building in which children are accommodated is by stairs, escalators, lift or other mechanical means,

it shall be the duty of the person who provides the entertainment -

- (i) to station and keep stationed wherever necessary a sufficient number of adult attendants, properly instructed as to their duties, so as to prevent more children or other persons being admitted to any such part of the building than that part can properly accommodate,
 - (ii) to control the movement of the children and other persons admitted to any such part while entering and leaving, and
 - (iii) to take all other reasonable precautions for the safety of the children.
- (2) Where the occupier of a building permits, for hire or reward, the building to be used for the purpose of an entertainment, he or she shall take all reasonable steps to ensure that the provisions of this section are complied with.
- (3) If any person on whom any obligation is imposed by this section fails to fulfil it, he or she shall be liable, on summary conviction, in the case of a first offence, to a fine not exceeding £500 or imprisonment for a term not exceeding 6 months or both and, in the case of a second or subsequent offence, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both.
- (4) A member of the Garda Síochána may enter any building in which he or she has

55 See also section 19 of the Lesotho Children's Protection Act 6 of 1980.

reason to believe that such an entertainment as aforesaid is being, or is about to be, provided with a view to seeing whether the provisions of this section are complied with.

(5) This section shall not apply to any entertainment given in a private residence.

The provision in the Tasmania Children, Young Persons and their Families Act 1997 is aimed at something different. Section 93 of this Act reads as follows:

Public entertainment by children

93. (1) In this section –

"entertainment" includes any performance, exhibition, display, match or contest;

"public entertainment" means –

- (a) any entertainment to which persons are admitted on payment; and
- (b) any entertainment which is open to the public, whether admission to the entertainment is or is not procured by the payment of money or on any other condition; and
- (c) any entertainment or other activity, the whole or any part of which is, or is intended to be, seen or heard by the general public (whether in this State or elsewhere and whether at the time the entertainment or activity takes place or at some later time) on broadcast receivers or television receivers or by the projection of a film or video;

"restricted public entertainment", in relation to a child, means a public entertainment which, or which is of a class which, the Minister has declared to be restricted public entertainment in respect of children the same age as the child.

(2) The Minister may, by order, declare any public entertainment or class of public entertainment to be restricted public entertainment in respect of children who have not attained the age, not exceeding 14 years, specified in that order in relation to that public entertainment or class of public entertainment.

(3) Without limiting subsection (1), a class of public entertainment may be determined by reference to –

- (a) the nature of the entertainment; and
- (b) the purpose of the entertainment; and
- (c) the persons who carry on the entertainment; and
- (d) the place in which, and the days or times at or during which, the entertainment is carried on.

(4) A person must not procure, induce, permit, counsel or assist a child to take part in a public entertainment which, in relation to that child, is a restricted public entertainment, except where the Secretary has given written permission for the child to take part in the public entertainment.

Penalty: Fine not exceeding 15 penalty units or imprisonment for a term not exceeding 3 months.

(5) This section does not apply in relation to a public entertainment –

- (a) the net proceeds of which are devoted to the benefit of a school or to a charitable purpose; or
- (b) that takes place on any premises wholly or mainly used for the purpose of conducting religious services.

(6) An order under this section is a statutory rule within the meaning of the Rules Publication Act 1953.

Section 114 of the draft Namibia Children's Act is similar to the Ireland provision, with one addition. Sections 114(3) and (4) of the draft Act provide, in addition to the possibility of a fine and or imprisonment as punishment for violation of the section, that a court may cancel any license issued under any law for the operation of the premises for performances, entertainment, or events of a convicted person who has also been convicted within the last five years of an offence under this section. Such cancellation of a licence shall also disqualify the person in question from obtaining any licence for a place of entertainment for five years from the date of that person's latest conviction.

The Commission recommends that a provision similar to the Namibian provision be included in the new children's statute.

