NATIONAL ASSOCIATION OF BROADCASTERS' SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON HOME AFFAIRS ON THE FILMS AND PUBLICATION AMENDMENT BILL

14 NOVEMBER 2003

1. INTRODUCTION

The National Association of Broadcasters would like to take this opportunity to thank the Portfolio Committee for the opportunity to make a written submission on the Films and Publications Amendment Bill. We would also appreciate the opportunity to make oral representations to the Portfolio Committee on the matter.

The National Association of Broadcasters ("the NAB") is the leading representative of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to its development. NAB members include:

- the three television channels and nineteen radio stations of the public broadcaster, the South African Broadcasting Corporation (“the SABC”);
- all the licensed commercial broadcasters in both radio and television;
- both the common carrier and the selective and preferential carrier licensed signal distributors; and
- over thirty community television and radio broadcasters.

This document makes a number of proposals with regard to the proposed amendments to the Films and Publications Act (“The Act”). The document not only addresses issues that relate directly to broadcasters. It goes wider, since it is submitted that the Bill touches on the climate of freedom of expression, which includes the right to receive and impart information as guaranteed. There are also some drafting errors, which will be pointed out.

We propose to deal with each section as it is found in the Bill. We have requested Prof Kobus van Rooyen SC, Chairperson of the Broadcasting Complaints Commission of South Africa, which was recognized by ICASA in 1995 as the official disciplinary body for all the broadcasters who are members of our Association, to prepare this document on behalf of the Association. Prof van Rooyen was also the Chairperson of the Task Group appointed by Dr Buthelezi in 1994-1996 to draft the FPA 1996 and write a report on the matter, which was published by the Government Printer on 3 March 1995. Task Group members included Dr Brigalia Bam, Gilbert Marcus SC, Ms Lauren Jacobson, Ms Fawzia Peer, Prof Nkabinde, adv W Huma, Prof A Coetzee, Prof D Morkel and Mr P Westra.

2. SPECIFIC SUBMISSIONS ON THE AMENDMENT BILL

AD SECTION 1 (a): Definition of "child pornography"

(1) The NAB submits that the proposed definition in the Bill does not accord with the recent judgment of the Constitutional Court ("CC") in *De Reuck v Director of Public Prosecutions and Others (15 October 2003).* Some comment on the judgment is necessary so as to motivate the proposal.

(2) The definition of child pornography, which was before the CC for Constitutional scrutiny, survived, but only after substantial reading down and, we submit, reading in. The definition in section 1 of the Films and Publications Act ("FPA") provides as follows:

"In this Act, unless the context otherwise indicates - child pornography, includes any image, real or simulated, however created, depicting a person who is or who is shown as being under

the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children."

(3) It has held by the CC that the definition as it appears as part of section 27 of the FPA fits into the general scheme of the Act. What would seem to have been individualization in the 1999 Amendment Act of the definition as read with section 27 has now emerged, through interpretation, to be in conformity with the Schedules. The Schedules and section 27 are read in such a fashion that what would seem to have been a clash, is now a unit. Furthermore, the Court has, in effect, read down the definition so as to ensure that it is in accordance with the freedom to impart and to receive information facet of freedom of expression in section 16 of the Constitution.

(4) The Court has also defined child pornography in such a manner that the material must be judged within context (as in the Schedules); that visual material which, judged as a whole, has as its predominant objective purpose the stimulation of erotic feeling in its target audience is pornography. Any image which, judged as a whole, predominantly stimulates aesthetic feeling is not caught by the definition. The Court then delineates the four categories that are to be found in the definition and *reads in* that it must be *explicit*: the image would not be child pornography unless it explicitly depicts: a child engaged in sexual conduct; a child engaged in a display of genitals; a child participating in sexual conduct; or a child assisting another person to engage in sexual conduct for the purposes of stimulating sexual arousal in the target audience. The test is the objective one of the reasonable viewer, who would not necessarily

be aroused himself or herself. “Sexual conduct” is as defined in Schedule 11 of the Act.

(5) The NAB submits that since the Court has, in effect, amended the *ipsissima verba* of the definition by reading in (“explicit”) and further reading down, it would be in the interests of justice to *replace* the definition in the 2003 amending Act with the definition the Court has, in effect, held to be the Constitutionally justifiable definition. It would assist those who are involved in the detection of the crime, and those who apply the Act. Persons who seek to possess or import for research, must obtain permission from the Executive of the Board in accordance with section 22. The Court indicates that insofar as lawyers, police officers and judicial officers are concerned, their position would be covered by reading in a defence. Since this was not necessary for purposes of the matter before the Court, the Court did not undertake such reading in. The NAB notes that the Bill addresses this point and it will be dealt with further on in this submission.

