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Submission on the Films and Publications Amendment Bill

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In this submission, the Media Monitoring Project (MMP) raises a number of concerns about the amendment to the Film and Publications Bill. Its submission has focuses on the undermining of the independence of the media through:

- The mandate of the Department of Home Affairs, and the Films and Publications Board;
- The constitutionality of the proposed amendments;
- The likelihood of undue government interference in the media, as a result of the Bill and;
- The problems posed by the form of pre-publication censorship called for in the Bill.

Introduction

The Films and Publications Amendment Bill presents an important piece of legislation in significantly amending the manner in which the film and publication industry operates in contemporary South Africa. It is clear that the bill, currently under amendment, proposes to extend the mandate and scope of the films and publications board to the cellphone and interactive computer games industry. In a radical departure from previous mechanisms controlling the media industry in South Africa, the current bill also seeks to oversee the content of print and broadcast news media, under the auspices of the Department of Home Affairs.

As a follow-up to the Films and Publications Amendment Act of 2004, it is crucial for the amended Act to be drafted in line with the human rights principles contained in both the South African Constitution and international mechanisms ratified and signed by the South African government. It is imperative for any amendments to current legislation to bear the aims and objectives of the constitution in mind and to act accordingly.

Since the establishment of the Films and Publication board, as a replacement for the Apartheid-era censorship board, the board has played a significant role in regulating the publication, possession and dissemination of films and written publications, with the noted exception of the news print media and broadcasters. Print and broadcast news mediums have until now significantly been exempted from direct control under the Films and Publications Act. The electronic media has been and continues to be regulated by the Independent Communications Authority of South Africa (ICASA), an independent chapter 9 institution, outside of the direct control of government, while the print media sector is governed by its own set of independent institutions and regulations.

The role of an effective, independent and robust media in the establishment and safeguarding of democratic norms and standards, especially in newly democratic societies, such as South Africa, can never be underestimated. It is crucial that the media continue to serve as a vital critical mechanism in holding the government accountable to all the residents of South Africa.

Coming from a history of severe repression and control where the media was utilised in the service of the Apartheid state as a crucial tool of propaganda. Where freedom of expression was strictly limited, and censorship was rigorously applied, it is imperative that post-1994 government policy provide the

opportunity for all South Africans to express their views and opinions, and to see their realities reflected in the media.

Freedom of Speech and a Free Media are the as fundamental building blocks upon which the free and democratic South Africa we have today was built. It is thus crucial for the current regime to preserve, expand and encourage such freedom of speech, and a free media, with limited interference on the part of government.

Within such a context, the Media Monitoring Project (MMP) welcomes the opportunity to comment on the Films and Publications Amendment Bill, 2006. The MMP, as an organisation dedicated to a human rights-centred independent media sector in South Africa regards any effort on the part of government to encroach upon, dilute, and erode the independence and freedom of the Media in South Africa in very serious light.

This document raises and comments on a number of issues which are brought up by the bill:

- Child pornography;
- Rescinding of exemption of print and broadcast Media;
- Freedom of Expression and Media;
- The mandate of the Department of Home Affairs;
- And, State censorship.

Child pornography

On the positive side, the Bill does seem to have as one of its major aims the elimination of all forms of child pornography in South Africa, through outlawing all depictions and results of child abuse, and admirably extending child pornography restrictions to interactive computer games, mobile cellular telephones and on the Internet (Section 2(b)).

Such concern for child abuse and child pornography is clearly apparent in the definitional amendment to Section 1 of the act. Under the new terms of the draft Bill, child abuse has been defined in section 1(a) as "... the use of a child in the creation, making or production of child pornography or child abuse images or for sexual exploitation and include exhibiting or showing images of sexual conduct to a child or exposing or encouraging a child to witness sexual conduct"

There is no doubt that the rights of the child to provision, protection and participation are particularly important in any matter concerning a child. The constitution directly and specifically outlines the additional rights enjoyed by children in South Africa. As alluded to in section 28 (2), "a child's best interests are of paramount importance in every matter concerning the child." The draft Films and Publications Amendment Act, does seem to have considered the rights of the child in drawing up the Bill.

Rescinding of exemption for print and broadcast media

A reading of the new draft Bill, however, reveals significant amendments to the role and functions of the Films and Publications Board, with print and broadcasting media content now, seemingly irrationally, falling under the control of the Department of Home Affairs. Such attempts at rescinding the exemptions held by print and broadcast media for the past 40 years have rightly been met with suspicion and objection from a number of interested organisations.

