

BRIEFING ON THE FILMS AND PUBLICATIONS AMENDMENT BILL (“THE BILL”)

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1. Introduction: History of the Bill

- The Bill (proposed amendment legislation) seeks to amend the Films and Publications Act of 1996 (“the Act”).
- It was introduced in National Assembly (one of the two houses of Parliament) in November 2015. It then went through a process of consideration and deliberation, including public participation, in the Portfolio Committee on Communication (“PCC”) until November 2017.
- Most recently, the Bill was debated and voted on by all political parties represented in the National Assembly at the Second Reading of the Bill on 6 March 2018. See “Next steps” below for details on the future progress of the Bill.

2. Main proposals in the Bill

2.1 Problematic proposals:

Context

The Act deals with *adult* pornography in two ways – for classification purposes:

(Note that “*child* pornography” is already illegal in South Africa.)

1. “XX” classification: Obscene material, which may not be distributed *at all*, not even between adults;
2. “X18” classification: Explicit/hard-core adult pornography (falling short of obscenity).

Up to now, the Act has provided that “X18” material may only legally be distributed to and accessed by *adults* within the four walls of a building that has been licenced as an “adult premises” – i.e. *adult* pornography may only be distributed *to adults* in these limited circumstances. All pornography that is currently freely available on the internet, is therefore illegal.

Problematic proposals

The Bill now proposes:

1. Watering down / narrowing the definition of “XX” material by **only prohibiting** the distribution of ***pornography that contains explicit violence***, which will result in more vile types of pornography and other degrading material becoming legally distributable between adults in South Africa;¹
2. Legalising the online distribution of “X18” pornography to adults in South Africa.²

Injustice: Why is this problematic and why must we act?

As explained in more detail in the endnotes to this briefing note:

1. Certain depictions of human beings on the internet and other media platforms, violate the human dignity inherent to all human beings. Such depictions would be in violation of the South African constitutional order, even if it does not contain explicit violence. The devaluing and dehumanising of people or groups, is a cause of many person-on-person crimes.

By only prohibiting pornography that contains explicit violence and allowing the distribution of ***non-violent degrading and dehumanising material***, South African law would be setting the bar for prohibited content far too low.³

2. The harms of pornography are real and grave. Protecting children from exposure up to the age of 18 is certainly laudable and an absolutely crucial intervention, but only addresses one of many ways in which children are impacted adversely by pornography. Children and women end up as victims of sexual abuse/violence – not mainly at the hands of other children/boys, but rather at the hands of men, aged 18 and older. Amongst many other harms, men’s use of or exposure to pornography therefore harms women and children.⁴

2.2 Good proposals:

The Bill also purports to introduce some *positive amendments*, including:

1. The criminalising of so-called “revenge porn”;
2. The criminalising of the creation, production and distribution of depictions of sexual violence and violence against children; and
3. Prohibiting the distribution of hard-core adult pornography (“X18” material) to children.

In light of these positive elements to the Bill, it would therefore not be preferable for the whole of the Bill to be done away with, as some of the political parties forming part of the opposition are calling for.

3. Next steps:

The Bill will advance through the following stages from here on:

1. It will be tabled in the National Council of Provinces (NCOP, the second house of Parliament) for deliberation and debate, including one further round of public participation.
2. Depending on the outcome of the NCOP process, the Bill could either be dropped, or passed by Parliament with or without amendments.
3. After being passed by Parliament, the Bill will be sent to the President to be signed into law.

4. What can be done?

There remains a couple of opportunities to engage on the Bill to bring about change:

Public engagement

1. **Petition the NCOP to amend the Bill:**⁵
<http://causeforjustice.org/petition-say-no-to-onlineporn-sa/>⁶
2. **Public participation through submissions:**⁷
Some individuals and organisations may be able to make substantive submissions to the NCOP during its public participation process.
3. **Engaging the political sphere:**
Organisations, including religious organisations, bodies and churches, can engage with the ruling party directly to attempt to dissuade them from their current course.⁸

Legal / Constitutional recourse

If public engagement does not yield the desired outcome and Parliament adopts the Bill in its current form, other avenues will need to be explored, such as:

4. Petitioning the President to refer the Bill back to Parliament for reconsideration;
5. Petitioning the President to refer the Bill to the Constitutional Court for a decision on its constitutionality;
6. After the President has signed the Bill into law, petitioning one third of the members of Parliament to apply to the Constitutional Court for an order declaring that part of the Bill is unconstitutional.
7. Civil society organisations bringing an application to the Constitutional Court for an order declaring that part of the Bill is unconstitutional.

Endnotes to Briefing on the Films and Publications Amendment Bill:

¹ The proposed amendment to water down the definition of prohibited material that may not be distributed at all in South Africa, is cause for concern. The Act at present outlaws material that -

- violates/disrespects human dignity,
- is degrading of human beings, and
- incites/promotes causing harm to human beings.

The proposal in the Bill is to replace these three prohibited materials with a single definition prohibiting only ***violent*** pornography. The unintended consequences are that –

- ***non-violent*** sexual material that ***violates human dignity***,
- ALL degrading material that does not contain an element of explicit violence; and
- material that incites or promotes harm being done to human beings,

will become legally distributable in South Africa.

This proposal cannot be supported, as it constitutes a clear violation of human dignity and will create public safety risks in relation to people inciting others in society to harm themselves and/or others. This is not in the interest of justice or in the public interest and cannot be justified on constitutional grounds.

The counter-proposal therefore is to: Either leave the provisions in the Act untouched (i.e. no amendments) or redraft it to bring it in line with constitutional norms and values.

