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Our Reference: FPAB [B37-2015]
Date: 26 May 2016

Portfolio Committee on Communications, National Assembly
For Attention: Mr Thembinkosi Ngoma
By Email: tngoma@parliament.gov.za

Honourable Madam Chairperson,

RE: FILMS AND PUBLICATIONS AMENDMENT BILL [B37-2015]: SUBMISSIONS

- 1 We refer to the abovementioned matter, specifically notice published on the Parliamentary Monitoring Group website on 7 April 2016 and Parliamentary press statement on 29 April 2016, alerting the public to a call for comments in respect of the Films and Publications Amendment Bill [B37-2015] (“the Bill”).
- 2 Cause for Justice (“CFJ/We”) hereby would like to thank the Committee for the opportunity to present you with these written submission, as may be amplified by oral representations at a later stage, and in so doing to be able to participate in the law-making process.
- 3 We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the public interest in the context of presentations or expression of adult content / explicit sexual conduct.

BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness. Three of CFJ’s core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human worth/value, and (3) protection of the vulnerable in society (social justice).

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- 5 During the course of 2013, 2014 and up to March 2015, CFJ was involved as one of three applicants in the “ICASA // StarSat (formerly TopTV)” judicial review case. The matter was disposed of in CFJ and its co-applicants’ favour at ‘leave to appeal’-stage in the Supreme Court of Appeal.
- 6 In addition, CFJ also made submissions to the FPB during July 2015 as part of the public participation process on the Draft Online Content Regulation Policy and is a participant in the SALRC’s Project 107 - Sexual Offences: Pornography and Children (still on-going).

SUBMISSIONS – INTRODUCTORY SUMMARY

- 7 We set out our most pertinent submissions under the clause-by-clause heading here below. Our submissions may be amplified by way of oral representations to the Committee at a later stage. We also set out a brief discussion of the constitutional context and what the Bill of Rights demands in the context of expression of explicit sexual conduct in Annexure A (attached hereto).

The foundational value of human dignity

- 8 As introduction to our submissions, CFJ would like to state categorically that 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. The characters’ sexuality is not presented in the context of human individuality and personhood. 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.¹
- 9 The Films and Publications Act, 1996 (“the Act”) includes in the definition of “XX” (illegal) classification, depictions of:

“explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person” (sections 16(4)(b)(i) and 18(3)(b)(i))

¹ Refer to Annexure A for an exposition of the constitutional context and what CFJ believes the Bill of Rights demands in this context.

10 CFJ respectfully submits that it is crucially important to develop the abovementioned sub-definition so as to ensure the protection of human dignity and the promotion of respect for human dignity.² We set out our proposal in this regard in 21.2.8 hereinbelow.

Policy considerations – harms of pornography

11 In addition to the aforementioned fundamental argument (the protection of human dignity), certain other policy considerations militate in favour of limitation of expression containing or depicting explicit sexual conduct, such as the *harms* of pornography.³ Some of these harms do not only affect children or adolescents, but also adults who are exposed to pornography and those who come into contact with individuals who have been exposed. Although causality between pornography and certain harms, in many instances, has not yet been established, correlation has been established and importantly, the absence of causality has not been proven by the ‘pro-pornography lobby’.

12 Harms include, amongst others:

12.1 Harms to viewers, both adult and children,

12.2 Harms specific to viewers who are children;

12.3 Harms to intimate partners and intimate partner relationships;

12.4 Harms to vulnerable groups in society (e.g. victims of sexual violence and crimes).

13 Specific forms of harm consist in the following, amongst others:

- loss of interest in sexual encounters with real people (as opposed to online representations), loss of libido and/or erectile dysfunction, sexual addiction/compulsivity;
- unhealthy expectations about sex and self-inflicted pressure to live up to imagery in pornography;
- devaluing of the opposite sex by viewing the opposite sex as objects to be used for sexual pleasure;
- acceptance of aggression as being part of a normal sexual experience;

² In accordance with section 10 of the Constitution and the objective normative value system contained in the Bill of Rights.

³ Refer in this regard to paragraph 18 of Annexure A and the academic research and other sources cited in the footnotes.