In this case, various organisations have presented an argument for the continued exemption of mainstream print and broadcast media from the provisions of the Films and Publications Bill succinctly and eloquently, in their correspondence with the Portfolio committee. Among them, the South African National Editors Forum (SANEF), the Freedom of Expression Institute (FXI), the National Association of Broadcasters (NAB) and the Media Institute of Southern Africa (MISA).

This concern was clearly illustrated in the joint statement by SANEF/FXI and MISA SA, on the 8th August, the *Business Day* article written by the Executive Director of the FXI, Jane Duncan. Again, on the 15th August, the letter to the parliamentary Portfolio Committee by the three bodies on the 24th August, and their representation to the portfolio committee on the 31st August. Similar criticism has also been forthcoming from the National Association of Broadcasters.

In accordance with the sentiments expressed by the organisations mentioned above, the MMP would like to express our unequivocal objection to the draft Bill, especially as it impacts upon a free and independent mainstream print and broadcast media. The MMP is particularly concerned over the attempts to curtail and limit freedom of expression contained in the Bill.

Freedom of expression and media

Despite specific and direct constitutional guarantees to freedom of expression and the media, the current Films and Publications Bill presents as an attempt on the part of the government to muzzle South African media organs. In such circumstances, the MMP feels it necessary to comment on the serious constitutional and legal consequences of the Bill in its current form.

Section 16 of the Bill of Rights clearly outlines the importance attached to the principal of freedom of expression and of the media in contemporary democratic South Africa, by the drafters of the South African constitutional democracy, and civil society.

According to section 16 of the Bill of Rights:

- (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 (own emphasis)

The draft Films and Publications Amendment Bill, however, seems to be in direct contravention of this fundamental right, with the Bill seemingly in violation of the supreme law of the country, as represented by the constitution. In such circumstances, it is extremely unlikely that the Bill as currently stated would be able to stand up to a constitution challenge.

The patent attempt at department of Home Affairs - and hence Government - interference in regulating the content of print and broadcast media, as outlined in the Bill, is extremely worrying. Since the South African context is of fully a functional, successful, independent institutions and structures with a specifically mandated role of oversight over the media,

The Bill has already been subjected to extensive constructive criticism by industry stakeholders, media and freedom of expression watchdogs, political parties and in the media. As a crucial piece of legislation with far reaching consequences, it is imperative for Parliament to pay attention to and engage with the critique provided by a number of relevant organisations dedicated to the cause of Freedom of Expression and Freedom of the media in South Africa.

In similar measure to the views expressed by inter alia, Print Media SA, the Media Institute of Southern Africa (Misa), South African National Editors Forum (SANEF), the National Association of Broadcasters (NAB) and the Freedom of Expression Institute (FXI), the MMP feels that the current Bill places far too strict restrictions on the free and independent operation of the media.

For specific rulings surrounding freedom of expression, the MMP defers to the submission of Print Media SA.

Mandate of Department of Home Affairs

Questions arise here as to the mandate of the Department of Home Affairs in involving themselves in media regulation. With the Bill failing to explain anywhere why this task should now suddenly fall under the auspices of the Department of Home Affairs, surely such functions should be better left to more appropriate independent regulators such as ICASA , who have a long and successful track record in regulating the electronic media sector in South Africa.

It would also appear as if the decision to include media control as part of the Films and Publications Act was undertaken unilaterally without sufficient consultation with civil society. While this lack of concern for the views and opinions of interested parties and organisations has been rectified with the call for public submissions on the Bill, the question still persists why civil society was not consulted prior to the drafting of the Bill.

While the arguments for self-regulation posited by some stakeholders pose their own set of problems, there are sufficient independent mechanisms, and legislation in place, to ensure that both the broadcast and print media meet their ethical and legal responsibilities. This is without the over-regulation and undue government interference proposed by the Bill under discussion.

State censorship

Through the lens of Human Rights norms and standards, and with due reference to the severe constraints on Freedom of Expression and the Media that obtained under the Apartheid regime, it is imperative in the new democratic dispensation for all South Africans to be given the opportunity to state their views and opinions and to see such views and opinions in the media.

Of particular concern, is the extent to which state censorship-under the lead of the Department of Home Affairs is not only permitted, but actually encouraged, by a number of provisions of the Bill. This most worrying aspect of the Bill is highly reminiscent of Apartheid era tactics to control and limit now-constitutionally guaranteed rights to media and free expression.

