OPINION

NATIONAL ASSOCIATION OF BROADCASTERS

THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE REVISED FILMS AND PUBLICATIONS AMENDMENT BILL INSOFAR AS IT RELATES TO BROADCASTING

INTRODUCTION

1. Consultant is the National Association of Broadcasters ("the NAB").

2. The NAB requires an opinion from us in relation to the revised Films and Publications Amendment Bill 27B – 2006 ("the revised Bill") currently before the Portfolio Committee on Home Affairs.

3. The NAB seeks an opinion regarding whether certain clauses of the revised Bill are unconstitutional insofar as they deal with television broadcasting. We do not, therefore, consider in this opinion whether aspects of the revised Bill are unconstitutional insofar as they deal with other forms of the media.

4. In this opinion, we deal with two clauses of the revised Bill that, in our view, are unconstitutional:

   4.1 Clauses 21 and 29 of the revised Bill – dealing with classification of films; and

   4.2 Clause 29 of the revised Bill – dealing with the creation of offences in relation to the broadcast of films containing "**sexual conduct**"

5. In each case we deal first with the effect of the clauses in question and then their constitutionality.

THE EFFECT OF CLAUSES 21 AND 29 DEALING WITH THE CLASSIFICATION OF FILMS

6. Section 23(3) of the Films and Publications Act 65 of 1996 ("the current Act") currently 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 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)."**

7. This section of the current Act therefore currently provides that, in general, broadcasters who have a broadcasting license are not required to submit films to the Film and Publication Board ("the FPB") for classification and approval.

8. The revised Bill removes the current exemption which is provided to licensed broadcasters. Unlike earlier versions of the Bill, however, the revised Bill replaces it with a new exemption. This is by virtue of clause 27 of the revised Bill which proposes the inclusion of a new section 23(3) of the Act:

> **"A broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall, for the purposes of broadcasting, be exempt from the duty to apply for classification of a film or game and, subject to section 24A(2) and (3), shall in relation to a film**

or game, not be subject to any classification or condition made by the Board in relation to that film or game."

9. The phrase "**subject to**" has a clear and accepted meaning. Its purpose to establish what is dominant and what subordinate or subservient.

***S v Marwane* 1982 (3) SA 717 (A) at 747H - 748A**

10. In the present context this means that although the proposed section 23(3) states that licensed broadcasters are not subject to any classification or condition made by the FPB, where the proposed sections 24A(2) and (3) require licensed broadcasters to adhere to the classifications and conditions of the FPB, this prevails and licensed broadcasters must indeed adhere to the classifications and conditions of the FPB.

11. Thus in our view, the effect of the proposed section 23(3), if enacted, would be as follows:

11.1 Licensed broadcasters will not, in general, be required to submit films for classification to the FPB in advance of screening them.

11.2 However, this is subject to a number of exceptions stated explicitly in the revised Bill:

11.2.1 The proposed section 24A(2)(b) would still apply to licensed broadcasters – it would therefore be a criminal offence for licensed broadcasters to broadcast a film

that has been accorded a "**refused classification**" or would have been classified as such by the FPB had it been submitted for classification.

11.2.2 The proposed section 24A(2)(c) would still apply to broadcasters – it would therefore be a criminal offence for broadcasters to broadcast a film that had been classified as "**XX**" or would have been classified as such by the FPB had it been submitted for classification.

11.2.3 The proposed section 24A(3) would still apply to broadcasters – it would thus be a criminal offence to broadcast a film classified as "**X18**" or would have been classified as such by the FPB had it been submitted for classification.

12. Thus, in effect, licensed broadcasters would still be subject to control by the FPB in terms of the revised Bill.

12.1 They face criminal penalties if they broadcast any film that has been classified as a "**refused classification**", "**XX**" or "**X18**" by the FPB.

12.2 They also face criminal penalties if they broadcast any film that would have been classified as a "**refused classification**", "**XX**" or "**X18**" by the FPB had it been submitted for classification.

13. Therefore, although the revised Bill removes the general obligation on broadcasters to apply for classification of films, in practical terms this obligation remains to a substantial extent. Where the film has already been submitted to the FPB by a film distributor or other party has been classified as "**refused classification**", "**XX**" or "**X18**", television broadcasters would be bound by this classification.