(6) The NAB, accordingly, suggests that Parliament repeal the present definition of child pornography and replace it with the following definition:

“child pornography” means any image, real or simulated, however created, explicitly depicting a person who is or who is shown as being under the age of 18 years

(a) engaged in or participating in sexual conduct;

(b) engaged in a display of genitals; or

(c) assisting another person to engage in sexual conduct

which, judged within context, has as its predominant objective purpose, according to the reasonable person, the stimulation of sexual arousal, in contrast to aesthetic feeling, in its target

audience and does not fall within the categories exempted in Schedules 5 or 9."

(7) This proposal includes the exemptions contained in Schedules 5 and 9. The Constitutional Court did not do so explicitly, but it is clear from its judgment that those exemptions would fall under aesthetic feelings. The NAB submits that it would, accordingly, make good sense, if the definition simply includes those exemptions.

(8) The NAB submits that the addition of *description* of a person to the definition involves literature, and would lead to substantial constitutional problems. It would lead to a ban of a literary masterpiece such as Nabokov's Lolita (which was already found to be not undesirable in the eighties). Schedule 1(2) already takes care of this situation and it should not be criminalized in section 27. The *distribution* and holding for distribution are, in any case, criminalized in section 28. The accent of Schedules 1 and 6 is on visual images. If this aspect is included, it should be done in a separate paragraph with its own definition – see Schedule 1 for a definition for such a case in item (2). The NAB is aware that the Internet presents some problems, but the visual image has, according to anecdotal evidence, been the main problem in the seduction of children. The CC in *De Reuck* has held that the rights of children must also be balanced against other rights and are not paramount, when they are not at risk. Literature does not place those rights at any risk.

(9) The NAB submits that by including aesthetic feelings as exclusionary, the CC has introduced the art exemption for child

pornography. Schedules 5 and 9 would, accordingly, also have to be amended by removing the art exclusion from the exemption.

(10) The NAB notes with interest that the first part of the CC interpretation is very close to the original definition[1] in the 1996 Act.[2] It is a narrower definition than the original, since it requires sexual arousal, an aspect that emerged only in the original definition when it dealt with nudity ("lewd"). Parliament's 1999 intention to make the definition stricter than the 1996 definition was not, with respect, given effect to. The words "sexual exploitation" and "degrade" are left out by the Court. The sexual exploitation, however, clearly influenced the CC in requiring sexual arousal. Since arousal of aesthetic feelings is now stated to be exclusionary, the Court has, in effect, also introduced art as an exemption in the case of child pornography. The contextual approach the Court adopts, also excludes the so-called "isolated passage" approach. The Court also states that scientific works (which would include documentaries) would hardly fall foul of the definition of child pornography as a result of the requirement that it must predominantly give rise to sexual arousal (see Para 41 of the judgment) – which a scientific work or a documentary would not do. The CC also held that the definition of "sexual conduct" in Schedule 11 would also apply to "sexual conduct" in the definition of "child pornography".

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[1] The *original* version of section 27 provided as follows:

"A publication shall be classified as XX if, judged within context -

(1) It contains a visual presentation, simulated or real of

(a) a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity;"

AD SECTION 1(b): "Degrade"

(1) It is the view of the NAB that insofar as the Bill plans to repeal the definition of "degrade" in section 1, this should not be done. If the intention was to broaden the scope of the definition of "child pornography", such broadening has become unnecessary in the light of the Constitutional Court's limiting interpretation of the definition. "Degrade" no longer forms part of the child pornography provision of the Bill, either. If the intention was to broaden the scope of protection in Schedules 1 and 6, where the word does appear, we also wish to advise against removal of the definition on Constitutional grounds. The definition of "degrade" is based on section 16(2)(c) of the Constitution and was cleared in 1996 by the Portfolio Committee with the Women's League of the ANC, which was adamant that a degradation clause be included in Schedules 1 and 6. The Constitutional Court has also, in the *Islamic Convention* case 2002(4) SA 294(CC), specifically used section 16(2)(c) so as to curb the broad provision concerning harmful relations in the Broadcasting Code. Although the Constitutional Court in the *De Reuck* matter did not deal with the meaning of "degrade", it is significant that it has not left it in its final determination of what child pornography means in the Act. It forms part of its motivation for the existence of Section 27; it does not go further than that. It is significant that O'Regan J, while argument was addressed to the Court in the *De Reuck* matter, specifically referred to the limiting definition of "degrade". Within the broader scheme of the Act, it would also be wise to keep the definition of 'degrade' intact: similar section 16(2)(c) wording is to be found in Schedule 10 and in section 29 of the FPA. Consistency is of paramount importance in an Act such as this Act, which impinges on several Constitutional rights.

