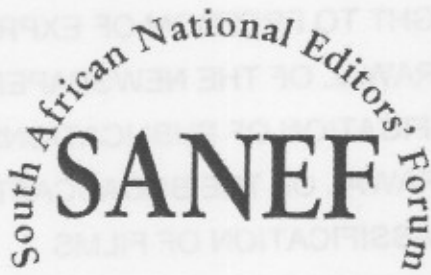


TABLE OF CONTENTS

1	INTRODUCTION	1
2	OBJECTS OF THE BILL	2
3	THE RIGHT TO FREEDOM OF EXPRESSION	3
4	WITHDRAWAL OF THE BILL FOR EXEMPTION AND THE	4
5	CLASSIFICATION OF FILMS	5
6	WITHDRAWAL OF THE BILL FOR EXEMPTION AND	6
7	THE CLASSIFICATION OF FILMS	7
8	THE UNCONSTITUTIONAL EFFECTS OF THE BILL ON	8
9	FREEDOM OF EXPRESSION	9
10	REDUCTION IN PROCEDURAL RIGHTS AND SAFEGUARDS	10
11	THE LIMITATION OF FUNDAMENTAL RIGHTS	11
12	CONCLUSION	12



SUBMISSION

BY

THE SOUTH AFRICAN NATIONAL

EDITORS FORUM

ON

THE FILMS AND PUBLICATIONS

AMENDMENT BILL

[B27-2006]

TABLE OF CONTENTS

1	INTRODUCTION	1
2	OBJECTS OF THE BILL	2
3	THE RIGHT TO FREEDOM OF EXPRESSION	4
4	WITHDRAWAL OF THE NEWSPAPER EXEMPTION AND THE CLASSIFICATION OF PUBLICATIONS	7
5	WITHDRAWAL OF THE BROADCASTING EXEMPTION AND THE CLASSIFICATION OF FILMS	15
6	THE UNCONSTITUTIONAL EFFECTS OF THE BILL ON FREEDOM OF EXPRESSION	23
7	REDUCTION IN PROCEDURAL RIGHTS AND SAFEGUARDS	33
8	THE LIMITATION OF FUNDAMENTAL RIGHTS	36
9	CONCLUSION	38

1 INTRODUCTION

- 1.1 These submissions are presented to the Parliamentary Portfolio Committee appointed to consider the Films and Publications Amendment Bill [B27-2006] ("Bill").
- 1.2 The submissions are presented on behalf of the South African National Editor's Forum ("SANEF") which is a voluntary forum comprised of South Africa's most senior print, magazine, broadcast and other electronic media editors, journalists and journalism trainers. SANEF would like to thank the appointed Parliamentary Portfolio Committee for giving it the opportunity to make this submission and records that it would like to also make an oral submission on the Bill when public hearings are held by that committee in respect of the Bill. SANEF and its members are committed to a programme of action to defend and promote media freedom and independence. To this end, SANEF is founded on the belief and understanding that –
 - 1.2.1 public and media scrutiny of the exercise of political and economic power is essential;
 - 1.2.2 the law related to the operation of the media should be consistent with South Africa's Bill of Rights in its protection of freedom of expression;
 - 1.2.3 journalists and media owners have a duty to work to the highest professional standards and ethics;
 - 1.2.4 journalists and media educators embrace a learning culture by committing themselves to ongoing education and training.
- 1.3 Whilst SANEF is supportive of legislative endeavours to protect children from exposure to child pornography, SANEF has serious concerns that certain provisions of the Bill, unjustifiably infringe the right to freedom of expression protected by section 16 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). In SANEF's view several provisions of the Bill impact negatively on the right to freedom of expression. They are deeply at odds with the principle of democratic tolerance which extends protection to opinions and ideas even under circumstances where the same may be

considered distasteful or even offensive. Furthermore, the Bill interferes with editorial independence in seeking to silence certain forms of protected speech in the pursuit of its objects and therefore constitutes a dangerous step towards sanitising public discourse which in effect equates to statutory censorship.

- 1.4 SANEF believes that those provisions in the Bill which infringe the fundamental right to freedom of expression should not form part of the final legislative package enacted by Parliament. SANEF has already made a submission to the Department of Home Affairs on the first draft of the Bill which submission must be read in conjunction with this submission, which aims to both supplement SANEF's initial submission and to focus on the legality and constitutionality of the Bill in so far as the same impacts on the right to freedom of expression. A copy of SANEF's submission to the Department of Home Affairs is attached marked Annexe "A".