12.9 Media regulation⁵⁶

⁵⁶ See also the draft Position Paper on the Media Developmental & Diversity Agency (MDDA), November 2000 at www.gov.za/documents/mdda on the question of media ownership in South Africa.

Children are avid consumers of media and information services, including television, radio, magazines and the Internet. In Australia, for instance, children aged between 5 and 12 years watch an average of 17 hours 27 minutes of television each week.⁵⁷

Article 17 of the CRC requires States Parties to recognise '... the important function performed by the mass media...' and encourage the dissemination of information that is of social and cultural benefit to children. It also requires States Parties to protect children from harmful material.

12.9.1 **Television broadcasts**

57 Australian Law Reform Commission **Report No 84**, p. 230.

The stated object of the Broadcasting Act 4 of 1999 is to establish a broadcasting policy in South Africa and for that purpose to ‘cater for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled’.⁵⁸ Broadcasting is regulated by a system of licenses and programming is made subject to licence conditions determined by Independent Communications Authority of South Africa (ICASA).⁵⁹

Section 2 of the Independent Broadcasting Authority Act 153 of 1993 (the predecessor of the Independent Communications Authority of South Africa Act 13 of 2000) enjoins the Independent Broadcasting Authority (IBA) to ensure that broadcasting licensees adhere to a Code of Conduct acceptable to the Authority. In terms of section 56(1) of the 1993 Act, ‘all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting Services as set out in Schedule 1’. The provisions of that sub-section do not, however, apply to any broadcasting licensee ‘if he or she is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a Code of Conduct enforced by that body by means of its own disciplinary mechanism, and provided that such Code of Conduct and disciplinary mechanisms are acceptable to the Authority’.

The existing Code of Conduct for Broadcasting Services does not provide any specific guidance on children.⁶⁰ However, the Code of the Broadcasting Complaints Commission of South Africa does provide that the electronic media must ‘exercise due care and responsibility in the presentation of programmes where a large number of children are likely to be part of the audience’.⁶¹ Likewise, a proposed new code of conduct prepared by J Browde SC and F Kathree also provides guidance to broadcasters in this regard.⁶² Paragraph 18 of this proposed new code of conduct reads as follows:

58 Section 2(e) of the Broadcasting Act 4 of 1999.

59 ICASA was established by the Independent Communications Authority of South Africa Act 13 of 2000 to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society as is required by section 192 of the Constitution, 1996.

60 For the text see <http://iba.org.za/actsched.htm> .

61 Section 7.1.3 of the Code of the BCCSA.

62 For the full text see <http://iba.org.za/policy/pg.htm> “Proposed New Code of Conduct”.

CHILDREN

18. Broadcasters are reminded that children⁶³ ... embraces a wide range of maturity and sophistication, and in interpreting this Code it is legitimate for licensees to distinguish, if appropriate those approaching adulthood from a much younger, pre-teenage audience.
- 18.1 Broadcasters shall not broadcast material unsuitable for children at times when large numbers of children may be expected to be part of the audience.
- 18.2 Broadcasters shall exercise particular caution, as provided below, in the depiction of violence in children's programming.
- 18.3 In children's programming portrayed by real-life characters, violence shall, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.
- 18.4 Animated programming for children, while accepted as a stylised form of story-telling which can contain non-realistic violence, shall not have violence as its central theme, and shall not invite dangerous imitation.
- 18.5 Programming for children shall with due care deal with themes which could threaten their sense of security, when portraying, for example, domestic conflict, death, crime or the use of drugs.
- 18.6 Programming for children shall with due care deal with themes which could invite children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, use of matches, the use of dangerous household products as playthings, or other dangerous physical acts.
- 18.7 Programming for children shall not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve conflict between individuals.
- 18.8 Programming for children shall not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depictions of violence shall portray, in human terms, the consequences of that violence to its victims and its perpetrators.
- 18.9 Programming for children shall not contain frightening or otherwise excessive special effects not required by the story line.