AD SECTION 1(c): "Distribute"

(1) The NAB submits that the inclusion of the phrase:" *and also the failure to take reasonable steps to prevent access thereto by such a person."* causes the definition of "distribute" to be too wide. The NAB recommends that this phrase be removed from the proposed definition.

AD SECTION 1(c), (d) and (e): Failure to take reasonable steps etc

(1) The NAB has no objection to the proposed additions.

AD SECTION 1(f): "Sexual conduct."

(1) The NAB submits that in the light of the Constitutional Court's approach to the word "includes" as meaning "means", we suggest that "includes" be removed.

(2) The NAB submits that female genitals should remain in the definition in (i). It was included, on expert medical advice, by the Task Group 1994-6 and accepted by the Portfolio Committee and Parliament.

(3) The NAB submits that the word "undue" would not fit the approach of the Constitutional Court in the *De Reuck* matter. Instead, use "lewd" which, in this context, would be interpreted narrowly. In fact, if the definition which the NAB proposes is used, the word "lewd" may be left out, since the dominant purpose must be the arousal of sexual feeling. "Undue" is, in any case, so vague as not to pass constitutional muster. The NAB also submits that "anal region" should not be added, as it is regarded as being vague and led to heated public debate against such inclusion in the definition of "indecency" in the censorship years before 1980.

(4) Bestiality – The NAB submits that the definition of sexual conduct ("Sexual intercourse" and "sexual contact") would include bestiality, so the addition is unnecessary. It should, however, be noted that it is already part of the prohibited categories in Schedules 1 and 6.

(5) The NAB submits that (vi) would in all likelihood lead to problems of interpretation, but this addition is acceptable if applied narrowly.

AD SECTION 3: classification of publications

(1) The NAB submits that the provision that no age restriction may be higher than 18 should be included in (a)(ii) to avoid a situation where the Board might revert to the 21 or 19 restriction, which would be unconstitutional.

(2) The NAB respectfully submits that the addition of subsection (4) amounts to a return to censorship for publications and should not be added. In the case of child pornography permission must, in any case, be obtained under section 22. It is sufficient that the *distribution* of Schedule 1 materials, which includes, per definition, *public display*, is prohibited by section 28(2). Schedule 2 publications may, in any case, not be distributed except via licensed premises in terms of section 24.

AD SECTION 4: 18 (1A)(b)

(1) The NAB suggests that the word "public" should be inserted before "exhibition" so as to bring it into line with section 26(1), alternatively add "in public" just after "any film" on the first line.

(2) The NAB submits that 18(1A)(b) should be read with section 23(3) and that the same exemption that broadcasters are afforded in terms of section 18(1A)(a), should also apply to 18(1A)(b).

AD SECTION 4(b)

(1) The NAB submits that (a) should read "with reference to Schedules 6,7,8 read with Schedule 9 and with reference to Schedule 10". Schedule 10 applies on its own and the sentence may be misinterpreted. Schedule 9 is read with Schedules 6 and 7.

AD SECTION 5: repeal of the proviso

(1) The NAB submits that in the eighties there was an ongoing debate on the possible addition of conditions by the Appeal Board. The Board's approach was that unless the Directorate appealed, no such addition could be made. Where the Minister referred a matter to the Board, it could even be banned – a most controversial provision which was specifically rejected by the Task Group and this was accepted by Parliament. The proviso in the 1996 Act was specifically added to make such an addition impossible. The question that arises is why a film distributor who appeals should be subjected to more stringent conditions if he appeals for a lesser restriction. It is different where the Appellant requests the Board to make a few cuts so as to lessen the age restriction or classification. But that does not need removal of the proviso, since it is based on consent. The removal amounts, with respect, to a return to the days when Tommie Muller in the sixties appealed to the Minister against the 14 restriction on the film *Debbie.* The Minister increased it to 21. There was a public outcry, and he withdrew his decision, after pleas from the public – in fact, including a conservative section of the community which, justifiably, felt that

teenagers should be warned against premarital sex and that this film carried such a warning.

