

# Oral Submissions

Children's Amendment Bill,  
2020

Portfolio Committee on Social  
Development

**13 May 2021**



# ***Content***

## ***1. Children and the media***

- Re-insert improved new section 6B.

### ***Offences***

- Amend section 305.

## ***2. Genetic origin of child***

- Retain current wording of section 294.



# ***Introduction***

## ***Background to Cause For Justice (CFJ)***

- CFJ core values:
  - Responsible exercise of freedom.
  - Promotion of human dignity/inherent worth of all human beings.
  - Protection of the vulnerable in society (social justice).
  - Protection of the family against destructive outside (and inside) forces.
  - Ensuring accountable exercise of state power.

# *Introduction*

## *Protecting children from (impact of) harmful media content*

- ICASA / StarSat (formerly "TopTV") judicial review case.
- Films and Publications Amendment Bill, 2015.
- FPB Draft Online Content Regulation Policy and FPB Classification Guidelines.
- SALRC Project 107: Sexual Offences (Pornography and Children).
- Launching **NEW** online training course during Child Protection Week: ***#ParentTalk on the Unspoken Epidemic of Children and Pornography.***

# ***"CHILDREN AND THE MEDIA"***

## ***Wording of section 6B (before being removed from the Bill)***

### ***6B Children and the media***

- 1) The media may not publish child pornography; identify children who have been victims of violence, abuse, exploitation, or who have been charged with or convicted of a crime, without the consent of their parent(s), caregivers, or guardians and the child as contemplated in 6A.
- 2) The media, parents, and caregivers or guardians must protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences.

# ***Why new section 6B must be re-inserted in the Bill***

- Harmful impact of exposure to sexual and violent content, especially pornography, on children is well-researched and documented by wide range of academics, researchers, international experts and child protection organisations.
- *“Classifiable elements within media content such as violence, sexual content and horror remain a concern and due to children’s extensive exposure to different media platforms, they are more likely to be exposed to violent and sexual content on the various platforms.” - FPB Discussion Document on the Review of the Classification Guidelines*



# ***Why new section 6B must be included in the Bill***

*“[A] child’s best interests are of paramount importance in every matter concerning the child.”*

– Section 28(2) of the Constitution

# ***"POSITIVE OBLIGATION" TO PROTECT CHILDREN***

## ***Necessity/importance of imposing positive obligation***

- Purpose of Children's Act includes making legislative provisions specifically applicable suitable to child protection context.
- Reason provided by DSD for removing section 6B: "Duplication"

# ***"POSITIVE OBLIGATION" TO PROTECT CHILDREN***

## ***Necessity/importance of imposing positive obligation***

- FPA contains negative obligations (what people may NOT do), but very few positive obligations (what people are legally required to do to protect children).
- Cross referencing between Children's Act, FPA and FPB Guidelines, SORMA and other existing mechanism existing practice – not duplication (comprehensive integrated system).



# ***"POSITIVE OBLIGATION" TO PROTECT CHILDREN***

## ***Necessity/importance of taking action now to act in the best interest of children***

- Amend and convert Bill to “Committee Bill” (can’t afford to wait for next round of legislative amendments to Children’s Act).
- CFJ able to provide assistance with drafting (connected with highly experienced legislative drafter).
- Draw from/build on work already done by state (e.g. FPA and FPB Guidelines).



# ***"POSITIVE OBLIGATION" TO PROTECT CHILDREN***

***Request – if Portfolio Committee disinclined to amend Bill at this time***

- Provide opinion for purposes of guidance to DSD (to the effect that):
  - DSD to amend Children's Act to include the necessary protective provisions; **OR**
  - DSD to work with DoC & DT and FPB to add the necessary protective provision to FPA (or other legislation falling under mandate of DoC & DT).



# ***Proposal # 1: Re-insert new section 6B***

- ***Insert improved version of new section 6B and ensure that the provision is implementable and enforceable.***
- ***In order to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences***

# ***Comments on section 6B(2) (since removed from the Bill)***

- Lack of clarity on the meaning of “the media”.
- Unnecessarily restricted list of “accountable persons”.
- Lack of clarity on the meaning of “potentially disturbing and harmful materials”.
- Lack of clarity on the meaning of “premature exposure to adult experiences”.
- Lack of objectively measurable and specified standard for compliance obligation: “must protect” children from harmful media content.

## ***Proposal # 2: Clarify meaning of "the media"***

- "Media" not defined in Act or draft Bill.
- Lack of legal clarity limits practical effectiveness of provision (loopholes).
- Vague and unclear statutory provisions are open to constitutional challenge (invalidity).

# ***Proposal # 2: Clarify meaning of "the media"***

## ***Provide suitable definition or description for "the media"***

- Broadcasters who are subject to regulation by ICASA and/or the BCCSA.
- Creators, producers, distributors and exhibitors of films, games, and publications that are regulated by the FPA.
- Creators, producers, distributors, and exhibitors of advertisements that fall under the jurisdiction of ASASA.
- Members of the Press Council of South Africa, and self-regulating news media.