14. Moreover, where a film has not been submitted to the FPB for classification, in many cases television broadcasters will likely find themselves forced to submit the films to the FPB themselves.

    14.1 This is by virtue of criminal prohibitions making it a criminal offence to broadcast any film that would have been classified as a "**refused classification**", "**XX**" or "**X18**" by the FPB had it been submitted for classification.

    14.2 Faced with the severe criminal penalties that may be imposed on a broadcaster that violates these provisions, broadcasters may well conclude that the only safe course is to avoid controversy and to submit the films for classification before broadcasting. This type of "**chilling**" effect has been repeatedly recognized by courts in analogous contexts relating to freedom of the media.

> ***Islamic Unity Convention v Independent Broadcasting Authority and Others*** **2002 (4) SA 294 (CC) at para 48**

***Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 39**

***National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1210G-I**

***Miami Herald v Tornillo* 418 US 241 (1974) at 257**

15. The effect of the revised Bill on broadcasters is broadened further due to the fact that the definition of "**film**" proposed by the revised bill is a very broad one:

> **"any sequence of visual images recorded in such a manner that by using such recording such images will be capable of being seen as a moving picture and includes any picture intended for exhibition through any medium or device."**

16. It is thus clear that "**film**" as defined in the revised Bill is not limited to what might colloquially be termed "**movies**".[1] Rather, every movie, every news bulletin, every documentary and every advertisement broadcast on television would fall within this definition and therefore be subject to the constraints above.

17. Accordingly, the effect of the revised Bill is that the FPB's rulings will determine which films and other programmes may or may not be broadcast on television.

18. In what follows, we consider whether this is constitutionally permissible.

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[1] We use this colloquialism in this opinion to distinguish between, on the one hand, "**movies**" and, on the other, the much broader category of "**films**" as defined in the Act.

THE CONSTITUTIONALITY OF CLAUSES 21 AND 29 DEALING WITH THE CLASSIFICATION OF FILMS

19. Section 192 of the Constitution provides as follows:

> **"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." (emphasis added)**

20. The Constitution thus requires that the "**regulation of broadcasting"** be conducted by "**an independent authority"** established by legislation.

21. The Bill must comply with section 192 of the Constitution if it confers on the FPB the power to engage in the "**regulation of broadcasting**".

    21.1 As we have set out in the previous section, the effect of the revised Bill is that the FPB's rulings will determine which films and other programmes may or may not be broadcast on television. The question is whether this amounts to the "**regulation of broadcasting**".

    21.2 The Concise Oxford Dictionary defines "**regulate**" as including "**control by rule**" and "**subject to restrictions**". In determining which films and other programmes may be broadcast on television, we are of the view that the FPB is controlling by its rule television broadcasters and subjecting their broadcasts to restrictions.

21.3 This is so even if the activities of the FPB in terms of the revised Bill are regarded merely as "**indirect**" regulation of broadcasting rather "**direct**" regulation. Courts in multiple jurisdictions have upheld the principle that "**what cannot be done directly cannot be done indirectly**".

See: "*'What Cannot Be Done Directly Cannot Be Done Indirectly': Its Meaning and Logical Status in Constitutionalism*", D.K. Singh The Modern Law Review, Vol. 29, No. 3 (May, 1966), pp. 273-288

21.4 This is so also even if it is only the effect of the revised Bill that allows the FPB to regulate broadcasting rather than its purpose. If a statute has an unconstitutional effect, that is sufficient for it to be declared invalid, as the Constitutional Court has made clear:

> **"The purpose and effect of a statute are relevant in determining its constitutionality. A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional. This will be the case where, for example, the legislation has a discriminatory impact on a particular racial group."**
>
> ***Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) at para 90 (emphasis added)**

21.5 Indeed, we point out that conferring a power on a particular body to determine which programmes may be shown is a particularly

intrusive form of regulation of broadcasting.

22. We are therefore of the view that the revised Bill does indeed purport to confer on the FPB the power to regulate broadcasters. In doing so, we are of the view that clauses 21 and 29 are unconstitutional in two separate respects in relation to section 192 of the Constitution.

