REPORT OF THE TASK GROUP:

FILM AND PUBLICATION CONTROL

TO

DR M G BUTHELEZI

MINISTER OF HOME AFFAIRS

OF THE REPUBLIC OF SOUTH AFRICA

DECEMBER 1994

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1 DECEMBER 1994

PRETORIA

REPUBLIC OF SOUTH AFRICA

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REPORT OF THE TASK GROUP

PUBLICATION AND FILM CONTROL

1 APPOINTMENT OF TASK GROUP

1.1 On 8 August 1994 the Minister of Home Affairs, Dr M Buthelezi, appointed a Task Group independently to draft a new Act to replace the existing Publications Act 1974, as amended. A new Act was thought to be necessary because the existing Act apparently lacks constitutionality in terms of the fundamental rights Chapter (Chapter III) of the Constitution of the Republic of South Africa. There had been much uncertainty in the minds of members of the publishing business, who both formally and informally had challenged the validity of the existing Act.

1.2 The following members were appointed to the Task Group:

Prof JCW van Rooyen S.C. (Chairperson)
Ms B Bam (General Secretary, SA Council of Churches)
Dr A Coetzee (Director of Publications)
Adv W Huma (Manager, CSIR)
Ms L Jacobson (Attorney, Johannesburg)
Adv G Marcus (Advocate, Johannesburg Bar)
Prof DW Morkel (Chairperson of the Publications Appeal Board)
Prof AC Nkabinde (previously Principal of the University of Zululand)
Ms F Peer (Labour Consultant and member of the Press Council)
Mr PE Westra (Director, SA Library, Cape Town)
Mr AP Tredoux (Secretariat)
Adv M O'Neil (Secretariat)

1.3 The Task Group decided to consult experts in the field of Publication and Film Control, both nationally and interntionally, and to call upon the public to file

representations and hold public hearings in this regard. Once these consultations had taken place the Task Group would draft the new Bill and hand it to the Minister, who would decide how to proceed further.

2 THE RELEVANT PROVISIONS FROM CHAPTER III OF THE CONSTITUTION

2.1 The Task Group could obviously not begin its work without first taking particular note of the fundamental rights Chapter (Chapter III) in the Constitution of the Republic of South Africa. For the first time in the history of South Africa all law is subject, in terms of the said Chapter, to the scrutiny of a Constitutional Court.

2.2 The Task Group took section 15 of Chapter III of the Constitution as its point of departure, but various other sections were also given particular consideration.

2.3 The Task Group considered the following sections from Chapter III (hereinafter for purposes of this report collectively to be referred to as Chapter III) of the Constitution to be particularly relevant:

Section 8: **Equality**

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Section 10: **Human dignity**

Every person shall have the right to respect for and protection of his or her dignity.

Section 13: **Privacy**

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

Section 14(1): **Religion, belief and opinion**

Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

Section 15: **Freedom of expression**

(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

Section 22: **Access to court**

Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

Section 24: **Administrative justice**

Every person shall have the right to -

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is

justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

Section 33(1): **Limitation**

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question, and provided further that any limitation to -

(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

Section 35: **Interpretation**

(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such

law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

2.4 Reasonable and Justifiable. The requirements that all limitations of rights should be "reasonable and justifiable in an open and democratic society based on equality and freedom", and that such limitation should "not negate the essential content of the right in question" received particular attention.

2.5 Interpretation. The manner of interpreting statutes as prescribed by the Constitution (see Section 35) differs from the traditional intention-cum-literal approach to this matter. In this regard the writings of several South African jurists were consulted.[1]

2.6 Restricted Interpretation. The Task Group also noted that, if the wording of a law is "reasonably capable of a more restricted interpretation", the Constitutional Court would not invalidate that law, and that such a law would then "be construed as having a meaning in accordance with the said more restricted interpretation".

2.7 Approach. We shall later (paragraph 4) outline the approach we adopted in drafting the new Bill.

2.8 Public international law. Section 35(1) of the Constitution states that a court of law "shall, where applicable, have regard to public international law applicable to the protection of rights entrenched in this Chapter". With this statement in mind we took particular

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[1] 1994 South African Journal of Human Rights 31-147.

note of:

(i) the Universal Declaration of Human Rights, as adopted on 10 December by the United Nations: section 1 (equality), sections 2 and 8 (anti-discrimination), section 12 (privacy), section 18 (freedom of belief, conscience and religion), section 19 (freedom of opinion and expression), and section 29 (limitation section);

(ii) the International Covenant on Civil and Political Rights: sections 18, 19, and 20;

(iii) the International Convention on the Elimination of all Forms of Racial Discrimination; and

(iv) the African Charter of Human and Public Rights: section 8 (religion and conscience), section 9 (information and expression of views), and section 18 (protection of women and children).

3 THE VALIDITY OF THE PUBLICATIONS ACT OF 1974, AS AMENDED

As a consequence of these preliminary investigations the Group concluded that several provisions of the Publications Act are in conflict with Chapter III of the Constitution, and that mere amendment of this Act would not remedy the situation. The following aspects of various sections of the Act were noted:

3.1 Section 1 provides that the constant endeavour of the population of the Republic of South Africa to uphold the Christian view of life should be recognised in the application of the Act. This provision conflicts with the equality requirement in section 33 of the Constitution and denies the equal protection of all religions (Sections 8(2) and 14).

3.2 Section 8(1)(a), which prohibits the production of an undesirable publication even before its having been found to be undesirable by a committee, amounts to unjustifiable and retroactive intrusion into privacy and interference with the freedom of artistic expression. This provision has been criticised by the Appellate Division.[2]

3.3 Section 8(1)(d) which, taken together with section 9(3), authorises the prohibition of possession as such of an undesirable publication, amounts to an unjustifiable intrusion into privacy. It probably also negates the essential content of the right to privacy. Also see section 21A, which makes possible the prohibition of possession of a film. No guidelines for such a prohibition are provided for by the Act.

3.4 Section 9(1), which makes it possible for a committee to prohibit all future issues of a periodical publication, would seem to be open to abuse, and in effect is a form of censorship. It negates the essential content of the right to freedom of expression. It could also give rise to unfair decisions.

3.5 Section 9(2) makes it possible for a committee to institute pre-censorship of publications. This provision is unreasonable and not justifiable in an open and democratic society, which rejects the concept of pre- censorship in the case of publications, but which, for practical purposes only, tolerates the concept in the case of films which are intended for public screening.

3.6 Section 9(4) makes it possible for a committee to prohibit the importation of publications from a specific publisher, and of publications which deal with a specific subject. The authority which is granted under this section can only lead

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[2] S v Mbroney 1978(4) SA 389(A).

to unfair adjudications: how could any committee ever apply this provision, without even having considered the nature of a specific publication? The powers are simply too sweeping.

3.7 Section 11(2)(b), which provides that committees need not hear interested parties before coming to a decision concerning limitation, conflicts with the requirement of a right to a fair hearing in section 24 of the Constitution.

3.8 The criteria provision in section 47(2) is controversial. The words "indecent", "obscene", "offensive" and "harmful to public morals" have all on occasion been interpreted narrowly by the Publications Appeal Board and the Supreme Court. They are, however, all subject to subjective interpretation.[3] The Constitutional Court may decide that these words are capable of a restricted interpretation and then guide the adjudicators, as the USA and Canadian Supreme Courts have done. It would seem, however, that legislatures are moving away from this terminology. Although terminology with comparatively wide connotations is to be found in the recent laws regulating publications and films in Australia (1994) and New Zealand (1993), even these laws tend to describe the activities which they intend prohibiting or limiting, rather than to depend solely on terms such as "offensive" or "indecent". In terms of the 1952 Cinematograph Act of India, the 1991 directive of the Minister should also be considered. Although it employs language having wide connotations it generally attempts to delineate the fields of application by reference to the nature of the material. However, the wide, and often vague, powers which this directive grants to the film censors, have recently been strongly criticised by one

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[3]Compare R Dworkin "Is there a right to pornography?" 1981 Oxford Journal of Legal Studies 177.

of India's leading film producers, Shyam Benegal.[4]

In contrast, the Canadian Criminal Code simply uses the words "undue exploitation of sex" and then defines the words with reference to particular material. In the end the Canadian Supreme Court[5] limited the applicability of these words to the portrayal of certain acts: sex coupled with violence, explicit sex which is degrading or dehumanizing to the participants if the risk of harm is substantial, and explicit sex with children, in this way excluding explicit sex, as such, from the ambit of undue exploitation.

The US Supreme Court[6] has held that legislatures must be precise in their use of language proscribing obscene material. The art and literary exemption is not, however, defined.

Accordingly, even if it could be argued that section 47(2)(a) is capable of a restricted interpretation in terms of section 35(2) of the Constitution, it could lead to unfair adjudications because of the way in which the words could be manipulated to fit the predilections of a particular adjudicator.[7] The wide connotations of the terminology makes it almost impossible for an interested party to question a decision on review and, in any case, creates uncertainty in the minds of publishers as to what would be acceptable.

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[4] In a paper read as the first Satyajit Ray memorial lecture organised by the West Bengal government on the 18th September 1994 in Calcutta - see The Times of India (Sept 19, 1994) p 9.

[5] R v Butler 1992 1 S.C.R. 452; Mbon "R v Butler ..." 1993 Ottawa Law Review 361.

[6] Miller v California 413 US 15 (1973); Lindgren "Defining Pornography" 1993 University of Pennsylvania Law Review 1153.

[7] Marcus 1993 South African Journal of Human Rights 140, at 143.

3.9 The reference of Section 47(2) to "or any part of it" has led to speculation that the Publications Act permits the so-called "isolated passage" method of adjudication.[8] Although the Supreme Court[9] has held that this is not the case, the provision seems to be open to abuse and, in any case, seems to deny the contextual approach which lies at the heart of artistic expression.