(2) It is submitted that the established practice of 23 years should not be amended now. The Review Board should be seen as a body of recourse for film distributors, not as a body of interference when the first Board has come to a decision. It would also lead to the possibility of the Minister being able to intervene by appealing. This kind of political intervention by the Minister (e.g. *Cry Freedom* and many others) constantly led to the independence of the Appeal Board being questioned under the old 1974 dispensation. The same problem would, most definitely, arise here where the Minister may appeal to the Board to increase the conditions, or even to ban a film. This places the independence of the Board, the members of which are appointed by the Minister after consultation with Cabinet, at risk - from an objective perspective. It is our view that it is important for justice to be seen to be done. This approach is, of course, not based on real bias but on perceived bias.

AD SECTION 7: BROADCASTS

(1) The NAB submits that the Broadcasting Amendment Act of 2002 has placed the responsibility for regulation of the content of broadcasts with the Independent Communications Authority of South Africa ("ICASA"). This approach accords with section 192 of the Constitution, which *imperatively* provides as follows:

"National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of view broadly representing South African society."

(2) Whereas it has always been part of the Films and Publications Act, in terms of section 26(4) of the Act, that films classified as XX may not be broadcast, section 7(c) of the Bill now amounts to interference by another Regulatory Authority (The Films and Publications Board) in the exclusive legislative and regulatory sphere of the Constitutionally mandated ICASA. That Authority, on 7 of March 2003, published its content related regulations after lengthy discussions and consultations with the public and broadcasters. In line with section 26(4) of the Films and Publications Act, which prohibits only XX films (both classified and unclassified), ICASA in clause 28 of its Code has prohibited only XX material[3] as defined in the FPA. From the Code it appears clearly that such films must, however, be broadcast late into the watershed – and the Broadcasting Complaints Commission has in fact held that material which falls into the class of X18 material may be screened only after midnight and before 05:00, with a continuous warning classification of S and with the age restriction of 18.

(3) The broadcasters are aware of this approach and have planned, where they are interested in doing so, their future purchases of X18 and similar material in accordance with clause 28 of this Code (which was already in place in 1999, but was made applicable only in 2003, when the regulatory power as to the Code was granted to ICASA – a decision which was in line with section 192 of the Constitution).

(4) We respectfully submit that it would be unnecessary commercial interference on broadcaster activities to introduce a ban on X18 material at this stage. They already have the vested right to broadcast X18 material after midnight. The NAB submits that insofar as children are concerned, the late watershed is employed to limit access. In the case of M-Net, the parental mechanism would in any case block out

[3] Clause 28 does not refer to violence, as does Schedule 6(5). However, clauses 14-17 of the Code deals with violence.

such material, which may also only be broadcast after midnight, according to the BCCSA guidelines, which conforms to the guidance of the 7 March 2003 Broadcasting Regulations of ICASA.

(5) The NAB submits that during the hearings before the Portfolio Committee in 1996 the IBA (now ICASA) contended that the Act should not prohibit X18 material for broadcasts – the IBA would regulate it, as it has done in its March 2003 Regulations.

(6) Furthermore, we submit that according to the new proposed subparagraph only *classified X18* material may not be broadcast. This means that the vast amount of *unclassified* material may be broadcast. It is our view that the new provision would cause serious confusion and could lead to arguments about whether the film classified as X18 by the Board was indeed the one shown. These films tend to have sexual content of the same or similar kind and are not always that readily distinguishable. In any case, decisions as to broadcasting content lies with the ICASA and its recognized body, the BCCSA. According to the Code, the broadcasters should seek guidance from existing certificates issued by the Films and Publications Board. It is also the policy of the BCCSA that television broadcasters should not lightly depart from classifications and age restrictions imposed by the Films and Publications Board.

(7) It is proposed that the word “broadcasts” be removed from 26(1)(a)(A) and (b) and the matter be left to the Constitutionally mandated Regulatory Authorities involved in such control: ICASA, its Monitoring and Complaints Unit, and the Broadcasting Complaints Commission of SA.