22.1 First, they encroach on the constitutionally mandated role of ICASA to regulate broadcasting.

22.2 Second, and in any event, they fail to meet the constitutional requirement that an authority regulating broadcasting must be "**independent**".

23. We elaborate on each of these issues in turn.

ENROACHMENT ON ICASA

24. The independent authority established by Parliament in terms section 192 of the Constitution is the Independent Communications Authority of South Africa ("ICASA"). Section 2(a) of the Independent Communications Authority of South Africa Act 13 of 2000 makes plain that ICASA is indeed the body established by Parliament to regulate broadcasting in accordance with section 192 of the Constitution.

25. Section 192 of the Constitution does not envisage multiple institutions being given the power to regulate broadcasting. It envisages "**an**" institution to regulate broadcasting – this is ICASA.

26. In enacting section 23(3) of the current Act, Parliament recognized this and acted in accordance with the Constitution by providing, in effect, that only ICASA has jurisdiction to regulate broadcasting. In terms of the Electronic Communications Act 36 of 2005 and its predecessors, ICASA has been given control over the regulation of broadcasters in respect of both:

26.1 Issues relating to licensing and ownership of broadcasters

See, particularly, sections 48 – 52 and 64 – 66 of the Electronic Communications Act

26.2 Issues relating to broadcasting content

See, particularly, sections 53 – 61 of the Electronic Communications Act

27. It follows that the effect of the revised Bill is to take jurisdiction conferred by the Constitution and Parliament on ICASA and instead allow it to be exercised the FPB. In our view, this is in conflict with section 192 of the Constitution.

FPB LACKS THE REQUIRED DEGREE OF INDEPENDENCE

28. In any event, even if the Constitution did contemplate more than one authority being empowered to regulate broadcasting, section 192 of the Constitution makes clear that a body regulating broadcasting must be "**independent**".

29. The Constitutional Court has now pronounced on at least five occasions on the meaning of a requirement of "**independence**" contained in the Constitution and what safeguards are necessary to achieve it.

> ***Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*** **1996 (4) SA 744 (CC) at paras 163 and 165**
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> ***Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*** **1997 (2) SA 97 (CC) at para 134**
>
> ***De Lange v Smuts NO and Others*** **1998 (3) SA 785 (CC) at paras 69 – 73**
>
> ***Van Rooyen and Others v The State and Others*** **2002 (5) SA 246 (CC) at paras 29 – 34**
>
> ***South African National Defence Union v Minister of Defence and Others*** **CCT 65/06, as yet unreported judgment delivered 30 May 2007, at paras 99 – 103**

30. In light of these decisions, and mindful of the fact that the test for judicial independence is not necessarily to be applied to functionaries other than judicial officers, we are of the view that the following is now clear:

30.1 An institution will only be considered sufficiently "**independent**" if it enjoys a sufficient degree of structural protection from

governmental control.

30.2 The correct test for assessing the independence of an institution is an objective one, involving an enquiry into how the reasonable observer would perceive the structural independence of the institution in question and government's capacity to exercise control over it.

30.3 While there is no closed list of factors to be considered in determining independence, particularly important issues are:

30.3.1 The appointment mechanisms of the members of the institution;

30.3.2 Security of tenure – including protection against unwarranted removal of the members of the institution; and

30.3.3 Financial security for members of the institution.

31. In this regard, section 3(2) of the current Act, as amended by clause 3 of the revised Bill, provides that the FPB **"shall be independent and function without any bias".**

31.1 However, this is in no way determinative of the issue. The decisions cited above make clear that for an institution to meet the constitutional requirement of independence, it is <u>not</u>

sufficient merely that a statute directs an institution to act independently and be independent.

31.2 Rather, an institution will only be considered sufficiently independent if it enjoys a sufficient degree of structural protection from governmental control.