2 OBJECTS OF THE BILL

- 2.1 Paragraph 2 of the memorandum on the objects of the Bill records that its objects include –

"... to ensure that all publications, films and interactive computer games distributed in the Republic, regardless as to the medium or format of such distribution, would be subject to the same principles and guidelines to serve the core objective of protecting children from potentially disturbing, harmful and age inappropriate materials in publications, films and interactive computer games, mobile cellular telephones and on the Internet since child pornography exists wherever there is a computer, a modem for access to the Internet and a mobile cellular telephone. The Amendment Bill further seeks to bring broadcasters of films within the scope of the Act."

- 2.2 Section 2 of the Bill gives effect to this legislative objective and provides that -

"s2 The objects of this Act shall be to -

- (a) regulate the creation, production, possession, broadcasting and distribution of certain publications, films and interactive computer games by means of classification to protect children from exposure to disturbing, harmful or age-inappropriate materials and*

against sexual exploitation or degradation in publications, films, interactive games, on mobile cellular telephones and on the Internet; and

(b) make the use of children in pornographic publications, films, interactive computer games, on mobile cellular telephones or on the Internet, punishable."

2.3 However, the Bill strays well beyond this limited objective by requiring that newspapers published by members of the Newspaper Press Union of South Africa and broadcasters licensed under the Broadcasting Authority Act 153 of 1993 ("IPA Act") be made subject to the classification procedures detailed in the Bill through the repeal of the exemptions in sections 22(3) and 23(3) of the Films and Publications Act 65 of 1996 ("Films and Publications Act"). The classification procedures which newspapers and broadcasters will now be subject to are further not limited to child pornography or child abuse but extend to expression which is protected under section 16(1) of the Constitution.

2.4 The classification criteria contained in sections 16 and 18 of the Bill are frequently either under-inclusive or over-inclusive or vague with the result that expression on issues of public interest such as child abuse, rape and indecent assault, declarations of war, propaganda for war, violent demonstrations, political unrest or racial incidents will be subject to legislative approval of such expression, an approach which is deeply at odds with a meaningful commitment to freedom of expression. The effect of this approach is that whilst the Constitution does not establish a hierarchy of rights the balance struck between the rights of children¹, on the one hand, and the freedom of

¹ Section 28 of the Constitution sets out a range of rights which provide protection for children. These rights are in addition to the protections afforded to children under other provisions in the Bill of Rights. Section 28 provides that – "Every child has the right –

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or to provide services that –
 - (i) are inappropriate for a person that child's age; or

expression on the other, has been unjustifiably struck in favour of the rights of children and at the expense of freedom of expression.

3 THE RIGHT TO FREEDOM OF EXPRESSION

3.1 Section 16 of the Constitution provides -

"S16(1)-Everyone has the right to freedom of expression, which includes-

- (a) *freedom of the press and other media;*
- (b) *freedom to receive or impart information or ideas;*
- (c) *freedom of artistic creativity; and*
- (d) *academic freedom and freedom of scientific research.*

(2) *The right in subsection (1) does not extend to-*

- (a) *propaganda for war;*
- (b) *incitement of eminent violence;*
- (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitute incitement to cause harm."*

3.2 The importance of freedom of expression is based on several complimentary rationales. The first of these rationales is that the democratic imperative and the common good is best served by the free flow of information and therefore that it is not only a vital function but also a duty of the press and other media to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. This value underpinning free expression was

(ii) *place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development;*

(g) *not to be detained except as a measure of last resort in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age;*

(h) *to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) *A child's best interests are of paramount importance in every matter concerning the child.*

(3) *In this section 'child' means a person under the age of 18 years."*

endorsed by the Supreme Court of Appeal in *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207 J -1208C -

"The freedom of expression is equally important. Professor van der Westhuizen (in Van Wyk et al: Rights and Constitutionalism: The New South African Legal Order at 264) describes it as essential in any attempt to build a democratic social and political order. Elsewhere it has been referred to as 'the matrix, the indispensable condition of nearly every other form of freedom' (Palko v State of Connecticut 302 US 319 (1937) at 327); and in the majority judgement of the European Court of Human Rights in Handyside v United Kingdom (1976) 1 EHRR 737 at 754 it was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this was not an overstatement appears from McIntyre J's reminder in Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Limited (1987) 33 DLR (4th) 174 (SCC) at 183 that 'freedom of expression... is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of Western society.' "