- causing people with a predisposition to violence to act out in sexual violence against intimate partners;
- desensitisation towards and/or acceptance of rape and other sexual crimes;
- greater propensity to divorce and to commit infidelity;
- physiological brain changes which fuel addiction behaviour;
- reduction in individuals' ability to critically assess harm (at the very least in attitude) towards others, while focusing on the impulsive benefit to themselves.

Response of Parliament in respect of expression containing explicit sexual conduct

- 14 In light of the aforementioned, CFJ will only be able to support the Department of Communications ("DoC") proposal to decriminalise online depictions of explicit sexual conduct (as well as on other platforms), if –
- 14.1 The "XX" classification is developed to provide proper protection for human dignity and to promote respect for human dignity; and
- 14.2 Proper consideration is given to the harms of pornography for viewers, their intimate partners and household members and for society as a whole; and protective measures are put in place to safeguard persons at risk against these harms.
- 15 We respectfully submit that the Committee, likewise, should not approve the proposed legalisation of online pornography in South Africa, unless it has satisfied itself that what has been proposed will pass constitutional muster both on fundamental grounds, as well as not being at odds with the public interest (i.e. what will best serve the common good).⁴
- 16 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.⁵ 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 crime and those who are at risk of becoming part of our damning statistics.

⁴ We note that the United States has already had two commissions of enquiry on the effects of pornography – the **President's Commission on Obscenity and Pornography** (1969/70) and **Attorney General's Commission on Pornography** (1985/86) – and in the United Kingdom several studies have also been undertaken to consider the scientific/empirical case for or against pornography.

⁵ Consider the dreadful examples of Mrs Engelbrecht and her daughter in *S v Engelbrecht* 2005 2 SACR 41 (W).

- 17 When considering the acceptability and constitutionality of limiting expression of explicit sexual conduct, the Constitutional Court's view on the matter should be one of the - if not *the* chief consideration. The Constitutional Court held in *De Reuck*⁶ that the limitation of pornography⁷ ***“does not implicate the core values of the right”*** and that pornography is, ***“for the most part, expression of little value which is found on the periphery of the right”***.

SUBMISSIONS – CLAUSE BY CLAUSE

18 Clause 1 *in re* Section 1 definitions:

18.1 **‘artistic’** – the proposed definition is not focussed or detailed enough. It is somewhat ambiguous and vague, which will leave it open to abuse and could cause it not to pass constitutional muster.

18.2 **‘child pornography’** –

18.2.1 Deletion of ‘includes’: We do not agree that this definition should be converted into a *numerus clausus* (closed list). This flies in the face of the Constitutional Court judgment in *De Reuck*, which acknowledged that there is a wider dictionary/ordinary/primary meaning to ‘child pornography’. To narrow the definition in the Act is to put children at risk. This must not be done.

18.2.2 Insertion of ‘explicit’: We do not agree that it is only graphic and detailed visual presentations or descriptions which constitute child pornography. It would not be in the best interest of children to water down the definition in this manner.

18.2.3 Deletion of ‘who is’: This should not be deleted. Any image or description of a person who is younger than 18, even though such person is depicted as being 18 years or older, should not be excluded from the definition of ‘child pornography’ merely because the person is depicted as being 18 years or older. By way of example, when a 16 year-old is depicted as being 18 years or older, the image must fall within the definition of ‘child pornography’. Children should not be used in the production of pornography, not even if they are made to appear 18 years or older.

18.3 **‘distribute’** – the reference to *‘includes’* in relation to sections 24A and 24B should not be deleted. Due to the continual proliferation of distribution channels for films, games and publications, the definition should not be a *numerus clausus*.

⁶ *De Reuck v Director of Public Prosecutions (WLD)* 2004 (1) SA 406 (CC) (“*De Reuck*”) at para [59].

⁷ The court specifically had to consider child pornography in the particular matter.

