



SUBMISSION

BY

THE SOUTH AFRICAN NATIONAL EDITORS' FORUM

ON

THE FILMS AND PUBLICATIONS

AMENDMENT BILL

[B27B-2006]

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1 INTRODUCTION

- 1.1 These submissions on the second draft of the Films and Publications Amendment Bill [B27B-2006] ("**Bill**") are made by the South African National Editor's Forum ("**SANEF**") to the National Council of Provinces ("**NCOP**").
- 1.2 SANEF is a voluntary forum comprised of South Africa's most senior print, magazine, broadcast and other electronic media editors, journalists and journalism trainers. 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; and
- 1.2.4 journalists and media educators embrace a learning culture by committing themselves to ongoing education and training.
- 1.3 To date, SANEF has fully participated in the legislative process in respect of the Bill having made written and oral submissions to the Parliamentary Portfolio Committee on Home Affairs ("**Committee**") on the first draft of the Bill and thanks the NCOP for giving it this further opportunity to engage in the parliamentary process. SANEF would also like to be afforded an opportunity to make an oral submission to the NCOP if it elects to hold public hearings on the Bill.

2 EXECUTIVE SUMMARY OF MAJOR CONCERNS

2.1 Whilst, SANEF acknowledges that certain amendments were made to the first draft of the Bill to accommodate concerns raised by SANEF and other bodies representative of the print and broadcast media industry, SANEF is concerned that the amendments do not go far enough in addressing the serious constitutional difficulties identified with the first draft of the Bill. In SANEF's view the second draft of the Bill unjustifiably infringes 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**") and will not pass constitutional muster in its present form.

2.2 In SANEF's opinion the following provisions of the Bill are unconstitutional and must be urgently addressed prior to the Bill's promulgation –

2.2.1 The wide application of the Bill

2.2.1.1 The exemptions in sections 16(1) and 16(2) of the Bill are limited in application by virtue of the fact that they are only of application to members of the Newspaper Association of South Africa ("**NASA**"). There are a significant number of publishers of daily, weekly, foreign and community newspapers as well as consumer, trade, technical, professional and other specialist magazines who are not NASA members. Under the Films and Publications Act 65 of 1996 ("**Films and Publications Act**") these publishers were only required to submit their publications to the Films and Publications Board ("**FPB**") where a complaint was lodged with the FPB and subsequently referred to the classification committee for a decision and classification¹. Under the Bill they will now be required to engage in the mandatory submission of their publications for pre approval by the FPB. This amounts to nothing less than what is referred to in our law as a prior restraint on the freedom of

¹ Section 16(1) read with section 17(1) of the Films and Publications Act 65 of 1996.

expression. Prior restraints have been found to be unconstitutional in a number of decisions by our courts.

2.2.1.2 Of further concern is that not only will the publishers of such publications be subject to pre approval classification by the FPB but distributors and advertisers² will also have to comply with the mandatory classification requirements of section 16(2) of the Bill with the result that the pre approval requirements of the Bill now extend to a significantly larger pool of persons than was the position under the Films and Publications Act.

2.2.1.3 Whilst, broadcasters subject to regulation by the Independent Communications Authority of South Africa ("**ICASA**") are not subject to the duty to apply for the classification of a film or game and are further not subject to any classification or condition made by the FPB in relation to that film or game by virtue of the provisions of section 23(3) of the Bill, film and documentary makers as well as distributors and other providers of content who are not broadcasters are subject to pre-approval classification with the result that the same concerns identified in paragraphs 2.2.2 and 2.2.3 are also of application to such persons.

2.2.2 **The suppression of constitutionally protected speech**

The fact that a significant number of publishers and other persons in the supply chain are brought within the ambit of the Bill is further exacerbated by the overbroad criteria which trigger the requirement for mandatory classification in section 16(2) and the different types of classification which can be imposed by the classification committee in terms of section 16(4). These range from an outright ban to the imposition of severe restrictions on the distribution of affected publications. Caught within the net of classification in terms of the criteria listed in section 16(2) is expression which is subject to

² Section 16(2) is applicable to "*any person.....who, for distribution or exhibition in the Republic, creates, produces, publishes or advertisers any publication.....*".

constitutional protection with the result that provisions in the Bill which operate to stifle altogether or to restrict such expression are by their very nature unconstitutional.

2.2.3 **The criminal sanctions in sections 24A and 24B**

2.2.3.1 Although NASA members are not subject to the provisions of sections 16(1) and 16(2) of the Bill, they are nevertheless subject to the criminal sanctions in sections 24A and 24B of the Bill with the consequence that the exemptions are of limited application. This is further exacerbated by the fact that in a number of respects sections 24A and 24B of the Bill override the exemptions contained in sections 16(1) and 16(2) thereby rendering the exemptions ineffectual and a nullity.

2.2.3.2 Broadcasters subject to regulation by ICASA are subject to the criminal sanctions in sections 24A(2) and (3) with the result that the concern identified in paragraph 2.2.3 are also of application to broadcasters.

2.3 In these submissions the following concerns and the reasons therefore will be detailed -

2.3.1 the effect of the proposed amendments to the Films and Publications Act set out in the Bill on newspapers and magazines, including:

2.3.1.1 the restrictions imposed by section 16(2) and 16(4) of the Bill;

2.3.1.2 the exemption provisions;

2.3.2 the effect of the Bill on broadcasting, including;

2.3.2.1 the impact of the proposed section 18 of the Bill;

2.3.2.2 the exemption provisions;

2.3.3 a review of the proposed sections 24(A) and 24(B) of the Bill; and

2.3.4 general comments on the Bill.

