

Ms D Tsotetsi, MP
Acting Chairperson of the Portfolio Committee on Communications
WS3/106
3rd Floor
90 Plein Street
Cape Town
8001

30 May 2016

Attention: Mr TK Ngoma

Per Email: tngoma@parliament.gov.za

Dear Ms Tsotetsi,

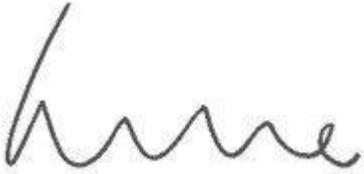
CONCISE SUBMISSIONS ON THE *FILMS AND PUBLICATIONS AMENDMENT BILL* [B37—2015]

Introduction

1. The Centre for Constitutional Rights (CFCR) is dedicated to upholding the *Constitution of the Republic of South Africa, 1996* (the Constitution). To this end, the CFCR seeks to promote the values, rights and principles provided for in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.
2. With reference to your call for submissions, the CFCR welcomes the opportunity to make concise submissions to the Portfolio Committee on Communications regarding the *Films and Publications Amendment Bill* and certain aspects of the Bill that we believe require revision or amendment.
3. It is not the purpose or intention of this submission to provide comprehensive legal analysis or technical assessment of the Bill, but rather to draw attention to key concerns in relation to the Bill, particularly in so far as it relates to constitutional values, rights and requirements.

4. As such, with reference to the aforementioned calls for comment, please find below, concise comments regarding the Amendment Bill.
5. We trust that our submission will be of assistance in guiding the Committee in its deliberations regarding the Bill.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Phephelaphi Dube', written in a cursive style.

MS PHEPHELAPHI DUBE

DIRECTOR: CENTRE FOR CONSTITUTIONAL RIGHTS

CONCISE SUBMISSIONS ON THE *FILMS AND PUBLICATIONS AMENDMENT BILL* [B37—2015]

Introduction

1. Section 16 of the Constitution detailed below, is of immense constitutional significance and arguably lies at the heart of democracy. As such, the limitation of the right to freedom of expression should be justifiable as a reasonable and proportional measure to achieve a legitimate purpose. The Constitutional Court in *De Reuck v Director of Public Prosecutions*,¹ has previously ruled that the right to freedom of expression must be construed in a manner that does not warrant a narrow reading.

Constitutional Framework

“16. Freedom of expression

(1) Everyone has the right to freedom of expression, which includes-

- a. freedom of the press and other media;*
- b. freedom to receive or impart information or ideas;*
- c. freedom of artistic creativity; and*
- d. academic freedom and freedom of scientific research.*

(2) The right in subsection (1) does not extend to-

- a. propaganda for war;*
- b. incitement of imminent violence; or*
- c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”*

2. Section 36, the limitations clause provides that;

¹2004 (1) SA 406 (CC).

1. *“The rights in the Bill of Rights may be limited only 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, including-*
 - a. *the nature of the right;*
 - b. *the importance of the purpose of the limitation;*
 - c. *the nature and extent of the limitation;*
 - d. *the relation between the limitation and its purpose; and*
 - e. *less restrictive means to achieve the purpose.”*

Ad Clause 1 introducing definitions to the principal Act

3. The definition of ‘artistic’ is given as *‘predominantly aesthetic according to the reasonable person’*. In light of the ruling of the Film and Publications Appeal Tribunal in the Goodman Gallery case concerning the censure of a painting - *The Spear* - this definition may be too broad and impose limitations on the freedom of expression in respect of the arts. The Film and Publications Board Appeal Tribunal was approached in order to determine whether or not a painting depicting the President with his genitals exposed deserved a classification which would restrict its exposure both by the gallery in which it was exhibited and by the press. The decision of the Classification Committee to assign a restrictive age classification of ‘16(N)’ to the painting *The Spear* that was displayed in the Goodman Gallery, its website and that of a newspaper, were set aside. The Tribunal urged the interpretation of art contextually so as not to limit the freedom of expression. The arts rely heavily on the freedom of expression guaranteed in the Constitution and the given definition seeks to limit that freedom.