3.10 Section 47(2)(b) provides that "blasphemy" is a ground for finding a publication or film undesirable. Whilst it could be argued that the second criterion in section 47(2)(b) ("offensive to the religious convictions or feelings of any section") provides equal protection for all religious sectors, the word "blasphemy" protects only the Christian and Judaic perception of God.[10] The inclusion blasphemy runs contrary to the equality of limitations which section 33 of the Constitution requires. It is submitted, therefore, that the inclusion of the word "blasphemy" in section 47(2)(b) is unconstitutional. We are aware of the judgments of the European Commission on Human Rights in the *Gay News* and *Choudhury*[11] applications and express no opinion in regard to the constitutionality of blasphemy as a common law crime. We shall deal with the acceptability of the second criterion of section 47(2)(b) in paragraph 8.4.8.

3.11 Sections 14(1) and 24(1) provide that the Minister may "at any time" refer a publication or a film to the Appeal Board in spite of an earlier finding by a committee that it is not undesirable. This amounts to an unjustifiable political

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[8] Van Rensburg Pornografie (1985) 112.

[9] Publications Control Board v Republican Publications 1972(1) SA 288(A).

[10] Burchell and Milton Principles of Criminal Law (1991) 560; R v Webb 1934 AD 493; Buren Uitgewers v Raad van Beheer oor Publikasies 1975(1) SA 379(C) 418; Publication Control Board v Gallo (Africa) Ltd 1975(3) SA 665(A) 671H.

[11] Gay News Ltd and Lemon v United Kingdom 5 European Human Rights Reports 123; Choudhury case (1990) no 17439/90.

intervention in vested rights and would most certainly be struck down by the Constitutional Court. Section 30(1) also provides for ministerial intervention in the case of public entertainment. We believe that this provision, which amounts to political intervention, is also invalid.

3.12 Section 15 of the Constitution also guarantees freedom of artistic creativity and freedom of scientific research. Although the present Publications Act, as amended in 1978, provides for a committee of experts to advise the Publications Appeal Board as to merits, we believe that any law regulating films and publications should expressly provide for the protection of *bona fide* artistic and scientific fields of endeavour. Acknowledgement of, and even absolute exemption for, these fields are to be found, for example, in the Canadian criminal code ("public good"), the British Obscene Publications Act 1959, the US Supreme Court's ruling in *Miller v California*[12] (exempting serious works of art, etc.) and the German Basic Law (section 5(3)). The New Zealand Act 1993 also provides for clear recognition of literary and artistic merit.[13]

3.13 We have reached the conclusion that a new Publications Act is necessary. The present Act intrudes upon the freedom of choice of adults in an unreasonable manner by making bannings widely possible; employs vague terminology; generally regulates the private domain of an adult too strenuously; gives preference to the Christian religion, which is in conflict with the equal protection clause; provides for political intervention by the Minister in certain instances; provides for ministerial intervention, which encroaches upon vested rights and administrative discretion to refer a public entertainment to a committee; and does not place sufficient emphasis on the freedoms of

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[12]413 US 15(1973).

[13]Section 3(4).

artistic expression and of scientific research which are guaranteed by the Constitution.

4 THE APPROACH TO DRAFTING A NEW FILM AND PUBLICATION BILL

Certain aspects of our approach to the drafting of a new Bill on publication and film control have already emerged in the previous paragraph. In this paragraph we therefore limit our comments to defining the broad outlines of our approach.

4.1 Formulation and Interpretation. The Task Group is aware that it is faced with a daunting task which is made especially difficult by the fact that it is not possible to know how the Constitutional Court will approach this kind of legislation. Will the Court approach it in the style of the American Supreme Court, which requires the various States to be precise in their legislation, and has struck down vague terminology, for example, in the *Hudnut* case,[14] or will its approach be like that of the Canadian Supreme Court[15] which gave a restricted interpretation to the words "undue exploitation of sex"?

On the one hand, although we realise that a rigid delineation of the criteria according to which material may be prohibited or limited, could be too restrictive, and may even amount to banning[16] of certain subjects, we have come to the conclusion that the new Film and Publication Act should be more precise than the present one. We have

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[14] American Booksellers v Hudnut 771 F. 2d 323 (7th Cir. 1985) affirmed 475 US 1001 (1986); Pollard "Regulating Violent Pornography 1990 Vanderbilt Law Review 125, 148; Lindgren "Defining Pornography" 1993 University of Pennsylvania Law Review 1153.

[15] R v Butler 1992 1 S.C.R. 452. Also compare R v Keegstra 1990 3 S.C.R. 697; Mahoney "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" 1992 Law and Contemporary Problems 77.

[16] Compare the judgment of Steyn CJ in Publications Control Board v William Heinemann Ltd 1965(4) SA 137(A) 154D.

reached the stage at which our consideration of the structures under the present Publications Act, research into related topics, and judgments in other countries have highlighted certain factors which are perceived to be harmful. We would therefore be increasing the public's uncertainty if we were again to employ vague terminology such as "indecent", "obscene" or "offensive".

However, it is impossible to be absolutely precise in this area - as pointed out by the European Court of Human Rights[17] and confirmed by several recent interviews with international scholars and jurists in India,[18] Canada,[19] Australia,[20] Egypt,[21] Zimbabwe[22] and the USA,[23] and as appears from legislation in many other countries,[24] as well as §184 of the German Criminal Code as interpreted by the German Courts.[25]

We have, therefore, combined two approaches: as far as possible, we have delineated the factual circumstances upon which a refusal of classification may be based, while adding the words "explicit" and "prolonged" which

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[17]E.g. in Kokkinakis v Greece (3/1992/348/421) p 15.

[18]Retired Chief Justice Bagwati and Retired Chief Justice Mishra in interviews of the Chairperson and Adv Huma with them.

[19]Interview by the Chairperson and Adv Huma with inter alia Sopinka J in Ottawa - September 1994.

[20]Interview of Dr Coetzee with authorities in Australia and see the Classification Bill 1994 (Schedule) - April 1994.

[21]Interview by Prof Mbrkel and Mr Tredoux with Egyptian authorities - September 1994.

[22]Contact by Dr Coetzee with authorities - September 1994.

[23]Where accent is placed on precise wording - interview by Chairperson and Adv Huma with Prof Floyd Abrams in Buffalo - September 1994.

[24]Compare the 1993 New Zealand Act and 1994 Australian Bill.

[25]Schönke-Schröder Strafgesetzbuch Kommentar §184.

emphasises the discretion which the adjudicator must exercise, but are not too vague.[26] Reference to words such as "indecent", "obscene" and "offensive" was therefore avoided. The term "lewd" is employed in one instance, but even the US Supreme Court[27] approved of its use, subject to its being given a narrow interpretation, in the context of child pornography. By referring to artistic merit as an exemption and as a factor, we believe we have allowed for a certain amount of evaluative discretion among adjudicators. Art and science are excluded from the ambit of the Bill. Although art and science are elusive concepts, we believe that evidence would lead to reasonable certainty in this area.

We have employed terms such as "on the whole" and "predominantly" so as to exclude any possibility of our being considered to support the "isolated passage" approach.[28]

The Task Group considered several definitions in so far as the protection of religious feelings are concerned.[29] It was felt that if this area is deemed liable to restriction, the criterion should be circumscribed in such a way that subjective reactions from the intolerant cannot be elevated to law by phrases such as "offensive to the religious convictions". The emphasis should be on the nature of the

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[26]See the questionnaire results of Lindgren "Defining Pornography" 1993 University of Pennsylvania Law Review 1153 at 1197 where the words "graphic sexually explicit" were regarded as the least vague terminology compared to terms such as "prurient interest", "lacks serious literary ... value", "patently offensive", "dehumanized". Prurient interest was regarded as most vague by 48% of the group and "graphic sexually explicit" only by 2%.

[27]Osborne v Ohio 110 S.Ct 1691 (1990); Quigley "Child Pornography and the Right to Privacy" 1991 Florida Law Review 347.

[28]Rejected by Ogilvie Thompson CJ in Publications Control Board v Republican Publications (Pty) Ltd 1972(1) SA 288(A).

[29]Canadian, Northern Irish, Irish and Indian laws, as well as American doctrine were studied.

attack, and in this regard we were guided by Canadian, Northern Irish, Irish and Indian legislation. This matter will be discussed in paragraph 8.4.8.

4.2 **The Protection of Sensitivities and Chapter III of the Constitution.** Although Parliament cannot and should not ignore the sensitivities of the community it represents, it should be borne in mind that the supreme law in the Republic of South Africa resides in Chapter III of its Constitution. Section 33 of the Constitution prescribes that the limits to the above-mentioned basic rights shall be reasonable and justifiable in an open and democratic society based on freedom and equality, and shall not negate the essential content of the rights in question. It must also be borne in mind that freedom of religion and political speech may be limited only if "necessary".

This kind of terminology certainly cannot be associated with indiscriminate bannings, intolerance and interference with freedom of choice.

We therefore believe that all regulation in the area of limitation of rights should be well-reasoned and based on a compelling state interest in, for example, maintaining peace or protecting children. The prevention of harm or, at least, of clearly perceived harm, should be the basis of any regulation in this area. We have added the phrase "clearly perceived harm", since recent opinion[30] has indicated that it is not always possible, or even desirable, to measure reactions in the field of human sciences by the results of experiments in the natural sciences.

Nevertheless, the Task Group cautioned itself against an approach whereby mere rumour, supposition or intolerance

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[30]Referred to by Janet Daley The Times (London) (14/4/94) p 16; see also The Economist (13/8/94).

becomes the basis for limitation of rights. South Africa has moved into a new, free democratic order and it would be in conflict with the spirit of this order unreasonably to limit artistic expression and freedom of choice. The emphasis should, as far as possible, be on regulation and management of the problem, and not on prohibition.

