

OVERVIEW OF THE FILMS AND PUBLICATIONS AMENDMENT BILL 2015

The Films and Publications Amendment Bill 2015 (“the Bill”) was introduced to Parliament on 23 February 2016. The proposed amendments to the Film and Publications Act 95 of 1996 (“the Act”) are wide-ranging and include the contentious issue of regulation of online content.

The deadline for public submissions on the Bill is 12h00 on Thursday, 26 May 2016. Submissions should be sent to Mr. Thembinkosi Ngoma, Secretary to the Portfolio Committee on Communications, per email tngoma@parliament.gov.za. If you wish to make an oral submission at the public hearings currently scheduled for 24 and 25 May 2016 then make this clear in your submission.

The below is intended as a summary – without comment – of the most important features of the Bill. At times the Bill can be a little difficult to understand and some terms are inconsistently used, so it is advisable to consult the source document linked to below if you are thinking of getting involved.

[Copy of the Films and Publications Amendment Bill 2015](#)

[Background information and documents as well as updates](#)

[Invitation for public submissions](#)

[Films and Publications Board website](#)

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What is the Films and Publications Act about?

1. The Act is the primary source of legislation regarding the classification of films, games and publications in South Africa. The operation of the Act is known primarily through the classification labels appearing on the covers of DVDs or associated with films at cinemas on or on television.



2. The Act sets up a Film and Publication Board (“**the Board**”) which is empowered to appoint classification committees to classify films, games and publications referred to them by the chief executive officer of the Board.
3. All films and games have to be classified before distribution in South Africa and distributors of such films and games must be registered with the Board. Publications – dealt with separately from films and games - are assessed only on receipt by the Board of a complaint.
4. The Act further creates criminal offences around “child pornography”¹ and grooming-type offences. Internet Service Providers are required to register with the Board to facilitate the fight against “child pornography”.
5. The ethos underpinning the Act was to shift away from the notion of a censorship board to a classification authority providing South African’s with the information required to make a choice about what they wanted to watch or play. In a recent presentation to Parliament the Board described its vision as the Board being a “leading, credible and visible content classification authority”.

¹ We believe the term “child pornography” is misleading. This material is not pornography; it is evidence of the criminal abuse of a child. As such the term Child Abuse Material or Child Sexual Abuse Material is preferable and increasingly being adopted in other jurisdictions.

Amendment of the Objects of the Act

6. The objects of the Act are to be broadened to criminalise explicitly the possession, production and distribution of child pornography and to create offences for “non-compliance with classification of the Board”.
7. One of the most important aspects of the Bill is the attempt to establish a legislative basis for the regulation by the Board of content in digital form distributed through electronic media. While the Act as it stands was written for and implemented in a world of cinemas, video stores and adult premises, the Internet and the ongoing communications revolution mean that we now consume content in completely different ways.
8. The Memorandum on the Objects of the Bill (“**the Memorandum**”) – published with the Bill – makes it clear that the Bill represent part of the effort to modernise the law:
“Until recently, the Board has predominantly focused its classification and monitoring attention and activities on physical platforms and less on digital platforms and social media. The increasing demands for online content and technological advances require the Board to extend its focus to the regulation of content on these diverse platforms. In this regard, it is necessary for the applicable legislation, policies and procedures to reflect these demands and technological advances.”

Definition of “child pornography”

9. The Bill proposes substantive amendments to the current definition of the term “child pornography”, including the:
 - 9.1. Introduction of a requirement that image or description of child must be “explicit”; and
 - 9.2. Deletion of the element of the current definition holding that an image / description is child pornography if it is capable of being used for the purposes of sexual exploitation.
10. The new definition showing amendments is set out below:
“**child pornography**” ~~includes any~~ means an explicit image, however created, or any explicit description of a person, real or simulated, ~~who is or~~ who is depicted, made to appear, look like, represented or described as being, under the age of 18 years-
 - (a) engaged in sexual conduct;
 - (b) participating in, or assisting another person to participate in, sexual conduct; or
 - (c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, ~~or in such a manner that it is capable of being used for the purposes of sexual exploitation;~~
11. The Memorandum explains that the amendment to this definition is intended to align the definition

with that judgement of the Constitutional Court in the matter of [De Reuck v Director of Public Prosecutions 2004 \(1\) SA 406 CC](#).²