Apart from the Code of Conduct for Broadcasters set by the Broadcasting Complaints Commission

63 Children are defined as persons under 16 years of age.

of South Africa, the South African Broadcasting Corporation (the SABC) adheres to the Code of Advertising Practice of the Advertising Standards Authority of SA. However, none of these applies specifically to children, although they both cover the general principle that children should be taken into consideration whenever a large number may reasonably be expected to be in the audience. The implication is that the SABC is not expected to cater specifically for children during adult viewing time - ie after the watershed of 21:00 during the week and 21:30 at weekends (which is an SABC rule, not an externally imposed one) - although some may be watching, of course. News bulletins are regarded as adult programmes too, even at 19:00, and the SABC is only expected to issue warnings of potentially disturbing visuals.

The SABC's mandate in terms of the Broadcasting Act 4 of 1999, and the obligations of its licensing conditions set by ICASA, do not impose any quota of children's programming. This is determined solely by the broadcaster. The provisions of the Films and Publications Act 65 of 1996 regarding the classification of films are, of course, adhered to.

There is no provision in any external code regarding warning symbols and age advisories, only that the broadcaster should warn viewers about content that is potentially damaging or disturbing to children. The systems of symbols, and the guidelines for those and for age advisories, have been introduced and are determined at the broadcaster's discretion. However, in an effort to arrive at some kind of standard - so that viewers can make informed choices - over the past year the SABC has had several workshops with the other broadcasters (M-Net and e-tv), which were attended by the BCCSA and representatives of the Films and Publications Board. These were initiated by the broadcasters, and have achieved a large measure of uniformity, except that M-Net is in a slightly different position owing to its decoder facility of parental blocking and an alternative language channel.⁶⁴

Even in the most commercial mature broadcasting market in the world - that of the United States of America - regulation of broadcasting has been increased in recent years. Obligations to screen a

64 As per Mrs Dorothy van Tonder, Manager: Audience Liaison, Corporate Affairs, SABC.

certain minimum quota of children's television programmes, and obligations to classify television programmes for their levels of violence, nudity and language, have been imposed on the private sector.

In general, the content of programs shown on Australian commercial television is co-regulated by the Australian Broadcasting Authority (ABA) and the broadcasters through industry codes of practice. However, regulation is stricter in regard to children's television. Each year, commercial television stations in Australia must broadcast a certain number of hours of program material specifically for children. This program material is classified by the ABA prior to broadcast under criteria set out in the children's television standards (CTS) established under the Broadcasting Services Act 1992 (Cth). The CTS apply only to these quota programs and are designed to ensure the availability of quality material that adds to children's experience and understanding.⁶⁵

65 Children are defined in the CTS as those under 14 years of age. Programmes classified "P" (pre-school children) can be shown between 7 am and 4.30 pm Monday to Friday. Programmes classified "C" (children) can be shown between 7 am and 8 am and between 4 pm and 8:30 pm Monday to Friday and 7 am to 8:30 pm on weekends and school holidays. Other suitable programmes such as those rated "G" (general) may also be shown at these times.

One of the objects of the Australian Broadcasting Services Act 1992 (Cth) is to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material that may be harmful to them. The Act does not define the term 'harm', but it is generally interpreted to mean an adverse psychological impact on children. For example, the CTS provide that no quota program may present images or events in a way that is unduly frightening or unduly distressing to children or present images that depict unsafe uses of a product or unsafe situations that may encourage children to engage in activities dangerous to them. The ABA is reviewing results of research on the television viewing behaviour of preschool aged children.⁶⁶

In addition to complying with the CTS, the Australian Broadcasting Services Act 1992 (Cth) requires the various sectors of the Australian electronic broadcasting industry, including commercial television stations, to develop a code of practice. In 1993 the ABA registered the Federation of Australian Commercial Television Stations code of practice that includes sections regulating the handling of complaints and the classification of programs.⁶⁷ The code of practice also requires all advertisements directed to children to 'exercise special care and judgement' and comply with the relevant CTS.

