
WRITTEN SUBMISSION BY THE FILM AND PUBLICATION BOARD (FPB)
PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL
[B9B-2018] (NATIONAL ASSEMBLY – SEC 75)

1. PURPOSE

1.1. The purpose of this document is to provide a written submission to the Select Committee on Security and Justice at the National Council of Provinces (NCOP) in line with the call for same issued by the Honourable S. Shaik, MP, Chairperson: Select Committee on Security and Justice (NCOP), relating to the Prevention and Combatting of Hate Crimes and Hate Speech Bill [B9B-2018] (PCHCHS).

2. BACKGROUND AND THE MANDATE OF THE FILM AND PUBLICATION BOARD

2.1. At the outset, it is helpful to share that the Film and Publication Board (FPB) is statutory entity established in terms of Films and Publications Act, 1996 (Act No. 65 of 1996) to classify films, games and certain publications through the provision of age-ratings and consumer advisories.¹

¹ Section 2 of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, provides that the objects of the Act as follows:

“... to regulate the creation, production, possession and distribution of films, games and certain publications to—

- (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;
- (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences;
- (c) make use of children in and the exposure of children to pornography punishable;
- (d) criminalise the possession, production and distribution of child pornography; and
- (e) create offences for non-compliance with this Act.”

- 2.2. This ensures that consumers of content, and particularly parents and guardians, by being informed of what may be contained therein are able to ensure that children are not prematurely exposed to harmful content that may have a socio-psychological impact on their development.
- 2.3. The FPB model is aligned with international standards as is found in the United Kingdom (UK), Australia, New Zealand and Singapore.
- 2.4. All films, games and certain publications that are distributed within the Republic of South Africa are required to be submitted to the FPB for classification. Importantly, this requirement does not extend to broadcast material and publications of members of the Press Council of South Africa (PC) and the Advertising Regulatory Board of South Africa (ARB).² The FPB only classifies publications (books, paintings, magazines) once a public complaint is received and therefore, these are not required for submission and pre-distribution classification.
- 2.5. The FPB also has the mandate to deal with the prohibition against the distribution of private sexual photographs and films³, the prohibition against the filming and distribution of films and photographs depicting sexual violence and violence against children⁴, and of relevance to the PCHCHS, the prohibition against propaganda for war; incitement of imminent violence and advocacy of hatred that is based on identifiable group characteristics, and that constitutes incitement to cause harm.⁵

² Section 16 (1) of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, provides that:

“Any person may request, in the prescribed manner, that a publication, other than a publication that is published by a member of the Press Council of South Africa or an advertisement that falls under the jurisdiction of the Advertising Standards Authority of South Africa, which is being distributed in the Republic, be classified in terms of this section.”

³ Section 18F of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended.

⁴ Section 18G of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended.

⁵ Section 18H of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended.

2.6. Prior to the promulgation of the recent amendments to the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, a comparative analysis was undertaken comparing the manner in which the United Kingdom (UK), Canada, New Zealand, Singapore, the United States of America (USA) and Australia deals with the distribution of online content in a regulatory framework. In these jurisdictions, online content is monitored by individual members of the public who on observation of offensive content, are able to issue a complaint to the relevant authority in the country. The Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, contains a similar provision under section 18E.

2.7. Although section 18E makes reference to the issuing of a take-down notice when the FPB has determined that there has been non-compliance, such a take-down notice must be subject to the due process of the law and in accordance with section 77 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002). This provision outlines the procedure to be followed regarding take down notices and provides the Non-commercial Online Distributor an opportunity to respond.

3. CONSTITUTIONAL FRAMEWORK

3.1. In the execution of its mandate, and considering the objects and the provisions of the PCHCHS as it currently stands, it would be important to consider the freedom of expression as provided for in the Constitution of the Republic of South Africa, 1996 (Constitution) which states as follows:

- “16. (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.”

The Constitutional Court in *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 113/11) [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (28 September 2012) at par 53 – 54 held that:

“[53] Embraced by the right is the liberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one’s own opinion about expression received, and in this way both promotes and protects the moral agency of individuals. Whether expression lies at the right’s core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law’s support is owed.

[54] In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public’s right to a healthy, unimpeded media.”

In *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22 (31 July 2021) at par 68 – 69, the Constitutional Court held that:

“[68] Freedom of expression “is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm”. This

is because it “is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability”.

[69] According to Emerson, there are four particular values that undergird the right to freedom of expression. These, as I understand them, include: (a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfilment; and (d) the encouragement of tolerance.”