- 18.4 **‘domestic violence’** – insertion of *‘explicit’*: It is not only graphic and detailed visual presentations or descriptions which constitute domestic violence. It would not be in the best interest of women and children to water down the definition in this manner. The explicitness of the depictions or descriptions will play a role for purposes of classification, but should not play a role in narrowing the definition of ‘domestic violence’.
- 18.5 **‘hate speech’** –
- 18.5.1 The proposed definition goes beyond the wording in section 16(2)(c) of the Constitution. This broadening of the definition should be clearly motivated by the DoC, so as to reduce the risk of the proposed definition failing a constitutionality test on the basis of overbreadth.
- 18.6 **‘sexual conduct’** – deletion of *‘whether real or simulated’*: The realness or simulation of sexual intercourse is not determinative of whether what is depicted is a depiction of sexual intercourse or not. What is determinative is what the reasonable viewer perceives. In other words, if from the reasonable viewer’s perspective the perceived depiction is of sexual intercourse, the fact that it may have been simulated is irrelevant. We accordingly oppose the deletion.
- 19 Clause 3 *in re* Section 2:
- 19.1 We propose that a further object be included to provide for the prevention of creation, production, possession and/or distribution of illegal (“refused classification” and “XX” classification) films, games and publications. Such additional object would cure some of the potential current unconstitutionality of the Act.
- 20 Clause 16 *in re* Section 16:
- 20.1 Proposed amendment to section 16(1) –
- 20.1.1 Before exempting advertisements falling within the jurisdiction of the AASA, the DoC has to be certain, and would therefore first have to provide the Committee with assurance, that the AASA has similar/equivalent classification (e.g. code of conduct) and protection measures in place to protect the public against illegal content and to provide consumer advice enabling informed consumer choices regarding exposure to content.
- 20.1.2 Exempting advertisements without having put in place comparable measures, will create a lacuna in the law and amount to irrational and arbitrary action by Parliament, which will be reviewable/unconstitutional in terms of the principle of legality.

20.1.3 The ideal would be to have a single classification system/standard in South Africa, 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.

20.1.4 We accordingly propose that steps 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.

20.2 Section 16(4)(b) – Proposed deletion of:

Explicit sexual conduct ***which violates or shows disrespect for the right to human dignity of any person***; and

Conduct or an act which is degrading of human beings; and

Conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour.

We respectfully submit that the proposed deletions above will result in the Act becoming unconstitutional in the following respects and for the reasons set out below:

20.2.1 Section 16(4)(b)(i): By replacing the proposed deleted words with ‘violent’ (explicit sexual conduct), the DoC opens the door for the creation, production, possession and distribution of non-violent content that violates/disrespects human dignity. Alternatively, if it is not the DoC’s intention and purpose to allow such material to be distributed, it should expand the definition of “sexual violence” in section 1 of the Act to include conduct which violates or disrespects human dignity.

By way of example, what classification should be put on content showing an adult male person in a non-violent manner urinating or defecating on an adult female person as part of explicit sexual conduct? Surely such content should carry either a “refused classification” or “XX” classification.

20.2.2 Section 16(4)(b)(ii): The same goes for the proposed deletion of degrading conduct. The above example applies equally to this provision.

20.2.3 Section 16(4)(b)(iii): The deletion of “promotion of harmful behaviour” would also open the door to the creation, production, possession and distribution of content that it could never have been the intention to do. Two examples that send shivers down the spine, include –

- An instructive film (or even documentary) without explicit visual references about how to poison an unwanted family member in such a way that death by poisoning would be untraceable, i.e. the perpetrator would never be suspected of murder.
- An instructive film (or even documentary) without explicit visual references about how to cut yourself so that no-one will know you are someone who cuts him/herself.

20.2.4 The provisions that are proposed to be deleted serve important and legitimate government purposes and implements the demands of the Bill of Rights in the field covered by the Act. They should not be deleted without addressing **unintended consequences** which would not be in the public interest and would result in putting people at risk. Also refer to our discussion in 21.2 hereinbelow with reference to the Constitutional Court judgment in *Print Media*.⁸

21 Clause 17 *in re* section 18:

21.1 Proposed deletion of 'except with respect to child pornography' from section 18(3)(a) –⁹

21.1.1 The proposed deletion will cause the Act to become inoperable as it will create a clash with section 24B(1) which, rightly in our opinion, makes it a criminal offence to distribute child pornography.