The national broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), have particular responsibilities under their respective enabling statutes. Both the ABC and SBS must develop codes of practice relating to programming matters and complaints handling and notify them to the ABA.⁶⁸ The main focus is on protecting children from

66 Australian Law Reform Commission **Report No 84**, p. 231.

67 Classified material must be broadcast in suitable time zones.

68 Section 10(1)(j) of the Special Broadcasting Service Act 1991 (Cth).

inappropriate material. For example, section 3.1 of the ABC code of practice states

[w]hile the real world should not be concealed from children, special care will be taken to ensure programs children are likely to watch unsupervised will not cause alarm or distress.⁶⁹

In Australia Pay TV is less regulated than commercial free-to-air television. All Pay TV operators have channels for child viewers but there is no legislative requirement for this and no regulation of when certain programs are shown. The Pay TV sector has submitted a code of practice for registration by the ABA.

69 Section 2.6 of the general SBS program code states that 'SBS recognises its responsibility to carry its multicultural message to young people and includes appropriate programming in schedules as and when funds permit': SBS Codes of Practice: Programming Policies SBS Sydney 1996, 19.

There is growing community concern, both in South Africa and internationally, about the effect of violence portrayed on television, video and computer on viewers' behaviour, particularly the effect on the behaviour and development of children.⁷⁰ In response to this concern, legislation in the USA and Canada requires that a v-chip (a technological blocking device) be installed in all new television sets over a certain size.⁷¹ The chip enables consumers to block the reception of programs in nominated ratings categories.⁷²

It is recommended that the Department of Trade and Industry, in consultation with the

70 See eg M Brown 'The portrayal of violence in the media: Impacts and implications for policy' (1996) (55) **Trends and Issues in Crime and Criminal Justice**; Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies **Report on the Portrayal of Violence in the Electronic Media** Senate Printing Unit Canberra 1997; W Josephson **Television Violence: A Review of the Effects on Children of Different Ages** Canadian Heritage Ottawa 1995.

71 Section 551(c) of the Telecommunications Act 1996 (US); (1996) 2 **International Research Forum on Television and Children** 4.

72 In Australia, a federal Ministerial Committee looking at the portrayal of violence in various forms of the electronic media recommended that v-chips be included in all new televisions sold in Australia. All the recommendations of the committee have been endorsed by federal Cabinet. Legislation to this effect has yet to be introduced: Australian Law Reform Commission **Report No 84**, p. 232.

Department of Communications and ICASA, investigate the possibility of introducing legislation to compel manufacturers to install technological blocking devices in all new television sets.

12.9.2 **Radio broadcasts**

The provisions of the Broadcasting Act 4 of 1999 also apply to radio. Like commercial television stations, commercial radio broadcasters are required to comply with a code of practice. In this regard, the Code of the Broadcasting Complaints Commission of South Africa provides that the electronic media must ‘exercise due care and responsibility in the presentation of programmes where a large number of children are likely to be part of the audience’.⁷³

The code developed by the Federation of Australian Radio Broadcasters, registered by the ABA in May 1993, does not include any provisions directed specifically at child listeners although it does prohibit the broadcasting of unsuitable programs such as those that incite violence or that present as desirable the misuse of drugs.

12.9.3 **On-line services**

The Internet is becoming a popular source of information and entertainment for children. Increasing numbers of schools are coming on-line and material on the Internet targeted at children is burgeoning. As with television, there is increasing community concern that young people are being exposed to pornographic and other inappropriate material⁷⁴ such as aggressive marketing on the

73 Section 7.1.3 of the Code of the BCCSA.

74 Such as how to make a bomb and where to buy the ingredients.

Internet. Placing or possessing material on the Internet that infringes existing legislation regulating, for example, racial vilification or defamation may be a criminal offence.⁷⁵ These laws are difficult to enforce as the originators of Internet material can rarely be identified.