As stated earlier we have taken particular note of section 35 of the Constitution, for which reason we transcribe it here again (our emphasis):

"35.(1) In interpreting the provisions of this Chapter a court of law shall *promote the values* which underlie *an open and democratic society based on freedom* and equality and shall, where applicable, have regard to *public international law* applicable to the protection of the rights entrenched in this Chapter, and may have regard to *comparable foreign case law.*

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, *provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.*

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

We have also noted several recent, meaningful contributions from South African writers[31] concerning how the fundamental rights Chapter should be applied, and the type of interpretation which section 35 prescribes, since section 35 certainly presents a substantial departure from the literalist approach to interpretation.

We are aware of the dangers of accepting foreign judgments[32]

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[31]See 1994 SA Journal of Human Rights 31-147.

[32]Compare Froneman J in Cozeleni v Minister of Law and Order and Another 1994(3) SA 625(ECD) 633F; Van der Vyver 1994 SALJ 19, 23-4.

and laws as guidelines, and of the approach of the European Court of Human Rights[33] in allowing a certain margin to the signatory states in legislation and rulings. However, freedom of expression and artistic creativity have become much more[34] than mere national or local rights: their universal acceptance and the search in most countries for fulfilment in these areas cannot be ignored. It would, therefore, be unwise simply to focus on local sentiments and not scrutinize international experience and ideals in this connection. The quality of democracy in a country may be judged by the degree of freedom of expression which its people enjoy.

We have also taken particular note of the following paragraph, which occurs after the last section of the Constitution (251):

"This Constitution provides a historical bridge between the past of a deeply divided society characterised by strife, conflict and untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex."

This paragraph emphasises the fundamental right of equality guaranteed in section 8 of the Constitution, and we believe that, in the balancing of rights of equality in the South African context, special weight should be attached to section 8. Section 33(1) and section 35(1) also use the word "equal".

4.3 The Canadian approach

"Concerns which are pressing and substantial in a free

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[33]Van der Vyver 1994 SALJ 19, 26.

[34]See para 9 of this report.

and democratic society". Although the Canadian *R v Oakes*[35] test as to what limitations would be reasonable has been subjected to critical scrutiny,[36] it would seem to be a useful guide in deciding whether limitations on the South African Constitution's section 15 guarantee of freedoms of expression, artistic creativity and scientific research are reasonable in terms of section 33(1) of our Constitution. Here it should be borne in mind that the Canadian Charter does not require that the limitation "shall not negate the essential content of the right in question", as the South African Constitution does. Conversely, the words "demonstrably justified" do not appear in the South African Constitution. The word "demonstrably" does not, in any case, seem to require that actual proof be provided, since the Canadian Supreme Court, in *R v Butler*,[37] ruled out the necessity for actual proof or evidence in deciding whether material amounted to an "undue exploitation of sex" in terms of the Canadian Criminal Code.

In *R v Oakes*[38] the Canadian Court held that the "onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation".

The Court then stated:

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central

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[35](1986) 1 SCR 103.

[36]Gibson "The deferential Trojan Horse : a decade of Charter decisions 1993 Canadian Bar Review 417, 440; De Mbtigny "The difficult relationship between freedom of expression and its reasonable limits 1992 Law and Contemporary Problems 35; Lokan "The Rise and Fall of Doctrine under Section 1 of the Charter" 1992 Ottowa LR 163.

[37]1992 CCC 129.

[38][1986] 1 SCR 103.

criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important. ~

Secondly, once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test' ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question ... Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."

We have taken particular note of the Canadian approach to deciding when limits may be placed on Charter rights. The following summary was provided by the Human Rights Law Section of the Canadian Department of Justice. The summary was prepared in June 1994.

"HIGHLIGHTS ON SECTION 1: REASONABLE LIMITS ON *CHARTER* RIGHTS

Section 1 of the *Charter* permits limits to be placed on Charter rights provided they are reasonable, prescribed by law and demonstrably justifiable in a free and democratic society.[39]

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[39]Section 1 states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

General

. Section 1 is engaged only after a judicial finding that a particular law or government action infringes a *Charter* right.

. The government then bears the onus of justifying the limit on a *Charter* right on the basis of cogent and persuasive evidence.

. Limitations on expressive activities which are motivated solely by economic profit may be more easily justified under s. 1 than forms of expression like political expression which more directly promotes s. 2(b) values: *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232.

. The Supreme Court articulated the s. 1 test in R. v. Oakes [1986] 1 S.C.R. 103, and later cases. Section 1 requires the government to establish:

(i) that the limit on the *Charter* right is 'prescribed by law';

(ii) that the objective is sufficiently pressing and substantial to warrant overriding a *Charter* right; and

(iii) that the means chosen to attain the objective are proportional to the objective. Proportionality will be achieved when

(a) the means chosen to achieve the objective are rationally connected to the objective;
(b) the means chosen impair the right as little as possible; and
(c) the effects of the legislation are not so severe as to outweigh the pressing and substantial objective.

Each element is considered in more detail below.

Prescribed by law

A limit on a *Charter* right is 'prescribed by law':

. when the limit has the force of law (ie. a statute or regulation); and

. when the limit is not vague. A law must give citizens fair notice about the consequences of their conduct and must give persons enforcing the law sufficient

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society".

direction in how to exercise their discretion: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

Pressing and substantial objective

. The limit on the *Charter* right must further a pressing and substantial objective. The objective must be specific and not general (i.e. if the objective was simply to prevent harm, without more specificity, this would probably not be sufficient). The objective must also be identifiable.

Some examples of 'pressing and substantial objectives' include:
- preventing the harm resulting to members of targeted groups and to society at large from exposure to hate propaganda (*R. v. Keegstra*, [1990] 3 S.C.R. 697).
- preventing the harm resulting to women and society in general from exposure to obscene materials (*R. v. Butler*, [1992] 1 S.C.R. 452).

. Reliable evidence must be available to demonstrate the pressing and substantial nature of the objective. Evidence of an impressionistic nature will not be enough, in and of itself.

For serial killer cards and games, this should include evidence relating to
- the incidence of materials like serial killer cards and games in Canada,
- the incidence of their importation into Canada,
- the nature of the harm which materials like serial killer cards and games produce, and
- the ages at which children or other members of society are affected by these materials, etc.

. A court may consider evidence such as
- Hansard,
- reports of commissions of inquiry,
- reports of parliamentary committees,[40]
- social science evidence, whether statistical or expert opinion,
- other expert evidence;
- international treaties or conventions, or
- the laws of other free and democratic societies.

Proportionality

(i) *Rational Connection*

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[40]For example, a court might consider the Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs when it examined Bill C-227 including the testimony of witnesses and comments of Committee members, etc.

. A court will consider whether the provision is arbitrary, unfair or based on irrational considerations.

. A court will consider whether there is the necessary degree of causality. Though it may not be possible, as in the *Butler* case, to prove an actual causal relationship between the prohibited materials and the harm, the government must be able to demonstrate that Parliament had a reasonable apprehension of harm, on the basis of the evidence before it.

. The evidence available to demonstrate the pressing and substantial nature of the legislative objective is also relevant to the rational connection and other elements of the s. 1 proportionality test.

(ii) *Minimal Impairment*

. The government must be able to demonstrate, on the basis of evidence, that the means chosen impair the *Charter* right as little as is reasonably possible.

A court will consider such factors as:

- whether the provisions are overbroad - does the law catch only those materials which Parliament intended to catch or which it had a reasonable basis for concluding would create a risk of harm to particular groups?

- whether the legislative provisions capture materials which have scientific, artistic or literary merit;

- whether the provisions focus on the more public sale and distribution of these materials or whether they apply to private use or possession of these materials;

- whether there were other means of attaining the objective considered? If so, why were they rejected? What impact would they have had? Would they have been less intrusive of *Charter* rights?; and

- whether the scheme as a whole is logical.

(iii) *Balancing of Effects and the Objective*

. A court weighs the effect of the law on an individual's *Charter* rights and whether that infringement outweighs the legislative objective. There are no cases in which the courts have held that a limit on a *Charter* right meeting the other elements of the s. 1 test was not justified under s. 1 because

of a failure to meet this last stage of the proportionality test."

4.4 A new freedom-oriented South Africa. On the whole, we believe that a new Film and Publication Act should promote the optimum amount of freedom for adults, and protect children against what is harmful or disturbing, bearing in mind that the insight of the modern child should not be under-estimated and that the roles of the parents and school should be given particular weight.

4.5 Consultation. Although we realise that Chapter III of the Constitution represents the supreme law in the Republic of South Africa, we deemed it necessary to request representations from the public on certain crucial issues which we had identified. Although 1562 representations were received, many failed to address the issues raised in our advertisement. Petitions against pornography were also handed to us at our public hearings, including that of pupils of Amanzimtoti High School and members of the "Threshold" Youth Group (A.C.F.).

We considered the possibility of having a survey of opinions carried out by experts. We concluded, however, not only that costs were prohibitive, but also that experience in this field indicates that it is extremely problematic to rely on such a survey in the case of matters involving morality and religion. The variety of circumstance is so vast that it is impossible to reach firm conclusions as to what is acceptable or not acceptable. A recent American study[41] also points to the predictability of the outcome of surveys in this regard. The following summary of the article is informative:

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[41] Wu & McCaghy "Attitudinal Determinants of Public Opinions toward Legalized Opinions toward Legalized Pornography" 1993 Journal of Criminal Justice 13; Lamont "Public Opinion Polls and Survey Evidence in Obscenity Cases" 1972-3 Criminal Law Quarterly 135.

"Most polls conducted in the United States on regulating pornography have not addressed the attitudinal dimensions of the public's opinions. This study attempted to identify the factors influencing the public's opinions on legalizing pornography in three outlets: adult bookstores, adult theatres, and video rental stores. In addition to standard demographic variables and religiosity, attitudinal variables concerning the link between pornography and sex crimes and the importance of sexual privacy also were examined. It was anticipated from earlier public opinion polls that the following groups would favour legalization: males, younger people, single people, people with a low religious commitment, and more educated people. It was anticipated, however, that the two attitudinal variables would intervene between other independent variables and the support of legalization.