- 3.3 Secondly, the rationale for free expression is based on considerations of moral responsibility, autonomy and dignity. This rationale was articulated and referred to in the judgement of Cameron J in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 1196 (SCA) at 608G -609G:

"In the South African Constitution, the guaranteed right to freedom of speech and expression expressly includes freedom of press and other media (as well as freedom of artistic creativity and scientific research); but it is by no means limited to them. The rationale for this wide freedom must clearly extend beyond instrumental justifications which depend on whether the freedom to speak and communicate advance the democratic process. As Ronald Dworkin, the legal philosopher and activist, states ('The Coming Battles over Free Speech' *New York Review of Books* (11 June 1992) 55 at 56), there is a second, further justification for such an encompassing protection of free speech:

'the second kind of justification of free speech supposes that freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.' "

- 3.4 The third value underpinning the right to freedom of expression is that it is only in an environment where competing ideas are freely aired, debated and challenged that the truth can be attained and that the restriction of dissident opinion impoverishes the search for truth. In its first judgement, dealing with freedom of expression, a unanimous Constitutional Court, articulated the three values underlying the guarantee of freedom of expression in the following way -²

"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."³

- 3.5 The Constitutional Court went on to acknowledge that the right to freedom of expression was fundamental to the exercise of other rights and was closely related to freedom of religion, belief and opinion, the right to dignity, the right to security in and control over the body, the right to freedom of association, the right to vote and to stand for public office and the right to assembly -

"These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether

² Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman, Constitutional Law of South Africa (Juta & Co), 1996.

individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."

- 3.6 The Constitution provides for a two stage analysis in determining whether there has been an infringement of a constitutional right. The first stage is to inquire as to whether the Bill infringes any of the fundamental rights contained in the Bill of Rights. If so, then, the second stage of the inquiry entails an analysis as to whether the infringement is justified under the limitation provided for in section 36 of the Constitution. It will thus be necessary for such an inquiry to be undertaken and what follows below is both an analysis of the Bill in the context of the rights contained in the Bill of Rights and the limitation contained in section 36 of the Constitution.

4 WITHDRAWAL OF THE NEWSPAPER EXEMPTION AND THE CLASSIFICATION OF PUBLICATIONS

- 4.1 Section 22 (3) of the Films and Publications Act is to be repealed in terms of section 21(c) of the Bill. Section 22 (3) of the Films and Publications Act provides –

"A newspaper published, and a poster of a newspaper issued as an advertisement of any newspaper, by a publisher who is a member of the Newspaper Press Union of South Africa, shall not be subject to the provisions of this Act."

- 4.2 Section 22 (3) was inserted in the Films and Publications Act to give effect to an agreement of more than forty years standing between the print media and the government of the day that in return for the exemption the print media industry would adhere to a system of self-regulation. A system of self-regulation has been vigorously pursued by the print media industry and in its present form the Press Ombudsman has jurisdiction over more than 640 newspapers and magazines. There is a press appeals panel which is chaired

³ South African National Defence Union v Minister of Defence & Ano 1999 (4) SA 469 (CC);

by the retired Judge President of the Cape High Court, Mr Justice King. He sits on the appeals panel with members of the public who have knowledge and experience of relevant facets of South African society as well as with representatives of the press. In terms of the Code of the Press Ombudsman, the Press Ombudsman may order a newspaper to correct mistakes and apologise for them in that newspaper. The mechanism has been effective and member newspapers have abided by the rulings of the Ombudsman conscientiously. The repeal of this section amounts to a breach of the undertaking which the newspapers have with government and there is no justifiable basis in light of the limited objectives of the Bill for this repeal.

