

REPUBLIC OF SOUTH AFRICA

FILMS AND PUBLICATIONS AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 -Bill; explanatory summary of Bill
published in Government Gazette No 25421 of 1 September 2003)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

[B 61—2003]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Films and Publications Act, 1996, so as to make further provision for the prohibition of child pornography; to provide anew for the designation of the Chairperson of the Review Board; to make certain textual alterations; to make further provision regarding the classification of films and publications; to provide for the registration of internet service providers; to provide for an obligation to report offences involving child pornography; and to increase penalties for offences involving child pornography; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 65 of 1996, as amended by section 1 of Act 34 of 1999

1. Section 1 of the Films and Publications Act, 1996 (hereinafter referred to as the “principal Act”) is hereby amended— 5

(a) by the substitution for the definition of “child pornography” of the following definition:

“‘child pornography’ includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years— 10

- (i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in, sexual conduct; or
- (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation;” 15

(b) by the deletion of the definition of “degrade”;

(c) by the substitution for the definition of “distribute” of the following definition: 20

“‘distribute’, in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections 25(a), (b) and (c), 26(1)(a) and (b) and 28(1) and (2), includes to hand or exhibit a film or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;” 25

- (d) by the insertion after the definition of “film” of the following definitions:
 “‘Internet address’ means a website, a bulletin board service, an Internet chat-room or newsgroup or any other Internet or shared network protocol address;
 ‘Internet service provider’ means any person who provides access to the Internet by any means;”;
- (e) by the insertion, after the definition of “Minister” of the following definition:
 “‘possession’, in relation to a film or publication, without derogating from its ordinary meaning, includes keeping or storing in or on a computer or computer system or computer data storage medium and also having custody, control or supervision on behalf of another person;”;
- (f) by the insertion after the definition of “Review Board” of the following definition:
 “‘sexual conduct’ includes—
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| <ul style="list-style-type: none"> (i) male genitals in a state of arousal or stimulation; (ii) the undue display of genitals or of the anal region; (iii) masturbation; (iv) bestiality; (v) sexual intercourse, whether real or simulated, including anal sexual intercourse; (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object; (vii) the penetration of a vagina or anus with any object; (viii) oral genital contact; or (ix) oral anal contact;”. | <p>15</p> <p>20</p> <p>25</p> |
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Amendment of section 5 of Act 65 of 1996

2. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:
- “(2) A member of the Review Board designated by the [President] Minister shall act as chairperson of the Review Board during the chairperson’s absence.”.

Substitution of section 17 of Act 65 of 1996

3. The following section is hereby substituted for section 17 of the principal Act:

“Classification of publications

- 17. (1)** A classification committee shall examine a publication referred to it and shall, with reference to Schedules 1, 2, 3 or 4, read with Schedule 5, or with reference to Schedule 10—
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| <p>(a) (i) classify the publication as—</p> <p style="padding-left: 20px;">(aa) XX, if it falls within either Schedule 1 or 10; or</p> <p style="padding-left: 20px;">(bb) X18, if it falls within Schedule 2; or</p> <p>(ii) where it is necessary to protect children from disturbing or harmful materials, determine that the publication only be distributed to persons of, or above, a specified age and may impose the condition that it only be distributed in a sealed and opaque wrapper which bears a distinct notice of the specified age restriction; and</p> <p>(b) inform the chief executive officer of—</p> <ul style="list-style-type: none"> (i) its decision; (ii) the reasons therefor; (iii) the classification, if any; (iv) in the case of an XX classification based on Schedule 1, of the particular item of Schedule 1 upon which that decision is based; and (v) in the case of an age restriction, of the conditions imposed. | <p>40</p> <p>45</p> <p>50</p> <p>55</p> |
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- (2) The chief executive officer shall—
- (a) where a publication submitted in terms of section 16(1) has been classified as X18 or XX in terms of a decision of the Board, cause that decision to be published in the *Gazette*;
 - (b) where a publication submitted in terms of section 16(2) has been reclassified as X18 or XX or freed from all restrictive conditions, including an X18 or XX classification, which was published in the *Gazette*, cause the latest classification to be published in the *Gazette* and, with reference to the previous classification, indicate that it has been substituted or withdrawn, as the case may be.
- (3) Where a particular issue of a periodical publication has been classified as X18 and subsequent issues are likely to contain material which would, upon submission, cause such issues to be classified as X18, the chief executive officer shall, with the consent of the publisher, classify such subsequent issues as X18.
- (4) Any person who intends to publish, distribute or exhibit in public any publication containing a visual presentation or description referred to in Schedule 1 or 2, shall submit such publication for classification, in the manner prescribed by regulations made under section 31(2), prior to its distribution or exhibition.”.