3 SECTION 19 OF THE BILL – PRE APPROVAL AND CLASSIFICATION OF PUBLICATIONS

3.1 Clause 9 of the Bill proposes the inclusion of sections 16(1) and 16(2) in the Films and Publications Act -

"16(1) *Any person may request, in the prescribed manner, that a publication, other than a newspaper that is published by a member of the Newspapers Association of South Africa, which is to be or is being distributed in the Republic, be classified in terms of this section.*

(2) *Any person, except the publisher of a newspaper contemplated in subsection (1), who for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that contains visual presentations, descriptions or representations of or amounting to –*

(a) sexual conduct;

(b) propaganda for war;

(c) incitement of imminent violence; or

(d) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,

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

"(3) The Board shall refer any publication submitted to the Board in terms of subsection (1) to (2) to a classification committee, for examination and classification of the publication."

3.2 **The wide application of sections 16(1) and 16(2) of the Bill**

- 3.2.1 Sections 16(1) and (2) of the Bill are not of application to newspapers published by NASA members with the result that NASA members are not subject to classification either where a third party requests the newspaper concerned to be classified or in terms of the mandatory classification provisions of section 16(2). Whilst, the exemption is welcomed it is extremely limited in application.
- 3.2.2 Of particular concern to SANEF is that sections 16(1) and 16(2) of the Bill are of application to a wide array of legitimate publications such as mainstream magazines (including professional, academic, financial, sports, leisure, information technology and trade magazines) as well as community and foreign newspapers. Under the Films and Publications Act, these publications were never subject to mandatory pre approval classification but only to classification where a complaint was lodged with the FPB and subsequently referred to the classification committee for a decision and classification³. In terms of section 16(2) foreign newspapers such as The New York Times and community newspapers such as Homeless Talk, Grocott's Mail and Gauteng Times and magazines such as Newsweek, Time, The Financial Mail, FinWeek, Oprah, True Love, Home and Garden and Top Gear, to name but a few, will now all be subject to prior approval by the FPB. In addition, section 16(2) is not limited in application to persons who publish newspapers and magazines but extends to persons who merely distribute them or who advertise in them. That this is so is evident from the fact that section 16(2) requires *"any person...who for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication"* to comply with the

³ Section 16(1) read with section 17(1) of the Films and Publications Act 65 of 1996.

mandatory pre approval requirements of section 16(2). The inclusion of a variety of persons involved in the supply chain of newspapers and magazines and the subjugation of such persons to the mandatory classification requirements of section 16(2) constitutes a significant deviation from the classification provisions contained in sections 16 and 17 of the Films and Publications Act. In contradistinction to section 16(2) of the Bill, the sections under the Films and Publications Act are limited in application to publications published by non NASA members and are further only operational under restricted circumstances, namely the lodging of a compliant which warrants the imposition of a classification.

3.2.3 The wide application of section 16(2) impacts on the constitutionality of the Bill as a significant number of legitimate publications will have to be submitted on a regular basis to the FPB for pre publication approval. The purpose of pre publication approval is to enable the classification committee to determine whether the publication should be banned or subjected to severe restrictions prior to publication and distribution. This amounts to nothing less than a prior restraint on the right to freedom of expression. Prior restraints on freedom of expression entail the imposition of restrictions on speech prior to entering the public domain and take the form of government consents, authorisations or licences as a pre-requisite for publication. Prior restraints are subject to a heavy presumption against their constitutionality due to their chilling effects on free speech and encouragement of self-censorship and have been found to be unconstitutional by our courts in a number of cases.⁴

3.2.4 Recently the Supreme Court of Appeal has again recognised the chilling effects of prior restraints on freedom of expression in *Midi Television (Pty) Ltd v Director of Public Prosecutions [2007] SCA 56 (RSA) at para 6* -

⁴ See *Mandela v Falati* 1995 (1) SA 251(W).

"[E]ven in jurisdictions that do not recognise the degree of protection that is afforded by the First Amendment, the test to be overcome before publication will be susceptible to prior restraint has always been considerable. In England, before the introduction of the Contempt of Court Act 1981, Lord Scarman said in Attorney-General v British Broadcasting Corporation that

'[t]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.' "

3.3 **The suppression of constitutionally protected speech**

- 3.3.1 In addition to the wide application of sections 16(1) and 16(2), the mandatory classification criteria in section 16(2) 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.
- 3.3.2 In a number of instances the criteria detailed in section 16(2) prohibit expression which is subject to constitutional protection with the result that news reports and articles written in the ordinary course of a publishers business will now have to be submitted to the FPB for prior approval. In order to properly assess whether section 16(2) of the Bill is constitutionally permissible it will be necessary to evaluate whether the expression affected by the section falls within section 16(1) of the Constitution.
- 3.3.3 Section 16 of the Constitution provides –

"S 16 (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".*

3.3.4 Expression which falls within the ambit of section 16(2) of the Constitution is not subject to constitutional protection. All other forms of expression fall within section 16(1) and are thus subject to constitutional protection. The Constitutional Court has held that where the State purports to regulate speech which falls outside section 16(2) of the Constitution, it encroaches on the terrain of protected expression and thus any attempt by the State to limit section 16(1) will only be permissible where the regulation meets the justification criteria in section 36(1) of the Constitution.⁵

3.3.5 The following extract from the matter of *Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)* at paragraphs 34 – 35 is apposite –

⁵ Section 36 of the Constitution provides – "*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)

"Where the State extends the scope of regulation beyond expression envisaged in s 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in s 36(1) of the Constitution.

The prohibition against the broadcasting of material that is 'likely to prejudice relations between sections of the population' self-evidently limits the right in s 16 of the Constitution. The phrase 'section of the population' in this part of clause 2(a) is less specific than 'race, ethnicity, gender or religion' as spelt out in s 16(2)(c). The prohibition clearly goes beyond the categories of expression enumerated in s 16(2). It does not, for instance, require that the material prohibited should amount to advocacy of hatred, least of all hatred based on race, ethnicity, gender or religion, nor that it should have any potential to cause harm."