AD SECTION 8 (a)(ii), (iii) and (iv) – broadcast of child pornography

(1) The proposed offence does not include the word “knowingly”. We submit that for the purpose of consistency “knowingly” should be added.

(2) The NAB submits that section 26(4) already prohibits broadcasting of XX material, and XX material includes “child pornography”. There is accordingly no reason for this duplication of what already appears in sections 26(4). It is our submission that the insertion of “causes to be broadcast” would be covered by the rules against complicity, which would also be covered by section 26(4). The NAB submits that it need not be added. It is already implicitly there by way of common law.

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(3) The NAB submits that, in fact, “causes to be exported or distributed” is totally unnecessary. The persons involved would either be distributors, or exporters, or accomplices. An accomplice need not be mentioned in legislation. Accomplices are always included by implication in statutory offences. The same applies to (ii) and (iii), where “contributes to, or assists” and “in any way takes steps to procure, obtain or access” would be covered by attempt and the offence of complicity in a crime.

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(4) It is the NAB’s view that subsections (2) and (3) of section 27 should not be retracted. Although the Constitutional Court did not refer to the sections as supporting the validity of section 27(1), it is submitted that 27(3) as it reads at present should remain intact. This is especially true of mere possession. The Act should explicitly require a court order before entering. And, insofar as section 27(2) is concerned, the State should ensure that it does not prosecute persons for material which has already been found not to amount to child pornography.

AD SECTION 8(a)(1) (b)

(1) It is our recommendation that the provision be amended to read as follows:

"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, the Independent Broadcasting Authority Act 153 of 1993 as amended, or the Customs and Excise Act 91 of 1964 as amended."

AD SECTION 8(b)(2)(a)(ii)

(1) The NAB submits that the duty under (ii) amounts to an unreasonable invasion of the right to remain silent. The person is questioned about what he or she had a duty to report on, and now the fact that he or she fails to answer becomes an offence. This cannot be acceptable in terms of section 35(1)(a) of the Constitution. Not even (b), which provides for permission of the DPP, would save this provision.

(2) Insofar as (c) is concerned, the NAB agrees with the provision.

(3) The NAB recommends that insofar as (d) is concerned, "Chief Executive Officer" should be substituted for "Board".

AD SECTION 27A: Internet Service Providers

(1) The NAB does not deem it appropriate to comment on this aspect as it concerns a specific category of providers, who would address this matter themselves, if they decide to do so. It should, however, be noted, in the interests of justice, that section 27A(3) amounts to an

unreasonable infringement of the provider's right to remain silent, insofar as it might have to report on its own omission in terms of subsection (2)(b).

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AD SECTION 29(1): BROADCASTERS

(1) The NAB respectfully submits that this addition is unnecessary. Once a publication is broadcast as visual material in a broadcast, it becomes part of the broadcast and an additional reference to "publication" is unnecessary. Section 29(2) already covers broadcasts, and the definition of film is broad enough to cover any material broadcast.

(2) It is the NAB's view that the regulation and control of broadcasting falls under ICASA, and any material that amounts to what is prohibited in section 29 is also covered by the Broadcasting Code. Compare the judgment of the Broadcasting Tribunal in the matter of *Liebenberg v YFM (1) 21(1)/2003* (available on the BCCSA web site at (www.bccsa.co.za). It should be borne in mind that both ICASA and the Broadcasting Complaints Commission may impose fines on broadcasters, and that it is unnecessary to add anything more on broadcasts to section 29. The NAB submits that section 29(2) was added to the FPA with the full support of broadcasters at a time when the position on hate speech was uncertain. Compare the *Islamic Unity Convention* case. [4] This judgment held that the Broadcasting Code was too broad insofar as it prohibited material pertaining to harm between sections, which was not constitutionally prohibited. As matters stand, section 29(2) may, indeed, be repealed. Any further addition as to broadcasters is, accordingly, not justified. As pointed

[4] *2002(4) SA 294(CC)*

out above, the addition is, in any case, superfluous in the light of section 29(2).

AD SECTION 12: SANCTIONS: FINES BY EXCO

(1) The NAB respectfully submits that section 12(d) is problematic. We note that it is based on consent of the film distributor, broadcaster, or Internet service provider.

(2) The NAB has already pointed out that broadcasters should not, in principle, be subject to section 26. It has, however, been accepted that in the case of section 26(4) the broadcasters would be subject to the Act, since broadcasting of XX material is regarded as so pernicious that it should be criminalized. But that is a matter for the Criminal Courts to decide on.