- 4.3 As a result of the withdrawal, all publications (as defined in section 1 of the Films and Publications Act), including newspapers and online publications will now be subject to the classification procedures and criteria detailed in section 16 of the Bill and any owner of a publication who fails to comply with the provisions of section 16 will further be subject to the criminal sanctions contained in sections 24A and 24B of the Bill. Not only do the provisions in question endeavour to regulate expression on the basis of content, but they also constitute a chilling effect upon free expression, a serious threat to editorial independence and a step along a slippery slope which is unjustifiable in principle and incapable of proper application in practice.
- 4.4 Sections 16(1) and 16(2) of the Bill deal with the two ways in which publications will be subject to classification. In terms of section 16(1) "*any person may request, in the prescribed manner, that a publication which is to be or is being distributed in the Republic be classified in terms of this section*". This section is similar to the provisions of section 16(1) of the Films and Publications Act which allowed for classification to take place pursuant the lodgement of a complaint with the Films and Publications Board ("Board").
- 4.5 Section 16(2) makes it mandatory for all publications which contain visual presentations, descriptions or representations of the items listed in section 16(2)(a) to (d) to be submitted in the prescribed manner for classification and provides as follows –

S16(2) *"Any person who, for distribution or exhibition in the Republic, creates, produces, publishes or advertises any publication⁴ that contains visual presentations, descriptions or representations of or amounting to—*

- (a) *sexual conduct;*⁵
- (b) *propaganda for war;*
- (c) *incitement to imminent violence; or*
- (d) *the advocacy of hatred based on any identifiable group characteristic,*

shall submit in the prescribed manner such publication for examination and classification to the classification office before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.

- 4.6 The categories subject to classification are far wider than the categories subject to classification under sections 16(4) and there is no exemption provision as provided for in sections 16(4)(a)(ii); 16(4)(b)(iii) or 16(4)(c)(iii) of the Bill. In addition, the provisions of section 16 (2)(d) are overbroad in application and travel far beyond the narrow and carefully circumscribed exclusion in section 16 (2)(c) of the Constitution. The reference to *"sexual conduct"* in section 16 (2)(a) of the Bill will result in the print and online media having to submit all news reports which contain descriptions of sexual assault, indecent assault and rape to the classification committee prior to publication. If one has further regard to the definition of *"sexual conduct"*, all articles on sexual intercourse regardless as to whether they are educational, artistic or literary works will also have to be submitted to the classification committee.

⁴ Which includes a newspaper in terms of section 1 of the Act.

⁵ "Sexual conduct" is defined as follows in section 1 of the Act- *to include (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."*

The same difficulty will arise in respect of any news report, photograph or article dealing with or depicting declarations of war, violent demonstrations, violent incidents or civil unrest due to the requirement that descriptions or visual presentations of "*propaganda for war*" or "*incitement to imminent violence*" must be submitted to the publication committee for classification. The effect of these provisions is that expression deserving of constitutional protection will now be subject to governmental approval contrary to the very tenants of freedom of expression.

4.7 The reference to "*the advocacy of hatred based on any identifiable group characteristic*" in section 16 (2)(d) is also contrary to and far wider than the wording in section 16 (2)(c) of the Constitution which excludes protection for expression which constitutes "*advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*" By widening hate speech to hatred based on "*any identifiable group characteristic*" and by omitting the requirement that such speech must constitute incitement to cause harm, the Bill extends its reach to speech which is deserving of constitutional protection thereby rendering this section in the Bill constitutionally invalid.

4.8 Section 16(4) of the Bill details the classification criteria which will be applicable to publications once they have been submitted to the classification committee pursuant to sections 16(1) and (2) of the Bill. Section 16(4) reads as follows –

S16(4) "*The classification committee shall, in the prescribed manner, examine a publication referred to it and shall —*

Classify the publication -

- (a) *as a "refused classification" if the publication contains visual presentations, descriptions or representation of—*
 - (i) *child abuse, propaganda for war or incitement to imminent violence; or*
 - (ii) *the advocacy of hatred based on any identifiable group or characteristic, unless, judged within context, the publication is a bona fide documentary or is a*

publication of scientific and literary merit on a matter of public interest;

Classify the publication as

- (b) *XX if it contains visual presentations or graphic descriptions or representations of—*
- (i) *explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;*
 - (ii) *conduct or an act which is degrading of human beings; or*
 - (iii) *conduct or an act which constitutes incitement to or encourages or promotes harmful behaviour,*
- unless, judged within context, the publication is a bona fide documentary or is a publication of scientific, literary or artistic merit, in which event the publication shall be classified X18 or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials;*

Classify the publication

- (c) *as X18 if it contains visual presentations or descriptions or representations of—*
- (i) *explicit sexual conduct,*
 - (ii) *the explicit infliction of sexual or domestic violence, or*
 - (iii) *the explicit effects of extreme violence,*
- unless, judged within context, the publication is a bona fide documentary or is a publication of scientific, literary or artistic merit, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials; or*
- (d) *if the publication contains visual presentations, descriptions or representations which may be disturbing or harmful to or age-*

inappropriate for, children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age-restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.