- 3.3.6 The difficulties which arise in respect of section 16(2) of the Bill are thus no different to the situation which the Constitutional Court had to consider in the *Islamic Unity* matter. In that matter the Constitutional Court had to consider whether provisions in the Independent Broadcasting Authority's ("IBA") Code of Conduct which limited section 16(1) of the Constitution constituted a reasonable and justifiable limitation on the right to freedom of expression in terms of section 36 of the Constitution. After having considered the offending provision in question, the Constitutional Court found that the challenged provision of the IBA's Code of Conduct was unconstitutional and invalid and stated the following at paragraph 51 of the judgment –

"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

the importance of the purpose of the limitation; (c) the nature and extent of the limitation; and (e) less restrictive means to achieve the purpose."

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." [our emphasis]

3.3.7 It is thus necessary to analyse the extent to which section 16(1) of the Bill attempts to limit expression protected by section 16(1) of the Constitution and to then further analyse whether such limitation is reasonable and justifiable in terms of section 36 of the Constitution.

3.3.8 Visual presentations, descriptions or representations of sexual conduct

3.3.8.1 Section 16(2)(a) provides that any publication that contains "*visual presentations, descriptions or representations*" of "*sexual conduct*" must be submitted to the FPB for examination and classification.

"*Sexual conduct*", is defined in section 1 of the Bill to include -

- (i) *male genitals or 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 stimulated, including anal sexual intercourse;*
- (vi) *sexual contact including the direct or indirect fondling or touching of the intimate parts of the body including the breasts, with or without any object;*
- (vii) *the penetration of a vagina or anus with objects;*

(viii) *oral genital contact; or*

(ix) *oral anal contact"*

3.3.8.2 Not only are the items listed in this definition extensive but the use of the word "*includes*", potentially renders the definition of "*sexual conduct*" open ended. In addition, "*sexual conduct*" does not constitute expression listed in section 16(2) of the Constitution and is thus expression which deserves protection. The overbroad definition of "*sexual conduct*" and its inclusion in section 16(2)(a) of the Bill will result in publishers and other persons subject to section 16(2) 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, informative, artistic or literary works will also have to be submitted to the classification committee. The effect of this provision is that expression which is constitutionally protected is now made subject to government pre authorisation. This is contrary to the very essence of the right to freedom of expression.

3.3.9 Visual presentations, descriptions or representations of propaganda for war

Section 16(2)(b) requires a newspaper or magazine to be submitted for classification whenever it contains "*visual presentations, descriptions or representations of or amounting to...propaganda for war*". It is submitted that section 16 (1)(b) of the Bill is wider in application than section 16(2)(a) of the Constitution in that the section is not limited to publications which in themselves constitute propaganda for war but extends to news reports or articles merely reporting on propaganda for war⁶, such as reports on the speeches

⁶ This interpretation arises as a result of the following words in section 16(2)(b) of the Bill - "*descriptions of.....propaganda for war.*"

made by former United States Secretary of State Colin Powell justifying America's reasons for invading Iraq and those of President George W Bush. There is no doubt that such statements would be in the public interest and would further be of such a nature that the print and online media would have a duty to report them. However, section 16(2) of the Bill will require editors on each occasion where statements such as these are made to either elect not to report them or to report them after having sought the required classification approval, alternatively to report them without the required classification approval. Where an editor decides not to report the statements, this will amount to nothing other than self-censorship. Where editors apply for classification approval, they will inevitably do so at the risk of sacrificing the immediacy and currency of the story and ultimately competitive market advantage. On the other hand, where editors elect not to apply for classification approval, whilst the story will be immediate, current and first to market, they will run the risk of criminal prosecution. State approval of protected expression is the antithesis of the right to freedom of expression guaranteed under section 16(1) of the Constitution.

3.3.10 Visual presentations, descriptions or representations of incitement of imminent violence

Section 16(2)(c) requires a newspaper or magazine to be submitted for classification whenever it contains "*visual presentations, descriptions or representations of or amounting to...incitement of imminent violence*". As is the case with section 16(2)(b) of the Bill, section 16(1)(c) of the Bill is wider in application than section 16(2)(b) of the Constitution in that the section is not limited to publications which in themselves constitute "*incitement of imminent violence*" but extends to news reports or articles merely reporting on instances of "*incitement of imminent violence*".⁷ In terms of this section, any news report, photograph or article dealing with or depicting declarations of

war, violent demonstrations, violent incidents or civil unrest will be subject to pre classification approval due to the requirement that descriptions or visual presentations of *"incitement to imminent violence"* must be submitted to the FPB 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.

3.3.11 Visual presentations, descriptions or representations of the advocacy of hatred based on any identifiable group characteristic

Section 16(2)(d) of the Bill requires newspapers and magazines to be submitted to the FPB for approval whenever they contain *"visual presentations, descriptions or representations of or amounting to the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm"*. Section 16(2)(d) of the Bill is also contrary to and far wider than the wording in section 16(2)(c) of the Constitution in two important respects. Firstly, section 16(2)(d) of the Bill is not limited to publications which in themselves constitute hate speech but extends to legitimate reports or articles on public utterances by public figures or ordinary members of the public that could invoke hatred of a group of people. Secondly, 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. The definition of *"identifiable group characteristic"* in section 1 of the Bill includes within its ambit characteristics based on *"race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality."* This is far wider than the provisions of section 16(2)(c) of the Constitution which is limited in application to the *"advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm"*. The effect of these provisions

⁷ This interpretation arises as a result of the following words in section 16(2)(c) of the Bill - *"descriptions or representations of.....incitement of imminent violence."*

is that reports or editorial critical of hate speech will be subject to mandatory pre approval by the FPB. This too is contrary to the fundamental right to freedom of expression.

