
Cause For Justice

Portfolio Committee on Communications

Films and Publications Amendment Bill 2015

30 August 2016

Public hearings: Cause For Justice oral submissions

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1. Introduction

- Cause For Justice is a non-profit human rights and public interest organisation founded to advance constitutional justice in South Africa, through participation in the legislative process and governmental decision-making structures, litigation and creating public awareness.
- ICASA // Starsat (TopTV) judicial review case: 2013 - 2015
 - CFJ was one of three applicants.
- FPB Draft Online Content Regulation Policy: CFJ made submissions during 2015;
- SALRC Project 107 - Sexual Offences: Pornography and children (still on-going)
 - Submissions and participated in workshop.

2. Protection of Human Dignity (in the context of expression of explicit sexual conduct)

Expression of explicit sexual conduct	
Constitution	
<ul style="list-style-type: none">● Section 10● Section 12● Section 28(2)	<ul style="list-style-type: none">● Section 16
Section 7(2), 36	

3. Balancing competing rights & interests

- Where does one draw the line?
- ***De Reuck 2004 (1) SA 406 (CC)***:
 - Limitation of pornography “does not implicate the core values of the right”
 - Pornography is “for the most part, expression of little value which is found on the periphery of the right”.
- German position:
 - Does the material present the characters truly as human beings with value in and of themselves?

3. Balancing competing rights & interests - continued

- German position - continued:
 - If it does, the sexual explicitness is acceptable, because sex forms a natural part of life.
 - If, on the other hand, the material basically employs its characters only as objects for other purposes such as sexual stimulation, the depiction is unacceptable because the work treats the characters not as humans, but only as objects.
 - Such work denies the characters their human individuality and personhood.
 - The German court therefore concerns itself not with the viewer's prurient interest but, ultimately, with human dignity.

3. Balancing competing rights & interests - continued

- Our position: There is a type of expression of explicit sexual conduct which does not present its characters truly as human beings with value in and of themselves. This type of expression solely or mainly employs its characters as objects for other purposes, such as sexual stimulation.
- We submit that such material constitutes a violation of human dignity and that limitation of freedom of expression on these grounds would therefore be reasonable and justifiable

4. Policy consideration: Protection from harm

- **People at risk of harm:**

- Viewers, both adults and children;
- Intimate partners of viewers and intimate partner relationships;
- Vulnerable groups in society, mostly women and children who end up being victims of sexual violence and crimes.

- **Harms borne out by research:**

1. Causing people with a predisposition to violence to act out in sexual violence against intimate partners;
2. Desensitisation towards and/or acceptance of rape and other sexual crimes;

4. Policy consideration: Protection from harm - continued

- **Harms borne out by research:**

3. Acceptance of aggression as being part of a normal sexual experience;
 4. Physiological brain changes which fuel addiction behaviour;
 5. Reduction in individual's ability to critically assess harm (at the very least in attitude) towards others, while focusing on the impulsive benefit to themselves.
 6. Devaluing of the opposite sex by viewing the opposite sex as objects to be used for sexual pleasure;
 7. Greater propensity to divorce and to commit infidelity;
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4. Policy consideration: Protection from harm - continued

- **Harms borne out by research:**

8. Loss of interest in sexual encounters with real people (as opposed to online representations), loss of libido and/or erectile dysfunction, sexual addiction/compulsivity;
 9. Unhealthy expectations about sex and self-inflicted pressure to live up to imagery in pornography.
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Annexure: Facts about Today's
Pornography and Endnotes to new book
by John D. Foubert, Ph.D, LLC

<http://www.johnfoubert.com/#!porn-research-fact-sheet/ohuve>

5. Proposed response of Parliament

Protection of human dignity and protection from harm

- The “XX” classification should be developed to provide proper protection and promote respect for human dignity;
- Proper consideration must be given to the harms of pornography for viewers, their intimate partners, household members and vulnerable groups and protective measures be put in place to safeguard those at risk;

- Thorough investigation by: Commission of Enquiry / Ad-hoc committee / Some other measure

- S v Engelbrecht [2 SACR 42 (W)].***

5. Proposed response of Parliament- continued

In South Africa, being a country with exceptionally high levels of domestic abuse and sexually violent crimes, the state should take special care not to fail people most at risk of harm - women and children. We accordingly respectfully propose that a thorough investigation be undertaken, whether by commission of inquiry, ad-hoc committee or otherwise, into the effects and harms of pornography in and for the current South African society. No less of a debt is owed to those who already are victims of sexual abuse/violent crimes and those who are at risk of becoming part of our already damning statistics.