- 4.9 There is no reason for a 'refusal' classification category in addition to an XX classification category as both categories amount to an outright prohibition in respect of publication. This unnecessary duplication only serves to further extend the grounds upon which publication will be prohibited.
- 4.10 The vague and overbroad language used in section 16(4) is also problematic. In particular, the reference to "*child abuse*" in section 16(4)(a)(i) will lead to uncertainty on whether newspapers, online publications and other publications will be able to report on instances of child abuse⁶ which are in the public interest. This is due to the fact that any publication which contains mere descriptions of "*child abuse*" will be subject to a 'refusal' classification in terms of section 16(4)(a)(i) of the Bill. Similarly, the XX classification will apply to expression which contains mere descriptions of "*explicit sexual conduct which shows disrespect for the right to human dignity of any person*"⁷, "*conduct or an act which is degrading of human beings*"⁸ and "*conduct or an act which constitutes incitement to or encourages or promotes harmful behaviour*".⁹ These classification criteria are overbroad and vague in application thereby rendering these provisions unreasonable and impractical to apply and accordingly constitutionally invalid. The prohibition of expression which contains visual representations, descriptions or representations of "*the advocacy of hatred based on any identifiable group characteristic*"¹⁰ in section 16(4)(a)(ii) is wider than the definition of hate speech provided for under section 16(2)(c) of the Constitution and will also not pass constitutional muster.

⁶ "*Child abuse*" is defined in section 1 of the Bill as - "... the use of a child in the creation, or production of child pornography or for sexual exploitation and includes exhibiting or showing images of sexual conduct to a child or exposing or encouraging a child to witness sexual conduct;"

⁷ Section 16 (4) (b)(i) of the Bill.

⁸ Section 16 (4) (b)(ii) of the Bill.

⁹ Section 16 (4) (b)(iii) of the Bill.

¹⁰ Section 16 (4) (a)(ii) of the Bill.

- 4.11 The classification of publications as being X18, if they contain visual representations, descriptions or representations of explicit sexual conduct, the explicit infliction of domestic violence and the explicit effects of extreme violence will create substantial uncertainty as to whether newspapers and other forms of publication media will be able to report on incidents of rape, indecent assault, domestic violence, the effects of crime or on incidents of violence which are in the public interest without the required warnings provided for in section 18A(1)(b) of the Bill. It will also be extremely difficult for the media to determine whether content which is in the public interest and which constitute genuine news items will be "*disturbing or harmful to, or age-inappropriate for, children*" due to the overbroad and vague nature of the language used in section 16(4)(d) of the Bill. On this basis these provisions in the Bill are also unlikely to pass constitutional muster.
- 4.12 The grounds detailed in section 16(4)(a)(ii) and 16(4)(b)(iii) which must be referred to by the classification committee when considering whether to classify a publication as XX or X18 are also limited in application and are far narrower than the protections contained in section 16(1) of the Constitution and in the to be repealed exemptions contained in section 29(4) to the Films and Publications Act. Of particular concern is that section 16(4)(a)(ii) does not give effect to the protections afforded to "*artistic creativity*" or to academic expression under section 16(1) of the Constitution. There is also no attempt to incorporate in this provision the exemptions for literary, artistic or dramatic works as provided for in Schedules 5 and 9 of the Films and Publications Act. Nor is there any attempt in the Bill to limit the application and ambit of sections 16(4)(a)(ii), 16(4)(b)(iii), 24A and 24B by excluding from their ambit the exemptions contained in the soon to be repealed section 29 and Schedule 10 of the Films and Publications Act, pertaining to -
- 4.12.1 a *bona fide* scientific, documentary, dramatic, artistic, literary or religious publication, film, entertainment or play;
- 4.12.2 a publication, film, entertainment or play which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