31.3 This was recently re-affirmed by the Constitutional Court in overturning a judgment of the Supreme Court of Appeal on precisely this point:

> **"The Supreme Court of Appeal emphasised that the regulations require that even though appointed by the Minister the members of the Board must be independent. The SANDF also relied on this argument. In response, SANDU argued that the Board must be seen to be independent and that in conferring the power of appointment upon the Minister alone, the regulations failed to establish confidence that the MAB would be independent. . . .**
>
> **. . . Given the role that the Minister performs as an employer, SANDU's argument – that the Minister's power to appoint the members of the MAB without any consultation gives rise to a perception that the MAB is not an independent and impartial tribunal as contemplated by section 34 of the Constitution – must be accepted. <u>It is not enough to respond as the Supreme Court of Appeal did that the Minister is obliged to appoint independent persons to the MAB. Giving one party to a dispute effective control over the appointment of the persons that will resolve that dispute does not result in a forum that is independent and impartial in the eyes of the other parties to the dispute.</u>"**
>
> ***South African National Defence Union v Minister of Defence and Others*** **CCT 65/06, as yet unreported judgment delivered 30 May 2007, at paras 100 – 101 (emphasis added)**

32. Thus the critical question is whether there are indeed sufficient structural protections of the FPB to ensure its independence, particularly with regards to appointment, security of tenure and financial security. In our view, the FPB does not satisfy the requirements for independence in any of these areas.

32.1 In terms of the proposed section 6(1) of the Act, the FPB's members are appointed by the Minister of Home Affairs. No role is envisaged for Parliament – the only form of consultation is with the Cabinet.

32.2 In terms of the proposed section 9(2) of the Act, the FPB's members are to be removed by the Minister of Home Affairs on the basis of the recommendations of a tribunal appointed by the Minister. No role is envisaged for Parliament.

32.3 In terms of the proposed section 12 of the Act, the members and staff of the FPB receive such remuneration, allowances and other benefits as may be determined by the Minister of Home Affairs in consultation with the Minister of Finance. Again there is no role envisaged for Parliament.

33. Thus, the Minister of Home Affairs has almost complete control of the appointment, removal and salaries of the members of the FPB and the reasonable observer would recognize this. This is plainly inconsistent

with the decisions of the Constitutional Court on independence cited above.

34. Therefore, in our view, the FPB does not meet the requirement of independence set out in section 192 of the Constitution for the regulation of broadcasting.

THE RELEVANCE OF THE EXEMPTION?

35. We have considered, in this regard, whether the constitutionality of the clause can be saved because broadcasters could apply to the FPB for a full or partial exemption in terms of section 22 of the Act – that is the general exemption clause. We are of the view, however, that the section 22 exemption procedure does not resolve the constitutional difficulty for two separate reasons.

35.1 First, the revised Bill (if enacted) would make clear Parliament's intention that broadcasters should still be subject to the criminal penalties contained in sections 24A(2) and 24A(3). The proposed section 23(3) in the revised Bill makes this explicit in relation to broadcasters. Under the circumstances, it is difficult to see what "**bona fide purposes**" could be determined by the FPB under the Act to justify granting such a general exemption.

35.2 Second, and more fundamentally, we are of the view that even

requiring broadcasters to apply to a body such as the FPB for an exemption is itself inconsistent with the Constitution. This is particularly the case given that:

35.2.1 Section 22 confers on the FPB the power to impose conditions of such an exemption;

35.2.2 Section 22 confers on the FPB the power to withdraw the exemption; and

35.2.3 The FPB lacks the essential guarantees for independence.

35.3 The section 22 exemption power therefore suffers from precisely the same constitutional difficulties set out above. It thus cannot be used to resolve these difficulties.

CONCLUSION ON CLAUSES 21 AND 29 IN RELATION TO SECTION 192 OF THE CONSTITUTION

36. For the sake of completeness, we should point out that the constitutional conflict we have identified is not capable of being justified in terms of section 36 of the Constitution, no matter how laudable the aims of the revised Bill might be.

36.1 Section 192 lies outside the Bill of Rights and is therefore not subject to any limitations analysis. Once a statute, properly interpreted, conflicts with section 192 of the Constitution, the statute is unconstitutional.

36.2 The Constitutional Court has made this clear in dealing with a similar section – section 165 of the Constitution which protects the independence of the judiciary:

> **"It must be kept in mind that judicial impartiality and the application without fear, favour or prejudice by the courts of the Constitution and all law, as postulated by s 165(2) of the Constitution, are inherent in an accused's right to a fair trial under s 35(3) of the Constitution. One of the main goals of institutional judicial independence is to safeguard such rights. However, institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights. The provisions of s 36 of the Constitution dealing with the limitation to rights entrenched in the Bill of Rights are accordingly not applicable to it. Judicial independence is not subject to limitation."**
>
> ***Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) at para 35 (emphasis added)**

37. We are therefore of the view that in subjecting broadcasters to regulation by the FPB, clauses 21 and 29 are in conflict with section 192 of the Constitution and would be unconstitutional and invalid if enacted in their present form.