Distribution of films and games

12. Chapter 4 – made up of section 18 of the Act – regulates the classification of films and games. The Bill proposes extensive revisions to the existing section 18, as well as the insertion of new clauses 18C to 18J, which seek to regulate:

- 12.1. Classification of films and games by an independent industry classification body;
- 12.2. Use of foreign classification systems for films and games;
- 12.3. Complaints against digital content services distributed online;
- 12.4. The distribution of private sexual photographs;
- 12.5. The filming and distribution of films and photographs depicting sexual assault and violence against children;
- 12.6. Propaganda for war, incitement of violence and hate speech;
- 12.7. The display of classification decisions; and
- 12.8. The reclassification of films and games.

Distribution and “online distribution”

13. The concept of the distribution of films, games and publications is central to the Act. The Bill proposes the following amended definition of “distribute”, covering both traditional and digital distribution:

“**distribute**”, in relation to a film, game or a publication, without derogating from the ordinary meaning of that word, includes –

- (a) to stream content through the internet, social media or other electronic mediums;
- (b) to sell, hire out or offer or keep for sale or hire and,
- (c) for purposes of sections 24A and 24B, includes to hand or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;

14. The Bill seeks to amend the definition of “distributor”, as well as introducing a definition for “online distributor”:

“**distributor**”, means, in relation to a film or game, means a person who conducts business in the selling, hiring out or exhibition of films including the streaming of content through the internet, social

² While we indicated that this document is a summary-without-comment, it is necessary to note that the approach adopted here is at odds with logic informing the definition of “child pornography” in the Sexual Offences Act and that Parliament has expressly rejected the interpretation adopted in the De Reuck matter.

media and other electronic mediums;

'online distributor' in relation to a digital film, digital game or publication, means a person who conducts business in the selling, hiring out or exhibition of films, games or publications online through the internet or any other electronic medium;

(underlined text represents additions to the Bill)

15. These definitions are important in understanding how the Bill is intended to operate. In particular, a distributor needs to be understood in the context of someone who conducts the business of distributing content.

Distributor	Online Distributor
conducts business	conducts business
selling, hiring or exhibiting	selling, hiring or exhibiting
films (and presumably games)	digital films, digital games and publications
Including the streaming of content through the internet, social media and other electronic media	online through the internet or other electronic media
Examples: Ster-Kinekor, DVD chains, company selling games (digital)	Examples: Video on Demand players such as Showmax, Netflix; Apple and Google online stores where games may be purchased, Youtube?

16. Any person who knowingly distributes or exhibits in public a film or game without being registered with the Board as a distributor or exhibitor of films or games shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding eight months or to both a fine and such imprisonment.

Complaints against digital content services distributed online

17. The Bill proposes the insertion of a new section 18E which would allow anyone to complain to the Board about “unclassified, prohibited content, or potential prohibited content, in relation to services being offered online by any person, including online distributors”.
18. The proposed section gives the Board – where it establishes there is merit in the complaint or that “the prohibited content or content or content being hosted online” has not been submitted for examination and classification – powers to:
- 18.1. Issue a take-down notice in respect of a “hosting service”;

- 18.2. Issue a service cessation notice in respect of a “live content service”; or
- 18.3. Issue a link-deletion notice in respect of a “link service”.