- 4.12.3 a publication, film, entertainment or play which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.
- 4.13 Whilst section 16(4) which deals with the basis for classifying publications provides for limited grounds for exemption, section 16(2) of the Bill which imposes a general obligation to submit publications for classification is absent any grounds for exemption. The effect of this provision is to ensure that all publications are made subject to the classification procedures set out in section 16 of the Bill. The exclusion of any reference to context when enquiring as to whether a publication should or should not be submitted in terms of section 16(2) is also contrary to the pronouncements of the Constitutional Court in the case of *De Reuck v Director of Prosecutions and Others* 2004 (1) SA 406 (CC) wherein it was stated that it was impossible to determine whether content should be subject to classification without reference to context and that the Films and Publications Act "*should be interpreted to allow consideration of such contextual evidence where it is relevant*".¹¹
- 4.14 It is also of little comfort that the print or online media may apply for an exemption in terms of section 21(1) of the Bill. Firstly, the exemption in section 21(1) of the Bill is subject to the Board's discretion that *bona fide* purposes will be served by such an exemption and secondly, limited to an exemption from sections 24A and 24B of the Bill with the effect that whilst the print and online media will not be subject to the criminal sanctions in sections 24A and 24B of the Bill, they will still have to comply with the classification procedures in section 16. Even where an exemption is granted, the print and online media will still be subject to the continual threat that the exemption may be withdrawn by the Board in terms of section 21(2) of the Bill. This in itself will probably result in self-censorship and in a reluctance to publish views or opinions of public interest which may be unpalatable or offensive to government.

¹¹ *De Reuck v Director of Prosecutions and Others* 2005 JDR 1230 (CCT) at paragraph 35 on page 20.

5 WITHDRAWAL OF THE BROADCASTING EXEMPTION AND THE CLASSIFICATION OF FILMS

5.1 Section 22 (c) of the Bill proposes to withdraw section 23(3) of the Films and Publications Act in its entirety. Section 23(3) provides as follows -

"A person who is or is deemed to be the holder of a broadcasting licence in terms of the Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993) and who is subject to section 56 (1) or (2) of that Act, shall be exempt from the duty to apply for a classification of a film and, subject to section 26 (4), shall in relation to the exhibition of a film not be subject to any classification made by the Board or any condition imposed in relation to the exhibition of the film by the Board under section 18(4)(b)."

5.2 Section 23(3) of the Films and Publications Act gives effect to the requirement in section 192 of the Constitution that broadcasting must be regulated independently and in the public interest so as to ensure fairness and a diversity of views broadly representing South African Society¹². Section 192 appears in Chapter 9 of the Constitution, which deals with state institutions supporting constitutional democracy. Section 181 of the Constitution to the extent relevant provides –

"s181 (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their duties without fear, favour or prejudice.

(3) Other organs of state¹³, through legislative and other measures, must assist and protect these institutions to ensure the

¹² Section 192 of the Constitution provides -"National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

¹³ Section 239 of the Constitution defines an organ of state as -

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution -

independence, impartiality, dignity and effectiveness of these institutions.

(4) *No person or organ of state may interfere with the functioning of these institutions."*

5.3 In accordance with the requirements of the Constitution, broadcasting is regulated by the Independent Communications Authority of South Africa ("ICASA"). The independence of ICASA is emphasised in section 3 of the Independent Communications Authority of South Africa Act 13 of 2000 ("ICASA Act"), the relevant provisions of which provide –

"s3 (3) The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice;

(4) The Authority must function without any political or commercial interference."

5.4 The now repealed IBA Act granted ICASA the power in terms of its constitutional mandate to monitor compliance by broadcasting licensees with their licences and with a code of conduct for broadcasting services prescribed by ICASA¹⁴. In addition, section 56 of the IBA Act provides for broadcasters to be subject to self-regulation provided that the system of self-regulation, including the code of conduct and the disciplinary mechanisms are acceptable to ICASA.

5.5 The Broadcasting Complaints Commission ("BCCSA) was set up in 1993 by the National Association of Broadcasters in terms of section 56(2) of the IBA

-
- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

¹⁴ Section 62(1) of the Independent Broadcasting Authority Act 153 of 1993.

Act as an independent self-regulatory body responsible for the adjudication and mediation of complaints against a broadcaster who has signed the BCCSA's code of conduct. The BCCSA is entirely independent from the National Association of Broadcasters and from its members (i.e. broadcasters). Where a broadcaster has not signed the BCCSA's code of conduct, any complaints lodged against that broadcaster will be adjudicated and determined by ICASA.