ADDITIONAL CONSTITUTIONAL DIFFICULTIES IN RELATION TO CLAUSE 29

38. Moreover, we are of the view that there are additional constitutional difficulties in relation to the proposed sections 24A(2) and 24A(3), as envisaged by clause 29. These difficulties arise from the fact that, as set out above, the sections render it a criminal offence for a broadcaster to broadcast any film that would have been classified as a refused classification, XX or X18 had it been submitted to the FPB for classification.

39. The effect of these sections is therefore to require licensed broadcasters to make a prediction – in advance of broadcasting an unclassified film – as to what classification the film would have received had it been submitted for classification. The licensed broadcaster is required to do so notwithstanding that:

39.1 The decision on classification is made by one of the classification committees of the Board (see proposed section 12(1) and 18(2) of the Act). Thus the broadcaster cannot know by which classification committee the film would have been classified.

39.2 The membership of the classification committees of the Board is not fixed or static – it appears from the existing section 10(1) of the Act and the new proposed section 10(1) of the Act that

persons can be appointed on a permanent or ad hoc basis to serve on any classification committee.

39.3 There is no requirement in the Act that members of the classification committees be legally trained nor that the classification committees follow a system of precedent akin to that of a court of law.

39.4 The decisions to be taken by the classification committee are inherently subjective – for example whether a film has artistic merit.

40. Broadcasters are therefore left in a highly invidious position. They will face great doubt and uncertainty in predicting how a particular film would have been classified. They therefore cannot predict with any degree of certainty whether they will be committing a criminal offence by broadcasting the film in question.

41. This gives rise, in our view, to two constitutional difficulties.

42. First, it violates the rule of law that is enshrined as a founding value of the Constitution by section 1(c) of the Constitution. The Constitutional Court has made clear that central to the rule of law is that law must be certain, clear, stable, accessible and ascertainable in advance so as to be predictable.

Another: In re Ex parte President of the RSA and Others **2000 (2) SA 674 (CC) at para 39**

De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2004 (1) SA 406 (CC) at para 57

Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at para 47

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at para 108

Veldman v Director of Public Prosecutions, Witwatersrand Local Division **2007 (3) SA 210 (CC) at paras 26 and 62**

43. Indeed, the requirements of the rule of law apply in all contexts but are particularly important in the context of criminal prohibitions. As the Constitutional Court has recently stated in an analogous context:

> **"Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. Their pronouncements on the validity of common-law criminal principles would create a fragmented and possibly incoherent legal order. An effective operation of the development of common-law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of *stare decisis* which is aimed at avoiding uncertainty and confusion, protecting vested rights and legitimate expectations of individuals, and upholding the dignity of the judicial system."**
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> ***Masiya v Director of Public Prosecutions, Pretoria*** **CCT 54/06, currently unreported judgment delivered on 10 May 2007, at para 69**

44. Second, it violates the right to freedom of expression contained in section 16(1) of the Constitution. This is due to the "**chilling effect**" to which we have already referred.

45. Faced with uncertainty over whether broadcasting a particular film will

likely be held a criminal offence, broadcasters may well conclude that the only safe manner to operate is to refrain from broadcasting unclassified films at all – at least those over which there is even a possibility of an adverse ruling by the FPB.

> ***Islamic Unity Convention v Independent Broadcasting Authority and Others*** **2002 (4) SA 294 (CC) at para 48**
>
> ***Khumalo and Others v Holomisa*** **2002 (5) SA 401 (CC) at para 39**
>
> ***National Media Ltd and Others v Bogoshi*** **1998 (4) SA 1196 (SCA) at 1210G-I**
>
> ***Miami Herald v Tornillo*** **418 US 241 (1974) at 257**

46. Thus, whatever the permissibility of the criteria in the Bill regarding when films should be classified as XX, X18 or refused classification –the chilling effect of the criminal prohibition would likely prevent other films from being broadcast as well. Its limiting effects on freedom of expression would thus be overbroad – meaning that they could not be justified in terms of section 36 of the Constitution.