Data were obtained as part of the Greater Toledo Survey conducted in 1988. Four-hundred-and-forty-nine adult respondents were interviewed by telephone after being selected by means of a random digit dialling technique. Basic descriptive statistics, analysis of variance, and multiple regression were employed to analyze the data.

Major findings include: 1) the sample was sharply divided on the legalization issue; 2) people who favoured legalizing pornography tended to be male, young, educated, and less religious, and they tended to doubt a link between pornography and sex crimes and believe that the law should not intrude into private sexual behaviours; 3) the attitudes regarding sex crimes and privacy intervened between respondents' demographic and religious characteristics and their opinions toward legalization; and 4) aside from the influence of the beliefs, respondents' sex consistently demonstrated predictive power."

Public hearings were conducted. The hearings were well-advertised and well attended. Representatives of religious groups, especially, addressed us and, all the representatives expressed extreme concern about pornography and its harmful effects. Special emphasis was placed on recent examples, where rapists and murderers had confessed that their addiction to pornography had led them to irresistible urges to apply what they had seen in pornography to real life, as they constantly sought greater sexual pleasure. Rhema Ministries also expressed their

concern, but proposed a practical scheme to manage the problem - a scheme not that different from the one proposed by us. The Freedom of Expression Institute supplemented their written representations by way of oral evidence at the hearings. They argued for the optimum amount of freedom in this sphere; child pornography was, however, indicated as a matter of serious concern. Hustler (SA) magazine was also represented and it argued for freedom of choice of adults in regard to inter alia explicit nudity and conceded that there were certain limits, e.g. child pornography, incest, bestiality and nauseating cruelty.

Although one cannot but have respect for the concerns of the said groups, there is simply no scientific evidence that the criminal mentality is caused by, or dependent upon, the availability of pornography. The mere testimony of such criminals is insufficient basis for a case of limitation. It is appropriate to quote Prof Ronald Dworkin[42] here:

> "Such evidence is plainly unreliable, however, not just because it is so often self-serving, but because, as the feminists Deborah Cameron and Elizabeth Frazer have pointed out, criminals are likely to take their views about their own motives from the folklore of their community, whether it is sound or not, rather than from serious analysis of their motives."

The claims of the said groups would have been more acceptable if they had limited their concern to examples of crimes involving a crude mixture of sex and violence. Pornography based on this mixture has been found to have some connection with the development of aggression and the

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[42] "Women and Pornography" The New York Review (October 21, 1993) p 36; Brannigan and Goldenberg "Pornography, Context, and the Common law of Obscenity" 1991 International Journal of Law and Psychiatry 97; Fisher and Barak "Pornography, Erotica, and Behaviour : More Questions than Answers" 1991 International Journal of Law and Psychiatry 65; contrast Lahey "Pornography and Harm - Learning to Listen to Women" 1991 International Journal of Law and Psychiatry 117.

Canadian Supreme Court has in fact recognised this connection. The Court has also recognised that the degradation of women by pornography also amounts to "undue exploitation of sex" if there is a substantial risk of harm. That it is not that easy to prove this substantial risk, appeared from a number of failed prosecutions before the Ontario Court of Appeal.[43]

The religious groups expressed a further concern, which is most definitely also of special concern to the Task Group: it makes a mockery of the law when decisions taken under an Act are apparently simply ignored. The groups mentioned issues of magazines which had been banned but were on sale in any case. Complaints were also made about the apparent lack of control at cinemas.

It is often said that the police must play a pro-active role in this regard: run a check on publications and keep a watch at cinema entrances. Consultations with the Commissioner of Police, Genl Van der Merwe, confirmed our view that, although the police should always be available to assist the public, the enforcement of an Act such as the present one, which relates to the morality of a community, should primarily rest with that community. The community should be kept well informed by the administrative structure as to how to lodge a complaint. It would, in fact, amount to an improper intervention if the police were to be seen as the complainants, for their view may be entirely out of step with a particular local community.

The Task Group has come to the conclusion that in a new Act special attention must be paid to law enforcement. The structure set up must take care to inform the public as to the meaning and effect of classifications and age restrictions. Some form of co-ordination in applying the

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[43] R v Hawkins 1993 150R 549.

decisions of the structures must be the duty of an officer appointed by the proposed administrative structure. The police should, however, only play a facilitating role and not be complainants. The local community could, if it chooses to do so, be more involved. Information should be available.

Although the more constructive contributions from the community are divided as to what the exact limitations of rights should be, the vast majority proposes that there should be some form of control concerning the interests of children. Sensitivities in the religious field were quite acute among religious societies and the religious leaders who gave evidence at our hearings. The same applies to the representations received from most religious groupings.

We have consulted with foreign experts in this field in Australia, New Zealand, India, Egypt, Zimbabwe, Canada, Great Britain and the USA. We have also drawn upon the materials collected by members of the Task Group in their contact with at least 30 foreign classification bodies during the last decade. The Department of Foreign Affairs also sent a questionnaire concerning the protection of religious feelings and the concept of adult bookshops and theatres to 15 missions. Informative answers were received.

Consultations were held with the Judge President of Transvaal, Mr Justice CF Eloff, the Independent Broadcasting Authority, the Department of Justice, Dr JA van S D'Oliveira (Attorney-General) and Adv K Attwell (Deputy Attorney-General), the Commissioner of Police, Genl J van der Merwe, leading film and video distributors, the SABC, M-Net, the National Association of Broadcasters, the Independent Broadcasting Committee, provincial representatives from the Eastern Cape and PWV Provinces (all provinces were invited). Chief Directors of the Arts Councils as well as Mr Raymond Tucker, a trustee of the

Market Theatre and Mr M Mannim from the University of the Witwatersrand.

5 A NATIONAL ACT AND ITS AMBIT

5.1 We have come to the conclusion that it would be extremely costly to implement a policy whereby each Province would classify individually. If there is to be administrative control it should be managed on a national basis. We called a meeting of representatives from the Provinces and those present supported this principle. Local authorities could, however, play a part in regard to the licensing of adult bookshops and cinemas.

5.2 Several people at our public hearings emphasised that some form of "grass-root" contact should be maintained by the authorities. We support this view and propose that an official of the proposed structure should, as part of his duty to impart information, keep in constant contact with the community which the structure serves.

6 ADMINISTRATIVE REGULATION

6.1 We have come to the conclusion that an administrative structure funded by the State, but which functions independently from government, and which draws on available expertise, is more appropriate in this field than a system which is based solely on criminal law. The consequences of criminal prosecution in the field of freedom of speech - including heavy fines and even imprisonment - could be unreasonable and could be perceived to be too harsh. However, a censorship body, in view of all the implications carried by the word "censorship", is also unacceptable.

We have, therefore, opted for an administrative Board with appeal to a quasi-judicial Review Board. As far as publications are concerned we believe that the system

should be based on applications (including complaints) only, and that the administrative structure should not be authorised to investigate matters on its own, because such an approach would violate the fair procedure rule in section 24 of the Constitution.

As far as films are concerned distributors will have to apply for classification. A comparison of 30 systems across the world has established that pre-classification of films is accepted almost internationally for practical reasons.

A few countries have industry-based control - the British Board of Film Classification in England, the Motion Picture Association in the USA, and a film board in Germany with legal backing - but they all classify before the films go on circuit. The Canadian Supreme Court has held that pre-classification of films is constitutionally acceptable - see *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* 41 O.R. (2nd) (1983) confirmed in 147 D.L.R. (3d) 58 - and the practice seems to be accepted in, for example, Germany and is the basis of recently promulgated legislation in New Zealand (1993) and Australia (1994-Bill).

Initially the Task Group was of the opinion that a full appeal should lie to the Supreme Court. Consultations with the Judge President of Transvaal, Mr Justice CF Eloff (who also discussed the matter with the senior South African Judge President), have, however, indicated that they are not in favour of such appeals. The Judges are of the opinion that the matters addressed in this Act do not fall within the legal domain and should be left to a quasi-judicial Review Board as the last body of appeal.

The Task Group has considered this view and have decided to propose that appeals be limited to cases where the Review Board prohibits material for distribution or exhibition or

limits its distribution to adult shops or theatres. We believe that the rights which are infringed upon here are so important, that a further appeal should lie to the Supreme Court.

In the light of the difference of opinion which exists in this respect, we realise that Parliament will have to decide this matter as a question of policy.

6.2 **Finally, after consultation with distributors, it was decided to maintain the system of pre-classification, but that the matter could receive attention at some later stage.**

7 THE AMBIT OF CONTROL

7.1 **Public entertainment and Theatre. We propose that control under the new Act should be limited to publications, films and videos.** The present Publications Act 1974 also governs public entertainment. The practical difficulties which have arisen in this respect have led us to conclude that this matter should be left to common and statutory law. Whereas a publication and a film are usually products of persons other than the distributor, who cannot be held responsible for their content, public entertainment is generally the result of a particular producer's interpretation of a script. The producer and the manager should accept responsibility for the production: common and statutory law provide sufficient safeguards.

We have consulted with the Chief Directors of the relevant Arts Councils and other interested persons, such as Mr Raymond Tucker of the Market Theatre, and they support the above proposal.

7.2 **Television. As far as broadcasting is concerned we have come to the conclusion that television should not fall**

under the Film and Publication Act. Television, as a mass medium, differs substantially from films screened in theatres, as well as from videos, which are rented from video distributors for personal use. The Independent Broadcasting Authority Act 1993 provides for its own control mechanisms, and the Code for broadcasters is to be found in Schedule 1 of this Act.

At our public hearings the SABC illustrated convincingly that internal controls, internal checks and their acceptance of the industry-initiated, independent Broadcasting Complaints Commission of South Africa (BCCSA) make further control by a structure under a new Film and Publication Act totally unnecessary. M-Net is also in favour of exclusion from a new Film and Publication Act. The National Association of Broadcasters also supports the exclusion. The Independent Broadcasting Committee, on the other hand, believes that the IBA Act should not regulate content. It left the matter open as to whether a new Film and Publication Act should be applicable to Television. We have consulted with the Independent Broadcasting Authority, but, because of time constraints, they have not reached a final decision. Section 80 of the IBA Act would seem to indicate that the IBA Act's mechanisms shall prevail in any case.