(3) However, in the case of X18 material, the ICASA Broadcasting Regulations allows broadcasting of such material as from well into the watershed. It is the NAB's recommendation, accordingly, that the criminal ban on X18 should not be implemented in the amended Act insofar as broadcasters are concerned.

(4) The NAB submits that compounding is allowed in our law in certain instances, otherwise it is a crime. Instances are to be found in the Criminal Procedure Act, the Merchant Shipping Act and the Customs and Excise Act. Therefore, in principle, the proposed new 12(d) [30(d)] is in order.

(5) However, there are other matters that raise substantial concern:

(a) The NAB submits that should the Exco initiate the complaint itself, its objectivity would be at risk.

(b) It is our submission that the word “summarily” would seem to indicate the absence of a full inquiry in terms of section 33 of the Constitution. In other words, the rules of administrative justice might not be followed. If that is the case, the procedure is unacceptable. The amendment does refer to an inquiry, but it is open to doubt how this will take place.

(c) The NAB respectfully submits that the fact that there is a right of appeal to the Minister is unacceptable. The Minister clearly falls within the executive branch of government and such a procedure would be open to Constitutional questions. We submit that if Parliament were to accept the procedure, the appeal should be to the Review Board.

(d) The NAB submits that a provision would have to be added to provide for the allocation of fines. It is the view of the NAB that such fines would have to be handed over to the National Treasury and that the impression should not, in any manner, be created that the FPB could bolster its own budget in this fashion. This is obviously not the intention, but it would be in the interests of certainty, if it were stated explicitly.

(e) The NAB submits that once the Exco becomes a fining body, its perceived objectivity in the exercise of its other administrative functions is placed at risk, as this is the same body that appoints a committee of the Board to classify a film. The Exco acts in

terms of section 22 to grant exemptions from sections of the Act. The Exco also exercises control over licensed premises.

(f) The NAB concludes that as soon as the Exco becomes an alternative to the criminal process, it loses its objectivity as part of the quasi-judicial mechanism. It becomes the policeman *and* judge of fines for what are otherwise offences in terms of criminal law.

(g) The NAB respectfully advises against the proposed procedure of fining. It introduces an element of law enforcement into a process that should otherwise be quasi-judicial, objective and impartial, and not part of the executive arm of law enforcement.

AD SECTION 13: THE NEW SECTION 30A (EXTRA-TERRITORIALITY)

(1) The NAB submits that it is well known that the crime of treason can be committed extraterritorially. The Terrorism Act contained a similar provision.

(2) However, to subject "any citizen or permanent resident" to criminalisation in terms of this Act for deeds committed outside the Republic is unacceptable.

(3) The question that immediately arises is why other deeds committed outside South Africa (murder/assault/drug peddling/child abuse) are not also subjected to prosecution locally.

(4) This provision would mean that if a person were to buy an X18 film overseas and screen it in public in a country where it is perfectly legal to do so without intervention by the law, he or she would be subject to

prosecution here. If this same person were in possession of child pornography in a foreign country where it is legitimate to possess it for a legitimate purpose, he or she would be liable to prosecution here, unless he or she obtained permission from the Exco in terms of section 22 of the Act. Such possession is legitimate in the USA, the UK, Canada, Ireland, Germany, and New Zealand – to name but a few examples. In the Netherlands, possession of child pornography for therapeutic purposes is legitimate; in South Africa it is an offence if permission is not obtained from the Exco in terms of section 22. In some countries the screening of films in public is not a contravention – and yet, if a citizen or permanent resident were to screen such a film in such a country and return to South Africa, he or she may be prosecuted.

(5) The NAB submits that there are not sufficient reasons to make this Act extraterritorial. We recommend that the provision not be enacted, and be scrapped from the Bill.

AD SECTION 13: Presumptions Section 30B

(1) It is our submission that the presumptions in (a) and (b) would seem to be constitutionally acceptable. The right to remain silent is limited here in a reasonable manner. Whether it is really necessary to spell these presumptions out is debatable. In the ordinary course of the criminal procedural process a duty arises on the accused to lead evidence and tell his or her story when a *prima facie* case has been made out by the State.

(2) The NAB finds the *prima facie* proof rule in (2) in order.