> ***Islamic Unity Convention v Independent Broadcasting Authority and Others*** **2002 (4) SA 294 (CC) at para 51**

47. We are therefore of the view that clause 29 also violates sections 1(c) and 16(1) of the Constitution and would be unconstitutional and invalid if enacted in its present form.

THE EFFECT OF CLAUSE 29 DEALING WITH THE CREATION OF OFFENCES IN RELATION TO THE BROADCAST OF FILMS CONTAINING "SEXUAL CONDUCT"

48. Clause 29 of the revised Bill proposes inserting sections 24A and 24B of the Act. These proposed sections create various criminal offences in relation to films and publications.

49. We have already explained the effects of the proposed sections 24A(2) and 24A(3). These sections deal with criminal offences in relation to the classification of films and, as we have set out above, in our view violate sections 1(c), 16(1) and 192 of the Constitution.

50. However, in our view, there are separate constitutional difficulties arising from the proposed sections 24A(4) and 24B(3) – which deal with the creation of offences in relation to the broadcasting of films containing "sexual conduct".

51. The proposed section 24A(4) provides as follows:

> **"Any person who knowingly distributes or exhibits any film, game or publication classified "X18" or which contains depictions, descriptions or scenes of sexual conduct to a person under the age of 18 years shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."**
>
> **(emphasis added)**

52. The proposed section 24B(3) provides as follows:

> **"Any person who has control over any film, game or publication which contains depictions, descriptions or scenes of sexual conduct and who fails to take all reasonable steps to prevent access to such materials by any person under the age of 18 years shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment."**
>
> **(emphasis added)**

53. These proposed sections thus involve severe punishments in relation to any film which "**contains depictions, descriptions or scenes of sexual conduct**". In respect of such films, it would be a criminal offence to knowingly distribute the film to a person under the age of 18 years and to fail to take reasonable steps to prevent access by people under the age of 18 years.

54. In this regard, the definition of "**sexual conduct**" is critical. The Act provides that it "**includes**":

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

55. It is not clear whether the word "**includes**" is to be understood as

exhaustively limiting the definition of sexual conduct to the terms listed or whether it envisages other forms of sexual conduct, not specifically defined.

See: *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) at paras 17-19

56. If the definition is not limited to the terms listed, then it is extraordinarily wide. Even if it is assumed to be limited to the terms listed, however, it is clear that the scope of the definition remains extremely broad. It includes a wide array of types of conduct ranging from conduct that might properly be understood mainly to occur in hard pornographic films (bestiality or the penetration of the anus) to conduct that may well be said to occur in mainstream films (sexual conduct involving the direct or indirect fondling or touching of the breasts and sexual intercourse.)

57. For this reason, there are countless mainstream films and documentaries that would fall within the criminal prohibition. To take just two examples:

57.1 Large numbers of mainstream movies involve "**descriptions, depictions or scenes**" of "**sexual intercourse**" or "**fondling or touching of the breasts**". As such, they involve descriptions, depictions or scenes of "**sexual conduct**".

57.2 Documentaries or magazine programmes relating to

reproductive health might equally contain "**descriptions**" of "**sexual intercourse**". They too thus involve descriptions of "**sexual conduct**".

58. If any such movie, documentary or magazine programme were distributed to a person under 18 this would potentially result in criminal liability for the broadcaster concerned. The same would be true even if the broadcaster did not actually distribute the film to a person under the age of 18, but merely failed to take reasonable steps to prevent such access.

59. The difficulty is that television by its very nature is accessible to persons under the age of 18. Thus, once such a film is broadcast on television, it may be viewed by such persons.

60. Under the circumstances, the practical effect of these provisions appears to be that countless mainstream movies and other programmes will not be able to be broadcast on television at all unless broadcasters wish to run the risk of being criminally convicted and faced with severe penalties.