Classification of digital films and digital games

- 19. Section 18 of the Act requires a person who distributes, broadcasts or exhibits any film or game in South Africa to register with Board and submit for examination and classification any film or game that has not already been classified, exempted or approved under the Act. Classification is done by a classification committee against a set of classification guidelines determined by the Council of the Board (“**the Council**”) in consultation with the Minister of Communications (“**the Minister**”).
- 20. There is an exemption from this requirement for broadcasters who are regulated by the Independent Communications Authority of South Africa (“**ICASA**”): broadcasters are not required to apply for classification for films they wish to broadcast and are not subject to a classification decision made by the Board.
- 21. The Bill also makes it clear that a reference to a “magazine” includes reference to an online version of that magazine.
- 22. The emergence of IPTV and Video on Demand (VoD) services in South Africa is a form of convergence between broadcasting and IP networks: the Bill makes is explicit that the exemption in favour of broadcasters does not apply to “a broadcaster who streams content through the internet”. Such a person is required to register with the Board as a distributor and submit content for classification where required.
- 23. The Bill proposes to introduce new definitions for “digital films” and “digital games”: this creates a distinction between offline distribution – “games” and “films” – and “online distribution” – “digital games” and “digital films”.

<p>“film” means 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;</p>	<p>‘digital film’ means 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 the internet or any other electronic medium or device;</p>
<p>“game” means a computer game, video game or other interactive computer software for interactive game playing, where the results achieved at various stages of the game are</p>	<p>‘digital game’ means a computer game, video game, online apps or other interactive computer software for interactive game played, where the results achieved at various stages of</p>

determined in response to the decisions, inputs and direct involvement of the game player or players;	the game are determined in response to the decisions, inputs and direct involvement of the game, accessed and played through the internet or any other electronic medium or device;
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24. The Bill then sets out – in a proposed section 18C(5) - a clear prohibition on the distribution of “digital films” and “digital games” unless these have been classified under the Act and display the labelling required by the Act³.

Independent classification of digital films, digital games and certain publications

25. The Bill proposes the insertion of a new section 18C which would introduce a system whereby the Board can delegate classification of “digital films, digital games and publications” to an approved and accredited “independent industry classification body” established by all or some distributors registered under section 18(1)(a) of the Act.

26. An “online distributor of digital films, digital games or publications” which is a member of an accredited and approved independent classification body will not be required to submit for examination and classification any film or game which has not been already classified, provided that:

- 26.1. The independent classification body has been duly accredited by the Board’s Council; and
- 26.2. Classification is undertaken in accordance with classification guidelines as determined by the Council in consultation with the Minister; and
- 26.3. Classification is undertaken by a classification committee as set out in section 10 of the Act and other requirements determined by Council or by the independent classification body are observed; and
- 26.4. The independent classification body informs the Board of all its “XX” and “X18” classifications of “digital films, digital games and publications and any other classification of digital films, digital games and publications” so that the Board may publish these classifications in the Gazette, after which such classifications are deemed to have been made by the Board; and
- 26.5. If a “digital film, digital game or publication” has already been classified by the Board, an independent classification body cannot classify or re-classify the digital film, digital game or publication.

Approval of foreign classification systems by Board

27. The Bill proposes the insertion of a new section 18D which would allow the Board to approve, on

³ 18C (5) No digital film or digital game may be distributed in the Republic unless it has been classified in terms of section 18 or this section, and a clearly visible label indicating the age limit and the nature of content is displayed on or in connection with the film or game and appearing next to the logo of the Board.

application and payment of the prescribed fee, the use by an “online distributor” of classification ratings used by a foreign classification authority or body. The Board would be able to attach such conditions to its approval as it considers necessary. In deciding whether to approve the application the Board must consider:

- 27.1. The extent to which it can monitor and audit compliance; and
- 27.2. The degree of alignment between the foreign ratings system and Council’s classification guidelines.

Display of classification decisions

28. The Bill proposes the insertion of a new section 18I regarding the display of classification decisions regarding a “digital film, digital game or publication”.

films and games	digital films and games
display label in the prescribed form	conspicuously display the Board’s classification decision and logo on <ul style="list-style-type: none"> • the landing page of the website, • the website catalogue and • at the point of sale of the online distributor services.

Re-classification

29. The Bill proposes the insertion of a new section 18J which would allow for a person to re-approach the Board for a less restrictive classification of a “film, game or publication” after a period of two years from the original classification. The new section would also allow a member of the public who is unhappy with or offended by a classification to apply to the Board for re-classification (a prescribed fee will apply).