## ***Proposal # 3: Other "accountable persons"***

- Only "media, parents, and caregivers or guardians" required to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences (list unnecessarily limited).
- Extend list: Place duty to protect children on all other persons and/or entities that work directly with – or in the furtherance of the best interests of – children.

## ***Proposal # 3: Include other "accountable persons"***

- Section 110 requires certain persons to report child abuse and child neglect (recognises higher duty of care to children than other members of general public).
- Extend duty to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences to persons referred to in section 110.



# ***Proposal # 4: "Potentially disturbing and harmful materials"***

- Phrase “potentially disturbing and harmful materials” too vague and open for interpretation (not practically implementable/enforceable).
- Needs clarification to pass threshold of law and constitutional muster (link to objective description/measuring stick).

# ***Proposal # 4: Clarify "potentially disturbing and harmful materials"***

- FPA classification scheme (in FPA and FPB Classification Guidelines) provides appropriate and suitable objective standard. Guidelines give meaning to “potentially disturbing and harmful materials” and assign age classifications to different materials based on wide range of relevant factors.
- Guidelines subject to review every four years (democratic and participatory comprehensive public consultation process) to ensure norms, values, and standards consistent with those of South African public as well as constitutional norms and values.

# ***Proposal # 5: “Premature exposure to adult experiences”***

## ***Clarification needed (context)***

- “Adult experiences” are those experiences that are sexual in nature (including displays of non-sexual nudity) or relate to what is traditionally commonly referred to as “vices” (such as substance abuse).
- Issue is exposure to media content that contains (depictions of) adult experiences (rather than premature exposure to real life adult experiences).



# ***Proposal # 5: Clarify “premature exposure to adult experiences”***

- FPA classification scheme and Guidelines provide objective measuring stick for the suitability/appropriateness of varying media content for children of different ages.
- Include reference to the FPA classification scheme and the Guidelines for purposes of determining the meaning of “premature exposure to adult experiences”.

## ***Proposal # 6: “Must protect”***

- Requires that media, parents, caregivers and guardians “must protect” children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences.
- Phrase “must protect” too vague: No indication or guidance as to manner in which these persons “must protect” children (i.e. standard of actions and measures to be taken to comply with obligation not specified).

## ***Proposal # 6: “Must protect”***

- Lack of objectively measurable and specified standard for compliance detrimental: Identified persons and groups left to subjectively determine own compliance (legislative text falls short of requirements for law of general application).
- Also: No sanction attached to non-compliance with the obligations.



# ***Proposal # 6: Clarify "must protect"***

- Set standard or bar for compliance with legislative obligation (not necessary to stipulate all possible actions and measures each specified person may conceivably take).
  - Each person or entity with duty to protect children obliged to implement reasonable steps and measures within their particular circumstances.
- Ensure provision sufficiently practically implementable and enforceable to pass constitutional muster.

## ***Proposal # 6: Clarify "must protect"***

- Directive for media regulatory authorities (guided by the FPA classification scheme and Guidelines) to revise and include practical measures in codes of conduct/good practice.
- Express obligation that all persons required to protect children (as contemplated in provision) must comply with all other applicable legal and ethical obligations and duties to protection of children in terms of law and the rules governing their professions, practices, industries, services, products, goods, media, and other created or produced content.

# ***Proposal # 7: "OFFENCES" - Amendment of section 305***

## ***Concern:***

- No enforcement mechanism or consequences (sanction) for non-compliance: No duty or incentive to comply.

## ***Proposal # 7: Amend section 305 to include contravention of proposed new section 6B as an offence***

- Need to provide enforcement mechanism and consequences (sanction) for non-compliance.
- Include in section 305(1)(c): *"A person is guilty of an offence if that person —fails to comply with section..."*.

# ***"GENETIC ORIGIN OF CHILD" - Section 294***

- ***Amendment previously proposed in respect of section 294:***
- Insertion of new subsection 294(2):
  - Allows High Court, upon application and good cause shown, to declare surrogate motherhood agreement valid where the child whose conception is contemplated in agreement, is not conceived by using the gametes of (any of) the commissioning parent(s).

# ***"GENETIC ORIGIN OF CHILD" - Section 294***

- ***AB and Another v Minister of Social Development 2017 (3) SA 570 (CC)***: Requirement of genetic link between child to be born and at least one commissioning parent (for legal surrogacy).
  - Rationality
  - Limitation of rights
  - Limitations analysis

# ***"GENETIC ORIGIN OF CHILD" - Section 294***

## ***Support for removal of proposal:***

- Lack of constitutionally justifiable grounds for proposed amendment of section 294.
- Section 294 as it currently reads is in line with the Constitution (as confirmed by the Constitutional Court).
- Parents who unable to use surrogacy, have the option of adopting child (South Africa has large orphan population and big need for adoptive parents): Prioritise lives of existing children in need of parental care and family life.

# ***In summary***

## ***Children and the media***

- Re-insert improved new section 6B.

## ***Offences***

- Amend section 305.

## ***Genetic origin of child***

- Retain current wording of section 294.

# Thank you

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