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## 16 DAYS OF ACTIVISM FOR NO VIOLENCE AGAINST WOMEN AND CHILDREN

### Memorandum

in respect of

#### The Films and Publications Amendment Bill, 2015

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**To:** The Honourable Mr Comely Humphrey Maqocwa Maxegwana, MP  
Chairperson, Portfolio Committee on Communications, National Assembly

**Date:** 25 November 2016

#### DELIVERED BY HAND

**Received by:** M PHILAMBER  
(Name)

(Signature)

Honourable Mr Maxegwana, MP and Honourable Members of the PCC,

1. 25 November 2016 marks the commencement of the annual "16 Days of activism for no violence against Women and Children", both locally and globally. This campaign offers an opportunity to reflect on what can be done and what should be done to end and prevent violence against women and children.

#### ***Films and Publications Amendment Bill, 2015 ("the Bill")***

2. One measure which will have an impact on violence, more particularly *sexual violence*, against women and children is the Bill. The impact of the Bill, whether beneficial or detrimental to the well-being and safety of women and children, will in large measure depend on its treatment, i.e. Parliament's treatment, of the distribution of pornography on digital platforms.
3. We welcome the proposed measures in the Bill aimed at –

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MANAGEMENT COMMITTEE MEMBERS: RYAN SMIT, GENERAL MANAGER | WYNAND VILJOEN, CHAIRPERSON  
CRAIG SNYDERS, EX-OFFICIO EXECUTIVE MEMBER | DIETER VON FINTEL, EX-OFFICIO EXECUTIVE MEMBER

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3. We welcome the proposed measures in the Bill aimed at –
  - 3.1 Criminalising
    - 3.1.1 “revenge porn”,
    - 3.1.2 child pornography, and
    - 3.1.3 depictions of sexual assault of children, and
  - 3.2 Prohibiting the distribution of adult content to children.

*Cause for Justice concerns*

4. In its current form, the Bill purports, through a newly *proposed section 24(3)*, to extend **legally permissible** distribution of pornography beyond buildings licensed as adult premises, to the online space.
5. In addition, the Bill proposes to water down the definition of disallowed “XX” classified content by outlawing only explicit *violent* sexual content, while non-violent content which violates or disrespects human dignity or which is degrading of human beings will, going forward, fall within the purview of permissible distribution. (*Refer the proposed amendments to sections 16(4)(b) and 18(3)(b) of the Films and Publications Act, 1996 (“the Act”).*)
6. **Cause for Justice** has addressed the Portfolio Committee on Communications (“PCC”) in detail on the above two areas of concern in its written submissions, as well as in its oral presentation during the public hearings before the PCC. However, from the public records of recent deliberations on the Bill in the PCC, there is no indication as to whether the concerns we have raised have been taken to heart. It is our sincere hope that these concerns will be responded to in a manner that will contribute towards bringing an end to and prevent violence against women and girls.

For the sake of clarity, we briefly restate our concerns hereinbelow:

**Distribution of pornography in South Africa**

7. The current state of the law is an uneasy truce between liberal views/interests (of those who are pro absolute freedom) and more socially-minded views/interests (of those who are pro the protection of human dignity and vulnerable groups in society). Under the terms of this truce, certain “softer” forms of adult content may be distributed and obtained from designated buildings licensed as adult premises. The requirement for distribution to take place “in person” provides a control mechanism or preventative element as anonymity is excluded from the process, which also ensures that adult content will not be distributed to children. (*Refer the current section 24(1) and (2) of the Act.*)

8. Due to certain shortcomings in the Act (and related enabling legislation), which was enacted in 1996 prior to the digital revolution of the 2000's, the advent of smart phones and media convergence, pornography is widely accessible online in South Africa.<sup>1</sup> At the same time, South Africa has exceptionally high levels of violent crimes, as well as sexual violence, in many cases perpetrated by men against women and children.

