



Cause For Justice Oral Submissions

Select Committee on Communications and Public Enterprises

**Public hearings on the
FILMS AND PUBLICATION AMENDMENT BILL [B 37B-2015]
12 September 2018**





Table of Contents.

1. Content of Written Submission
2. Introduction
3. Main concerns
4. Procedural irregularities
5. Other serious matters requiring the Committee's attention
6. Textual problems requiring ironing out

Content of Written Submission.

1. Submission document (29 pages), including:
 - a. Annexure A: Constitutional Context and What the Bill of Rights demands
 - b. Annexure B: Summary timeline of interaction with Parliament, DoC and FPB
2. Annexure C: Memorandum on procedural irregularities in relation to the Bill
3. Annexure D: Proposed wording/working definition for the “XX” classification
4. Annexure E: Research Summary “Pornography & Public Health” on the harms of pornography
5. Annexure F: E-mail to Committee Secretary dated 17 August containing the voice of 6,528 petitioners/signatories who share our main concerns and support our proposals in respect thereof



Introduction.

- Background to Cause for Justice [See paras 4 to 8 of CFJ Written Submission.]
- We know of at least **60 individuals** who sent in submissions directly to the Committee, also citing our main concerns and supporting our proposals in respect thereof.
- De Reuck 2004 (1) SA 406 (CC):
 - Limitation of pornography ***“does not implicate the core values of the right” (freedom of expression)***
 - Pornography is ***“for the most part, expression of little value which is found on the periphery of the right”***.

Introduction (continued).

- German approach:

*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.).*

Main Concerns. [See pages 3 – 11 of CFJ Written Submission.]

Current Act:	Amendment proposed in the Bill:	Consequence:
“XX” definition:		
<ul style="list-style-type: none"> •Explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person,¹ •Conduct or an act which is degrading of human beings,² and •Conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour.³ 	<ul style="list-style-type: none"> •Explicit sexual conduct <i>accompanied by explicit violence</i>, [Remove: “which violates or shows disrespect for the right to human dignity of any person”] •Remove all •Remove all 	<p>More vile, degrading and dehumanising materials will become legally distributable;</p> <p>The position proposed is that it will be fine to distribute such materials, as long as it does not contain explicit violence – <i>no matter how degrading and dehumanising it is.</i></p> <p>Material inciting harm will also become legally distributable.</p> <p>Examples: Para 18 of CFJ Written submissions</p>

¹ Ss 16(4)(b)(i) and 18(3)(b)(i) of the Act.

² Ss 16(4)(b)(ii) and 18(3)(b)(ii) of the Act.

³ Ss 16(4)(b)(iii) and 18(3)(b)(iii) of the Act.

Main Concerns.

Current Act:	Amendment proposed in the Bill:	Consequence:
<p>“X18” definition: “Explicit sexual conduct” (section 1)</p>		
<ul style="list-style-type: none"> • Only accessible by and distributable to adults inside an “adult premises” (section 24(1) and (2)) 	<ul style="list-style-type: none"> • Accessible by and distributable to adults online, subject to conditions incl. prevention of access by children (new subsection 24(3)) • The elements proposed to be removed from the “XX” definition will either become “X18” classified or lower, in terms of the FPB Classification Guidelines. • The Bill proposes the inclusion of sexual intercourse with a human corpse in the definition of “explicit sexual conduct” in section 1. It then fails to amend the “XX” definition to include this extension in the “XX” definition. 	<p>Legalising material that research shows is a cause of adults perpetrating sexual violence on vulnerable individuals – mostly women and children – <u>without first conducting an investigation of the costs to society.</u></p> <p>If this is accepted, it will <i>become legally allowable to distribute material containing sexual acts with a human corpse.</i> This would constitute an unjustifiable violation of the human dignity inherent in the body of a deceased person and living person.</p>

Main Concerns (continued).

- Watering down of “XX” definition:

1. Question for DoC and Committee:

“Why would we want to set the bar so low? Why legalise the distribution of material containing all manner of paraphilic disorders, including necrophilia, coprophilia and urophilia? Why allow people to be degraded and dehumanised in media content?”

- a. It would not be in line with what the Constitution / Bill of Rights demands.

The scope of legitimate exercise of constitutional freedoms does not extend to the use of such freedoms to violate human dignity and placing people at risk of harm and exploitation. That would constitute abuse of constitutional freedoms.”

Main Concerns (continued).

- Watering down of “XX” definition:
 - b. It will place people (being filmed) at risk of harm and exploitation.
 - c. It is not what the court in the Print Media judgment required: [See Part 2 of Annexure C to our Written Submissions.]
 - i. The majority did not find the definition to be vague or overbroad.
 - ii. The minority, whose finding is a non-binding opinion, proposed that “*substantial redrafting is required*”.