² There exists ***well documented scientific research evidence of the extensive individual (physical and psychological), relational and public (health, safety and other social) harms of pornography***, which should first be given proper consideration, before a decision is taken about wide-spread dissemination of hard-core pornography to adults in South Africa through the internet.

One of the most concerning harms of pornography is the perpetration of sexual violence/abuse against children and women by adult men triggered into these criminal acts through exposure to pornography.

<http://endsexualexploitation.org/violence/>

Observations:

1. Pornography use is rife in South Africa. [We are in the top 20 of all countries in the world. We are number 1 in the world for accessing pornography via smart phones. <https://carteblanche.dstv.com/stats-south-africas-porn-habits/>]
2. Gender-based and domestic sexual violence is rife in South Africa. Mostly adult males exploiting, abusing and violating women and children. [This is a matter of public record.]
3. Research / scientific evidence shows that pornography use is a cause of gender-based / sexual violence.

The above observations are cause for proper investigation – preferably by way of official commission of enquiry – to critically consider the consequences for the whole of society when adults are exposed to adult pornography. In light hereof, the policy decision by government and the National Assembly and PCC to legalise the ***online*** distribution of pornography to ALL adults ***without conducting an official and credible investigation into the effects of pornography on South African society***, is difficult to fathom and reckless.

The counter-proposal: In the interim – until such time as an official investigation has been conducted – as far as the distribution of hard-core (“X18” classified) pornography to adults is concerned, the current “licensed adult premises” regime (sections 24(1), (2) and 24A(3) of the Act) strikes a constitutionally justifiable balance between protection from harm and protection of human dignity (on the one hand) and freedom of expression (on the other).

³ In determining what the Bill of Rights demands in the present context, the following considerations are instructive:

- a. In *De Reuck v Director of Public Prosecutions (WLD) 2004 (1) SA 406 (CC)* (“*De Reuck*”) the Constitutional Court, after identifying the core values of freedom of expression, held that the limitation of pornography (The court specifically had to consider child pornography in the particular matter.) “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 (De Reuck at para [59]).
- b. 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 (See *Human Dignity: Lodestar for equality in South Africa* (Laurie Ackermann, JUTA, 2012) at p 13). The approach of the German courts regarding the protection of human dignity in this context, can be summed up as follows: (**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.**)

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

⁴ Harms include, amongst others:

- Harms to viewers, both adult and children,
- Harms specific to viewers who are children;
- Harms to intimate partners and intimate partner relationships;
- Harms to vulnerable groups in society (e.g. victims of sexual violence and crimes).

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;
- 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;

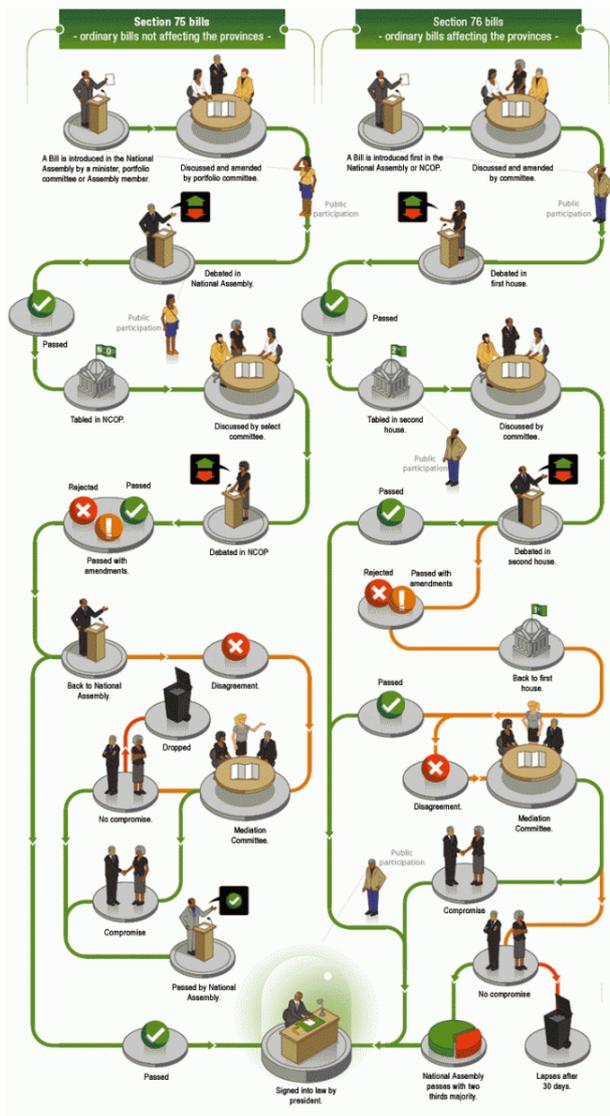
- acceptance of aggression as being part of a normal sexual experience;
- causing people with a predisposition to violence to act out in sexual violence against intimate partners;
- desensitisation towards and/or acceptance of rape and other sexual crimes;
- greater propensity to divorce and to commit 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.

[http://endsexualexploitation.org/wp-content/uploads/NCOSE_Pornography-Public-Health_RESEARCH-SUMMARY_8-15-17-1.pdf]

⁵ Amendments would be necessary to promote human dignity and protect society from harm, and without limiting freedom of expression more than is necessary (reasonable and justifiable) to achieve these aims.

⁶ To deliver a meaningful petition, around 50,000 signatures are required. As at 20 March 2018, around 5,000 petitioners have signed the petition. Another 45,000 signatures are still required.

⁷ The Films and Publications Amendment Bill has been tagged as a Section 75 Bill:



⁸ Seeing as the ruling party has a 62% voting majority in Parliament and individual MPs are not allowed to vote according to their conscience, any political solution in the short term would necessarily require persuading the party leadership to change its current position.