3.2. The Constitutional Court in *Qwelane* importantly went on to state however at par 73 – 74 that:

“... “[t]he corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.” In *Islamic Unity, Langa DCJ* elucidated:

“Freedom of expression is applicable, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”

[74] These dictates of pluralism, tolerance and open-mindedness require that our democracy fosters an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be. However, as stated by this Court in *Mamabolo*, this does not mean that freedom of expression enjoys superior status in our law. Similarly, a unanimous Court in *Khumalo v Holomisa* stated that, although freedom of expression is fundamental to our

democratic society, it is not a paramount value. That being said, as this Court observed in *Laugh it Off*, “we are obliged to delineate the bounds of the constitutional guarantee of free expression generously”.

Acknowledging the fact that South Africa is a relatively young democracy which has emerged from decades of repression, censorship and prescribed conformity, it is imperative that the freedom of expression and the rights of the media must be protected.

Section 36 of the Constitution however provides that:

“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 and the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purposes;
- (e) less restrictive means to achieve the purpose.”

4. PROMULGATION OF THE FILMS AND PUBLICATIONS ACT, 1996 (ACT NO. 65 OF 1996), AS AMENDED

It is to maintain the required proportionality and balance between respecting the freedom of expression and protecting the rights of persons, in particular those of children, that the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, was promulgated.⁶

⁶ The Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, repealed the Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967), and the Publications Act, 1974 (Act No.

The Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, provides for the establishment of the FPB that is responsible, as highlighted above, for the classification of both films, games and certain publications and no film or game, that falls within the mandate of the institution, may be distributed or exhibited in public unless it has been classified by the FPB.

The Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, is a “law of general application” as required by section 36 (1) of the Constitution. The Constitutional Court has held that such a requirement derives from an important principle of the rule of law, namely that “rules be stated in a clear and accessible manner”.

In doing so the provisions of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, are justifiable noting that the nature of the right and the extent of the limitation, on the one hand, and the purpose of the limitation on the other need to be considered.

Acknowledging that the freedom of expression is an important right in our Bill of Rights, there is nonetheless a legitimate government purpose to empower the FPB to execute its legislative mandate.

The main purposes of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, through the regulatory tools used by the FPB, is on the one hand to classify content to provide age-ratings and consumer advisories to ensure that consumers make appropriate viewing and gaming choices for themselves and children in their care, and on the other hand to execute the expanded mandate of the FPB, which in particular is to deal with complaints from the public where content has been distributed containing either propaganda for war, incitement of imminent violence, or advocacy of

42 of 1974), and created a new comprehensive regulatory framework for films, games and certain publications.

hatred based on an identifiable group characteristic⁷ and that constitutes incitement to cause harm.

5. COMPARABLE PROVISIONS IN THE PCHCHS

In comparison, with specific reference to the provision in the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, which allows complaints to be lodged where content has been distributed illustrating advocacy of hatred based on identifiable group characteristics and that constitutes incitement to cause harm, the PCHCHS includes a definition of hate speech which states under section 4 that:

“(1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to –

- (i) be harmful or to incite harm; or
- (ii) promote or propagate hatred,

based on one or more of the following grounds:

- (aa) age;
- (bb) albinism;
- (cc) birth;
- (dd) colour;
- (ee) culture;
- (ff) disability;
- (gg) ethnic or social origin;
- (hh) gender or gender identity;

⁷ The Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, defines “identifiable group characteristic” as “a characteristic that identifies an individual as a member of a group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality”

- (ii) HIV status;
- (jj) language;
- (kk) nationality, migrant or refugee status;
- (ll) race;
- (mm) religion;
- (nn) sex, which includes intersex; or
- (oo) sexual orientation,

is guilty of an offence of hate speech.”

Acknowledging that the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended defines hate speech as “...any speech, gesture, conduct, writing, display or publication, made using the internet, which is prohibited in terms of section 16 (2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group” one may argue that there is an element of similarity between the two provisions.

18E. Complaints against prohibited content.—(1) Any person may complain to the Board about unclassified, prohibited content, or potential prohibited content, in relation to services being offered online by any person, including commercial online distributors and non-commercial online distributors.

(2) If, upon investigation by the Board or by the compliance officers in terms of section 15, it is established that there is merit in the complaint and or that the prohibited content or content being hosted or distributed using the internet constitutes prohibited content in terms of this Act or has not been submitted for examination and classification as required in terms of sections 16, 18, 18C or 18D, the matter must be referred to the Board which may, subject to due process of law—

- (a) in the case of a non-commercial online distributor, issue a takedown notice in accordance with the procedure in section 77 of Electronic Communications and Transactions, 2002 (Act No. 25 of 2002); or
- (b) in the case of internet service providers, issue a takedown notice in terms of section 77 of Electronic Communications and Transactions, 2002 (Act No. 25 of 2002).

18H. Prohibition against propaganda for war; incitement of imminent violence and advocacy of hatred that is based on identifiable group characteristics, and that constitutes incitement to cause harm.—No person may distribute through any medium including the internet and social media, any film, game or publication which amounts to propaganda for war, incites imminent violence or advocates hate speech.