7.3 **Possession. We propose that, with the exception of child pornography, prohibition of possession should no longer be permitted. Such prohibition amounts to an unreasonable intrusion of privacy as guaranteed in section 13 of the Constitution.**

One of the questions which arose in our discussion was whether child pornography should not be subjected to a possession ban in addition to a distribution ban. Numerous States in the USA have chosen this course of action and the

Supreme Court has not invalidated it as unconstitutional."[44] A majority of the members of the Task Group (Prof Van Rooyen and Mr Westra dissenting) propose that a possession prohibition should be imposed on child pornography. The minority believes that a distribution prohibition would be sufficient and that a possession prohibition would be unreasonable as it amounts to an undue invasion of the privacy of a person. Section 14 of the Sexual Abuses Act takes sufficient care of the rights of children and where there is a reasonable suspicion of abuse, the necessary steps could be taken under that section. Possession as such does not provide sufficient reason to believe that abuse has taken place or is to take place. The majority believes that the escalating problem of child abuse necessitates such a prohibition and has the support of many jurisdictions in the USA, for example. Apart from this we consider that possession of other forms of pornography does not give rise to concerns which are pressing and substantial. It must be borne in mind that possession *for purposes of distribution* does fall foul of the proposed Bill, since "distribution" includes possession for purposes of sale or hire. **The proposed possession prohibition on child pornography is, however, left to a criminal law provision. Prosecutions and search warrants should, according to this proposal, only take place, or be issued, on the written authority of an Attorney General.**

We also propose that the Indecent Photographic Matter Act 1967, which criminalises possession of indecent photographic matter, be repealed. Not only are its terms vague and open to abuse, but the concept of a possession ban, in the absence of clear harm, unjustifiably limits the fundamental right to privacy.

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[44] Osborne v Ohio 110 S.Ct 1691 (1990); Lu "The Role of State Courts in Narrowing Overbroad Speech Laws after Osborne v Ohio" 1991 Harvard Journal on Legislation 253; Quigley "Child Pornography and the Right to Privacy 1991 Florida Law Review 347.

We, however, include an offence regarding the distribution of certain categories of pornography in this Bill. To prevent a clash between a decision of the Board and the criminal law, a conviction does not follow once the Board has found the Film and Publication Act not to be applicable.

7.4 **Import.** The proposed Bill is directed at the prohibition or limitation of the distribution of certain materials. The present Publications Act prohibits the import of undesirable material - see section 8(1)(a), read with section 47(5). To prohibit the import of a publication could be perceived to be prior restraint. "Distribution", however, incudes holding for the purposes of sale, etc. The above implies that a member of the public could import a film or publication for private use - except in the case of child pornography.

7.5 **A limited prohibition jurisdiction; differences with the past; emphasis on regulation.** Although the structures to be set up bear similarity to structures under the present Act, they are, however, significantly different from past structures:

7.5.1 the manner of appointing members of the Board and the Review Board is democratised and aimed at independence;

7.5.2 parties are heard before any limitation is imposed;

7.5.3 the chief executive (formerly the Director) is no longer permitted to refer a matter to a classification committee without an application;

7.5.4 the names of committee members are available;

7.5.5 ministerial intervention is no longer possible;

7.5.6 there shall be no censorship of publications; in the case of films practical considerations require pre-classification. Self-regulation could, however, be phased in under the exemption clause;

7.5.7 the area of prohibition is limited to certain matters: child pornography, explicit mixture of sex and violence, explicit bestiality, the explicit infliction of extreme violence or cruelty, and religiously aggressive material.

7.5.8 All of these matters are anyway exempted in the case of, for example, *bona fide* artistic, religious or literary works or *bona fide* opinion on religion, which fall outside the ambit of the Act.

7.5.9 The distribution of publications and films containing defined sexual activity is limited to adult premises.

7.5.10 As far as sexuality, violence, and language are concerned, the written word shall no longer be subject to total prohibition, but distribution by way of adult premises is provided for. Once gain, the *bona fide* artistic and literary exception is applicable.

7.5.11 In the case of publications age restrictions and sealed wrappers are employed to protect children, and a system of classification of films and videos - which has been operating since September 1992 - should be refined further so as to inform parents of the nature of films and videos, and adults of sensitivities which may be offended by a film or video.

7.5.12 The possession of child pornography is made an offence. No other possession ban is proposed, given the importance of the privacy fundamental right. An offence in regard to the distribution of certain forms

of pornography is, however, proposed.

8 MATTERS WHICH SHOULD BE REGULATED

8.1 Introduction. Our general approach has been to base most limitations on research, when the research is conclusive or at least convincing. We have, however, taken note of a recent press statement[45] by a group of British psychologists who concede that in the past they erred by demanding proof, of the kind required in the natural sciences, that particular material is deleterious to children. We have also taken note of the Canadian Supreme Court's approach in *R v Butler*,[46] where researched evidence of harm was not considered to be essential, and community standards and tolerance towards the freedom of choice of others were regarded as sufficient criteria. The Task Group, however, constantly cautioned itself against overhasty conclusions concerning what is termed morally or religiously *offensive*, "offensive" being a word open to subjective interpretation, and a concept which we do not choose to introduce into the proposed new Bill.

8.2 Age Restrictions. Section 30 of the Constitution protects children (defined as persons under 18 years of age) against abuse. We have little doubt that the psychological and educational level of the modern child is substantially higher than that of his or her counterpart three decades ago. However, all film classification systems nowadays concentrate on age restrictions and consumer advice to parents as to the sensitivities which could be affected by a film. Although the age limit in some systems is as low as 12 and 16, 17 or 18 seems to be the usual limit.

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[45]Janet Daley The Times (London) (14/4/1994) p 16; The Economist (13/8/1994).

[46]1992 Canadian Criminal Cases 129.

There has been much research into the effect of screen violence on children. In 1986 the Publications Appeal Board appointed Prof Jackie Jordaan (Unisa) and Dr Beatrix du Toit (University of Pretoria) to summarise research in this field and to come up with proposals.[47] Their convincing report emphasises the importance of age restrictions, and criticises the earlier approach to classification in which sexuality was the main concern of the film censors. One of the neglected areas, according to Jordaan and Du Toit, was that of films in which the heroes employed substantially more violence against the crooks than the latter did. They argued that such films, which often starred Schwarzenegger, Manson and Norris, should be subject to higher age restrictions. They also drew attention to the fact that younger children are not able to distinguish between reality and fiction on the screen, and that when, for example, the heroes in the "A-Team" devise miraculous methods to kill off the criminal enemy, a child younger than 7 is not aware that he or she is watching fiction, and should be informed of this by a parent.

The best-known study, by Huesmann and Eron, traces the viewing habits of a group of American schoolchildren from when they were eight years old in 1960.[48] They were interviewed again in 1971 and in 1982. The researchers found that the eight-year-olds showed positive correlation between the amount of TV violence they watched and their

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[47]Jordaan and Du Toit "Psychological Guidelines on Publication Control by Age Restriction and Parental Supervision designed to protect Children from Media Violence" (Unpublished study, available at Directorate of Publications, 1986).

Jordaan en Du Toit "Sielkundige Riglyne vir Publikasiebeheer oor Kinders se Blootstelling aan die Oudiovisuele Uitbeelding van Erotiek: Verslag aangevra deur die Appèlraad oor Publikasies" (Unpublished study, available at Directorate of Publications, 1989).

[48]The present summary is taken from an overview given by "The Economist" (Aug 13, 1994); Hagell and Newburn Young Offenders and the Media (London 1994); Eron and Huesmann "Television as a Source of Maltreatment of Children" 1987 School Psychology Review 195.

aggressiveness. There was also a positive correlation between their aggressiveness at the age of eight and at the age of nineteen. When the members of the test group had turned thirty, those who had watched most TV violence as children tended to have more criminal convictions and were more likely to assault their spouses. Huesmann and Eron conducted similar studies in Australia, Poland and Israel and found the same pattern.

Studies by other researchers in Britain and the USA have come up with the same results. An analysis of 217 studies made between 1957 and 1990 concludes that there is "positive and significant correlation between television violence and aggressive behaviour". The American Psychological Association's commission on violence and youth concluded in 1993 that "there is absolutely no doubt that higher levels of viewing violence on television are correlated with increased acceptance of aggressive attitudes and increased aggressive behaviour".

The above research has been criticized. It has been argued that correlation is not the same as causality. An American study in 1982 and a more recent Dutch study found little connection between violence and aggression.[49] In April 1994 the Policy Studies Institute in London published the outcome of one of the studies it had done: the juvenile offenders interviewed, in contrast to other juvenile offenders interviewed, had not watched video nasties and the like. Other social factors had caused their criminality. Jonathan Freedman from Toronto has also criticised the Huesmann and Eron results: children who are aggressive by nature, or as a result of circumstances, tend to watch more aggressive TV: the watching is the result, not the cause.

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[49]See the previous note.

Ultimately the question is whether children - the future adults - transform what they see on television into real-life violence. Although opinion differs on the extent to which this happens, there is a degree of consensus in regard to the so-called "vulnerable minorities": on occasion some forms of media violence can effect certain children. Aetha Huston, a researcher into the influence of television on children, estimates that 4-6% of violence can be attributed to media influence.

As mentioned earlier, during April 1994 a number of British psychologists[50] issued a statement in which they conceded that in the past they had erred by demanding proof or evidence, of the kind required in the natural sciences, of causality. They stated that their research has led them to believe that there is a connection between aggression and media violence and that stricter control should be exercised by Television and the British Board of Film Classification.