Amendment of section 18 of Act 65 of 1996

4. Section 18 of the principal Act is hereby amended—
- (a) by the insertion, after subsection (1), of the following subsection:

“(1A) Any person who intends to distribute or exhibit any film—

 - (a) shall register with the Board as a distributor or exhibitor, or a distributor and exhibitor, of films; and
 - (b) shall submit for classification any film which is intended for distribution or exhibition in the Republic and which has not been classified or approved in terms of this Act or in terms of the Publications Act, 1974 (Act No. 42 of 1974), in the manner prescribed by regulations made in terms of section 31(2).”;
 - (b) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

“(a) The classification committee shall examine a film referred to in terms of subsection (2) and shall, with reference to Schedules 6, 7 and 8, read with Schedules 9 and 10, classify that film—

 - (i) as XX, if it falls under Schedule 6 or 10;
 - (ii) as X18, if it falls under Schedule 7;
 - (iii) by imposing any restriction in accordance with Schedule 8;
 - (iv) as a film which may be distributed or exhibited only after the prescribed age restriction and consumer information, where applicable, have been clearly and conspicuously displayed on all materials advertising that film or, in the case of a home entertainment product, on the cover or packaging of that film; or
 - (v) as a film without any restrictions if suitable for all ages.”.

Amendment of section 20 of Act 65 of 1996, as amended by section 6 of Act 34 of 1999

5. Section 20 of the principal Act is hereby amended by the deletion, in subsection (3), of the proviso.

Amendment of section 25 of Act 65 of 1996

6. Section 25 of the principal Act is hereby amended by the substitution for paragraph (c) of the following paragraph:
- “(c) distributes any publication in conflict with any condition imposed on such a publication in terms of section 17;”.

Amendment of section 26 of Act 65 of 1996

7. Section 26 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
 - “(a) exhibits in public or distributes any film which has not been classified by the Board [**or which has been classified as XX in terms of a decision of the Board which has been published in the Gazette**];”;
- (b) by the insertion in subsection (1) after paragraph (a) of the following paragraph:
 - “(aA) exhibits in public or distributes or broadcasts any film which has been classified as XX in accordance with Schedule 6 or 10;”;
- (c) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
 - “(b) exhibits in public or distributes or broadcasts any film which has been classified as X18 contrary to the provisions of section 24;”;
- (d) by the substitution in subsection (1) for paragraph (e) of the following paragraph:
 - “(e) without the approval of the chief executive officer, exhibits in public during the same screening session, or distributes on the same film, an advertisement or a trailer of a film with a more restrictive classification than the featured film;”.

Amendment of section 27 of Act 65 of 1996, as amended by section 8 of Act 34 of 1999

8. Section 27 of the Principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) (a) Any person shall be guilty of an offence if he or she—
 - (i) is in possession of;
 - (ii) creates or produces or in any way contributes to, or assists in, the creation or production of;
 - (iii) imports or in any way takes steps to procure, obtain or access; or
 - (iv) exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed,
 a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.
 - (b) Paragraph (a) does not apply to a person who is in possession of a film or publication containing child pornography if such possession is necessary for the performance of any function in terms of this Act.”;
- (b) by the substitution for subsection (2) of the following subsection:
 - “(2) (a) A person shall be guilty of an offence if he or she, having knowledge of the commission of an offence under subsection (1) or having reason to suspect that such an offence has been or is being committed—
 - (i) fails to report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; or
 - (ii) fails to furnish, at the request of an official of the South African Police Service, all particulars of such knowledge or suspicion.
 (b) No prosecution under this subsection shall be instituted without the written authority of the National Director of Public Prosecutions.”;
- (c) by the substitution for subsection (3) of the following subsection:
 - “(3) Any person who has under her or his control any material referred to in Schedule 1, 2, 6 or 7 and who fails to take all reasonable steps to prevent access to such materials by a person under the age of 18 years shall be guilty of an offence.”;
- (d) by the addition of the following subsection:
 - “(4) Subject to Schedule 5 or 9, as the case may be, the Board shall refer to the South African Police Service for prosecution any film or publication submitted to it in terms of this Act if it contains child pornography.”.

Insertion of section 27A in Act 65 of 1996

9. The following section is hereby inserted in the principal Act after section 27:

“Registration and other obligations of Internet service providers

- 27A.** (1) Every Internet service provider shall—
- (a) register with the Board in the manner prescribed by regulations made under this Act; and
 - (b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.
- (2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall—
- (a) take all reasonable steps to prevent access to the child pornography by any person;
 - (b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and
 - (c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.
- (3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.
- (4) Any person who fails to comply with the provisions of this section shall be guilty of an offence.”.