3.4 **Classifications applicable to publications**

3.4.1 The overbroad application of section 16(2) is exacerbated by the provisions of section 16(4) of the Bill. 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 —

- (a) classify that publication as a "refused classification" if the publication contains visual presentations, descriptions or representation of or amounting to -*
 - (i) child pornography, propaganda for war or incitement to imminent violence; or*
 - (ii) the advocacy of hatred based on any identifiable group or characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is, except with respect to child pornography, a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;*
- (b) classify the publication as XX if it contains visual presentations, descriptions or representations of or amounting to -*
 - (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;*
 - (ii) bestiality, incest , rape or conduct or an act which is degrading of human beings; or*

- (iii) *conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour,*
- (iv) *explicit infliction of sexual or domestic violence; or*
- (v) *explicit presentations of extreme violence,*

unless, judged within context, the publication is, except with respect to child pornography, 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;

- (c) *classify the publication as X18 if it contains visual presentations or descriptions or representations of explicit sexual conduct, unless, judged within context, the publication is except with respect to child pornography, 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.*

3.4.2 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 publications will be prohibited.

- 3.4.3 The vague and overbroad language used in section 16(4) is also problematic. The XX classification will apply to expression which contains mere descriptions of "*explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person*"⁸, "*conduct or an act which is degrading of human beings*"⁹ and "*conduct or an act which constitutes incitement to or encourages or promotes harmful behaviour*".¹⁰ These classification criteria are overbroad and vague in application thereby rendering these provisions unreasonable to apply and accordingly constitutionally invalid. Further, the multiplicity of interpretations which could be given to these provisions renders them impractical and incapable of assisting in objectively classifying publications. The prohibition of expression which contains visual representations, descriptions or representations of "*the advocacy of hatred based on any identifiable group characteristic*"¹¹ 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.
- 3.4.4 The classification of publications as being X18, if they contain visual representations, descriptions or representations of explicit sexual conduct, the explicit infliction of sexual or 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

⁸ Section 16 (4) (b)(i) of the Bill.

⁹ Section 16 (4) (b)(ii) of the Bill.

¹⁰ Section 16 (4) (b)(iii) of the Bill.

¹¹ Section 16 (4) (a)(ii) of the Bill.

determine whether content which is in the public interest and which constitute genuine news items will be "*disturbing, harmful 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.

- 3.4.5 The grounds detailed in section 16(4)(a)(ii) and 16(4)(b)(v) which must be referred to by the classification committee when considering whether to classify a publication as a "*refused publication*", 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 in section 29(4) to the Films and Publications Act. The classification of publications as being XX or X18, if they contain "*visual representations, descriptions or representations of explicit sexual conduct*"¹² will create substantial uncertainty as to whether newspapers and other forms of publication media will be able to report on incidents of rape and indecent assault. The proposed definition of "*explicit sexual conduct*" set out in section 1(g) of the Bill will, in SANEF's view, not assist in curbing this uncertainty as "*explicit sexual conduct*" is defined to include a "*description of any conduct characteristically associated with sexual intercourse*". This definition is even broader than the definition of "*sexual conduct*". Of further concern is that section 16(4)(a)(ii) does not give effect to the protections afforded to academic expression under section 16(1) of the Constitution and that the term "*public interest*" is now narrowly defined and limited to "*matters pertaining to the common well-being or general welfare of the public or serving the interests of the public.*"¹³ Our courts have further recognised that it is also not only impossible but also undesirable to attempt to define what is meant by the public interest in legislation. On the question of the cancellation of a liquor

¹² Proposed section 16(4)(c) of the Act, set out in section 19 of the Bill

¹³ The second draft of the Bill introduces for the first time a definition for "*matters of public interest*" in section 1. In terms of this definition "*matters of public interest*" are defined as "*discussions, debates or opinions on matters pertaining to the common well-being or*

licence and whether it is in the public interest, the High Court in *Mitchell v Mossel Bay Liquor Licensing Board 1953 (1) SA 256 (C)* remarked that –

"It is impossible to define all the circumstances which together are to be comprehended under the concept of 'public interest'; but it may in certain cases conceivably be in the public interest to cancel the licence of a licensee who persistently contumaciously disregards the boards requirements. In this way, a cancellation effected pursuant to secs. 137 and 21(2) may, in a sense, operate as a penalty upon the licensee: but if the dictates of public interest require the cancellation of the licence, the licensee will have no redress. In the ultimate analysis, each case must, in my view, be considered on its own merits and in relation to all the circumstances prevailing in the particular locality concerned."

- 3.4.6 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*".¹⁴

general welfare of the public and includes discussions, debates and opinions on matters pertaining to religion, belief or conscience."

¹⁴ *De Reuck v Director of Prosecutions and Others 2005 JDR 1230 (CCT)* at paragraph 35 on page 20.

3.4.7 The right of the press and other media enshrined in section 16(1) of the Constitution to receive or impart information or ideas by visual presentation, description and representation appears to be exactly what sections 16(2) and 16(4) of the Bill aim to limit. The purpose of submitting a publication for classification is to afford the classification committee the opportunity of either banning the publication completely or imposing restrictions on it before publication or distribution. In assessing whether this limitation on the right to freedom of expression is reasonable and justifiable in an open and democratic society it is necessary to understand the nature of the right.