The continued reliance on structures and principles developed by the Apartheid regime 12 years after the advent of a democracy established on human-rights focused foundations is especially problematic. It is imperative to ensure that current practice does not result in similar patterns of rigorous and total control over people's lives and minds that characterised the censorship boards of old. This is a very real possibility if the current Bill is approved by cabinet and signed into law.

Such problems are clearly evident in considering the ramifications of the envisaged additions contained in the Bill, most specifically those relating to the functions and roles of the new Board, as outlined in the newly inserted section 9.

Section 9, as outlined in the Bill reads as follows:

Composition, functions, powers and management of Classification Office

9A. (1) The classification office shall consist of the chief executive officer and such number of officers as may be determined by the Board having regard to the functions, powers and responsibilities of the classification office.

(2) The functions of the classification office shall be to—

- (b) examine and determine the classification of any film, interactive computer game or publication submitted to the Board under this Act;
- (c) determine, in accordance with any classification guidelines established by the Board, the conditions to be imposed on the distribution, exhibition and possession of any film, interactive computer game or publication classified in terms of this Act;
- (d) determine any application made under sections 22 and 23 of this Act for an exemption from any provision of this Act in respect of any film, interactive computer game or publication;
- (e) determine any application made under section 18(1)(b) of this Act for registration as a distributor or exhibitor of films, interactive computer games or publications;

- (f) establish, in consultation with all relevant stakeholders, classification guidelines to be used in determining what is disturbing, harmful or age-inappropriate for children in films, interactive computer games and publications;
- (g) as soon as possible after the lapse of every consecutive period of 12 months, publish the classification guidelines and make an appeal to all relevant stakeholders to make representations concerning the classification guidelines and to amend them on the basis of such representations;
- (h) make regulations relating to—
 - (i) the procedures and forms for making any application or submission under this Act;
 - (ii) the form of any certificate to be issued in terms of this Act;
 - (iii) the format and details of the display or exhibition of decisions of the Board with respect to films, interactive computer games and publications classified in terms of this Act; and
 - (iv) any matter required and permitted to be prescribed and, generally, procedures aimed at the effective achievement of the objects of this Act: Provided that such regulations shall be approved by the Board.

(3) The classification office shall have all such powers as are reasonably necessary to enable it to carry out the duties and exercise all the functions necessary for the effective achievement of the objects of this Act.

(4) The chief executive officer shall be responsible for all matters relating to the administration and management of the classification office, including—

- (b) the appointment of administrative staff;
- (c) appointment of compliance officers;
- (d) the allocation of spheres of responsibilities among and between management officers; and
- (e) the submission of the annual report and financial statement as prescribed by the Public Finance Management Act, 1999 (Act No. 1 of 1999) and Treasury Regulations.”.

The new section 9A-relating to the principal powers (section 9A (3)), functions (Section 9A (2) (g)) and roles of the classification office, in making regulations for example, are clearly indicative of the similarities between the current envisaged legislation and the situation that existed under Apartheid. It is imperative for such powers, roles and functions to be cognicant and consistent with the human rights considerations stated in the South African Constitution.

Furthermore, as alluded to by other experts in the field, constitutional provisions clearly and directly establish the Independent electronic media authority, ICASA, as the only institution legally mandated to make and change legislation relating to regulating the broadcast media sector. If the Bill were to be passed in its current

form, not only would the Bill fail on constitutional grounds, but it would lead to confusion and possible duplication of functions between the Films and Publications Board and ICASA.

Conclusions

The MMP objects to the Films and Publications Amendment Bill. The MMP feels that the amendments to the mandate and obligations of the Films and Publications Board, as outlined in the Films and Publications Amendment Bill, 2006 are unnecessary, far too restrictive, and unconstitutional.

The MMP is concerned that the print and broadcast media are now to be subject to the scrutiny of the Department of Home Affairs, through the Films and Publications Boards. It is also felt that the Amendment Bill largely ignores constitutional issues of Freedom of Expression and the independence of the Media, as well as the mandate of ICASA, to regulate the broadcast media in South Africa.

In addition, the MMP seeks clarification on the intention behind the inclusion of print and broadcast media within the ambit of the Department of Home Affairs.

The MMP's submission has shown that many of the proposed amendments are unnecessary in order to ensure that the media adheres to the already established regulations and, codes of good practice.

Should you require further information, please do not hesitate to contact the MMP. The MMP would also welcome the opportunity to make an oral presentation of this submission to the Portfolio Committee.

Yours sincerely

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