75 See, for instance, sections 7, 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See also section 29 of the Films and Publications Act 65 of 1996.

The Films and Publications Act 65 of 1996⁷⁶ provides for the classification of certain films and publications through a mechanism known as the Film and Publication Board. Section 27 of the Films and Publications Act 65 of 1996 creates the offences of knowingly creating, producing, importing or being in possession of a publication or film which contains a visual presentation of child pornography.⁷⁷ The definition of 'film'⁷⁸ is broad enough to encompass visual presentations and images relayed on the Internet. However, given its specific focus and the nature of the classification system, it is clear that the Films and Publications Act 65 of 1996 does not, and cannot, specifically regulate Internet material, including advertisements, accessible to children.⁷⁹

Some commercially developed filtering programs that allow parents to restrict children's access to on-line services are available. The dilemma some parents face in this regard is that their children are far more computer literate than they themselves. This places the parents in an uncomfortable catch 22 situation: you need a child to install the computer programmes to prevent that child from accessing certain sites!

The Australian Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies suggested in 1997 that on-line service providers should establish procedures to ensure that prospective account holders are over the age of 18.⁸⁰ Shortly afterwards the Wood Royal Commission made a number of recommendations designed to prevent material exploitative of children from being placed on the Internet and to protect young Internet

76 As amended by the Films and Publications Amendment Act 34 of 1999.

77 'Child pornography' is defined in the Act to include '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 participation in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children'.

78 See the definition of 'film' in section 1 of the Act.

79 It is doubtful whether the Films and Publications Act 65 of 1996 can even effectively deal with child pornography. See in this regard the report of a national workshop on 'Combatting child pornography through effective law enforcement' held in Cape Town on 12 -14 May 2000, a paper prepared by Working Group 1 of the International Association of Prosecutors on 'Combatting use of the Internet to exploit children', 23 March 1999, etc. The Commission is also looking at combatting child pornography as part of its investigation into sexual offences (Project 107).

80 **Report on the Regulation of On-Line Services**, Part 3, recommendation 6 Canberra: Senate Printing Unit 1997.

users from other harmful material that may be available on-line.⁸¹ The Royal Commission recommended that support be given to the development of labelling technology that can be combined with appropriate software to limit the material that can be accessed by minors.⁸² It considered this necessary, in light of the sheer scale of the Internet and the inability to regulate effectively what is available on it.

81 **Final Report Vol. V: The Paedophile Inquiry** Sydney: NSW Government Printer 1997, chapter 16.

82 Recommendation 100.

In Australia, the 1996 investigation into the content of on-line services by the ABA recommended a self-regulatory framework for the Internet. The main features of this framework would be the development of codes of practice for service providers and the development of voluntary content labelling schemes to enable parents and providers to identify, material potentially harmful to children.⁸³ The review considered that the regulatory framework for on-line services should recognise that the majority of parents will accept responsibility for managing their children's use of on-line services in the home.

12.9.4 **Printed material**

As stated previously, the Films and Publications Act 65 of 1996, as amended, provides for the classification of certain publications.⁸⁴ Upon submission of a complaint or an application, a classification committee appointed in terms of the Act examines and considers the content of the publication and classifies the publication as XX, X18, R18 or F18.⁸⁵ The distribution or advertisement for distribution of publications so classified (or in conflict with conditions which may have been imposed) is a criminal offence.⁸⁶ For the publication of a publication classified as R18, for instance, the following conditions may be imposed:⁸⁷

- (1) that the publication shall only be distributed to persons older than 18 years of age, or older than a specified younger age and that the notice shall bear a distinct notice of such restriction;
- (2) that the publication shall only be distributed in a sealed and, if necessary, opaque wrapper which must also, if applicable, bear the notice referred to in (1) above.

83 Australian Law Reform Commission **Report No 84**, p. 234.

84 'Publication' is given a very broad meaning in the Act and includes '(i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet'.