21.1.2 The proposed deletion would also go against the Constitutional Court's decision in *De Reuck*, where the court ruled that the section 22 exemption procedure provides the mechanism whereby parties who want to distribute content for bona fide purposes may do so on approval from the FPB.¹⁰

21.1.3 The proposed deletion should therefore not be accepted.

21.2 Section 18(3)(b) – Proposed deletion of:

Explicit sexual conduct ***which violates or shows disrespect for the right to human dignity of any person***; and

Conduct or an act which is degrading of human beings; and

⁸ *Print Media South Africa and another v Minister of Home Affairs and others* (CCT 113/11) [2012] ZACC 22 ("*Print Media*")

⁹ Note, in this regard, the difference in the structure of section 16(4)(a) and section 18(3)(a).

¹⁰ See *De Reuck* at paras [72] to [88].

Conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour.

21.2.1 In addition to our submissions in 20.2.1 to 20.2.4 above, we respond as follows to paragraph 3.12.1 of the Explanatory Memorandum published with the Bill, which reads:

*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.*

21.2.2 The bold and italicised wording above seems to be a reference to the Constitutional Court’s decision in *Print Media*.

21.2.3 The DoC is of the view that there is some vagueness in those provisions of section 18(3)(b) that it is proposing to delete, that the supposed vagueness has been deemed to be unconstitutional and that it therefore requires remedial action. A study of the judgment in *Print Media* however reveals the following:

21.2.4 The court did not consider section 18(3)(b) of the Act at all. Nor did the court consider section 18(3)(b)’s counterpart in section 16, namely section 16(4)(b). The court only considered section 16(2)(a), read with section 16(1).

21.2.5 Only the *minority* judgment of Van der Westhuizen J considered the vagueness of phrases such as “violates or shows disrespect for the right to human dignity of any person”, or “degrades a person”, or “constitutes incitement to cause harm”.¹¹ The *minority* held that section 16(2)(a) of the Act was constitutionally invalid for providing for prior restraint based on vague and overly broad criteria.

The *majority*’s response to the *minority*’s decision is crucial: The majority found that the question of the criteria’s constitutionality for being vague and overbroad is peripheral to the main issue and unnecessary to decide.¹² **The majority accordingly made no finding in respect of vagueness.**

¹¹ See para [105] of *Print Media*.

¹² At para [72].

21.2.6 It is also crucially important to consider the *minority's* own answer/proposed remedy to the supposed vagueness. The minority indicated that **“substantial redrafting is required”** and **“[i]t is up to the legislature to rethink the classification scheme.”**¹³

21.2.7 What the abovementioned bears out, considered in the light of -

- the importance of the protection of human dignity, the protection of people from violence and/or inhuman or degrading treatment, and the protection of children;
- the spirit, purport and objects of the Bill of Rights; and
- our submissions in Annexure A and 20.2 above;

is that what the Bill of Rights demands is not 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.

21.2.8 **In addition to the above, CFJ submits and proposes that the definition of “XX” classification, both in section 16(4)(b) and 18(3)(b), should be developed to include material which does not present its characters truly as human beings with a value in and of themselves but employs its characters only as objects for other purposes, notably sexual stimulation, because such work treats the characters not as humans, but only as objects and deny the characters their human individuality and personhood.**¹⁴

21.3 Section 18(6) – Proposed exemption of broadcasters from section 24A(2) and (3):

21.3.1 Before exempting broadcasters falling within the jurisdiction of ICASA, the DoC first has to assure the Committee that the BCCSA Code of Conduct (section 54(3) of the Electronic Communications Act, 2005 (ECA)) and ICASA Code of Conduct (section 54(1) 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.

¹³ At para [108]

¹⁴ Refer paragraph 12.2 of Annexure A.