6. OFFENCES AND PENALTIES

In terms of section 24G of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, a person shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment, where such a person knowingly has distributed in any medium, including the internet and social media any film, game or publication which amounts to:

- a) propaganda for war;
- b) incites imminent violence; or
- c) advocates hate speech.

Comparably, section 4 (1)(b) of the PCHCHS makes it an offence where:

“Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is—

- (i) accessible by any member of the public; or
- (ii) accessible by, or directed at, a specific person who can be considered to be a victim of hate speech,

is guilty of an offence.”

Section 6 (3) of the PCHCS provides further that:

“Any person who is convicted of an offence referred to in section 4 is liable, in the case of—

- (a) a first conviction, to a fine or to imprisonment for a period not exceeding three years, or to both a fine and such imprisonment; and
- (b) any subsequent conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”

Importantly, the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, imposes criminal sentences for offences and highlights the maximum term of imprisonment. Hereto there appears to be a duplication of offences in instances where the prohibitions are similar. The offences and penalties listed in the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, appear to be more detailed noting the lack of provision of the maximum fine that may be imposed under the PCHCS.

7. ENFORCEMENT COMMITTEE

Section 3 (d) of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended, provides for the creation of an Enforcement Committee which shall have the power to investigate cases of non-compliance with any provision of the Act by a distributor, exhibitor or any other person to whom the Act applies, including instances

where advocacy of hatred based on an identifiable group characteristic and that constitutes incitement to cause harm has been placed on the internet, with the view to adjudicating all such cases and make appropriate findings.

Where appropriate, the Enforcement Committee shall *inter alia* impose a fine or through the FPB refer a matter to the National Director of Public Prosecutions for prosecution.

An aggrieved person may appeal to the Appeal Tribunal against a finding of the Enforcement Committee.

The PCHCHS proposes ventilation of contraventions before the criminal courts as opposed to, in instances of the issuing of fines, to the criminal courts.

8. CHALLENGES WITH THE PCHCHS

Beyond the need to acknowledge the fact that the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended includes provisions which address certain of the issues which the PCHCHS attempts to canvas, as more fully captured above, one would need to consider other challenges such as:

- a) Need for the PCHCHS to ensure that it is not formulated in a fashion that infringes on the freedom of expression which if unattended may stifle legitimate and robust public discourse, where the public may self-censor for fear of legal repercussions.
- b) Duplicating or countering efforts within the Films & Publications Act instead of strengthening them. Reference should be made to these efforts and the Bill should where possible, acknowledge and or entrust more powers to the FPB as an enforcement statutory entity, particularly on the online platforms where hate speech is so highly prevalent. This will ensure that the constitutional obligations intended by this Bill are realized through practical measures,

- c) Ensure that PCHCHS is not overly broad and vague in the provision of definitions which may lead to room for potential abuse and misinterpretation.
- d) Although encouraging an objective interpretation as to what constitutes hate speech, in instances where a subjective interpretation for what constitutes hate speech is prescribed, the PCHCHS may grant excessive power to law enforcement agencies and the prosecuting authority to target individuals or groups based on subjective interpretations of hate speech.
- e) Further, the PCHCHS should avoid ambiguity which may lead to selective enforcement, potentially leading to biased outcomes in instances where it may be used to suppress certain political or ideological viewpoints, particularly if those in power have the ability to influence how hate speech is defined and prosecuted.
- f) The PCHCHS in its current guise may limit open debate and discussion on topics which carry many differing views and contentions, and thereby discourage dissenting opinions.
- g) The PCHCHS would need to consider including provisions which address the root causes of hate crimes and assist in fostering social harmony through advocacy and awareness raising initiatives which would more adequately address underlying social issues.

9. BUILDING ON THE ENFORCEMENT PROVISIONS OF THE FP ACT

9.1. In addition to providing for the establishment of the enforcement committee which has the powers to hear public complaints relating to non-compliance with the provisions of the Act, including online hate speech, the FP Act further:

- a) impose penalties to *Any person who knowingly distributes in any medium, including the internet and social media any film, game or publication which amounts to propaganda for war, incites imminent violence, or advocates hate speech, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment (see s24G),*
- b) requires the FPB to, within two years after the commencement of this Act publish the guidelines which the Board and the Appeal Tribunal apply in order

to determine what is harmful or disturbing in terms of Schedules 3 and 8 in the *Gazette* Board (S31(3)). The entity has already started this process based on international lessons. We hope to publish the draft guidelines for public consultation.

9.2. It is for this purpose the entity submits the consideration of efforts currently underway in terms of the FP Act so that we can build on this foundation instead of duplicating or countering efforts.

10. CONCLUSION

- 10.1. The FPB would like to thank the Select Committee on Security and Justice at the NCOP for the opportunity granted to make inputs on this Bill which is at the heart of building a cohesive nation in South Africa in line with the constitutional imperatives.
- 10.2. The FPB is available to provide further submissions to the Select Committee at its request and convenience.