Prohibition against distribution of private sexual photographs and films

30. The Bill proposes the insertion of a new section 18F into the Act to criminalise what is generally referred to as “revenge porn”. In essence this creates an offence where one person exposes a private sexual photograph or film through electronic media if this is done without the consent of a person appearing in the film or photograph and with the intention of causing distress to that person.

31. Further:

- 31.1. A photograph or film is to be regarded as “private” if it “shows something that is not of a kind

ordinarily seen in public.”

31.2. A photograph or film is to be regarded as “sexual” if it

31.2.1. shows all or part of an individual’s exposed genitals or pubic area;

31.2.2. shows something that a reasonable person would consider to be sexual because of its nature; or

31.2.3. regarding its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

32. Any person found guilty of an offence under this section will be liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

Prohibition against filming and distribution of films and photographs depicting sexual assault and violence against children

33. The Bill proposes the insertion of a new Section 18G which sets out a prohibition against the creation, production or distribution – “in any electronic medium including the internet and social networking sites” - of films and photographs depicting sexual assault and violence against children.

***18G.** (1) No person may create, produce or distribute in any electronic medium including the internet and social networking sites any films or photographs depicting sexual assault and violence against children.*

34. This insertion is confusing as it appears to repeat the prohibition on the creation, production or distribution of child pornography / child sexual abuse material.

35. Any person who is found guilty of an offence under this section is liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

Prohibition against propaganda for war, incitement of violence and hate speech

36. The Bill proposes the insertion of a new section 18H prohibiting the distribution of any film, game or publication which advocates propaganda for war, incites violence or advocates hate speech through any medium “including the internet and social networking sites”:

***18H.** No person may distribute through any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech.*

37. Hate Speech is defined as follows:

***‘hate speech’** includes any speech, gesture, conduct, writing, display or publication which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates,*

advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group;

38. Any person found guilty of an offence under this section will be liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

Distribution of publications

39. Chapter 3 of the Act – comprising section 16 – regulates the classification of publications. The current position is that any person may request that a publication which is being distributed in South Africa be classified by the Board.

40. A “publication” is defined broadly as meaning:

- 40.1. any newspaper, book, periodical, pamphlet, poster or other printed matter;
- 40.2. any writing or typescript which has in any manner been duplicated;
- 40.3. any drawing, picture, illustration or painting;
- 40.4. any print, photograph, engraving or lithograph;
- 40.5. any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;
- 40.6. computer software which is not a film;
- 40.7. the cover or packaging of a film;
- 40.8. any figure, carving, statue or model; and
- 40.9. any website, message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the internet.

41. Where a publication contains content that amounts to propaganda for war, incites violence or advocates hatred based on any identifiable group characteristic and constitutes incitement to cause harm, the publisher must submit the publication for classification.

42. The Memorandum indicates that the Bill seeks to give effect to the constitutional amendments of section 16(2)(a) as instructed by the Constitutional Court in [Prime Media v Minister of Home Affairs and another \(CCT 113/11\)](#). This judgement held that section 16(2)(a) of the Act is constitutionally invalid, because it provides for prior restraint of publications based on vague and overly broad criteria.

43. As a result, amendments proposed by the Bill expand the exemption from the requirement to submit publications for classification from newspapers published by a member of a body recognised by the Press Council and which subscribes and adheres to a code of conduct enforced by the Press Council, to:

- 43.1. Magazines that are published by a member of body recognised by the Press Council and which

subscribes and adheres to a code of conduct enforced by the Press Council; and,

43.2. Advertisements falling within the jurisdiction of the Advertising Standards Authority of South Africa (ASASA).

44. A member of the public does not have the right to request the Board to classify publications in the form of newspapers, magazines and advertisements meeting the above requirements.