- 21.3.2 Exempting 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 will be open to constitutional review.
- 22 **Clause 19 in re Section 18E** – This section will be rendered ineffective if it does not provide an express and short turn-around time within which the FPB must act. If the time element is not regulated in the Act, it has to be done in Regulations. At the very least a provision similar to the proposed proviso to section 16(3) must be included.
- 23 **Clause 19 in re Section 18F** – We respectfully submit that this section is defective – a rework of the definition of “*sexual*” is necessary, as well as the deletion of the proposed subsection (b) to section 18F(1). We submit that:
- 23.1 A reference to nude or exposed genitals, breasts and buttocks should be included in the definition of “*sexual*”, as well as a cross-reference to the definition of “*sexual conduct*” in section 1.
- 23.2 Irrespective of the intent of the person making the disclosure, it should be illegal to post photographs showing the nudity of any person without his/her consent. We accordingly propose the deletion of subsection (b) to section 18F(1).
- 24 **Clause 19 in re Section 18G** – There can be no justification for limiting the scope of this proposed section only to children. The section should be amended to apply to both children *and adults*.
- 25 **Clause 19 in re Section 18J** - This section will be rendered ineffective if it does not provide an express and short turn-around time within which the FPB must act. If the time element is not regulated in the Act, it has to be done in Regulations. At the very least a provision similar to the proposed proviso to section 16(3) must be included.
- 26 Clause 23 in re the insertion of Section 24(3) –
- 26.1 Given the existing research evidence regarding the harmful effects of pornography on individuals, intimate partner and domestic relationships, and society as a whole, we are not able to definitively approve of the proposed decriminalisation of online distribution of adult content at this stage. Proper consideration will have to be given to the harms of pornography and protective measures will have to be put in place to safeguard persons at risk. It has come to our attention that a leading and authoritative academic publication on the harms of pornography will be released in the USA during September 2016.

- 26.2 CFJ will, after having considered the latest research evidence set out in the abovementioned publication, be in a better position to form an opinion in respect of the proposed decriminalisation and regulation. We accordingly hope to address the Committee on this point as part of our oral submissions or before a commission of inquiry or ad-hoc committee.
- 26.3 The proposed section 24(3) should not only apply to films and games. It should also apply to publications. The proposed section therefore should be amended accordingly throughout.
- 26.4 The Committee must ensure that the conditions contained in the proposed subsection offers at least the same levels of protection (in the online sphere) as does section 24(1) and (2) in respect of adult premises.
- 26.5 We submit that the **proposed section 24(3)(a)** should be expanded to state exactly which measures will satisfy the Board. Whatever measure are chosen, should be effective in achieving the aim of ensuring that children will not be able to access material containing explicit sexual conduct online.
- 26.5.1 These measures should include (at least) a measure to ensure that children do not gain access to the content by way of identity fraud, e.g. by providing details of an adult parent, sibling or acquaintance.
- 26.5.2 It should also include a measure similar to the current section 24(2)(a) in respect of notice(s) on the online platform/interface.
- 26.6 Subsection (d): It is unclear why the requirement in respect of secure payment methods should only apply in respect of **promotions** of films, games or publications and not also to the distribution of all films, games and publications (including the main feature). If it is not the DoC's intention that all "X18" content may only be distributed to the extent that it is paid for by the user, it should explain why the payment requirement should only apply in respect of promotions and also confirm to what extent distributors will be allowed to distribute "X18" content free of charge.
- 26.7 The word "*verifiable*" in the proposed subsection (e) should be replaced with "*verified*". We also propose that the phrase, "*solely for his or her private records*", be deleted, as it is superfluous.
- 26.8 The one-year period in the proposed subsection (f) is too short and should be replaced with at least 3 (three) years. Refer to our submissions in 26.9 below in this regard.
- 26.9 Subsection (g) –

26.9.1 The term “*material*” is too vague. It should be replaced with references to films, games and publications.

26.9.2 Reasonable suspicion of supplying of “X18” material to children should not be the only basis upon which the CEO should be able to obtain a copy of a register. Due to the current academic research regarding the harmful effects of 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,¹⁵ 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 in respect of persons convicted of violent crimes.

26.10 Subsection (j) should be amended to refer not only to material “classified as “X18””, but also to “*any film, game or publication which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film, game or publication is a bona fide documentary or is of scientific, literary or artistic merit or is on a matter of public interest*”, so as to bring it in line with section 24A(4).

27 Clause 24 *in re* Section 24A –

27.1 Section 24A(2):

27.1.1 The wording of the exception in respect of broadcasters subject to regulation by ICASA, should be made subject to the proposed section 18(7).

