MEMORANDUM

TO: **THE JOINT TAGGING MECHANISM** (SPEAKER, DEPUTY SPEAKER (NA); CHAIRPERSON, DEPUTY CHAIRPERSON (NCOP))

THE CHAIRPERSON, PORTFOLIO COMMITTEE ON COMMUNICATIONS (NA)

THE CHAIRPERSON, SELECT COMMITTEE ON COMMUNICATIONS AND PUBLIC ENTERPRISE (NCOP)

FROM: **CAUSE FOR JUSTICE** (HUMAN RIGHTS AND PUBLIC INTEREST NGO) DIRECTOR, LEGAL & POLICY

SUBJECT: **PROCEDURAL IRREGULARITIES – FILMS AND PUBLICATIONS AMENDMENT BILL [B37-2015]**

DATE: 5 APRIL 2018

SENT BY: E-MAIL

INTRODUCTION

The Films and Publications Amendment Bill [B37-2015; B37B-2015 adopted by the National Assembly on 6 March 2018] is widely considered to be a contentious piece of amendment legislation, but which, in our view, addresses important matters affecting the public interest.

The intention underlying many of the provisions of the Bill is good: – to serve the public interest and the common good – and the Bill aims to carry out the mandate of the Films and Publications Act, 1996 (the Act) more efficiently and in the interest of the people of South Africa.

The purpose of this engagement by way of memorandum

Cause for Justice ("CFJ") has followed the progress of the Bill through the National Assembly, including the Portfolio Committee on Communications (PCC). We are at this stage concerned that the Bill is constitutionally vulnerable due to procedural irregularities in the handling of the Bill by Parliament to date.

These procedural constitutional irregularities relate to, amongst others:

1. the incorrect tagging of the Bill by the Joint Tagging Mechanism (JTM);
2. the incorrect advice and misleading (possibly intentionally) of the PCC by the Parliamentary Legal Services on points of law, resulting in the PCC suffering under an error (misdirection) of law, which means that members could not and did not properly apply their minds to issues before them; and
3. the PPC failing to facilitate adequate public participation within its process.

The purpose of this memorandum is to draw your attention to the abovementioned irregularities and to open a channel for engagement around potential remedial action to hopefully save the Bill from being declared unconstitutional or invalid (after being signed into law by the President).

Our observations of political interaction around the Bill in the National Assembly suggests that several opposition parties are contemplating a constitutional attack on the Bill, once enacted.

In our view, the Bill contains crucial amendments to strengthen available legal and regulatory mechanisms to achieve the important and legitimate objectives of the Act. In addition, the time and resources invested in the Bill since its inception with the FPB/Department of Home Affairs (and later Department of Communications) is extensive. In our opinion, every effort should be made to cure constitutional deficiencies in order to save the Bill from invalidation.

It is in this context that we approach you with a view to opening discussions around remedying the procedural shortcomings.

PROCEDURAL CONSTITUTIONAL IRREGULARITIES

1. INCORRECT TAGGING OF THE BILL:

The Bill was tagged as a section 75 Bill (not affecting the provinces). However, in terms of section 76(3) of the Constitution, a bill must be dealt with in accordance with section 76 ***if it falls within a functional area listed in Schedule 4*** to the Constitution.

Interpretation of the law

The interpretation of the italicised phrase emphasised above has been considered and ruled on in a number of court decisions, including:

- Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010) (http://www.saflii.org/za/cases/ZACC/2010/10.html) ("Tongoane"); and
- Democratic Alliance v President of South Africa and Others (18392/13) [2014] ZAWCHC 31; [2014] 2 All SA 569 (WCC); 2014 (7) BCLR 800 (WCC); 2014 (4) SA 402 (WCC) (13 March 2014) (http://www.saflii.org/za/cases/ZAWCHC/2014/31.html)

The courts have distinguished the characterisation of a Bill (in order to determine legislative competence) from its tagging. With tagging of Bills what matters is not the substance or the true purpose and effect of the Bill: what matters is whether the provisions of the Bill "in substantial measure fall within a functional area listed in Schedule 4". [1]

The tagging or "substantial measure" test – "focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4".[2]

[1] Para [58] of Tongoane.
[2] Para [59] of Tongoane.