Amendment of section 28 of Act 65 of 1996

10. Section 28 of the principal Act is hereby amended by the deletion of subsection (3).

Amendment of section 29 of Act 65 of 1996

11. Section 29 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
“Any person who knowingly broadcasts or distributes a publication which, judged within context—”.

Amendment of section 30 of Act 65 of 1996

12. Section 30 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
“(1) Any person found guilty of a contravention of section 25(a), (b) or (c), 26(1)(a), (aA), (b) or (f), 26(4), 27(2) or (3), 27A, 28(1) or (2) or 29 may be sentenced to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”;
 - (b) by the insertion after subsection (1) of the following subsection:
“(1A) Any person found guilty of a contravention of section 27(1) may be sentenced to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.”;
 - (c) by the substitution for subsection (3) of the following subsection:
“(3) Any person found guilty of a contravention of any other section of this Act may be sentenced to a fine or to imprisonment for a period not exceeding six months.”; and
 - (d) by the addition of the following subsection:
“(4) (a) If any person who has contravened or failed to comply with section 26(1)(a), (aA), (b), (c), (d), (2) or (3) or 27A(1) agrees to abide by a decision of the executive committee of the Board and deposits with the Board such sum as the executive committee of the Board may determine but not exceeding the greater of two thousand rand or twice the prescribed classification costs on each such contravention or failure

to comply, the executive committee of the Board may, after conducting an enquiry, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited.

(b) There shall be a right of appeal to the Minister from any determination or order of the executive committee of the Board under paragraph (a), as long as that right is exercised within a period of three months from the date of such determination or order.

(c) The imposition of a penalty under paragraph (a) shall not be regarded as a conviction in respect of a criminal offence but no prosecution for that offence shall thereafter be competent.”.

Insertion of sections 30A and 30B in Act 65 of 1996

13. The following sections are hereby inserted in the principal Act after section 30:

“Extra-territorial jurisdiction

30A. (a) Any citizen or permanent resident of the Republic who commits any act outside the Republic which would have constituted an offence under this Act had it been committed within the Republic, shall be guilty of the offence which would have been so constituted and liable to the penalty prescribed for such offence in this Act.

(b) No prosecution under this section shall be instituted without the written consent of a Director of Public Prosecutions.

(c) For the purpose of this section, any court in the Republic and any Director of Public Prosecutions shall have jurisdiction.

Presumptions and proof

30B. (1) If in any prosecution in terms of this Act it is proved that—

(a) any message or communication, including a visual presentation, was placed on any distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that it was so placed by the registered subscriber or user;

(b) access was gained or attempted to be gained to child pornography on a distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that such access was gained or attempted to be gained by the registered subscriber or user.

(2) If in any prosecution it is necessary to prove that—

(a) any application for registration or classification in terms of this Act has or has not been made to the Board; or

(b) any publication or film has or has not been submitted to the Board in terms of this Act; or

(c) any decision or classification has or has not been made or that any restriction or condition has or has not been imposed by the Board in terms of this Act; or

(d) a certificate of exemption has or has not been issued, granted, withdrawn, cancelled or suspended by the Board; or

(e) a decision or classification of the Board has or has not been suspended by the Review Board,

a certificate, issued under the authority of the executive committee of the Board, shall, upon its mere production, be *prima facie* proof of such fact.”.

Amendment of Schedule 1 to Act 65 of 1996

14. Schedule 1 to the principal Act is hereby amended—

(a) by the deletion of items (1)(a) and (2);

- (b) by the substitution for item (1)(c) of the following subitem:
“(c) bestiality, incest or rape;”.
- (c) by the the substitution for item (1)(d) of the following subitem:
“(d) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or”.

Amendment of Schedule 2 to Act 65 of 1996

15. Schedule 2 to the principal Act is hereby amended by the substitution for item (2) of the following item:
“(2) it describes predominantly and explicitly any or all of the acts mentioned in Schedule 1 or item (1).”

Substitution of Schedule 3 to Act 65 of 1996

16. The following Schedule is hereby substituted for Schedule 3 to the principal Act:

“SCHEDULE 3

AGE RESTRICTIONS FOR PUBLICATIONS

- A classification committee or the Review Board may impose any or both of the following conditions on the distribution of a publication if, judged within context, it is necessary to protect children in the relevant age group against harmful or disturbing material in the publication:
- (a) That it shall only be distributed to persons older than 18 years of age, or older than a specified younger age, and that the publication shall bear a distinct notice of such restriction;
 - (b) that it shall only be distributed in a sealed and, if necessary, opaque wrapper which shall also, if applicable, bear the notice referred to in paragraph (a).”.