AD SECTION 14: elimination from Schedules of child pornography

(1) The NAB respectfully submits that elimination of child pornography from Schedules 1 and 6 must be a drafting *error*. The Board classifies according to these Schedules and would not be permitted simply to fall back on section 27 and the definition in section 1. Accordingly, it should not be eliminated.

(2) The NAB also finds it difficult to understand why item (2) has been removed from the ambit of Schedule 1. The NAB submits that this kind of material should, so as to protect children, be totally removed from distribution and not even be available on licensed premises. What is available as X18 on licensed premises goes into homes, and if there is concern[5] about paedophiles seducing children with pictures, there should also be similar concern about paedophiles reading to children from a book. Bona fide literature is not included in the Schedule 1(2) prohibition.

AD SECTION 14: SUBSTITUTION OF (1)(c) in Schedule 1

(1) The NAB submits that the Task Group 1994 considered the addition of "incest", but came to the conclusion that it would be extremely difficult to identify instances of incest. One must, with all due respect, be extremely careful before amendments are made to the Schedules. It causes problems of consistency and could be confusing. Insofar as rape is concerned, it is already covered by item 1(b). Advice: the item should not be added to. The NAB submits that a wide variety of sexual acts can be found that are not included. In German law there is simply

[5] The concern is based on anecdotal evidence. In De Reuck the CC, however, expressed its concern about such possible misuse.

a reference to bestiality, and US instances where an attempt was made to enumerate many instances were struck down for vagueness.

AD SECTION 14: AMENDMENT OF (1)(d)

(1) The NAB submits that the 1994 Task Group paid careful attention to the matter of degradation. Ms Lauren Jacobson, one of the members of the Task Group and an experienced media lawyer, prepared the part of the Report on degradation and advised that it was a vague term that would lead to Constitutional difficulties. The Task Group agreed. However, in the last stage of the Portfolio Committee's work in 1996, the degradation item was added – but with a definition of degradation that was limited to the hate speech provision in section 16(2)(c) of the Constitution. The NAB submits that the words "shows disrespect" are far too vague, and that it would be much safer simply to keep the present wording intact, as well as the criterion accepted in the *Islamic Unity Convention* Constitutional Court Case. The splitting of section 16(2)(c) also raises the question whether one part of section 16(2)(c) would be sufficient. It is the NAB's view that the whole phrase should be used, and not be divided by "or". The identical aim would be achieved, but on grounds that are clear. The NAB submits, once more, that the Schedules should not be amended without further consideration.

AD SECTION 15: SCHEDULE 2

(1) As pointed out above, the printed word, which predominantly describes child pornography, should (as is presently the case) fall under the total ban of distribution in Schedule 1. The NAB accordingly recommends that item 2 be left intact in Schedule 1, and Schedule 2 not be amended. The words "or item 1" should not be added.

AD SECTION16: SUBSTITUTION OF SCHEDULE 3.

(1) The NAB submits that the proposed amendment merely removes the "R18" category. The "R18" is a well-known classification and should not be removed without careful consideration.

AD SECTION 17 RE SCHEDULE 6

(1) The NAB respectfully submits that deletion of item 1 is a drafting *error,* and that it should remain in order for the Board to classify accordingly.

(2) As to item (2), the NAB submits that the same argument applies as in paragraph (1) above. However, it should read that item (3) is amended, *not* (2), which deals with violence and sex.

(3) Item (3) also warrants the same comment as above. The NAB recommends that the carefully worded "degrade" provision should not be altered. The NAB submits that the additions would serve no purpose and were rejected by the Portfolio Committee in 1996. Furthermore, it should be noted that it is not (3) which is substituted, but (4).

AD SECTION 18: SCHEDULE 10: ADDITION OF RACE, ETHNICITY AND GENDER

(1) The NAB submits that the Portfolio Committee decided, in 1996, not to add race or ethnicity to Schedule 10. It could politicize the Board, as happened in the eighties when race did fall under the auspices of the Committees and the Appeal Board. It was decided to leave this matter to the Courts, and section 29 is geared to that purpose. The NAB

submits that there would be no problem if gender were added, but Schedule 6 already, in effect, caters for it in item 4.

3. CONCLUSION

The NAB thanks the Portfolio Committee once more for the opportunity of making submissions on the Films and Publications Amendment Bill. As the leading representative of the broadcasting industry, the NAB trusts that the Portfolio Committee will consider its submissions carefully. The NAB is available to assist in any matter raised in its submission.