Any Bill that substantially affects a functional area of concurrent legislative competence (i.e. affects the interests of the provinces) must be enacted in accordance with the procedure stipulated in s 76 of the Constitution (a procedure more burdensome than the one stipulated in s 75).

Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. To apply the 'Pith and Substance' test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that s 76(3) requires to be enacted in accordance with the s 76 procedure. The 'substantial measure' test, on the other hand, permits a consideration of the provisions of the Bill and their impact on matters that substantially affect a functional area listed in Schedule 4. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process.[3]

Application of the law

Schedule 4 to the Constitution includes "Consumer Protection" as a functional area of concurrent legislative competence between National and Provincial.

The objects of the Films and Publications Act (1996) are to regulate the creation, production, possession and distribution of films, games and certain publications to:

(a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;

(b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and

(c) make use of children in and the exposure of children to pornography punishable.

Essentially therefore, this legislation deals solely or mainly with consumer advice and protection in relation to consumer products, namely films, games and publications.

The Preamble to *the Bill* includes a long list of objects explaining the purposes/objects for its enactment. Most, if not all of these objects, relates to the main purpose – which is the provision of consumer advice and consumer protection - most notably, the protection of consumers who are children.

To use but one example, clause 23 of the Bill [B37B-2015] proposes the legalising of the online distribution of pornography, subject to certain listed conditions, aimed at amongst others the protection of consumers who are children. These consumer protection measures are something the provinces must be consulted on and have a say on in accordance with the procedures laid down in section 76 of the Constitution and as further given effect to by the Rules of Parliament.

[3] Para [69] - [70] of Tongoane

In summary, not only do the provisions of the Bill substantially affect the functional area of Consumer Protection (for purposes of tagging), the subject-matter of the Bill ***is*** Consumer Protection - in relation to films, games and publications.

In our view, the Bill should have been tagged as a section 76 bill. We can see no basis for its tagging as a section 75 bill.

This concern is pertinent and urgent as the Bill is about to undergo its progression through the NCOP.

Potential Remedy

We understand that due to Joint Rule 163(1)(c), the tagging of the Bill can no longer be officially remedied. That however, does not mean that the progress of the Bill through the NCOP necessarily has to fall foul of section 76. In our opinion, adherence to the requirements of section 76 could still be achieved, irrespective of the fact that the Bill is officially tagged as a section 75 bill. There are also other legal remedies available whereby the effect of incorrect tagging could be cured. We are at your disposal to further discuss potential remedial action that may save the Bill from annulment.

2. INCORRECT ADVICE AND MISLEADING OF THE PCC BY THE PARLIAMENTARY LEGAL SERVICES:

Clauses 15(i) and 17(b) of the Bill [B37B-2015] proposes an amendment to the definition of "XX" classification in sections 16(4)(b) and 18(3)(b) of the Act.

The proposal is to delete large portions of the following sub-definitions of the "XX" classification:

(i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;

(ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;

(iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;

And to replace these prohibited depictions with the following wording, namely:

(i) explicit sexual conduct accompanied by explicit violence **[which violates or shows disrespect for the right to human dignity of any person]**;
(ii) bestiality, incest**[,]** or rape **[, conduct or an act which is degrading of human beings;**
(iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;]

The Department of Communications explained the reason for the above proposed amendments as follows in paragraph 3.12.1 of the Explanatory Memorandum published with the Bill, which reads:

*Section 18(3)(b) has been revised to remedy **the vagueness thereof which resulted in the provision being deemed to be unconstitutional**, as a result it only makes reference to ''explicit violent sexual conduct'' in order to distinguish the ''XX'' category from the ''X18'' voluntary sex category.*