Amendment of Schedule 6 to Act 65 of 1996

17. Schedule 6 to the principal Act is hereby amended—
- (a) by the deletion of item (1);
 - (b) by the substitution for item (2) of the following item:
“(2) bestiality, incest or rape;”;
 - (c) by the substitution for item (3) of the following item:
“(3) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm;”; and
 - (d) by the deletion of item (4).

Substitution of Schedule 10 to Act 65 of 1996

18. The following Schedule is hereby substituted for Schedule 10 to the principal Act:

“SCHEDULE 10

PROMOTION OF HATRED

- (1) A film or publication which, judged within context, advocates hatred that is based on race, ethnicity, gender or religion and constitutes incitement to cause harm, shall be classified XX.
- (2) Item (1) shall not apply to—
- (a) a *bona fide* scientific, documentary, artistic, dramatic, literary or religious film or publication, or any part thereof which, judged within context, is of such a nature;

- (b) a film or publication which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (c) a film or publication which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.”.

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Repeal of Schedule 11 to Act 65 of 1996

19. Schedule 11 to the principal Act is hereby repealed.

Short title

20. This Act is called the Films and Publications Amendment Act, 2003.

MEMORANDUM ON THE OBJECTS OF THE FILMS AND PUBLICATIONS AMENDMENT BILL 2003

1. OBJECTS

The main objective of this Bill is to make provision for the prohibition of child pornography and for matters incidental to the more effective investigation and prosecution of child pornography offenders.

To this end the Bill seeks to—

- substitute the definition of child pornography because the current definition is limited to images and the display of genitals. It does not include descriptions of child pornography or other parts of the body, which may also be used for pornographic purposes;
- delete the definition of “degrade” because it is unnecessarily limiting in that it is gender-biased and does not take into account the violation of the right to human dignity in its totality;
- substitute the definition of “distribute” so as to impose an obligation on adults who have collections of pornographic publications to take reasonable steps to prevent access to such materials by young children;
- bring Internet service providers within its jurisdiction in so far as child pornography is concerned. It is therefore necessary to include definitions of “Internet address” and “Internet service providers” in the Act;
- substitute the definition of “sexual conduct” so as to make it applicable to the Act as a whole and to emphasise that genitals are not the only parts of a body involved in sexual activities;
- extend the meaning of “possession” to include downloading on computers;
- provide for more effective regulation of publications containing visual presentations or descriptions referred to in Schedules 1 and 2 for better protection of children from potentially disturbing and harmful materials;
- impose an obligation on distributors and exhibitors to submit all films for classification prior to distribution or exhibition and to provide for the registration of all distributors and exhibitors of films;
- provide for a more effective system of classification to better protect children from potentially disturbing and harmful images.
- remove limitations on the ability of the Review Board to properly exercise its powers of review and to make decisions consistent with its findings;
- express more clearly the offence provisions in section 26(1)(a) by separating the two offences, as well as prohibiting the broadcast of films classified “XX” or “X18”;
- express more clearly the prohibitions on child pornography and to extend the prohibition to the broadcasting of child pornography as well;
- provide for the imposition of a legal obligation on persons who have knowledge of the commission of an offence involving child pornography, to report such knowledge to the police so as to make the investigation and prosecution of child pornography offenders more effective;
- impose an obligation on persons who have materials which are potentially disturbing and harmful to children to take reasonable steps to prevent access to such materials by children;
- make child pornography a matter for law-enforcement authorities and not a matter for classification committees of the Board;
- address the problems of child pornography on the Internet by bringing Internet service providers within the jurisdiction of the Act;
- extend the prohibition of publications which fall within the limitations in section 16(2) of the Constitution to the broadcast of such publications as well;
- increase the maximum prison sentence for offences involving child pornography from 5 to 10 years.

2. ORGANISATIONS OR PERSONS CONSULTED

The following national departments were consulted and provided written comments on the Bill:

- Arts, Culture, Science and Technology
- Safety and Security

- Justice and Constitutional Development

3. FINANCIAL IMPLICATIONS FOR STATE

No additional financial implications are envisaged.

4. IMPLICATIONS FOR PROVINCES

No such implications are envisaged.

5. PARLIAMENTARY PROCEDURE

The Department of Home Affairs and the State Law Advisers are of the opinion that the procedure established by section 75 of the Constitution should be applied in respect of this Bill since it contains no matter to which the procedure referred to in section 74 or 76 of the Constitution applies.