27.1.2 Before exempting broadcasters falling within the jurisdiction of ICASA, the DoC first has to assure the Committee, that the BCCSA Code of Conduct (section 54(3) of the Electronic Communications Act, 2005 (ECA)) and ICASA Code of Conduct (section 54(1) 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.

27.1.3 Exempting 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 will be open to constitutional review.

¹⁵ Refer paragraph 18 of Annexure A and footnotes.

27.1.4 The wording in subsection (c) “*or would have been so classified had it been submitted for classification*” should be deleted. Refer in this regard to the process around the Films and Publications Bill, 2006, which was rejected as unconstitutional by the President and in respect of which internal and third party legal opinion was obtained.

27.2 Section 24A(3):

27.2.1 The wording in subsection (c) “*or would have been so classified had it been submitted for classification*” should be deleted. Refer in this regard to the process around the Films and Publications Bill, 2006, which was rejected as unconstitutional by the President and in respect of which internal and third party legal opinion was obtained.

27.2.2 We respectfully propose that to cure unconstitutionality the abovementioned wording should be replaced with the following wording: “*or which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film, game or publication is a bona fide documentary or is of scientific, literary or artistic merit or is in a matter of public interest*”.

27.3 Section 24A(4):

27.3.1 Do not amend subsection (4)(b). Refer in this regard to the process around the Films and Publications Bill, 2006, which was rejected as unconstitutional by the President and in respect of which internal and third party legal opinion was obtained.

27.3.2 As section 24A(4) does not refer to “negligently”, it should be amended by inserting the words “*or negligently*” after the word “*knowingly*”, to bring the section in line with the proposed section 24(3)(j).

28 Clause 27 *in re* Section 24E – refer to our comments above *in re* Section 18F (23 above).

29 Clause 27 *in re* Section 24F – refer to our comments above *in re* Section 18G (24 above).

CONCLUSION

30 We trust that the above submissions are of assistance to the Committee and look forward to your response thereto (if any) in due course. CFJ remains at the Committee’s disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes.

31 We accordingly hereby respectfully request the Committee to –

- 31.1 Allow us an opportunity to augment the current brief written submissions with more detailed comprehensive submissions at a later stage; and/or
- 31.2 Give us an opportunity to make oral submissions (representations) to the Committee at the appointed time to augment these brief written submissions.

Yours faithfully,

CAUSE FOR JUSTICE: MANAGEMENT COMMITTEE

EXPRESSION OF EXPLICIT SEXUAL CONDUCT: CONSTITUTIONAL CONTEXT AND WHAT THE BILL OF RIGHTS DEMANDS

CONTEXT – HUMAN DIGNITY, FREEDOM AND SECURITY OF THE PERSON, FREEDOM OF EXPRESSION, CHILDREN

The Bill of Rights – Fundamental rights and values

- 1 In the context of pornography and also in respect of expression containing other forms of adult content / explicit sexual conduct, there is an intersection of fundamental rights, which requires in depth and proper consideration in order to chart a course within constitutional waters.
- 2 Section 10 of the Constitution, 1996 provides that “[e]veryone has inherent dignity and [has] the right to have their dignity respected and protected.”
- 3 Section 12 of the Constitution provides that “[e]veryone has the right to freedom and security of the person, which includes the right – (c) to be free from all forms of violence from either public or private sources and (e) not to be treated or punished in a cruel, inhuman or degrading way.”
- 4 Section 16(1) of the Constitution provides that “[e]veryone has the right to freedom of expression, which includes – (a) freedom of the [...] media, (b) freedom to receive and impart information and ideas and (c) freedom of artistic creativity.” Excluded from this freedom right is propaganda for war, incitement of imminent violence and hate speech based on race, ethnicity, gender or religion that constitutes incitement to cause harm.¹⁶
- 5 Section 28(2) of the Constitution provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.”
- 6 All rights in the Bill of Rights may only be limited 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.¹⁷
- 7 The state is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.¹⁸

¹⁶ Section 16(2) of the Constitution.

¹⁷ See section 36 of the Constitution, which lists a minimum of five factors that are relevant for purposes of the “limitation analysis”.