Correct legal position, misleading by legal advisors and concomitant consequences

On more than one occasion during the deliberations on the Bill in the PCC, but most strikingly in the PCC meeting on 14 November 2017, the Parliamentary Legal Advisors either mistakenly or negligently or intentionally misled the PCC members on the findings of the Constitutional Court in the *Print Media judgment (http://www.saflii.org/za/cases/ZACC/2012/22.html)*.[4]

The Parliamentary Legal Advisors advised the PCC members that the Constitutional Court declared wording similar to the wording currently contained in sections 16(4)(b) and 18(3)(b) of the Act, to be vague and overbroad.[5] That was an untrue statement and if the statement was made with full knowledge, it was also an outright lie.

What the Parliamentary Legal Advisors were referring to was a finding by a minority judgment of Van der Westhuizen J and two Justices.[6] The majority of the court, consisting of Skweyiya J and *seven* Justices, did not agree with the minority's finding.[7]

Not all findings of a court are binding precedent. All findings of a unanimous court will be binding, but with a split court only the findings of the majority and those findings of the minority that the majority agrees with, i.e. incorporates into the majority's findings, are binding.

What the Parliamentary Legal Advisors did, was to present findings of the minority, *which the majority did not agree with*, as binding precedent of the Constitutional Court – which of course they are not. In other words, they misled the PCC members into believing that the Constitutional Court had ruled that the provisions of the Act were vague and overbroad and therefore ***had to be*** amended. As a result, the PCC was not aware that one of the options available to it in respect of the proposed amendments, was to leave the Act untouched – i.e. to not accept the proposed amendments.

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[4] *Print Media South Africa and another v Minister of Home Affairs and others* (CCT 113/11) [2012] ZACC 22. ("Print Media")

[5] From 2 hours 10 minutes and 15 seconds into the recording of the PCC meeting on 14 November 2017, available on the website of the Parliamentary Monitoring Group (https://pmg.org.za/committee-meeting/25476/).

[6] Only the *minority* judgment of Van der Westhuizen J considered the vagueness of phrases such as "violates or shows disrespect for the right to human dignity of any person", or "degrades a person", or "constitutes incitement to cause harm". The *minority* held that section 16(2)(a) of the Act was constitutionally invalid **for providing for prior restraint based on vague and overly broad criteria**. See para [105] of Print Media.

[7] The *majority*'s response to the *minority*'s decision is crucial: The majority found that the question of the criteria's constitutionality for being vague and overbroad was peripheral to the main issue and unnecessary to decide. **The majority accordingly made no finding in respect of vagueness. In fact, it is impossible to speculate what the majority may have found had they considered vagueness. They may quite possibly have found the provisions to not be too vague or overbroad.** See para [72] of Print Media.

This option is still open to Parliament, as there is no binding precedent of the Constitutional Court compelling the amendment of the specific provisions of the Act.

The Parliamentary Legal Advisors also neglected to inform the PCC of the proposed remedy for the supposed vagueness and overbreadth posited by the minority in *Print Media*, namely that "**substantial redrafting is required**".[8]

If the proposed amendments in the Bill could somehow be said to constitute "substantial redrafting", such redrafting consists of the deletion of all supposedly vague provisions and replacing it with a single provision – "accompanied by explicit violence". In so doing, prohibited distribution of certain forms of explicit sexual conduct, degrading materials and incitement of harm, will be reduced to depictions of explicit violence only. The wording currently contained in the Act however serve important and legitimate purposes, including the protection and promotion of human dignity, the protection of people from inhuman or degrading treatment, and the protection of children.

Application of the law

In legal terms, the PCC suffered under an error/misdirection of law which resulted in its members being unable to properly apply their minds to the issue before it. These irregularities constitute grounds for invalidation of the proposed amendments as they resulted in arbitrary or capricious decision-making.