85 Section 17(1) of the Films and Publications Act 65 of 1996. The classification is done with reference to the Schedules to the Act.

86 Section 25 of the Films and Publications Act 65 of 1996.

87 Schedule 4 to the Films and Publications Act 65 of 1996.

The Films and Publications Act 65 of 1996, as amended, has been criticised for not protecting children effectively, especially as regards to the use of the Internet.⁸⁸ Although the classification scheme provided for by the Act does provide some form of protection to children, the administration of the scheme is re-active as it is activated by the submission of a complaint or an application. By then it is usually too late to do anything about it.

The Commission will be considering all aspects relating to child pornography in its investigation into sexual offences. For present purposes, and as an interim measure, **the Commission urges the Department of Home Affairs, as the Department responsible for the administration of the Films and Publications Act 65 of 1996, to affect the amendments to the Act agreed upon at the national workshop held in Cape Town on 12 to 14 May 2000.** The Commission is convinced that these amendments will address some of the concerns relating to the effective law enforcement against child pornography in South Africa. **In addition the Commission recommends that when films or video material unsuitable for viewing by children or children of a certain age group are advertised, such advertisements (trailers) themselves must be age appropriate.**

12.9.5 Complaints and review mechanisms

⁸⁸ See the proceedings of a national workshop on the "Combatting child pornography through effective law enforcement" held in Cape Town, 12 - 14 May 2000.

Children tend not to make complaints about media services on their own behalf.⁸⁹

In Australia, the Broadcasting Services Act 1992 (Cth) lays down a general procedure for making complaints related to radio and television codes of practice that requires consumers to approach the service provider first. If the consumer is not satisfied with the provider's response or does not receive one within 60 days, he or she can refer the matter to the ABA for investigation.⁹⁰ Complaints about possible breaches of program standards, including CTS, can be made directly to the ABA. Any person aggrieved by a decision of the Classification Board about a publication can apply for review of that decision by the Classification Review Board.⁹¹ The application must be in writing and accompanied by the prescribed fee.⁹²

89 In 2000 the Broadcasting Complaints Commission of South Africa received 50 complaints which were perceived to have been harmful to children. All these complaints were lodge by adults. Three complaints by children (friends) were received regarding blasphemy on television: Registrar, Broadcasting Complaints Commission of South Africa (letter dated 26 April 2001).

90 Sections 148 and 149 of the Broadcasting Services Act, 1992 (Cth).

91 Section 42(1)(d) of the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

92 Section 43(1) of the Classification (Publications, Films and Computer Games) Act 1995 (Cth).

In its report,⁹³ the Australian Law Reform Commission points out that it cannot be assumed that the methods which work for adults in terms of formal complaints are also accessible to children. This requires imagination and sensitivity to the developmental stages of childhood in relation to various approaches which might enable children to participate in the processes of critical evaluation of the media. The Australian Law Reform Commission then recommends that information about media complaints mechanisms should be included in the national child consumer education strategies proposed at recommendation and that media service providers, the ABA and the Classification Board should ensure that their complaints procedures are appropriately modified for child consumers.⁹⁴

One of the principal objects of the Broadcasting Services Act 1992 (Cth) is to protect children from potentially harmful program material. As pointed out by the Australian Law Reform Commission,⁹⁵ for regulatory systems to be effective, regulators must be able to identify accurately and specifically the harm they seek to avoid. This can be difficult in the media industry because its products are open to diverse interpretations. Child consumers cover a wide range of ages and developmental stages. What is distressing to one child consumer may be amusing or informative to another. Neither the Convention on the Rights of the Child nor the federal legislation regulating the media offer guidance on the meaning of harm in this context. The Australian Law Reform Commission therefore recommends that international and Australian research on the effects of the media on children at different ages and stages of development should be comprehensively reviewed to determine more clearly what is harmful to the variety of child consumers. A summary of the results should be distributed to legislators, regulators, media providers and schools.⁹⁶ The Australian Law Reform Commission further recommends that national child consumer education strategies proposed should strongly encourage all States and Territories that have not already done so to include compulsory units on critical evaluation of the media, including advertising, in primary and

93 **Report No 84**, p. 235.