3.5 **The nature of the right to freedom of expression**

3.5.1 The Constitutional Court has on numerous occasions expressed that freedom of expression lies at the heart of a democracy as the public needs to be able to hear, form and express opinions and views freely on a wide range of matters.¹⁵ The values underlying the right to freedom of expression are captured in the Constitutional Court judgement of *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at paragraph 7 -

"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."

3.5.2 The protections afforded to freedom of expression extend to expression which is critical, offensive, shocking or even disturbing. This principle was recognised in the *Islamic Unity* case where the

¹⁵ *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), *Khumalo v Holomisa* 2002 (5) SA 401 (CC); *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC)

following extract from the *Sunday Times v The United Kingdom (No. 2)* (1992) 14 EHRR 229 at paragraph 50(a) was cited with approval –

"... 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."

- 3.5.3 The Constitutional Court has, however, recognised that some expression falling within section 16(1) of the Constitution is of comparatively lesser value than expression which lies at the core of the right and which is essential to the functioning of a democracy.
- 3.5.4 In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004(1) SA 406 (CC), the Court held that child pornography although protected by section 16(1), was *"for the most part, expression of little value which is found on the periphery of the right"* and therefore found that the limitations in that case were permissible.
- 3.5.5 What distinguishes the finding in *De Reuck* with the Bill is that the limitation on expression in *De Reuck* only involved child pornography and not news, editorial or opinion. This is an important distinction in determining the constitutionality of the limitations on the right to freedom of expression in the Bill as freedom of the press and media is enshrined in section 16(1)(a) of the Constitution and unlike child pornography is located at the core of the right to freedom of expression.
- 3.5.6 The importance of the press and media and its value to society has been emphasised in a number of judgements –

3.5.6.1 In *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1209I-J, the Supreme Court of Appeal stated the following –

"... we must not forget that it is the right, and indeed a vital function, of the press 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. The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens - from the highest to the lowest ranks."

3.5.6.2 In *Midi Television (Pty) Ltd v Director of Public Prosecutions* [2007] SCA 56 (RSA) at paragraph 6 the following was articulated by the Supreme Court of Appeal-

"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 press is to abridge the rights of all citizens and not merely the rights of the press itself."
[emphasis added]

3.5.7 The Constitutional Court has also emphasised the important role played by the press and media in the development and maintenance of a democratic society -

3.5.7.1 *"In a democratic societythe mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As*

primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16".

Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) at paragraph 24.

- 3.5.7.2 *"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognized by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that '[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.' A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life."*

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

- 3.5.8 The Bill in prohibiting news, reports and opinion on *inter alia* -

- 3.5.8.1 rape or indecent assault;
 - 3.5.8.2 public statements by individuals, public leaders or groups;
 - 3.5.8.3 domestic violence;
 - 3.5.8.4 incidents of violent crime;
 - 3.5.8.5 book reviews and film reviews, where the subject matter of the review contains depictions of restricted matters;
 - 3.5.8.6 letters and editorials
- seeks to limit freedom of speech in respect of speech that clearly falls outside of the ambit of section 16(2) of the Constitution.
- 3.5.9 The mandatory pre-publication classification, as proposed in section 16(2) of the Bill will not only result in an outright ban or a severe restriction on the publication and distribution of news, reports and opinions but will also have a 'chilling' effect on the right to freedom of expression particularly as -
 - 3.5.9.1 the Bill gives no indication of how long the classification procedure will take and a delay of a few days in classifying material, particularly of material to be published as news, severely undermines the ability of the press to report competitively;
 - 3.5.9.2 as the provisions of section 16(2) of the Bill are extremely broad, publishers may self-censor material which they think might fall within the ambit of section 16(2); and
 - 3.5.9.3 the severe punishment for publishers or distributors who publish or distribute newspapers and magazines which have not been submitted for classification set out in section 24A will stifle expression.

3.5.10 **Are the limitations on freedom of expression reasonable and justifiable?**

3.5.11 Having examined the importance of the right to freedom of expression and freedom of the press and the invasive nature of the limitations in the Bill, it is necessary to assess the purpose of the limitation and the relationship between the purpose and the limitation itself, as required in terms of section 36(1)(d) of the Constitution. The aim of this enquiry is to establish whether the limitation exceeds its purpose, in which event, SANEF submits that the limitations are incapable of passing constitutional muster.

3.5.12 The primary object of the Bill is to protect children from potentially disturbing, harmful and age inappropriate materials in publications, films and interactive computer games, mobile cellular telephones and on the Internet.¹⁶ Whilst this objective is a laudable one and one which is mandated in terms of section 28(2) of the Constitution which deals with the best interests of children, the limitations in the Bill must be the least infringing means of achieving the objects of the Bill. If they are not then the limitations in the Bill will not constitute a justifiable limitation on the fundamental right to freedom of expression. In SANEF's view the Bill does not give effect to this requirement for the following reasons -

3.5.12.1 the mandatory pre approval classification requirements of the Bill constitute an unconstitutional prior restraint on the right to freedom of expression;

3.5.12.2 the vague, overbroad and in certain instances under inclusive provisions of the Bill result in an outright ban or severe restriction being placed on the ability and capacity of the media to report on items of public interest, such as news reports, articles and opinion on rape, indecent assaults, incidents of violence, unrest and violent crime;

- 3.5.12.3 the mechanisms employed by the Bill to protect the interests of children in respect of child abuse and child pornography are overarching in application and most certainly do not constitute the least restrictive means of achieving the Bill's stated purpose.
- 3.5.13 It was on this very basis that the Constitutional Court in the *Islamic Unity* case found that the provisions in question in the IBA's Code of Conduct whilst laudable in aim were unconstitutional. Accordingly, SANEF is of the view that the infringement of the right to freedom of expression is not justified under the limitation provided for in section 36 of the Constitution and the Bill will not pass constitutional muster.