A memorandum prepared for the Task Group by Dr Daan van Vuuren,[51] from the SABC, also indicates that media violence

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[50]Referred to by Janet Daley The Times (London) (14/4/94) p 16. Generally compare Hagell and Newburn Young offenders and the Media (London 1994); Docherty Violence in Television Fiction (London 1990).

[51]He refers to: Botha, M.P. An Investigation into the effect of television viewing on high school pupils by means of structural equation models. Office Report. Pretoria. HSRC, 1989.

Botha, M.P. Televisieblootstelling en aggressiwiteit by hoërskoolleerlinge: 'n Opvolgondersoek oor vyf jaar. Unpublished D.Phil.-thesis, Bloemfontein, UOVS, 1990.

Botha, M.P., Van Vuuren, D.P. "Preference for television violence and aggression among children from various South African Townships: Preliminary Results". Paper read at a conference of the International Society for Research on Aggression, Delray Beach, Florida, July 1994.

Comstock, G., S. Chaffee, N. Katzman, M. McCombs, and D. Roberts. Television and Human behaviour. New York: Columbia University Press, 1978.

Comstock, G., Paik, H. Television and the American Child. New York: Academic

contributes to violence, although the degree to which this occurs may not be that substantial. For his full report see Annexure A.

The Task Group is of the view that it would be irresponsible not to pay heed to the above-mentioned research, and supports the proposals for greater awareness of problems in this area, as set out by the Jordaan-Du Toit research, quoted above.

As far as sexuality is concerned, Prof Jordaan and Dr Du Toit filed another report in 1989. They stress the need for a correlation between modern sex education programmes and the age restrictions imposed.

The Task Group believes that the experts appointed under the proposed system would necessarily take modern research and trends into consideration, and that in this connection it is not possible for the Task Group to be prescriptive.

We believe that 18 years should be the highest age restriction, and that the other age restrictions should be

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Press, 1991.

Eron, L.D., Huesmann, L.R. "Television as a source of maltreatment of children". School Psychology Review 16(2), 195-202, 1987.

Fauconnier, G. Mens en Media. Leuven. Garant, 1990.

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McLeod, J.M., Kosicki, G.M., Pan, Z. On understanding and misunderstanding media effects. In: J. Curran, M. Gurewitch. Mass Media and Society. London: Edward Arnold. 1991.

Roberts, D.F., Maccoby, N. Effects of Mass Communication. In: G. Lindzey, E. Aronson (eds.) Handbook of Social Psychology, New York: Random House, 1985.

determined from time to time by the proposed Board.

Many representations received by us - including that of the Transvaal Education Department - were concerned about the apparent lack of any attempts to check whether the age restrictions were being applied.

We are adamant that this is a matter which should receive priority: the Board to be set up cannot merely make the rules; it must explain to the public how the rules function, and explain to the public the meaning of the warnings and classifications which have been imposed. We believe Parliament has a duty to ensure this by inter alia budgeting for this service.

As far as magazines displaying nudity are concerned, we believe that the present system of age restrictions should be continued. The plastic wrapper condition is still useful, in spite of the criticism that some shops do not always abide by it. The intention is to discourage children from browsing in such magazines. It has been noted that many shops display the more risqué type of magazines in places where management can keep an eye on them. At our public hearings complaints were lodged against this practice - the display being easily available to children. It may be useful to display such magazines on higher shelves, as is the case in the USA and the United Kingdom, but this does not seem to be a matter on which we should propose legislation. The manner of display depends too heavily on the circumstances in the shop. It may well be that shop owners would, in any case, in the interests of children create a separate area for the books which are not so risqué that they would justify sale in adult shops only.

Although some criticism of adult bookshops, videoshops and cinemas was expressed in some of the representations, there is consensus among film and most magazine distributors that

these outlets seem to be a workable solution, in the interests of children, and also for adults who do not wish to be confronted with this kind of material in ordinary shops. Religious bodies and societies, however, expressed concern about such shops and consider them to be unacceptable.

The concept of age restrictions on magazines has been accepted in Germany, and also in recent legislation in New Zealand and Australia. Adult shops, as a legal concept, are also to be found in several countries, notably the USA, Canada and Germany.

The Task Group accepts that views differ sharply on this matter, but believes that Chapter III of the Constitution guarantees a maximum amount of freedom for adults, and that these shops and theatres are available for those adults who would like to buy or see this kind of material.

Although such a system places an onerous duty on the community itself, we believe that this is in accord with the ideals of an open democratic society based on freedom and equality: for the sake of freedom certain concessions to the freedom of others have to be made, which means that new responsibilities towards children may have to be accepted. Education, information and personal responsibility will be necessary ingredients of the system.

8.3 **Consumer advice to Parents and Adults.** Most systems of film and video control have, during the last decade, moved away from censorship to classification. Classification, aptly called consumer advice in Australia, aims at informing parents of possible sensitivities in their children which may be affected by a film, and adults of sensitivities which may, even in their own case, be affected. In 1992 the R18 (plus rating) was introduced and the response of the public has been most positive. The R18 warns the public of

nudity, sex, offensive language and violence in a film. We have decided to include, where applicable, a warning to the public that their religious sensitivities may also be offended.

In order to maintain a consumer-oriented approach, as well as flexibility for meeting new demands, we have decided to leave the details of the classification system to the proposed Film and Publication Board, which will make the regulations in this respect.

8.4 **Limitations on Adults.** The point of departure in an open and democratic society based on freedom and equality should be that adults are free to decide for themselves; the State should not intervene unless absolutely necessary. We have therefore taken the utmost care not to intrude unnecessarily in imposing limitations on adults. Oral and written representations, from religious groups especially, have agitated strongly for a return to much stricter censorship. Many people have expressed their extreme concern about the effects of pornography on children and women. They claim that there have been sufficient examples of rapists having confessed to their addiction to pornography to warrant their concern. They include non-violent explicit sex and nudity in the category of harmful pornography, and argue that, for rapists, this is but a further step in their search for more explicit and violent sensation. Although these arguments are attractive and one cannot but be impressed by the dedication of the groups concerned, the authorities whom they quote have not been accepted in law. The Canadian Supreme Court - which in modern times has gone the furthest in protective interpretation - has not accepted that explicit sex between consenting adults is deleterious for adults to view.

Various persons who testified at the public hearings quoted

Prof John Court's[52] figures of the increase in rape in certain countries, including Australia, after pornography had been made available in these countries. It is of interest to note that the New Zealand Indecent Publications Tribunal[53] rejected his theories and accepted Prof Donnerstein's testimony that photographs of non-violent explicit sex and nudity in *Penthouse* (US) as such are not harmful. The Canadian approach, as indicated, is in accord with the approach of the New Zealand Tribunal.

8.4.1 **Child Pornography.** In the first place, we took note of International resistance to child pornography. There have been 18 jurisdictions in the USA prohibiting even possession of such material, and a unanimous demand from classification bodies at the 1992 International Standards in Screen Entertainment Conference in London, that possession of child pornography should be prohibited. Australia and New Zealand have recently included child pornography among absolute prohibitions, whilst the Canadian Supreme Court has also held that it amounts to "undue exploitation of sex". §184 of the German Criminal Code also specifies child pornography as worthy of an absolute prohibition. In *New York v Ferber*[54] the United States Supreme Court upheld a New York statute prohibiting

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[52] "Pornography and Sex Crimes: a re-evaluation in the light of recent trends around the world" 1977 International Journal of Criminology and Penology 129. He confirmed these claims in a document before the New Zealand Indecent Publications Tribunal - see next note.

[53] 1991 New Zealand Gazette 1464 (Decision no 4/91): "In our view the above statements suggest that Dr Court's criticisms are based on a personal moral stance. They appear to be based on an overall disapproval of sexual promiscuity, homosexuality and any sexual behaviour which deviates from monogamy within heterosexual marriage. Depictions of moral codes which differ from those of an individual or group cannot in a Western-style democracy be used as the basis for the prohibition of materials. Moreover distaste in itself, is an insufficient ground to classify Penthouse (US) as unconditionally indecent."

[54] 458 US 747 (1982).

the commercial production and distribution of even non-obscene material depicting children engaging in sexual conduct. Hereby the first amendment protection of free speech was limited further than *Miller v California*[55] had permitted. The latter test requires that the material has to be patently offensive, appeal to prurient interest and, when taken as a whole, lack serious literary, artistic, political or scientific value, whereas in *Ferber* the Court held that in the case of material depicting children engaged in sexual conduct, such criteria need not be met. The *Ferber* Court specifically delineated its justification for regulating child pornography, basing its decision on the harm children suffer as a result of posing for pornographic films or photographs. Two types of harm were found to be present: first, a child posing and being photographed while engaging in sexual conduct suffers physical and psychological harm from the actual process itself. Studies were cited in support of this conclusion. Secondly, the Court held that the commercial distribution of the depictions was harmful to children. Dissemination in the "mass distribution system for child pornography" created the possibility that the depiction may be used in later years in a fashion detrimental to the child. The Court reasoned that if commercial distribution could be stopped, there would be no economic incentive to produce this kind of material.[56] The Court set limits as to what constituted "child pornography": the material must "visually" depict sexual conduct by children below a specific age. The Court accepted the New York statute's definition of "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual

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[55]413 US 15 (1973).

[56]See Quigley "Child Pornography and the Right to Privacy" 1991 Florida Law Review 347.

intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals". The Court cautioned that the word "lewd" should be interpreted narrowly.

In the light of *Ferber* eighteen states adopted legislation prohibiting even the possession of child pornography as defined in *Ferber*. In 1984 the US Congress enacted a law that almost entirely prohibited the possession of child pornography.[57] In *Osborne v Ohio*[58] the Court confirmed the validity of such a statute.

The *Osborne* Court reasoned that the individual's privacy right was subordinate to the state's interest in prohibiting the private possession of child pornography. The protection of children so depicted justifies, according to the Court, the stronger interest so protected. The Court also accepted Ohio's contention that a significant amount of child pornography occurs outside of commercial channels. The prohibition of distribution alone was therefore insufficient.