61. In what follows, we consider whether this is constitutionally permissible.

THE CONSTITUTIONALITY OF CLAUSE 29 DEALING WITH THE CREATION OF OFFENCES IN RELATION TO THE BROADCAST OF FILMS CONTAINING "SEXUAL CONDUCT"

62. The starting point in evaluating the constitutionality of the proposed sections 24A(4) and 24B(3) is whether the expression prohibited by these provisions falls within section 16(1) of the Constitution. Section 16 of the Constitution provides as follows:

> **"(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 imminent violence; or**
>
> **(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."**

63. In our view, there can be no question that much of the prohibited expression – for example mainstream movies including scenes of sexual conduct – falls squarely within section 16(1) of the Constitution and is therefore expression protected by the Constitution. Such expression cannot conceivably be regarded as falling in the section 16(2) exceptions given that section 16(2) of the Constitution makes no

reference at all to expression concerning sexual conduct.

64. Indeed, even much expression that members of the public might find inappropriate or offensive falls within the protection of section 16(1) of the Constitution. As the Constitutional Court has emphasised, freedom of expression is:

> **"... applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established."**
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> ***Sunday Times v The United Kingdom (No. 2)* (1992) 14 EHRR 229 at para 50(a)**
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> **Cited with approval in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 28**

65. Thus, once it is so that the effect of the proposed sections 24A(4) and 24B(3) is that countless mainstream movies and other programmes will not be able to be broadcast on television at all, it follows that the provisions limit the right to freedom of expression contained in section 16(1) of the Constitution.

66. What remains to be considered then is whether this constitutes a reasonable and justifiable limitation of the right in terms of section 36 of the Constitution. Section 36(1) of the Constitution provides as follows:

> **"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation**

is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

67. In assessing whether the limitation on freedom of expression occasioned by the proposed section 16(2) is permissible, we must begin by understanding the nature of the right in question.

67.1 In its first judgment dealing with freedom of expression, a unanimous Constitutional Court articulated the values underlying the guarantee of freedom of expression in the following way:

> **"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."**
>
> ***South African National Defence Union v Minister of Defence & Another*** **1999 (4) SA 469 (CC) at para 7**

67.2 This approach has been consistently followed.

> ***S v Mamabolo*** **2001 (3) SA 409 (CC)**
>
> ***Islamic Unity Convention v Independent***

Broadcasting Authority and Others **2002 (4) SA 294 (CC)**

Khumalo v Holomisa **2002 (5) SA 401 (CC)**

Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae) **2006 (1) SA 144 (CC)**

South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others **2007 (1) SA 523 (CC)**

67.3 Moreover, the present prohibition affects not only the right to freedom expression in general, but also that the right to freedom of the media. Freedom of the media is specifically enshrined in section 16(1)(a) of the Constitution and its value has been repeatedly stressed by the Supreme Court of Appeal and the Constitutional Court.

National Media Ltd and Others v Bogoshi **1998 (4) SA 1196 (SCA) at 1209I-J**

Khumalo and Others v Holomisa **2002 (5) SA 401 (CC) at para 24**

South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others **2007 (1) SA 523 (CC) at para 28.**

67.4 Most recently, the Supreme Court of Appeal made clear that it is the rights of the public that are affected when press freedom is limited:

"It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. . . . 'Press exceptionalism – the idea that journalism has

> **a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine.' The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."**
>
> ***Midi Television (Pty) Ltd v Director of Public Prosecutions* [2007] SCA 56 (RSA) at para 6 (emphasis added)**

68. Having set out the importance of the right at stake, it is necessary to consider the nature and extent of the limitation. Clause 29 appears to envisage a complete ban on the broadcast of large numbers of mainstream movies and other programmes. The limitation is accordingly prolonged and severe.

69. Against the importance of the right to freedom of expression and freedom of the press and the intrusive nature of the limitation, must be weighed the importance of the purpose of the limitation.

69.1 Clause 2 of the Bill proposes that the Act be amended to reflect the following objects:

> **"The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to—**
>
> **a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;**
>
> **b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and**

c) make use of children in and the exposure of children to pornography punishable."

69.2 There can be no doubt that these are important and constitutionally mandated objects, particularly in light of section 28(2) which deals with the best interests of children.

70. However, for a limitation of rights to pass constitutional muster, what must be considered is not only the importance of the purpose of the limitation, but also, in terms of section 36(1)(d) of the Constitution, "**the relation between the limitation and its purpose**". This involves asking whether the limitation achieves the purpose and whether it is overbroad in that it goes beyond the purpose in question.