Main Concerns (continued).

- Watering down of “XX” definition:

It will result in:

- The violation of the inherent dignity of people and/or degrading people, in that materials containing such depictions will be legally distributed or sold

[Note: It is not always possible to deduce consent/wilful participation, including the nuances of coercion, dominance and power imbalances from image/video content – that is why a higher objective standard is necessary to protect people]; and

- A public health and safety risk in that people will be allowed to distribute material to incite recipients to harm others or themselves.



Main Concerns (continued).

- Watering down of “XX” definition:

2. Proposal: *Either*

- a. Leave the provisions of the Act untouched, i.e. reject the proposed amendments (This would be in line with the majority in the Print Media case and will still allow any interpretational shortcomings to be addressed through the FPB Classification Guidelines.) **OR**
- b. Redraft the provisions to bring it in line with constitutional norms and values, as was proposed by the minority in the Print Media case. (We provided a proposed starting point for such drafting exercise in Annexure D to our Written Submissions.

Main Concerns (continued).

- Legalising of the ONLINE distribution of “X18” (hardcore adult pornography):

1. Harms of pornography – cause for investigation:

- The harms of adult pornography are grave. [See Annexure E to our Written Submissions for the Research.]
- Taking but one harm as example: **Pornography is a cause of sexual aggression and gender-based violence**
 - **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/>]]
 - **Gender-based, domestic and sexual violence is rife in South Africa.** Mostly adult males exploiting, abusing and violating women and children. [This is a matter of public record.]
 - **Scientific/research evidence shows that pornography use is a cause of gender-based / sexual violence.**

Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:

Dr. Paul Wright and his research team ... analyzed recent data on pornography use and sexual violence from 22 studies and 7 different nations. They found that in correlational, cross-sectional, and longitudinal studies, **pornography use and acts of sexual aggression were directly connected**. This connection held true for both men and women, and for verbal and physical aggression. **Violent pornography was even more strongly linked to sexual violence**. Moreover, after viewing over 500 studies to determine whether consumption of pornography caused gender based violence, Dr. Max Waltman of Stockholm University concluded that the weight of the evidence shows the direction of the connection clearly. He noted that **the available research shows that pornography causes gender based violence through most every methodology imaginable, using experimental and nonexperimental studies, quantitative and qualitative studies, and samples of specific groups and samples of the general population**. Dr. Waltman describes the effects as not only statistically significant but robust.”

[Wright, P.J., Tokunaga, R.S., & Kraus, A. (2015). A Meta-Analysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies. *Journal of Communication*. doi:10.1111/jcom.12201
Waltman. M. (2014). The politics of legal challenges to pornography. Doctoral Dissertation.]

Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:

Let's take stock:

- Non-violent adult pornography is therefore poison, and violent adult pornography is even more toxic. ***Does that provide a rational justification for prohibiting the distribution of ONLY the one, and legalising the other? We think not.***
- The harms of adult pornography, or at least of this one harm, is **cause for serious concern and warrants proper investigation.**
- The **SEIAS on the Bill did not look at the social and economic impact** of legalising the mass distribution of adult pornography to adults via the internet.

Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:
 2. If the legislative proposal is accepted, it will be done without having investigated to determine what the cost of that decision will be.
- According to the research, more vulnerable people, mostly women and children, will fall prey to, in most instances, adult male sexual predators.
- To take this decision to legalise, without having given proper consideration to the research and the impact it will have, is to declare: ***“Male sexual entertainment is more important than the safety and protection of women and children.”*** That would be a travesty of justice..
- **S v Engelbrecht** 2005 (2) SACR 41 (W)
- **“Porn seen as trigger for UCT rape spree”** 15 November 2016, Timeslive

Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:

3. Proposal:

- a. Conduct or commission an official and credible investigation into the effects (social and economic impact) of adult pornography on South African society;
- b. In the interim – ***until such time as an official investigation has been conducted*** – as far as the distribution of hard-core (“X18”) adult pornography to adults is concerned, keep the current “licensed adult premises” regime (sections 24(1), (2) and 24A(3) of the Act) intact, as it 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).

Main Concerns (continued).

- Legalising of the ONLINE distribution of hardcore adult pornography:

4. Question for DoC and Committee:

“How can we, knowing that exposure to non-violent adult pornography results in men (some, not all) perpetrating sexual violence on women and children, support the mass online distribution thereof into our society as a matter of state policy and of law, and especially without first conducting an investigation to count the cost of such decision?”

Procedural irregularities – Annexure C.