The Court held that the ban on possession protects children from two forms of possible abuse. First, child molesters who possess child pornography may use the depictions to convince a child to engage in sexual conduct. Secondly, the Court reasoned that child pornography "permanently recorded the victim's abuse", which could cause potential harm to the child in the future.

The Task Group has unanimously decided to support the

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[57]Child Protection Act of 1984.

[58]110 S.Ct. 1691 (1990).

above reasoning. It is proposed that child pornography should be subject to absolute prohibition of distribution. A majority of the members (Prof Van Rooyen and Mr Westra dissenting - see para 7.3) also propose that possession of child pornography be prohibited by criminal law, and include such a provision.

The above approach is inter alia supported by Ster-Kinekor, United International Pictures, Nu Metro and the South African publishers of *Hustler Magazine* and *Penthouse*.

8.4.2 **Secondly, we have taken special note of Prof Donnerstein's[59] research into the depiction of the mixing of violence and sex, and of his conclusion that there is evidence (though not proof) of increased aggressiveness in males as a consequence of having seen such material on video.** Against this, we have weighed the well-motivated research of *Kutchinsky*[60] that there is no evidence that pornography increases sex crimes, as well as *Childress'* point of view that it is the violence and not the sex in the mixture that might have deleterious effects.[61] New Zealand and Australia have recently included in their statutes limitations on depicting the crude mixing of sex and violence, and the recent judgment, in terms of the Canadian Criminal Code, in *R v Butler*[62] has included

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[59]For references see Berl Kutchinsky "Pornography and Rape : Theory and Practice?" 1991 International Journal of Law and Psychiatry 47; Lahey "Pornography and Harm - Learning to listen to Women" 1991 International Journal of Law and Psychiatry" 39.

[60]See previous note.

[61]Childress "Reel 'Rape Speech': Violent Pornography and the Politics of Harm" 1991 Law & Society Review 177; Deana Pollard "Regulating Violent Pornography" 1990 VanderBilt Law Review 125.

[62]1992 CCC 129.

the crude mixing of sex and violence within the ambit of "undue exploitation of sex". §184 of the German Criminal Code also prohibits violent pornography.

In our opinion, there is no compelling reason why *written* material of this kind should be banned absolutely: it simply does not have the direct impact of, for example, photographs. For an adult the freedom to read whatever he or she chooses should predominate.

8.4.3 **Thirdly, we propose that explicit scenes of bestiality be prohibited.** Although we could find no concrete evidence that viewing such material is deleterious, we believe that Parliament should, under limited circumstances, have the right to forbid what it regards as abhorrent social conduct. Of course, by this criterion such a list could be endless, but we have limited it to the above instance, for which limitation there is international precedent.[63] This limitation is supported by Ster-Kinekor, United International Pictures and the publishers of Hustler magazine (SA).

8.4.4 **Fourthly, we believe that the glorification of violence and its effects or its presentation as harmless can find no justified place within our violence-stricken community.** We believe that desensitisation of some viewers may reasonably be deduced to be the consequence of such depiction, and that even photographs of this nature should be prohibited unless they have *bona fide* documentary value. In the case of films, such

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[63]See e.g. § 184 of the German Criminal Code as well as the New Zealand statute; also compare R v Smeenk 1993 150R 549 (Court of Appeal, Ontario) in regard to necrophilia and vampirism: "Manifestly, these explicit depictions of indignities to the human body rendered the material degrading or dehumanizing and created the risk of harm contemplated by Butler."

violence, if it permeates the film and there is no artistic value in the film, should also be prohibited.[64] This approach is supported by the main film and video distributors in varying degrees.

8.4.5 **Explicit sexual conduct. In the absence of legally acceptable evidence that the viewing of explicit sexual conduct is deleterious to adults, we have decided to propose that, unless these scenes have *bona fide* scientific, artistic, dramatic or literary merit, their availability should be restricted to adult premises.**[65] The allegations by several persons who addressed us at the public hearings that explicit sexuality and nudity causes crime, as interesting as they may be, are not legally convincing.

The New Zealand Indecent Publications Tribunal accepted Prof Donnerstein's expert evidence that non-violent explicit sex is not harmful.[66] It rejected Prof John Court's[67] conflicting evidence. The Meese Report[68] also asserts that there is a link between the viewing of pornographic materials and crime. The report has, however, attracted criticism as being unscientific, especially as far as non-violent erotica is concerned.[69]

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[64]Compare § 131 of the German Criminal Code; Löffler (ed) Die Darstellung der Gewalt in den Massenmedien (München 1973).

[65]See Smith" Zoning Adult Entertainment: A Reassessment of Renton" 1991 California Law Review 119.

[66]Indecent Publications Tribunal 1991 New Zealand Gazette 1464 (Decision no 4/91).

[67]"Pornography and Sex-crimes ..." 1977 International Journal of Criminology and Penology 129.

[68]Attorney-General's Commission on Pornography (1986) 329.

[69]Becker and Levin in Readings : A Journal of Reviews and Commentary in Mental Health, Sept 1986 p 12; Childress "Reel Rape Speech ..." 1991 Law and Society Review 177; R Dworkin 'Women and Pornography" The New York Review

Howitt and Cumberbatch[70] significantly say the following:

"It would be a rather selective use of evidence to make a strong case that pornography is so influential as a cause of sexual and other forms of violence against women and children that its elimination would result in a diminution in such attacks. One reason for this is that it is unlikely that pornography is the only determinant of sexual and other forms of violence and that pornography can be influential in the absence of other conducive factors. It is also a distortion of history to believe that there is anything peculiarly modern about the maltreatment of women and children in the form of physical abuse, sexual abuse, or sexually violent attacks. However, some authors urge us to believe that things are different now because of sexually violent pornography. Equally, it would be overgenerous to the research evidence to argue a case for the benefits of pornography. The idea that pornography might serve as substitute for the direct expression of sexual violence has not really been subject to the necessary empirical tests for reasons already discussed. However, it is probably unrealistic to believe that there is a major contribution made by pornography in this respect since there is no substantial evidence of any reduction in sexual crime where pornography circulation rates have increased.

In many ways pornography seems to serve as a totem of society's ills and its convenience and tangibility as a focus makes it easier to identify as a cause of some unacceptable features of life. Indeed, there is a good deal of justification for the association of pornography with social ills in the public mind: Pornography is part of the sexual abuse of children, battered wives seem more likely to be pressurized by pornography, some sexual offenders use pornography as part of the preparation for their crimes, the breakdown of the family is more common where pornography is prevalent, the traditional family is vulnerable in many of those societies in which pornography is pervasive, and so forth."

The Task Group has decided that, although such materials may be regarded as offensive by many people

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(October 21 1993).

[70] Pornography : Impacts and Influences (Commissioned by the Home Office Research and Planning Unit 1990).

(non-readers especially), this is insufficient reason for prohibiting non-violent explicit sexual material. It has received no recognition in law, not even in *R v Butler*. We therefore propose that only violent pornography be prohibited, while non-violent sexually explicit material will be available in adult bookshops where the entry of children will be prohibited.

We also propose that written pornography should be allowed for sale in adult premises. The emphasis is on material which, judged as a whole, predominantly and explicitly, and without any literary merit, describes sex with children, a crude mixture of sex and violence, explicit sex, and bestiality. Also see paragraph 9 on art and literature.

8.4.6 **Degradation of Women.** The Task Group grappled with the question of whether to legislate to prohibit material which denigrates or degrades women. The problem and its implications are described by Ronald Dworkin[71] as follows:

"Pornographic photographs, films, and videos are the starkest possible expression of the idea feminists most loathe: that women exist principally to provide sexual service to men. Advertisements, soap operas, and popular fiction may actually do more to spread that idea in our culture, but pornography is the rawest, most explicit symbol of it. Like swastikas and burning crosses, pornography is deeply offensive in itself, whether or not it causes any other injustice or harm. It is also particularly vulnerable politically: the religious right supports feminists on this issue, though on few others, so feminists have a much greater chance to win political campaigns for censorship than any of the other campaigns they fight.

And pornography seems vulnerable on principle as well. The conventional explanation of why freedom of speech is important is Mill's theory that truth is most likely to emerge from a 'marketplace' of ideas freely

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[71] "Women and Pornography" by Ronald Dworkin in The New York Review (Oct 21, 1993).

> exchanged and debated. But most pornography makes no contribution at all to political or intellectual debate: it is preposterous to think that we are more likely to reach truth about anything at all because pornographic videos are available. So liberals defending a right to pornography find themselves triply on the defensive: their view is politically weak, deeply offensive to many women, and intellectually doubtful. Why, then, should we defend pornography?"

It is worth noting that the issue of regulating and/or prohibiting pornography is the subject of heated debate in North America and the United Kingdom. Nettie Pollard[72] describes two strands of feminist debate in this area. The first is anti-pornography feminism whose adherents cannot always agree on the distinction between pornography, which is harmful and erotica, which is not. The anti-censorship feminists have emerged as a response to anti-pornography feminism. In the past, feminists were virutally anti-censorship by definition, Pollard argues. The anti-censorship feminists argue that suppression of information for women is one of the ways women have been kept under the power of men. Anti-censorship feminists believe that it is possible for women to participate in pornography, including that produced by women and for women. Pollard also points out that the right wing has capitalised on the feminist anti-pornography movement, gaining credibility from feminists for programmes which are themselves anti-feminist.