94 **Report No 84**, recommendations 61 and 62.

95 **Report No 84**, p. 235 - 236.

96 **Report No 84**, recommendation 63.

secondary school syllabuses.⁹⁷

12.10 **Advertising**

97 **Report No 84**, recommendation 64.

Children have high levels of consumption and considerable influence on family spending.⁹⁸ Advertising and marketing targets them directly from an increasingly young age. There is considerable community concern about the effects of advertising on children.

The Advertising Standards Authority of South Africa (ASA) has formulated specific standards in respect of children and safety for the advertising industry. In terms of this standard, advertisements addressed to or likely to influence children should not contain any statement or visual presentation which might result in harming them, mentally, morally, physically or emotionally (the general principle).⁹⁹ The aim of the general principle is that children should not be brought under the impression that it is acceptable and safe to be in certain surroundings, and that the depiction of a particular activity or circumstances in such a way would not have the likely effect that children would attempt to emulate it with the concomitant risk of physical, moral or mental harm or that the impression is created that it is acceptable to act in a certain manner.

The ASA standard gives as unacceptable examples where the above principle may apply the following :

An advertisement -

- which encourages children to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels or the like;
- where children appear to be unattended in street scenes unless they are obviously old enough to be responsible for their own safety, and where they are shown to be playing in the road unless it is clearly shown to be in a play area or other safe area, in street / traffic scene where they are seen to disobey traffic rules;
- where children are seen leaning dangerously out of windows or over bridges, or climbing dangerous cliffs;
- where small children are shown climbing up to take things from a table above their

98 See Shirley Fairall 'Who's the boss?', **Fair Lady** 25 April 2001, p. 70 - 73.

99 Section 14.2.1.1 of the Advertising Standard.

- heads or where medicines, disinfectants, antiseptics or caustic substances are shown within reach of children without close parental supervision, or where unsupervised children are shown using those products in any way;
- where children are being shown using matches or any gas, paraffin, petrol, mechanical or mains powered appliances in such a way which could lead to their suffering injury.

Another principle formulated by ASA provides that advertisements should not exploit the natural credulity of children or their lack of experience and should not strain their sense of loyalty.¹⁰⁰

Instances where this principle may apply are, inter alia, the following:

- for a commercial product or service which contains any appeal to children which suggests in any way that unless the children themselves buy or encourage other people to buy the product or service, they will be failing in some duty or lacking in loyalty toward some person or organisation, whether that person or organisation is the one making the appeal or not;
- which leads children to believe that if they do not own the product advertised they will be inferior in some way to other children or that they are liable to be held in contempt or ridicule for not owning it;
- offering a free gift, where the gift is not 'free' in the literal sense, i.e. where it is available without a consideration; if a condition applies, i.e. 'Free with ...'. This fact should be stated as well as any other conditions that will apply if the free gift is not deliverable immediately; if the main conditions, e.g. the purchase of something, is met. The gift should be portrayed in such a manner that its size can be determined by showing it in relation to some common object.

Given these standards, and provided the advertising industry continues to adhere to them, the Commission sees no need to divert from what is basically a self-regulatory scheme. Therefore

100 Section 14.3.1 of the Advertising Standard.

we do not recommend any legislative intervention in this regard.

Some research has been done on the effects of advertising on children. In Australia, the Federal Bureau of Consumer Affairs has reported that children below the age of five years are unable to discriminate consistently between programs and advertisements, especially when they are similar in style.¹⁰¹ Further, children below seven or eight years are said to possess little or no ability to recognise the persuasive intent of television advertising.¹⁰² However, there is continuing debate about the level of regulation needed to protect children at different ages and stages of development from inappropriate marketing techniques.