70.1 It is our view that the limitation in question is manifestly overbroad. The criminal prohibitions affect entirely mainstream films. They prevent these films being screened on television at all. They do so even where such films have been given age restrictions of less than 18 from the FPB. The effects of the revised Bill thus go far beyond even the most broad reading that one can give to the objects.

70.2 It was precisely on this basis that the Constitutional Court struck down as unconstitutional the provisions at issue in the ***Islamic Unity*** case. There too, the aim behind the restriction was laudable, but the restrictions were overbroad and had a severe

impact on freedom of expression. The Court concluded as follows in this regard:

> **"There is no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint is based are far too extensive and outweigh the factors considered by the Board as ameliorating their impact. As already stated, no grounds of justification have been advanced by the IBA and the Minister for such a serious infraction of the right guaranteed by s 16(1) of the Constitution. It has also not been shown that the very real need to protect dignity, equality and the development of national unity could not be served adequately by the enactment of a provision which is appropriately tailored and more narrowly focused. I find therefore that the relevant portion of clause 2(a) impermissibly limits the right to freedom of expression and is accordingly unconstitutional."**
>
> ***Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 51 (emphasis added)**

71. Consequently and particularly given the overbroad effect of clause 29, we are of the view that the limitation on expression occasioned by the revised Bill cannot be justified.

72. We have considered whether the constitutional difficulty in respect of this clause is resolved by the partial exemption accorded by the proposed section 23(3) of the Act to licensed broadcasters. However, it is clear that this is not the case and that licensed broadcasters would not be able to make use of section 23(3) to escape liability in terms of these provisions.

72.1 This is because the exemption proposed is limited in its ambit. It

is only that a licensed broadcaster shall be "**exempt from the duty to apply for classification of a film . . . [and] not be subject to any classification or condition made by the Board**".

72.2 Accordingly, the exemption does not assist broadcasters in relation to the self-standing criminal offences envisaged in the proposed sections 24A(4) and 24B(3).

73. We are therefore of the view that clause 29 of the revised Bill would be unconstitutional if enacted in its present form in that it violates section 16(1) of the Constitution.

74. Clause 29 is also in our view constitutionally problematic for an additional reason. Somewhat incomprehensibly, there does not appear to be any linkage between parts of these criminal prohibitions and the classification provisions contained in the earlier part of the revised Bill.

74.1 On its face, the proposed section 24A(4) appears to criminalize the distribution to a person under 18 of any film "**which contains depictions, descriptions or scenes of sexual conduct**" irrespective of whether the film has been submitted for classification and irrespective of what classification is conferred by the FPB.

74.2 Similarly, the proposed section 24B(3) applies to any film

"**which contains depictions, descriptions or scenes of sexual conduct**", irrespective of whether the film has been submitted for classification and irrespective of what classification is conferred by the FPB.

75. Thus, the criminal prohibitions in these sections appear to operate even if a particular film has been submitted to the classification committee and has been approved for distribution to persons under eighteen. This is in our view plainly irrational which itself means the section is unconstitutional.

> ***Ex parte President of the Republic of South Africa and Others, In re: Pharmaceutical Manufacturers Association of SA and Another*** **2000 (2) SA 674 (CC) at paras 84-85**
>
> ***United Democratic Movement v President of the Republic of South Africa and Others (No 2)*** **2003 (1) SA 495 (CC) at para 55**

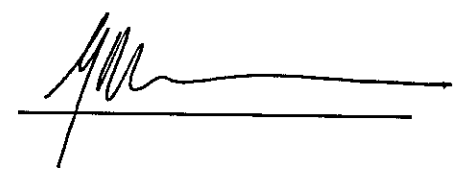
76. We are therefore of the view that clause 29 of the Bill would be unconstitutional and invalid if enacted in its present form.

CONCLUSION

77. We are therefore of the view that the following clauses of the revised Bill would be unconstitutional if enacted in their present form:

77.1 Clauses 21 and 29 of the revised Bill – dealing with classification of films; and

77.2 Clause 29 of the revised Bill – dealing with the creation of offences in relation to the broadcast of films containing "**sexual conduct**".



G.J. MARCUS SC

S. BUDLENDER

Chambers

Johannesburg

9 October 2007