- 5.6 Similar provisions to those in the IBA Act are to be found in the Electronic Communications Act 36 of 2005 ("ECA").¹⁵ In particular, section 54 of the ECA provides for a code of conduct to be adhered to by all broadcasting service licensees. In this regard, section 54(1) requires ICASA to review all existing regulations, and prescribe regulations setting out a code of conduct for broadcasting service licensees. This code of conduct must be adhered to by all broadcasting licensees except where a broadcasting service licensee is a member of a body which has proved to the satisfaction of ICASA that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms and both the code and disciplinary mechanisms are acceptable to ICASA.¹⁶
- 5.7 The removal of the exemption in section 23(3) of the Films and Publications Act has the effect that broadcasters will have to comply with the provisions of section 18 of the Bill which regulates the circumstances under and the manner in which films must be submitted to the classification office for pre-broadcast classification. Any broadcaster who fails to comply with the provisions of that section will be subject to the criminal sanctions contained in sections 24A and 24B of the Bill. By requiring that broadcasters be made subject to regulation by a government body other than ICASA, the Bill seriously undermines and interferes with the constitutional requirement that broadcasting be regulated independently and in the public interest. Further, the Board and the classification committee all fall within the definition of an organ of state in section 239 of the Constitution and as such are required to comply with the

¹⁵ The Electronic Communications Act 36 of 2005 repealed and replaces the Independent Broadcasting Authority Act 153 of 1993

¹⁶ Sections 54(2) and (3) of the Electronic Communications Act 36 of 2005.

provisions of section 181 (3) and (4) of the Constitution. To the extent that the Bill provides for the regulation of broadcast content by the Board and the classification committee, these organs of state will be in contravention of sections 181 (3) and (4) of the Constitution.

5.8 The following provisions in the Bill undermine the independence of ICASA by virtue of the power sought to be given to the Board, chief executive officer and the classification committee –

5.8.1 Section 9A(2) which empowers the classification office to examine and determine the classification of any film submitted to the Board and to also determine, in accordance with any classification guidelines issued by the Board, the conditions to be imposed on the distribution, exhibition and possession of any film;

5.8.2 Section 9A(2)(b) which authorises the classification office to determine an application made under section 22 for an exemption from any provision of the Act and in respect of any film;

5.8.3 Section 9A(2)(d) which empowers the classification office to issue classification guidelines to be used in determining what is disturbing, harmful or age inappropriate for children in films;

5.8.4 Section 9A(2)(e) which empowers the classification office to publish classification guidelines every twelve months;

5.8.5 Section 9A(2)(f) which empowers the classification office to make regulations relating to the procedures and forms for making any application or submission, the form of any certificate, the format and details of the display of decisions of the Board and generally on all ancillary or incidental administrative or procedural matters that are necessary to be prescribed in terms of the Bill;

5.8.6 Section 10 which pertains to the appointment by the classification office of classification committees to perform or carry out with regard to films all functions and duties assigned to or imposed on them in terms of section 18(2) of the Bill;

- 5.8.7 section 18(1) which requires any person who distributes or exhibits any film to register with the Board as a distributor or exhibitor of films and to submit for examination and classification any film that has not been classified, exempted or approved in terms of the Films and Publications Act;
- 5.8.8 section 18(2) which establishes a classification committee for the purpose of examining and classifying films;
- 5.8.9 section 18(3) which details the criteria to be taken into account by the classification committee when classifying a film as a 'refused' classification, XX classification or X18 classification;
- 5.8.10 Section 22(c) of the Bill which relates to the repeal of the exemption in favour of broadcasters in section 23(3) of the Films and Publications Act;
- 5.8.11 Sections 24(A) and section 24(B) which detail the criminal sanctions which will be imposed on broadcasters where they fail to comply with the provisions of the Bill.
- 5.9 These provisions extend to the regulation of broadcasting services and broadcasting signal distribution. Given section 192 of the Constitution, these provisions are unconstitutional.
- 5.10 Sections 18(1) and section 18(3) of the Bill also raise other constitutional concerns. In this regard, section 18(1) provides as follows –
- "s18(1) Any person who intends to distribute or exhibit any film or interactive computer game in the Republic shall in the prescribed manner and on payment of the prescribed fee –*
- (a) register with the Board as a distributor or exhibitor of films or interactive computer games; and*
- (b) submit for examination and classification any film or interactive computer game which has not been classified, exempted or approved in terms of this Act or the Publications Act, 1974 (Act No. 42 of 1974)."*