In Australia no advertisements may be broadcast during nominated pre-schoolers' viewing periods.¹⁰³ At other times, broadcasters are required to ensure that commercials and sponsorship announcements are clearly distinguishable from programs to child viewers.¹⁰⁴ In addition, stations may not broadcast advertisements designed to put undue pressure on children to ask their parents or other people to purchase an advertised product or service.¹⁰⁵ Advertisements may not state or imply that a product makes children who own it superior to their peers or that a person who buys an advertised product for a child is more generous than a person who does not.¹⁰⁶

Concern about the potentially harmful effects of advertising on children is not restricted to the Australian community. Tight controls on advertising during television programs directed at children have been introduced in a number of overseas jurisdictions. In Quebec advertisements directed at children and adults can only be broadcast when the 2 to 11 year old age group represents less than

101 Australian Law Reform Commission **Report No 84**, p. 237.

102 See also S Frith & B Biggins (eds) **Children and Advertising: A Fair Game?** Sydney: New College Institute for Values Research, University of NSW, 1994.

103 CTS 13(2): ABA **Australian Children's Television** Sydney ABA 1997, 29.

104 CTS 15: ABA **Australian Children's Television** Sydney ABA 1997, 29.

105 CTS 18(1): ABA **Australian Children's Television** Sydney ABA 1997, 29.

106 CTS 18(2): ABA **Australian Children's Television** Sydney ABA 1997, 29. The Federation of Australian Commercial Television Stations' Code of Practice also sets out guidelines for advertising during children's programmes.

15% of the audience. Advertisement directed exclusively at children may only be broadcast during programs where the audience is less than 5% children. This ensures that children have adult supervision during peak times of advertising to children.

Sweden, Norway, Greece, Germany, Belgium, France and Austria ban advertising during children's TV programs.¹⁰⁷ Danish regulation of advertising directed at children is relatively similar to that in Australia and provides, for example, that advertisements must not contain a direct appeal to children to persuade others to buy the product being promoted and must not give the children the impression that they will have physical or psychological advantages if they buy the product.¹⁰⁸ In addition, children under the age of 14 cannot give recommendations or testimonies about any product or service.¹⁰⁹

Research on the effects of advertising on children at different ages and stages of development should be reviewed to enable the preparation of guidelines for all advertisers to protect children at different ages and stages of development from harm. The review should look at international material in the area such as the Scandinavian reports that lead to the banning of advertising during children's television programs.¹¹⁰ It should consider what effect exposure to advertising has on young people who are introduced to it at a later age. The advertising guidelines should include information on what constitutes misleading practices in relation to young media consumers. The following questions should also be considered during the course of the research review.

- To what extent do 'misleading practices' and all child directed advertising impact on the buying habits of child consumers?

107 Australian Law Reform Commission **Report No 84**, p. 239.

108 Sections 16 and 18 of the Radio and Television Act 1992 (Denmark).

109 Section 23(2) of the Radio and Television Act 1992 (Denmark).

110 Other documents of interest would be the guidelines on child friendly advertising produced by the Consumentenbond in the Netherlands as well as its report on the success of unconventional methods of advertising children's toys, food and entertainment.

- What degree of regulation is required?
- How successful are current overseas attempts at regulation?
- Do 'safe' forms of advertising exist which can be used to promote children's products?

The Commission therefore recommends, as did the Australian Law Reform Commission,¹¹¹ that research on the effects of advertising on children at different ages and stages of development should be undertaken to enable the preparation of best practice guidelines for all advertisers to protect children at different ages and stages of development from harm. The Departments of Communications, Home Affairs, Trade and Industry, the Independent Communications Authority of South Africa and the Advertising Standards Authority of South Africa (ASA) should conduct this review in consultation with the relevant stakeholders and community groups, provide the results to the ASA and assist ASA to develop and refine appropriate best practice standards for distribution to advertisers.

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111 Recommendation 66, **Report No 84**.