4 SECTIONS 21 AND 23 OF THE BILL – THE DISTRIBUTION AND EXHIBITION OF FILMS AND GAMES

4.1 The exemption in favour of broadcasters

- 4.1.1 Section 23(3) of the Bill provides that a broadcaster who is subject to regulation by ICASA shall for the purposes of broadcasting be exempt from the duty to apply for the classification of a film or a game and shall in relation to a film or a game not be subject to any classification or condition made by the FPB in relation to that film or game. Broadcasters who are regulated by ICASA are however subject to the provisions of section 24A (2) and (3) of the Bill in terms of section 23(3) and are further subject to the provisions of section 24A(4),(5), (6) and (7) and the whole of 24B of the Bill. This is due to the fact that the exemption granted to broadcasters in section 23(3) is limited to the duty to apply for a classification of a film or game and does not extend to the distribution, exhibition or advertisement of a film or a game.
- 4.1.2 Although the exemption contained in section 23(3) of the Bill is wider in application than the limited exemption granted to newspapers published by NASA members - by virtue of the fact that all broadcasters are subject to regulation by ICASA in that a licence is required for the provision of a broadcast service, broadcasters are

¹⁶ Explanatory memorandum to the original Bill and section 2 of the second draft of the Bill.

now made subject to the criminal sanctions contained in section 24A(3), (4),(5), (6) and (7) and the whole of section 24B of the Bill and the difficulties associated with the imposition of such criminal sanctions on broadcasters are discussed in detail in paragraphs 5.4 and 5.5below.

4.2 **The impact of the proposed section 18 of the Bill**

Whilst broadcasters are not subject to pre-classification approval of their films and games, all persons who are not broadcasters run the risk of having the distribution or exhibition of their films or games prohibited altogether or severely restricted, if such films or games fall within the classification criteria detailed in section 18(3) of the Bill. Due to the fact that the classification criteria in section 18(3) and the types of classifications capable of being imposed in that section are similar to those in sections 16(2) and 16(4), the same constitutional difficulties applicable to publishers also arise in respect of persons who are not broadcasters. Section 18(3) will accordingly also not pass constitutional muster for the same reasons set out in paragraph 3.3 of this submission.

5 **SECTIONS 24(A) AND 24(B) OF THE BILL**

5.1 Clause 29 of the Bill proposes the inclusion of section 24A and 24B. These proposed sections create various criminal offences in relation to films and publications.

5.2 The severe penalties for a failure to comply with the provisions of the proposed section 16(2) of the Bill are likely to have a chilling effect on expression and certain provisions of section 24A and 24B are therefore unconstitutional for the same reasons as those advanced in this submission in respect of section 16(2) of the Bill. However, there are a number of other difficulties which SANEF believes should be highlighted in respect of the proposed sections 24A and 24B -

5.3 **Section 24A(2)**

5.3.1 Section 24A(2) provides that -

"24A(2) Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication referred to in section 16(1) of this Act which has –

- (a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper contemplated in section 16 (1), not been classified by the Board;
- (b) been classified as a 'refused' classification; or
- (c) been classified as XX, or would, except with regard to a newspaper contemplated in section 16(1), have been so classified had it been submitted for classification,

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.

- (3) Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the Board as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or a publication which has been classified X18, or would have been so classified had it been submitted for classification, 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." (our emphasis)

5.3.2 The provisions of this section are only of application to publications which have been classified pursuant to section 16(1) of the Bill (i.e. classification pursuant to a request made by any person). The section is impermissibly overbroad in application in that it will be an offence to distribute, exhibit, offer for sale or advertise any publication which has "*not been classified by the Board*"¹⁷ as well as publications which would have been classified as XX, if they had been submitted for classification. The effect of this section is that publishers who are not NASA members will be guilty of having contravened the section in the absence of a request having been made for a publication to be classified under section 16(1) and under circumstances where a classification has not even been made by the FPB under section 16(1). Publishers are not prescient and they should not be made criminally liable for publications which may be or should have been classified by the FPB. The effects of the section are unduly harsh, if one considers that the offence pertains to publications which are not subject to mandatory classification. The wide application of the prohibition and the severe 'chilling' effect that the same will have on the right to freedom of expression renders this prohibition unconstitutional.

5.4 **Section 24A(3)**

5.4.1 Section 24A (3) reads as follows -

Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the Board as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or a publication which has been classified X18, or would have been so classified had it been submitted for classification, shall be guilty of an offence and liable, upon conviction, to a fine or to

¹⁷ Section 24A (2) (a) of the Bill.

imprisonment for a period not exceeding five years or to both a fine and such imprisonment." [our emphasis]

5.4.2 Section 24A(3) is of application to both NASA members and to non NASA members and will significantly affect the ability of newspapers and other publishers to place advertisements in their publications in respect of the items concerned because an onus is placed on the party permitting advertising to ascertain, or judge, whether any item would have been classified in a particular manner. It is not reasonable to expect a newspaper or other publication offering advertising space to conduct its own assessment of all products to be advertised that may or may not be classified in a certain manner by the FPB were they to be submitted for classification. The same concerns which arise in respect of section 24A(2) are also applicable to this section and for the reasons stated in paragraph 5.3.2 above, this provision is also unconstitutional.

5.4.3 Similarly, broadcasters will also be liable if they broadcast films or games which would have been classified as X18 had they been submitted for classification with the result that notwithstanding the exemption granted to broadcasters under section 23(3) of the Bill, broadcasters will be required to submit films and games to the FPB for classification under circumstances where there is a possibility that a film or game should be classified as X18 but has not been so classified. The exemption granted to broadcasters under section 23(3) of the Bill does not extend to section 24A (3) of the Bill with the result that the exemption granted to broadcasters is rendered a nullity. The practical effect of this provision is that broadcasters will be prohibited or severely restricted from reporting on news items in the ordinary course of business and will further be unable or restricted in their ability 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. The effect of section 24A(3) and its application to broadcasters constitutes an unjustifiable attempt to regulate speech

which is deserving of protection in terms of section 16(1) of the Constitution.