6. Preventing a lacuna in the law

AASA: Exempting advertisements (proposed section 16(1) of the FPAB)

ICASA: Exempting broadcasters (proposed section 18(6) of the FPAB)

The DoC would have to satisfy itself and first provide the Committee with assurance that the AASA Code of Conduct and the BCCSA Code of Conduct (s 54(3) of the ECA) and the ICASA Code of Conduct (s 54(1) of the ECA) **have been** amended and updated to provide for classification and protection measures similar to section 24 of the Act and criminal prohibitions similar to section 24A(2) and (3) to protect the public against illegal content, protect children and to provide consumer advice enabling informed consumer choices regarding exposure to content.

6. Preventing a lacuna in the law - continued

Exempting advertisements and broadcasters without having put in place comparable measures, will create a lacuna in the law and amount to irrational and arbitrary action by Parliament which may be reviewable/unconstitutional

PROPOSAL: Single classification system that cuts across all media / platforms

- The ideal: A single classification system/standard dealing with the regulation **of content** of all forms of expression, irrespective of platform or medium. This would bring legal certainty to the landscape of content regulation.
 - Steps should be taken by government to make the FPB classifications and guidelines applicable across the board to all forms of expression, irrespective of the industry body with jurisdiction over the various forms of media.
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7. Provisions that serve important and legitimate government purposes

Proposed deletions of certain subsections of ss 16(4)(b) & 18(3)(b)

- “Which violates or shows disrespect for the rights to human dignity of any person”
 - “Conduct or an act which is degrading of human beings”
 - “Conduct or an act which constitutes incitement, encourages or promotes harmful behaviour”
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7. Provisions that serve important and legitimate government purposes - continued

Reasons offered by DoC seems to be a reference to Constitutional Court judgment in *Print Media (2012)*:

*“Section 18(3)(b) has been revised to remedy the **vagueness thereof which resulted in the provision being deemed to be unconstitutional**, as a result it only makes reference to “explicit violent sexual conduct” in order to distinguish the “XX” category from the “X18” voluntary sex category.”*

Only the *minority* judgment considered the vagueness and overbreadth of the aforementioned phrases.

7. Provisions that serve important and legitimate government purposes - continued

The majority found it unnecessary to decide the point and therefore did not make any finding on vagueness or overbreadth.

The minority's own answer to the supposed vagueness was that "substantial redrafting is required" and "[it] is up to the legislature to rethink the classification scheme."

7. Provisions that serve important and legitimate government purposes - continued

Conclusion:

The Bill of Rights does not demand the deletion of provisions that may be difficult to interpret and define. Where those provisions serve important and legitimate government purposes, as we have shown above, the task of the state (in discharging its constitutional obligations to the public and in the public interest) is to do the drafting work necessary to provide clear meaning to these provisions. Mere capitulation cannot be the answer. This would amount to letting the people of South Africa down and result in an injustice.

8. The importance of specifying measures to protect children

Section 24(3)(a)

- The Act should contain the detailed measures that will satisfy the FPB or should provide that the Amendment Act will not enter into force until such time as final measures have been published by way of Regulation.
- The measures chosen should be effective in achieving the aim of ensuring that children will not be able to obtain online access to material containing explicit sexual conduct.

Measures to counter identity fraud by children

9. Obtaining access to identities of users of “X18” material

- **S 24(3)(g):**
 - Due to the current academic research regarding the harmful effects to exposure to pornography on persons with a proclivity to violence and secondary effects (real risk of harm) for people with whom they come into contact, the CEO should be entitled to obtain a copy of registers annually (and going back up to three years) to cross-reference these registers to:
 - The National Register for Sex Offenders; and
 - The criminal records i.r.o. Persons convicted of violent crimes.
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THANK YOU



A non-profit human rights organisation