Distribution of adult content online

45. The Bill proposes amendments and additions to section 24 of the Act aimed at regulating the distribution of X18 of adult content online. Under the current framework adult content may be distributed by a person holding a licence to conduct the business of an adult premises. The Act imposes obligations on the holder of such a licence designed to prevent children from viewing adult content.

46. The Memorandum states that one of the objects of the Bill is to “decriminalise the online distribution of adult content on all platforms including digital platforms”.

47. A new proposal allows for any person registered as a distributor under section 18(1)(a) to distribute a film or game classified as X18 online where

47.1. The Board has granted an exemption to the distributor.

47.2. The distributor can ensure to the satisfaction of the Board that children will not be able to access the film or game on-line.

47.3. Classification and age restriction information must be clearly displayed on the screen of the user throughout the screening.

47.4. The user has confirmed that he or she is 18 years or older prior to commencing viewing of the film or playing the game.

47.5. No promotion of the film or game is allowed to be accessed without it being paid for by way of a credit card or another child secure method agreed to by the Board. The promotion of the film or game will be subject to the same conditions regarding distribution as the main feature of the film or game.

47.6. The distributor keeps, “solely for his or her private records, a register of all instances where access was granted to a user, whose name, address and verifiable age must be noted in the register kept for that purpose”. This register must be kept for one year from the date when distribution took place.

47.7. If the film or game is exhibited online in a public place, that place is licensed as an adult premises.

48. The CEO of the Board may approach a court *ex parte* (i.e. without notifying the distributor) for the production of the register or persons to whom X18 content was distributed if he or she “has

reasonable cause” to believe that the online distributor is supplying material to children under the age of 18.

49. The Board may, after due inquiry, suspend an exemption for a maximum period of 12 months if any of the conditions set out above are not being met.
50. A distributor who knowingly or negligently grants access to a film or game classified as “X18” to a child under the age of 18 shall be guilty of an offence and liable upon conviction to a fine not exceeding R750 000 or a maximum term of 5 years’ imprisonment or both.

Internet Service Providers

51. An Internet Service Provider is defined in the Act as “any person who carries on the business of providing access to the internet, by any means”. Currently ISPs are required to register with Board and to “take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography”.
52. ISPs are further obliged to take all reasonable steps to prevent access to child pornography once it becomes aware thereof and to report the matter to SAPS – including details of the person maintaining or hosting or distributing or in any manner contributing to an internet address at which such content is found - and assist them with their investigations.
53. Amendments proposed in the Bill would extend these obligations to situations where an ISP “has knowledge that its services are being used for the hosting or distribution of child pornography or advocating racism and hate speech”.
54. Provision is made in the Bill for fines and possible imprisonment for failure to register with the Board or to observe the obligations in respect of child pornography, hate speech or speech advocating racism”.

Penalty Committee

55. The Bill proposes the creation of a Penalty Committee which will have the power to investigate cases referred to it by the CEO of the Board of non-compliance with the Act other than where this involves offences set out in sections 24A, 24B, 24C and 27A(2), (3) and (4) of the Act. This Committee will further be able to adjudicate on these cases and make appropriate findings after granting the CEO and the respondent a reasonable right to be heard.
56. The Penalty Committee will consist of four suitably-qualified members. The chairperson must be:
 - 56.1. a judge or retired judge of the High Court of South Africa;
 - 56.2. an advocate or attorney with at least 10 years of appropriate experience;
 - 56.3. a magistrate or retired magistrate with at least 10 years’ appropriate experience; or
 - 56.4. a lecturer of law or a retired lecturer of law of a South African University with at least ten years’

appropriate experience.

57. The maximum sanction to be imposed by the Penalty Committee is a fine of R150 000, although it may also order that a case be referred to the National Director of Public Prosecutions for consideration. A finding by the Committee that a person has contravened the Act is not to be regarded as a criminal conviction. Once the Committee has disposed of the matter then no further criminal prosecution for the same offence is allowed.

Powers of compliance officers

58. The Bill seeks to revise and strengthen the powers of compliance officers to enter into and inspect premises and facilities of distributors in order to ensure that all films and games being distributed have been classified and labelled as required.