8 In addition to the abovementioned individual rights, the Bill of Rights as a single body of law, contains an “objective normative value system”¹⁹ based on the founding values of human dignity, equality and freedom. The surest way of avoiding any unconstitutionality in legislation and individual legislative provisions would be to ensure that they promote the values that underlie our open and democratic society, as well as the spirit, purport and objects of the Bill of Rights.²⁰

WHAT THE BILL OF RIGHTS DEMANDS

9 For purposes of applying the abovementioned constitutional imperative(s) to the issue of representations of explicit sexual conduct and more specifically, the distribution of films, games and publications via various platforms (media), the following important considerations have to be weighed in the balance:

10 On the one hand –

10.1 the inherent dignity or worth of all people must be protected and respected,

10.2 people must be protected from all forms of violence,

10.3 people may not be treated in cruel, inhuman or degrading ways, and

10.4 children’s best interest must be the paramount consideration in every matter affecting children.

11 On the other hand, the free expression right –

11.1 entitles those who produce pornography for profits, to impart information and ideas, whilst also

11.2 entitling those who wish to wish to view pornography, to receive information and ideas.

12 The balancing exercise between these competing rights claims is always a difficult and delicate matter. In such matters, the **objective normative value system** contained in the Bill of Rights

¹⁸ Section 7(2) of the Constitution.

¹⁹ See *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)* at [54]-[56] and [43]-[44].

²⁰ See section 39(1) and 39(2) of the Bill of Rights.

is a guiding principle to strike an appropriate and just balance.²¹ CFJ proposes that in this highly contested environment the *spirit, purport and objects* of the Bill of Rights are important keys to a just outcome. In determining what the Bill of Rights demands in the present context, the following considerations in our opinion are instructive:

12.1 In *De Reuck*²² the Constitutional Court, after identifying the core values of freedom of expression, held that the limitation of pornography²³ “does not implicate the core values of the right” and that pornography is, “for the most part, expression of little value which is found on the periphery of the right”. The Court also acknowledged that child pornography is not afforded constitutional protection in many democratic societies.²⁴

12.2 Retired Constitutional Court judge Laurie Ackermann has expressed the view that Germany probably has the richest and most deeply philosophically grounded scholarship and jurisprudence on human worth (human dignity) and equality in the world.²⁵ The approach of the German courts regarding the protection of human dignity in this context, can be summed up as follows:²⁶

*“...in the course of statutory interpretation, German judges have developed a concept of pornography that views it in the light of the Basic Law's primary injunction to protect human dignity. In a case that centered on the infamous Fanny Hill, the Federal Court of Justice declined to pronounce the book pornographic since it presented sexuality in the broader context of human life. Rather than deploying a subjective standard that attempts to determine the extent to which a particular work offends the viewer or reader,²⁷ the German court analyzed the presentation of sexuality in its human context. **Mathias Reimann summarized the characteristically Kantian German approach: The court essentially asks whether the material presents the characters truly as human beings with a***

²¹ Carmichele at [54]: Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

“The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.”

²² *De Reuck v Director of Public Prosecutions (WLD)* 2004 (1) SA 406 (CC) (“*De Reuck*”)

²³ The court specifically had to consider child pornography in the particular matter.

²⁴ *De Reuck* at para [59].

²⁵ See *Human Dignity: Lodestar for equality in South Africa* (Laurie Ackermann, JUTA, 2012) at p 13.

²⁶ **Kommers, Donald P.; Miller, Russell A. (2012-11-01). *The Constitutional Jurisprudence of the Federal Republic of Germany*. Third edition, Revised and Expanded (Kindle Locations 13428-13480, 13758-13767). Duke University Press. Kindle Edition.**

²⁷ This was the approach of the U.S. Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

value in and of themselves. If the material does, the court will find the sexual explicitness 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, notably sexual stimulation, the court will find the depiction of sex unacceptable because the work treats the characters not as humans, but only as objects. Such a work denies the characters their human individuality and personhood. The approach of the German court thus concerns itself not with the viewer's prurient interest but—ultimately— with human dignity.²⁸ The regulation of pornography, then— whether done under the limited provisions of the criminal law or the somewhat broader provisions of the youth protection statute— is, like so much else in German constitutional law, centered on the protection of dignity under Article 1.”