Ad Clause 4 amending section 3 of the principal Act read with Clause 5 which amends section 6 of the principal Act , and Clause 6 introducing section 6B to the principal Act

4. Since one of the primary aims of the Bill is to establish the Penalty Committee (the Committee) and identify its duties and the manner in which it will be composed, it is paramount that both its composition and functions are transparent and independent, as well as seen to be so. Whilst the functions of the Committee are expressly provided for as to be without bias, it seems unlikely that

this will be so. This is due to the fact that the Committee will be appointed by the Minister with the only outside consultation being Cabinet. Furthermore, when appointing the members of the Committee, the Minister takes advice from an advisory panel which is appointed at the sole prerogative of the Minister. This gives the Minister almost exclusive control of the Penalty Committee, thus affecting the degree to which the Committee is an independent entity. This is particularly true for the removal of a member of the Committee from office. The decision to remove such a member will be based on a finding of a tribunal appointed by the Minister alone. These rules are not exclusive to the Penalty Committee but apply to the Council, as well as the Appeal Tribunal. It is important that the bodies established by the Act and Bill be established in constitutionally sound manner.

Ad Clause 15 functions and powers of Compliance Officers read with Clause 19 independent classification

5. These particular clauses provide for the regulation of digital content that is distributed within the Republic. The requirement that any person who intends to distribute any film, game or certain publication in the Republic shall first apply for registration as a film or game and publications distributor amounts to pre-publication classification, which is akin to censorship. The compliance officers whose roles are articulated in these provisions are to be accompanied by members of the South African Police Services (SAPS) who are empowered to search and seize non-compliant material. Whilst there is an express mention of due regard to human rights, it is unlikely that any refusal by a distributor to allow entry into his/her premises will bode well for said distributor.

6. The Board is granted the power to dispatch classifiers to the distributors' premises for the purposes of classifying digital content. Section 14 of the Constitution provides that everyone has the right to privacy including the right not to have the privacy of their communications infringed or to have their person, property or home searched. As such, this is a recognition that the State may not be granted untrammelled access to search and seize. It is vital that citizens within a democracy are protected from unjustified intrusions of privacy and property by agents of the state. As it appears, this provision arbitrarily permits the State to infringe on personal freedoms and associated fundamental rights, contrary to the Constitution.

Ad Clause 19 inserting S18C to 18J into the Act

7. These insertions concern the classification of all online content. Taking into account the sheer volume of the digital world, this task is impracticable. Requiring all content that is distributed by everyone who has access to the internet to be classified amounts to censure and is a clear violation of the freedom of expression.

Other Considerations

8. The stated purpose of the Amendment Bill - namely the protection of children from exposure to inappropriate material - is crucial in the upholding of children's rights as contained in section 28 of the Constitution. However, an appropriate balance has to be struck between the right to freedom of expression and children's rights. As the amendments appear, the means to achieve its stated purpose overshoot the ends, thus conferring on the state greater powers with which to infringe other rights.
9. From the list of stakeholders consulted, it is clear that those who will be affected the most - the users of online services - were not consulted. From the wording of the provisions, anyone who uses social media and hosts a blog can be charged under this Bill, should it become law. When one considers the volume of people who use the internet and social media to communicate daily, it is unclear how the objects of the Act would be achieved.
10. The objects of the Bill mention co-regulation of online content and a state that serves to create and enhance cooperation between the Board and the Industry. However publishers of online content - according to the Bill - are expected to be passive compliers to the classification rules despite the description of the relationship being one of partnership. Throughout the Bill, the Board vests itself with powers to punish and enforce. Should online distributors fail to comply with the classification process, they could have their distribution permits revoked or be forced to submit all their content to the Board for prior classification. This, despite the *Print Media South Africa and Others v Minister of Home Affairs and Film and Publication Board* 2012 (6) SA 443, (CC) Constitutional Court decision which rejected pre-publication classification on the basis that the requirement was an infringement of the right to freedom of expression. The same decision underscored that laws should encourage lawful conduct, rather than seeking to enforce

compliance with laws through restricting conduct altogether. As such, in accordance with this decision, pre-publication classification should only be used in certain limited circumstances and after the obtaining of a court interdict.

11. We trust that our comments will be of assistance in guiding the Portfolio Committee on Communications in its deliberations and finalisation of Amendment Bill.

MS REBECCA SIBANDA

CENTRE FOR CONSTITUTIONAL RIGHTS

30 MAY 2016