



Submission to the Home Affairs Portfolio Committee on the Film & Publications Amendment Bill, 2006

Introduction

1. The Films and Publications Amendment Bill (the Bill) has as its stated object the protection of children from potentially disturbing, harmful, and inappropriate materials in the media. Likewise, the South African Human Rights Commission (SAHRC) has a strong and particular interest in the protection of children and their rights. At the same time, the SAHRC was established by Chapter 9 of the Constitution with the purpose of strengthening constitutional democracy in the Republic, and believes that a free press is an essential cornerstone of such a democracy.
2. The SAHRC strongly supports Parliament's attempts to protect children from pornography by bringing new media under the regulations of the Films and Publications Act. We do not support the notable deletion of section 22, subsection (c), which would bring publications such as daily newspapers under the umbrella of the Act. The SAHRC believes that the potential for "prior restraint" may at the least create a chilling effect on the press leading to harmful self-censorship, and at worst, lead to governmental suppression of the media.

The Interests of the SAHRC

3. The SAHRC is an independent state institution established by Chapter 9 of the Constitution for the purposes of entrenching constitutional democracy in South Africa. The SAHRC has a constitutional mandate under section 184(b) to "promote the protection, development and attainment of human rights" and under section 184(c) to "monitor and assess the observance of human rights in the Republic."
4. Children's rights are of obvious concern to the SAHRC as they necessarily include the human rights of any person, such as the right to life, dignity, equality, and security as guaranteed by the Constitution. As a particularly vulnerable group, children are also entitled to special protections and rights. As a signatory to the Convention on the Rights of the Child (and in accordance with the Constitution), South Africa "must undertake to protect

the child from all forms of sexual exploitation and sexual abuse.”¹ In accordance with such obligations, the SAHRC applauds Parliament’s efforts to protect minors from sexual exploitation by the media and keep pornography out of the hands of vulnerable children through the use of the classification system for films and other visual media. The Commission is of the opinion however, that the Amendment Bill limits freedom of expression as guaranteed by section 16 of the Constitution and does not do so in the least restrictive means possible.

5. Under its mandate to promote and protect human rights in the Republic, the SAHRC is also charged with protecting freedom of expression, including freedom of the press. Though it may be difficult for some to view the freedom of the press as impacting “human” rights, this freedom is no less important than any of the other rights included in the Bill of Rights in our Constitution. Its inclusion in not only the Constitution’s Bill of Rights, but also other foreign, and international laws such as Article 19 of the Universal Declaration of Human Rights is evidence that the freedom of expression, “which includes freedom of the press and other media,”² is indeed a human right requiring the protection and promotion of the Commission.

Why freedom of the press is important

6. All parts of the Constitution enjoy the presumption of purpose, and the explicit requirement of the right to freedom of the press in section 16(1)(a) is no exception. It is widely believed that without a free press, few other human rights are within reach of a society. The ability of an independent press to investigate and disseminate information and ideas, and keep watch over the government is essential to social, economic, and political development.
7. This belief in the importance of the press in a successful democracy has a long history. The 18th Century Irishman Edmund Burke is quoted as having said that “there were three Estates in Parliament, but in the Reporters’ Gallery yonder, there sat a fourth Estate more important than they all.”³ Thomas Jefferson, President and founding father of the United States, wrote: “Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it,” and also, “were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”⁴ In recent times, scholars such as Nobel Prize-winning economist and recipient of the 2002 International Humanist

¹ Article 34, United Nations Convention on the Rights of the Child (1989).

² Section 16(1)(a), The Constitution of the Republic of South Africa (1996).

³ Thomas Carlyle, On Heroes and Hero Worship (1841).

⁴ Thomas Jefferson, Letter to John Jay (1786); Letter to Edward Carrington (1787).

Award Amartya Sen have written about the importance of a free press to a democracy. According to Sen, “press freedom can enrich human lives, enhance public justice, and even help to promote economic and social development.” He even noted that a substantial famine has never occurred in a country with a democratic government and a relatively free press.⁵

8. The SAHRC likewise believes that freedom of the press is an essential component of the bundle of human rights guaranteed by our Constitution and deserves the attention and protection of the Commission.