5.5 Section 24A(4) and Section 24B(3)

5.5.1 Section 24A(4) and section 24(B)(3) are of application to all newspapers, including NASA member publications and other publications and are also of application to all broadcasters, film makers, documentary makers and content providers . The sections are similar in nature and effect and are of grave concern to SANEF.

5.5.2 Section 24A(4) of the Bill provides that -

"S24A(4) 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."

5.5.3 Section 24B(3) provides as follows -

"S24 B (3) 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 any 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."

5.5.4 "*Distribute*" is defined in section 1 of the Bill to include "*to sell, hire out or offer or keep for sale or hire*". Advertisements placed in newspapers and publications for films, games or publications

classified as X18 could be interpreted as the offering for sale of such films, games or publications by a broadcaster, newspaper or publication in contravention of section 24A(4). Whilst it will be practically impossible for newspapers and publications to control the advertising of films or publications classified as X18 under section 24A(4), the prohibitions in section 24A(4) and 24B(3) are not limited to X18 films and games but also to the distribution of a publication which "*contains depictions, descriptions or scenes of sexual conduct*". In respect of such publications and films, it would be a criminal offence to knowingly distribute the publication or film to persons under the age of 18 years and to fail to take reasonable steps to prevent access by people under the age of 18 years.

5.5.5 The definition of "*sexual conduct*" in section 1 of the Bill is so wide in application that articles in newspapers or magazines on rape, indecent assault or HIV/Aids would amount to descriptions of sexual conduct. Similarly book or film reviews which contain descriptions of sexual intercourse will also involve descriptions of sexual conduct. The negative effect on freedom of expression is significantly exacerbated by the fact that the partial exemption proposed in the Bill for newspapers published by NASA members does not operate in respect of these criminal provisions with the result that the majority of newspapers and magazines will fall foul of this provision if they contain descriptions of sexual conduct or sexual intercourse as they are ordinarily sold without an age description. The same concern will also arise in respect of any film covering the same content and which is broadcast by broadcasters.

5.5.6 Further, section 24A(4) appears to criminalise the distribution of a publication or film "*which contains depictions, descriptions or scenes of sexual conduct*" to a person under 18 irrespective of whether the publication or film has been submitted for classification and irrespective of what classification is conferred by the FPB. Thus and notwithstanding the already overbroad classification provisions contained in section 16(2) of the Bill, the provisions dealing with the

enforcement of the Bill go beyond that which the Bill prescribes as classifiable thereby further extending the ambit of the restrictions imposed by the Bill. This is due to the fact that the criminal prohibition in these sections appears to operate even if a particular publication or film has been submitted to the classification committee and has been approved for distribution to persons under 18. This is blatantly unreasonable and irrational with the consequence that these sections are patently unconstitutional.

5.5.7 **Section 24B(2)**

5.5.8 Section 24B (2) states that -

"S24B(2) Any person who, having knowledge of the commission of any offence under subsection (1) or having reason to suspect that such an offence has been or is being committed and fails to –

(a) report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; and

(b) furnish, at the request of the South African Police Service, all particulars of such knowledge or suspicion,

shall be guilty of an offence and liable, upon conviction, to be sentenced to a fine or to imprisonment for a period not exceeding ten years or both to a fine and such imprisonment."

5.5.9 The effect of section 24B(2) is that a journalist investigating any incident of child pornography or the sexual exploitation of children will have to comply with the provisions of this section, failing which that journalist will be guilty of an offence.

5.5.10 The section applies to all films, newspapers and publications and is wide in application as it includes within its ambit a mere suspicion of

any conduct covered by section 24B(1). In addition, the provisions of section 24B(2)(b) will significantly undermine the confidentiality of journalists' sources and ultimately the integrity of the print and broadcast media. The protection of journalistic sources is a measure which carries prime importance in democratic societies based on freedom and democracy. A failure to protect journalistic sources nullifies the right the print media holds to freedom of expression as the print media will not readily publish stories concerning child pornography and the sexual exploitation of children under circumstances where journalists are forced to give up their sources. The same concern also arises in respect of the broadcast media.

5.5.11 In certain foreign jurisdictions the protection-worthy status of a journalist's confidential source has been recognised and been granted a protection from disclosure akin to legal privilege.

5.5.12 In the United Kingdom¹⁸ legislation has been enacted which states that -

"No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it can be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or the prevention of disorder or crime¹⁹."

5.5.13 Legislative fiat in the United Kingdom thus prevents a request of journalistic sources from operation unless some particularly high hurdles can be cleared and even then only a court can order the production of such information. This protection of journalistic sources should be instructive to our legislature, and it should be recognised that there are democratic imperatives which make it permissible for journalists and publishers to protect the sources of their editorial

¹⁸ Contempt of Court Act, 1981

¹⁹ Section 10

content save in instances where the state has established extremely compelling reasons for the disclosure of such sources.

- 5.5.14 Member states in the European Union also recognise that the –
- "Protection of journalistic sources is one of the basic conditions for press freedom....Without such freedom, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."*²⁰
- 5.5.15 It is also recognised in the European Union that only an overriding requirement in the public interest could trump the right to keep secret a journalistic source.
- 5.5.16 Dicta such as these illustrate that the protection of journalistic sources from disclosure is actually a basic and fundamental tenet of a well functioning democratic society. The provisions of the proposed section 24B(2) stand in direct opposition to the well recognised principle that it is the right of journalists and publishers to keep secret their sources unless ordered by a court to disclose a source and provided that the court concerned is satisfied that it is in the interests of justice to make such an order. For this reason, SANEF contends that section 24B (2) is also unconstitutional.