5.11 The provisions of section 18(1) are wide in application and will require broadcasters to submit all broadcast material for classification prior to the broadcast thereof. It is to be noted that unlike section 16(2), section 18(1) of the Bill does not attempt in any way to limit the duty to submit materials for classification to certain forms of expression. In addition, "film" is widely defined in section 1 of the Films and Publications Act to include—

- "(a) any sequence of visual images recorded on any substance, whether a film, magnetic tape, disc or any other material, in such manner that by using such substance such images will be capable of being seen as a moving picture;
- (b) the soundtrack associated with and any exhibited illustration relating to a film as defined in paragraph (a);
- (c) any picture intended for exhibition through the medium of any mechanical, electronic or other device."

5.12 The effect of section 18(1) when read in conjunction with the statutory definition of a "film" and when combined with the removal of the exemption for broadcasters will result in broadcasters having to ensure that all broadcasting material including *bona fide* scientific, documentary, or literary works and other forms of expression which are deserving of protection under section 16(1) of the Constitution are submitted to the classification office for classification. The requirement that all broadcast material be submitted to the classification office for classification for prior approval amounts to nothing less than a prior restraint and in the context of the extremely wide provisions of section 18(1), it is submitted that this provision is unconstitutional.

5.13 Section 18(3) makes provision for the different types of classification applicable to films. The provisions of section 18(3) and in particular, the criteria which must be taken into account in determining whether or not to classify a film as a 'refused' classification, a XX classification or an X18 classification are the same as those contained in section 16(4) of the Bill. This being the case, our comments on the constitutional difficulties which arise with the various classification categories in respect of section 16(4) and which have

been detailed in paragraphs 4.6 through to 4.12 above also have application to section 18(3).

- 5.14 The requirement that broadcasters must submit all broadcast material for classification approval which in terms of that process may result in an outright prohibition or restriction on the broadcast of such material constitutes a serious affront to the special protections accorded to the right to freedom of expression which, includes freedom of the press and other media as well as the right to receive or impart information or ideas. The provisions of section 18 also undermine the provisions of section 2 of the Broadcasting Act 4 of 1999 ("Broadcasting Act") which requires that broadcasting policy be established and developed which is in the public interest and which, *inter alia*, ensures plurality of news, views and information and provides a wide range of entertainment and education programs. Section 18 is also contrary to section 2(s) of the ECA which requires that electronic communications (including broadcasting services) are regulated in the public interest and for that purpose to –

"2(s) ensure that broadcasting services, viewed collectively-

- (i) *promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;*
- (ii) *provide for regular-*
 - (aa) *news services;*
 - (bb) *actuality programmes on matters of public interest;*
 - (cc) *programmes on political issues of public interest;*
and
 - (dd) *programmes on matters of international, national, regional and local significance;*

- (iii) *cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled; "*

5.15 To the extent that the provisions of section 18 will severely prohibit or restrict the ability of broadcasters to report on news items in the ordinary course of business or to air documentaries dealing with child abuse, declarations or threats of war, statements amounting to propaganda for war, violent demonstrations, unrest incidents, racial incidents, domestic violence and criminal activity, to name but a few of the items which will now fall within the ambit of section 18, constitutes an unjustifiable attempt to regulate speech which is deserving of protection in terms of section 16(1) of the Constitution.

5.16 Content regulation of speech is the antithesis of freedom in a democracy and any attempt to inhibit the media in their capacity and duty to inform their audiences about attitudes within society, including the airing of unpopular or offensive views will be contrary to the right to freedom of expression. This point was made in the decision of the European Court of Human Rights in *Jersild v Denmark (19 EHRR 1)*. In that case, the applicant was employed as a television journalist and was involved in a programme dealing with a group of racist youths living in Copenhagen. In the course of the interview, which was subsequently broadcast, the interviewees made numerous derogatory and racist remarks. The journalist was prosecuted in terms of a law prohibiting the making of, *inter alia*, statements, which insulted or degraded a group of persons on the basis of their race, colour, national or ethnic origin. The European Court held that the law in question violated Article 10 of the Convention. In paragraph 31 of the judgment, the court stated the following –

"A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in the dissemination in his capacity of television journalist responsible for a news programme of Denmark radio. In assessing whether his conviction and sentence were necessary, the court will therefore have regard to the principles established in its case law relating to the role of the press.