#### *Harms of pornography*

9. Even if measures aimed at protecting children from online exposure to adult content were to be effective, which is highly questionable, the Bill fails to take proper account of the harms that result from exposing **adults** to adult content and to provide adequate protection from such harms.
10. Even non-violent adult content that is viewed by adults, have harmful effects on viewers, on viewers' intimate partners, on family relationships, and especially on vulnerable groups in society, mostly women and children who end up being victims of sexual violence and abuse. These harms are borne out by scientific/research evidence (see for example <http://fightthenewdrug.org/get-the-facts/>) and case law (*S v Engelbrecht* 2005 (2) SACR 41 (W)).
11. One of the harms of pornography is that watching pornography leads to violence. Amongst other things, research indicates that when people with a proclivity/predisposition towards violence are exposed to pornography (even non-violent forms), they act out in **sexual** violence – abuse turns into **sexual** abuse.<sup>2</sup> The people most at risk are women and children, especially young girls aged 10 and older, who are fully developed or developing into the image of mature women. These young girls are a particularly vulnerable group in our society.
12. In the light of the aforementioned research conclusions, it is unthinkable that in South Africa, being a country with high levels of domestic abuse and sexually violent crimes, the mass distribution of pornography could be sanctioned by State policy. The State should take the utmost care not to fail people most at risk of harm – women and children.
13. At the very least, prior to taking such a drastic policy decision (i.e. sanctioning the online distribution of pornography), the State should undertake a thorough investigation - preferably by way of an official commission of enquiry - into the effects and harms of pornography in and for the current South African society.

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<sup>1</sup> New measures proposed by the Bill, and in the FPB Online Regulation Policy, however will enable the blocking of unlawful online content.

<sup>2</sup> See for example, Shope, Janet Hinson. "When Words Are Not Enough: The Search for the Effects of Pornography on Abused Women." *Violence Against Women* 10:56-72. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.576.5028&rep=rep1&type=pdf>.

14. 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.

### **Protecting human dignity and promoting respect for human dignity**

15. Certain forms of adult content, so-called “hard core” pornography, violates the human dignity of its characters in that human beings are portrayed as objects (or are exploited as such) for purposes of sexual stimulation, without presenting characters truly as human beings, with value in and of themselves. These materials are covered by the current definition of “XX” classification (*sections 16(4)(b) and 18(3)(b) of the Act*).
16. Notwithstanding the harms associated with pornography (referred to hereinabove), distribution of this type of adult content (whether online or otherwise) should not be legalised. The “XX” classification should therefore not be watered down, as this would result in unlawful content being re-characterised as allowable adult content (“X18” classification).<sup>3</sup> Materials that violate human dignity, are degrading of human beings or promotes harmful behaviour, should continue to be unlawful, **even if it does not contain violence or sexual violence**.<sup>4</sup>

### **Conclusion**

17. The regulation of pornography should always be considered in its proper constitutional context. The Constitutional Court in *De Reuck v Director of Public Prosecutions (WLD)*<sup>5</sup> held that the limitation of pornography<sup>6</sup> “**does not implicate the core values of the right [to freedom of expression]**” and that pornography is, “**for the most part, expression of little value which is found on the periphery of the right**”.<sup>7</sup>
18. We interpret the Constitutional Court as saying (applied to the context of the Bill) that if a **choice** must be made between **keeping people entertained** (sexually aroused) **OR** denying those people their entertainment in order to promote respect for human dignity and to **protect vulnerable groups against violence**, we as a society should choose

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<sup>3</sup> There is no policy reason or legal obligation to amend the “XX” definition, as the Constitutional Court in *Print Media South Africa and another v Minister of Home Affairs and others* (CCT 113/11) [2012] ZACC 22 did not declare it to be vague or overbroad. We addressed the impact of the *Print Media judgments* (both majority and minority) in paragraph 21.2 of Cause for Justice’s written submissions.

<sup>4</sup> See paragraph 20.2 of Cause for Justice’s written submissions.

<sup>5</sup> 2004 (1) SA 406 (CC).

<sup>6</sup> The court specifically had to consider child pornography in the particular matter.

<sup>7</sup> *De Reuck* at para [59].

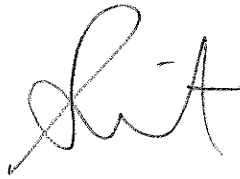
the latter. This should be our choice even if we would save just one victim from sexual violence.<sup>8</sup>

19. In the light of the abovementioned facts and circumstances, we respectfully submit that this is the choice Parliament is faced with. Protecting women and girls from violence should be of paramount importance, during this time and at all times. We accordingly implore Parliament to act and give effect to that which is most important.
20. Thank you for your consideration of our concerns.

Yours faithfully,

**Cause for Justice: Management Committee**

Per:

A handwritten signature in black ink, appearing to read 'Smit', written over a horizontal line.

**S A Smit, Executive Board member**

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<sup>8</sup> The other harmful effects of pornography should also play a role in this choice.