6 GENERAL COMMENTS ON THE BILL

6.1 The repeal of section 21

- 6.1.1 The proposed repeal of section 21 of the Act relating to the right to appeal a decision of the FPB, set out in section 25 of the Bill, is of concern.

²⁰ European Court of Human Rights, *Goodwin v United Kingdom* [1996] 22 ECHR 123

- 6.1.2 Decisions of the FPB will now only be capable of going on appeal to the Appeal Tribunal and not the High Court. There is no indication of how the Appeal Tribunal will operate and the rules which will govern the appeal procedure. In addition there is a concern that unlike the High Court, the Appeal Board is not an independent, tested, impartial body.
- 6.1.3 Once a decision has been made by the Appeal Board it may, by operation of law, be taken on review to the High Court. The review procedure is, however, a much more limited application in that only the procedure in reaching a decision and not the merits of a decision may be reviewed. Review procedures will be limited to an analysis of the record received by the High Court of the proceedings before the Appeal Board and no new evidence will be permitted to be adduced. An erroneous decision of the Appeal Board will not be subject to further appeal should the correct procedures have been complied with in that forum. Section 21 should therefore not be repealed.

6.2 **Section 18A**

- 6.2.1 Section 18A of the Act deals with the manner in which classification decisions must be displayed. Section 18A (1) provides as follows –
- "Where a film, interactive game or publication has been classified or exempted from classification in terms of the Act it must -"*
- 6.2.2 The subsections to section 18A (1) detail the information which must be disclosed on the cover or packaging of any classified film, interactive game and in any advertisement for a classified film as well as the manner in which classified publications should be packaged. The display, informational and packaging requirements detailed in sections 18A(1)(a), (b) and (c) should only be of application to those films, interactive games and publications in respect of which the FPB has issued a classification order. Under no circumstances, should sections 18A(1)(a), (b) and (c) be of application to exempted films,

interactive games and publications as this in effect renders any exemption under the Bill, a nullity and utterly meaningless.

6.3 **Sections 23 and 24**

6.3.1 Section 19 of the Act, set out in section 23 of the Bill provides that -

"S19 The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for classification in terms of section 16 or the reclassification of a film, game or publication, or for a permit, exemption or licence, or who is the publisher of a publication which is the subject of an application for classification, or whose financial interest could be detrimentally affected by a decision of the Board on such application, or in regard to an exemption or permit, the withdrawal of which is being considered, or who appeals to the Appeal Tribunal against a decision with regard to such an application shall – "

6.3.2 All the persons referred to in section 19 are entitled to appear in person before the FPB, the classification committee or Appeal Tribunal to adduce oral or written evidence and have his or her case duly considered.

6.3.3 The amended section 20 of the Act, set out in section 24 of the Bill, however, provides that -

"20(a)(1) The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for a decision and classification in terms of section 16 and any person who applied for the classification of a film or game, or the publisher or distributor of a publication which formed the subject of any complaint or application in terms of section 16, may within a period of 30 days from the date on which he or she was notified of the decision in the prescribed

manner appeal to the Appeal Tribunal." [emphasis added]

6.3.4 Notwithstanding, the reference in section 19 to the right granted to the persons listed in section 19 to make oral representations to the Appeal Tribunal, section 20 prescribes that only certain persons have a right to appeal to the Appeal Tribunal, thereby excluding a number of those persons listed in section 19. Those excluded are, any person who has applied for the reclassification of a film, game or publication, or for a permit, exemption or licence, or whose financial interest could be detrimentally affected by the decision of the Board on such application, or a person whose exemption application or permit is being considered for withdrawal. In addition only a publisher or distributor of a publication which formed the subject of a complaint or application may bring an appeal and not an artist, exhibitor, creator, editor, journalist or any other party affected by the decision of the FPB. Section 20 must be amended to give such persons a right to an appeal

6.4 **Miscellaneous**

The Bill, in many instances such as in the proposed sections 19 and 20, refers to *"any person who has lodged a complaint"*. It should be noted that the reference in these sections to the lodging of a complaint is not referred to in section 16(1). Section 16(1) merely provides that *"any person may request in the prescribed manner"* that a publication be classified. In order to ensure that there is uniformity between the wording used in section 16(1) and that in sections 19 and 20 of the Bill, section 16(1) should be amended to refer to the lodging of a complaint.

7 **CONCLUSION**

7.1 SANEF submits that the constitutionally objectionable provisions identified in this submission should be omitted from the final legislation. They are too deeply at odds with the principles underlying any legitimate system of freedom of expression in that they –

- 7.1.1 chill free expression and encourage self-censorship;
 - 7.1.2 interfere with editorial independence;
 - 7.1.3 violate the principle that expression should not be prohibited on the basis of content; and
 - 7.1.4 impose on speakers and audiences an obligation to comply with state sanctioned ideas as to what constitutes permissible expression at the expense not only of dissident views but also of expression deserving of constitutional protection.
- 7.2 In short, the Bill is *"incompatible with South Africa's present commitment to a society based on a 'Constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours.' ..."*²¹
- 7.3 Should you have any queries or require any additional information, please contact Femida Mehtar the Executive Director of SANEF on (011) 442-3785 or on (011) 442 -3780 or via the following email address - director@sanef.org.za.

²¹ *S v Mamabolo (E.TV, Business Day and Freedom of Expression Institute intervening)* 2001 (5) BCLR 449 (CC).