How to balance the opposing constitutional claims

- 13 The major question therefore is how to resolve competing claims in the context of expression of explicit sexual conduct. Should the state allow human dignity (worth) to be sacrificed (in instances where the violation/disrespecting thereof is established) for the sake of freedom of expression? The Constitutional Court in *De Reuck* has provided guidance suggesting that the legitimate (constitutionally acceptable, lawful, justifiable) exercise of this freedom does not extend as far as to encompass violating/disrespecting human dignity.
- 14 In other words, as a general premise, freedom of expression should be exercised in a manner so as not to violate the constitutional value of human dignity. It is reasonable and justifiable to limit freedom of expression in order to protect human dignity and to protect respect for human dignity. Conversely, however, freedom of expression should not be limited more than is necessary to achieve this constitutional objective in the particular circumstances.
- 15 The Constitutional Court's guidance is based on its reasoning that limitation of expression in this context does not implicate the core values of the free expression right and the expression in question therefore for the most part is of little value and is found on the periphery of the right.
- 16 The logical conclusion would be that when human dignity (and for that matter also the specific rights that give effect to it, such as the protection of people from violence and/or inhuman or degrading treatment, and the protection of children) is implicated, limitation of expression of explicit sexual conduct would be justified.

²⁸ Mathias Reimann, "Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the U.S.," *University of Michigan Journal of Law Reform* 21 (1987– 88): 201– 53, at 229.

- 17 It is important to note that the Constitutional Court's decision in *Print Media South Africa and another v Minister of Home Affairs and others* (CCT 113/11) [2012] ZACC 22 ("*Print Media*") does not contradict the aforementioned conclusion / general supposition. The court in *Print Media* merely found that the Act's administrative prior classification system was constitutionally deficient in the particular circumstances of the case, due to the availability of less restrictive alternatives for achieving important legislative purposes.
- 18 Apart from the abovementioned fundamental proposition, there are also certain policy considerations that support the limitation of expression of explicit sexual conduct. So, for example, there is a growing body of scientific/research evidence and empirical data regarding the harms to both adults and children resulting from or associated with exposure to pornography.²⁹ These considerations provide a further basis for limitation of the expression in question.

²⁹ Some of these materials include:

Summary of the effects of pornography published on CFJ's website at: <http://causeforjustice.org/pornography-destructive-or-harmless/> (23 November 2015)

Article in the Time magazine of 18 April 2016 (Vol. 187, No. 14 | 2016) by Belinda Luscombe on page 32, titled: "*Porn v Sex*".

Justice Alliance of South Africa, Cause for Justice, Doctors for Life International NPC v ICASA, On Digital Media (Pty) Ltd and others Case no 18519/2013 (WCC). See the Rule 53 record, i.e. the complete record of the public participation process before ICASA, as well as the court record, i.e. the court papers prepared and filed by the parties in the case.

Coy, Maddy and Horvath, Miranda A. H. (2011) Lads mags, young men's attitudes towards women and acceptance of myths about sexual aggression. *Feminism & Psychology*, 21 (1). pp. 144-150. ISSN 0959-3535 <http://dx.doi.org/10.1177/0959353509359145> Available from Middlesex University's Research Repository at <http://eprints.mdx.ac.uk/6595/>.

"Basically... porn is everywhere" - A Rapid Evidence Assessment on the Effects that Access and Exposure to Pornography has on Children and Young People. By Miranda A.H. Horvath, Llian Alys, Kristina Massey, Afroditi Pina, Mia Scally and Joanna R. Adler. (2014) (<http://www.childrenscommissioner.gov.uk/publications/basically-porn-everywhere-rapid-evidence-assessment-effects-access-and-exposure>)

Eric W. Owens, Richard J. Behun, Jill C. Manning & Rory C. Reid (2012): The Impact of Internet Pornography on Adolescents: A Review of the Research, *Sexual Addiction & Compulsivity: The Journal of Treatment & Prevention*, 19:1-2, 99-122 **To link to this article:** <http://dx.doi.org/10.1080/10720162.2012.660431>