We are currently in the process of **obtaining Senior Counsel advice** in respect of the matters highlighted in Annexure C to our Written Submission regarding:

- **Incorrect tagging;**
- **Error of law due to misleading by Parliamentary Legal Services; and**
- **The PCC’s failure to facilitate adequate public participation after making amendments outside of the scope of the original Bill;**

We are also disappointed by the violation of the separation of powers principle which resulted in our concerns not being ventilated at the opportune time in the PCC:

- The DoC distributed a document titled “Annexure C” at the 7 March 2017 PCC meeting which incorrectly stated that no comments were received in respect of the proposed amendments to sections 16(4)(b) and 18(3)(b) (although we had commented extensively on it); and not including our comments on the proposed new section 24(3), amongst others.

Other serious matters requiring the Committee's attention.

Other matters requiring the Committee's urgent intervention include:

- **Definitional uncertainty and concerns regarding:**
 - The interplay between “commercial online distributor” / “distributor” / “non-commercial online distributor”, and the regulatory scheme that will result
 - “domestic violence”
 - “hate speech”
 - “prohibited content”
 - “sexual conduct”

Clause 1 of the Bill, in relation to Section 1 of the Act

[See pages 12 – 14 of CFJ's Written Submission.]

Other serious matters requiring the Committee's attention.

- The ***further fragmentation of the regulatory landscape*** by the proposed exemption of advertisements falling under ASASA and broadcasters falling under ICASA; AND consequently putting consumers at risk of harm due to regulatory discrepancies.

Clause 15(a) in re section 16(1); Clause 17(c) in re section 18(6); Clause 24 in re section 24A(2)

[See paras 44.1 and 45.3 of CFJ's Written Submission.]

- Proposed ***softening of the law*** regulating films containing "***child pornography***", whether inadvertently or purposely.

Clause 17(a) in re section 18(3)(a)

[See para 45.1 of CFJ Written Submission.]

Other serious matters requiring the Committee's attention.

- ***Oversight to address consequences of non-compliance by “commercial online distributors”***. Section 18E(2) addresses “non-commercial online distributors” (sub (a)) and “internet service providers” (sub (b)), but fails to deal with “commercial online distributors” at all.

Clause 19 in re new section 18E(2)

- ***Unjustified requirement of “intention to cause harm” in relation to ‘revenge porn’*** uploaded online without the consent of the depicted person. The proposed subsection (b) to section 18F(1) should accordingly be deleted, and so too the reference to “with the intention to cause the said individual harm” in the proposed new section 24E.

Clause 19 in re new section 18F(1)(b); Clause 27 in re new section 24E

[See para 47.2 of CFJ Written Submission.]

Other serious matters requiring the Committee's attention.

- Even if the decision is taken to legalise online distribution of adult pornography to adults, which we oppose if it is done without a proper investigation into the social and economic costs of such decision, the newly ***proposed section 24(3) still suffers from some shortcomings***, which need to be addressed.

Clause 23 in re new section 24(3)

[See paras 49.4 – 49.11 of CFJ Written Submission.]



Other textual problems requiring ironing out.

- Clause 5 in re Section 4A: See para 42 of CFJ Written Submission.
- Clause 14 in re Section 15A: See para 43 of CFJ Written Submission.
- Clause 19 in re new sections:
 - 18E: See para 46;
 - 18F: See para 47.1; and
 - 18J: See para 48 of CFJ Written Submission

Other textual problems requiring ironing out.

- New section 18G:
 - Sub-section (1) refers to “**sexual violence**”, but sub-section (7) and the proposed new section 24F refers to “**sexual assault**”. This incongruency should be addressed by using the same terminology in both sections.
 - Sub-section (2)(c) should be re-numbered as sub-section (3) and the remainder of the section also re-numbered accordingly.
 - The reference to “and (2)” in the currently wrongly numbered sub-section (2)(c) has no meaning and should be removed.
- Clause 23 in re section:
 - 24A(2) – see para 50.1.3
 - 24A(3) – see para 50.2; and
 - 24A(4) – see para 50.3 of CFJ Written Submission.

Other textual problems requiring ironing out.

- Clause 28(a) in re section 27A(2):
 - The sub-section contains references to “internet **access** provider” and “internet **service** provider”. Both these terms are used elsewhere in the Bill. In order to remove uncertainty and confusion, the same terminology should be used throughout the legislation.
- Clause 28(b) in re section 27A(4):
 - Remove from sub-section (a) the proposed “and (2)”, as sub-section (b) already contains a reference to “subsection (2)”. It will create confusion if subsection (2) is referred to in both subsections (4)(a) and (4)(b).

Inherent dignity.

- “Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. ... The very nature of prostitution is the commodification of one’s body. ... ***The very character of the work [...] devalues the respect that the Constitution regards as inherent in the human body.***”

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)



Thank you.