As a result of and in addition to the above, the PCC and by extension the NA, accepted proposed amendments that fail to address glaring **unintended consequences** which are not in the public interest and would result in putting people at real risk of harm.[9]

Potential Remedy

Although a court is likely to find the NA process (decision-making) to be flawed, based on the abovementioned irregularities, the consequences thereof could still be cured during the NCOP process. The NCOP and its Select Committee, being alive to the error of law of the PCC and the

[8] See para [108] of Print Media.

[9] By way of example, under the wording approved by the NA for the "XX" classification, the following content will be legally distributable between adults in South Africa:

- Content showing an adult male person in a non-violent manner urinating or defecating on an adult female person.
- An instructive film (or even documentary), without explicit visual references, about how to poison an unwanted family member in such a way that death by poisoning would be untraceable, i.e. the perpetrator would never be suspected of murder.
- An instructive film (or even documentary) without explicit visual references about how to cut yourself so that no-one will know you are someone who cuts him/herself.

We are hopeful that the fact that the abovementioned content will become legally distributable, are unintended consequences flowing from the NA's ill-conceived adoption of the amendments, rather than an indication of the NA's true view of what kinds of content should be allowed to be distributed in South Africa.

unintended consequences of the proposed amendments they have adopted, could come to a decision in respect of the proposed amendments based on the true legal position and address the unintended consequences appropriately.

We have been working on proposed wording for the "XX" classification, which takes account of the unintended consequences of the Bill's provisions and addresses same to bring the wording in line with the Bill of Rights and South African constitutional norms and values. We would be willing to provide you with our working definition for further consideration.

3. THE PCC FAILING TO FACILITATE ADEQUATE PUBLIC PARTICIPATION:

The facts

On 6 June 2017, the PCC sought and obtained the NA's permission in terms of NA Rule 286(4)(c) to amend other provisions of the Act, going beyond the scope of the Bill initially introduced in Parliament by the Department of Communications.

The PCC's interim report on the Bill, dated 23 May 2017, noted that: "*The amendments which the Committee wishes to inquire into include but are not limited to the definitions, section 4A and section 31A.*"

On our count, the A-version of the Bill [B37A-2015] added **8** new clauses and **10** new definitions to the Bill.

The abovementioned new clauses and definitions inserted into the Bill by the PCC *post-dated* the public submissions, hearings and consultations on the Bill. The PCC made these additions/ amendments themselves and adopted it themselves. As such, the public was not afforded an opportunity to comment on the additional proposed amendments that did not form part of the original Bill and which fell outside of the Bill's original scope.

The law

In terms of section 59(1)(a) of the Constitution, the NA must facilitate public involvement in the legislative and other processes of the NA and its committees.

Whether Parliament has taken adequate steps to facilitate public participation depends on whether members of the public are afforded a reasonable opportunity to meaningfully participate and have an adequate say.[10]

Application of the law to the facts

In relation to additional proposed amendments made to the Act by the PCC, that did not form part of the Bill originally introduced and which fell outside of the Bill's original scope, there has not

[10] Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016) paras [57] – [61]. (http://www.saflii.org/za/cases/ZACC/2016/22.html) ("Land Access Movement")

been any public participation at all to date. It is difficult to fathom how "no participation" can ever pass the test of "adequate participation". As was the case in *Land Access Movement,* failure to facilitate adequate public participation taints legislation with invalidity, as it does not pass the procedural constitutional benchmark.

Potential Remedy

As was noted under the previous section, the procedural irregularities in the NA/PCC process may be curable during the NCOP process. The NCOP and/or its Select Committee, being alive to the lack of public participation in respect of "beyond-the-scope" amendments of the PCC, could facilitate public participation as part of its process to give the public an opportunity to consider and comment on additions made to the Bill by the PCC.

CONCLUDING REMARKS

As noted in the introduction to this Memorandum, we are at your disposal to further engage on the matters highlighted above with a view to finding solutions to cure the procedural constitutional irregularities the Bill is currently tainted by.

We trust that the aforementioned is of assistance and look forward to an opportunity to enter into further discussions with you in this regard in due course.