How the Bill may infringe upon freedom of the press

9. Section 22, subsection (c) of the Films and Publications Act of 1996 (the Act) specified that newspapers published by members of the Newspaper Press Union of South Africa should not be subject to the provisions of the Act. In the Amendment Bill however, this clause has been deleted. Under the current version of the Bill, daily newspapers would be required to submit their issue for examination and classification before publication if it contains certain types of material.⁶
10. While on its surface, this requirement may seem entirely reasonable, the potential chilling effects on the media cannot be overstated. Certainly a newspaper that publishes pornographic photographs should fall under the classification requirements, but many of the other listed grounds are not so cut and dry. For example, a newspaper covering a racially tinged, but legal protest may decline to report the story for fear that it may be considered incitement to violence or advocacy of hatred, and thus need to be pre-classified. In the newspaper publishing business, the delays of the type required by the classification process are unacceptable. The only feasible course of action for such newspaper publishers would be to engage in a form of self-censorship harmful to the goals of democracy.

Prior Restraint

11. When a person or organization is required to seek permission from the government before publishing materials, and that permission is not granted, this is known as prior restraint. Prior restraint is thought to be the most extreme form of censorship, and the most harmful to democracy. In one of the major freedom of the press cases in the United States, the U.S. Supreme Court wrote that prior restraint, “by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil

⁵ Amartya Sen, Article for the World Association of Newspapers for World Press Freedom Day (2004).

⁶ Visual presentations, descriptions or representations of or amounting to sexual conduct; propaganda for war; incitement to imminent violence; or the advocacy of hatred based on any identifiable group characteristic.

sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”⁷

12. The SAHRC trusts that Parliament’s intent is not to control the media, but rather to protect children from harmful images. However, the Constitution is the supreme law of the Republic, and the rights guaranteed therein may not be abridged based on trust of our elected leaders. Our history has shown that once a right or freedom has been relinquished or taken, it can be extremely difficult to regain. Though this government may have no intention of muzzling the media, a future one may unscrupulously use this law to control the people’s access to information.
13. When a government wishes to tighten its grip on its power to oppress its people it often looks first to control the output of the media and eliminate those reports which paint it in an unfavorable light. Fortunately, our Constitution explicitly provides for a press free from such control in section 16. As a constitutional democracy, South Africa must not, and may not allow the government the power to undermine the Constitution as supreme law of the Republic.
14. NGOs in both South Africa and the international community have questioned how this aspect of the law will actually fight child pornography. The South African National Editors’ Forum (SANEF) has stated that it knows of no case involving the mainstream media brought before the courts or the press ombudsman concerning child pornography, and the International Press Institute (IPI) points out that the law could create confusion to applicability when other bodies such as ICASA and the Press Ombudsman have already been charged with regulating the media.
15. The Freedom of Expression Institute (FXI) has also expressed concern over several “gag orders” issued by South African courts preventing the press from publishing planned stories. There is an understandable fear among the press that under such circumstances, a classification system created and staffed by the government could lead to stories critical of the government being suppressed when they are required to be examined before publication.

Section 36 – Limitations

16. The drafters of our Constitution recognized that under certain circumstances, the rights granted may be limited, and provided for such circumstances in section 36. Therefore, freedom of expression as provided for in section 16 may be limited, but only to the extent that such limitation is reasonable and justifiable. In making that determination,

⁷ Neb. Press Ass’n. v. Stuart, 427 U.S. 539, 559 (1976).

relevant considerations include the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

17. As mentioned, the relation between the Bill's stated purpose of protecting children and the limitation placed on the freedom of the press is at best extremely tenuous. The Commission knows of no such cases where newspapers have published pornography, and these dangerous restrictions on press freedom would seem to be fighting an as yet non-existent problem. The SAHRC again supports Parliament's efforts to protect the Republic's children, but believes that subjecting the print media to pre-publication is unnecessary, overreaching, and likely unconstitutional.

Conclusion

18. The Press Ombudsman, the structure best qualified to deal with complaints against the South African press, has noted that freedom of expression "is an essential element of a free democratic society and a defence against tyranny."⁸ By stripping away the guarantees of a free press granted by our Constitution, we risk the danger that future governments will once again use the media as a tool of oppression. As Constitutional Court Judge Kate O'Regan has stated, "Without both an independent press and an independent judiciary, democracy cannot flourish."
19. The SAHRC is charged with the promotion of such a flourishing democracy, and as such cannot support the deletion of section 22(c) from the Act. The Commission recommends that the exemption for newspapers published by the Newspaper Press Union of South Africa remain in effect.

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⁸ <http://www.ombudsman.org.za/content/default.asp>