The Position in the United States. In 1985, President Reagan's attorney general, Edward Meese convened a commission to re-examine pornography. The commission concluded that pornography caused sexual crimes. The commission has been criticised by people like Marjorie Heins of the American Civil Liberties Union. She claims that the commission was "... chaired by a zealous anti-

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[72] "The Modern Pornography Debates" by Nettie Pollard in Journal of Media Law and Practice Vol 14 No 4 1993.

pornography prosecutor" and was biased and unscientific.[73]

In 1983, Catherine MacKinnon and Andrea Dworkin drafted an ordinance that outlawed or attached civil penalties to all pornography. They defined pornography as "graphic sexually explicit subordination of women through pictures and/or words" that meet one or more of a series of tests including "women are presented and dehumanised as sexual objects, things, or commodities" or "in positions of sexual submission, servility, or display". In 1984 a similar ordinance was adopted by the Indianapolis legislature. The ordinance had no exemption for literary or artistic works. In 1985, the Seventh Circuit of Appeals held the ordinance unconstitutional on the grounds that it violated the First Amendment's guarantees of free speech and press. In 1986 the Supreme Court upheld the Seventh Circuit's decision.

MacKinnon[74] argues that society would lose nothing if all pornography were banned. Indeed, she argues, women would become emancipated. She argues that pornography significantly increases the number of rapes and other sexual crimes. She argues that because pornography portrays women as "... submissive victims who enjoy torture and mutilation ...", it contributes to the inequality of women in American society and therefore militates against the values that are meant to be protected by the equal protection clause in the American Bill of Rights. The Fourteenth Amendment provides that all people are to be treated equally and MacKinnon argues that the First and Fourteenth Amendments are bound to clash. "The law of equality and the law of freedom of speech are on a collision course in this country", she says. She believes

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[73] "The Dreaded 'P' Word" by Marjorie Heins in Sex, Sin and Blasphemy, (The New York Press 1993).

[74] "Pornography, Civil Rights and Speech" by Catherin A. MacKinnon in Pronography - Women, Violence and Civil Liberties, A Radical New View, edited by Catherin Itzin, (Oxford University Press 1992).

that by eliminating pornography one is defending equality of opportunity although it may restrict liberty.

Ronald Dworkin[75] takes issue with MacKinnon's argument and points out that one cannot protect people against being insulted or damaged because others have "... hostile or uncongenial tastes ...". He argues that this would amount to an argument that outlaws sexists and bigots. "In a genuinely egalitarian society, however, those views cannot be locked out, in advance, by criminal or civil law: they must instead be discredited by the disgust, outrage, and ridicule of other people", argues Dworkin.

The Position in Canada. Professor Kathleen Mahoney[76] points out that there are strong similarities in the underlying constitutional values of both the Canadian and American constitutions. The central values in both constitutions are liberty and equality and both recognise the right to basic dignity, non-discrimination and freedom of expression. However, she notes that there has been a difference in the application of the values, particularly because of a difference in application of the so-called balancing technique. Both countries' constitutional doctrines recognise that freedom of speech is not absolute. Nonetheless, the technique of balancing one right against the other has resulted in some fundamentally different decisions emerging from American and Canadian courts.

The seminal Canadian decision, for our purposes, was handed down by the Supreme Court of Canada in the matter of *R v Butler*[77] in February 1992. The case dealt with section 163 of the Canadian Criminal Code and the extent to which it

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[75]supra.

[76]"Obscenity Laws: From a Morality to an Equality" by Professor Kathleen Mahoney.

[77]Regina v Butler 1992 Canadian Criminal Cases, 70 C.C.C.

violates the guarantee to freedom of expression in the Canadian Charter of Rights and Freedoms.

Section 163 makes it an offence to make, publish, distribute or possess obscene material. In order for material to qualify as obscene, Canadian courts have found that the exploitation of sex must not only be its dominant characteristic, but the exploitation must be **undue**. In determining when the exploitation of sex will be undue, the courts formulated the "community standard of tolerance test". This test provides that it is the standards of the community as a whole which must be considered and not the standards of a small segment of that community. The community standards test is concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to.

Canadian judges began to recognise that material which exploits sex in a degrading or dehumanising manner will fail the community standards test. This idea was accepted and expanded in *R v Butler*.

This type of material would fail the community standards test, because it is perceived by public opinion to be harmful to society, particularly to women. The court acknowledged that the accuracy of this perception is not capable of exact proof.

The court went on to try and make a link between community standards and a test of harm. The court decided that in the future, courts would have to determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. They defined harm in this context as meaning something that predisposes people to act in an anti-social manner such as, for example, the physical or mental

mistreatment of women by men. The court went on to find as follows:

> "Anti-social conduct for this purpose is conduct which society formally recognises as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence."

Further, the court found as follows:

> "The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanising may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanising is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production."

The court went on to find that although section 163 violates the right to freedom of expression guaranteed in the Charter, the section is justified and its interpretation provides an intelligible standard.

The manner in which *R v Butler* categorised harm and found that certain types of pornography are dangerous, merits close examination. The court quoted with approval the following excerpt from the Report on Pornography by the Standing Committee on Justice and Legal Affairs produced in 1978:

> "The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male/female streotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimisation, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any

> medium of depiction, description or advocacy which violates these principles."

The court found that the objective of avoiding the harm associated with the dissemination of pornography is sufficiently pressing and substantial to warrant some restriction on the full exercise of the right to freedom of expression.

Although the court found "that the literature of the social sciences remains subject to controversy", it found a link between obscenity and the risk of harm to society at large:

> "While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs."

In conclusion, the court found that Parliament was entitled to have a "reasoned apprehension of harm resulting from the desensitization of individuals exposed to materials which depict violence, cruelty and dehumanization in sexual relations".

The court found that Section 163 is designed to catch material that creates a risk of harm to society and that materials which have scientific, artistic or literary merit will not be caught by the provision.

It should be noted that, amongst others, the Canadian Civil Liberties Association argued that reasonable time, manner and place restrictions would be preferable to outright prohibition. The court rejected this argument on the basis that once it has been established that the objective is the avoidance of harm caused by the degradation felt by women and of the negative impact such material has on perceptions and attitudes towards women, it is untenable to argue that these harms could be avoided by placing restrictions on

access to such material. Making the materials more difficult to obtain by increasing their cost and reducing their availability would not, in the court's view, achieve the same objective.

> "Once Parliament has reasonably concluded that certain acts are harmful to certain groups in society and to society in general, it would be inconsistent, if not hypocritical, to argue that such acts could be committed in more restrictive conditions."

Applicability for South Africa. There are two fundamental difficulties in attempting to frame legislation in this area. The first is that there is no clear proof of harm, in other words, no clear causal connection between pornography and violent behaviour. As the court found in *R v Butler*, this area of research "... remains subject to controversy". As a result, it is well-nigh impossible to frame suitably clear, certain and constitutionally valid legislation to deal with the possible causal connection.

During the course of verbal representations from the public, the Task Group heard many accounts of an alleged causal connection between notorious American serial killer Ted Bundy's consumption of pornography and his sexual murders. Debora Cameron and Elizabeth Frazer[78] reject this thesis and warn against "... treating what sex murderers say about themselves as unproblematically true, even when it seems to coincide with our analysis". Cameron and Frazer explain:

> "That sexual offenders other than murderers use cultural clichés to construct their accounts of themselves is attested by sociologists Diana Scully and Joseph Marolla who interviewed convicted rapists and found recurring, culturally familiar themes in

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[78] "Moving Beyond Cause and Effect" by Deborah Cameron and Elizabeth Frazer in Pornography, Women, Violence and Civil Liberties (see Supra).

> their narratives.[79] Scully and Marolla call these clichés 'vocabularies of motive' and suggest that rapists use them in order to justify their behaviour and 'negotiate a non-deviant identity' for themselves."

Cameron and Frazer reject the "cause-and-effect relation" between pornography and sexual violence. They argue that "... it (pornography) does not cause sexual violence (but) it may be criticized for its role in shaping certain forms of desire (and not others)". They make the point that pornography is by no means the only form of representation or discourse that could be accused of shaping anti-social desires.

Ronald Dworkin[80] echoes the sentiments of many members of the Task Group when he examines why so many people dislike pornography and want to prohibit it:

> "The sado-masochistic genre of pornography, particularly, is so comprehensibly degrading that we are appalled and shamed by its existence. Contrary to MacKinnon's view, almost all men, I think, are as disgusted by it as almost all women. Because those who want to forbid pornography know that offensiveness alone does not justify censorship, however, they disguise their repulsion as concerns that pornography will cause rape, or silence women, or harm the women who make it."

Diana EH Russel[81] argues against censorship of pornography. She advocates a policy proposed by MacKinnon and Dworkin whereby victims of pornography should be able to sue the media if harm results.

In the light of the above, we have been able to find

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[79]Cameron and Frazer (supra) referring to Diana Scully and Joseph Marolla, cited in L. Kelly Surviving Sexual Violence (Cambridge: Press, 1989).

[80]supra.

[81]Making Violence Sexy: Feminist Views on Pornography, Edited by Diana E.H. Russell (Open University Press 1993).

neither sufficient concensus on the subject nor sufficient evidence to show that legislation in this area would be reasonable and justifiable as required by Section 33 of the Constitution. We believe that education in this area and a commitment on the part of government to support such education and to monitor Section 8 (the equality clause) and Section 10 (the human dignity clause) of the Constitution, will go a long way towards dealing with concerns in this area.

Finally, it is important to bear in mind that the Task Group has recommended that the explicit mixture of sex and violence should be proscribed in films, videos and photographs (see para 8.4.2). The degradation issue is also, to a certain extent, addressed by way of this provision. We believe that this recommendation also accords with the *Butler* court finding that the "portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex".[82]

8.4.7 **Race relations.** Another vexing issue with which the Task Group has had to grapple was whether the promotion of racial hatred in a publication or film should be a ground for a prohibition in terms of the proposed draft Bill.

Section 29(1) of the Black Administration Act 38 of 1927 provided that it was an offence for any person intentionally to promote feelings of hostility between the black and white populations. Section 47(2)(d) of the Publications Act 1974 provided that, if a publication or film or any part thereof contains

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[82]Also compare R v Smeenk 1993 15 CR 549 (Court of Appeal, Ontario). The case illustrates how difficult it is to meet the Butler test. Two judgments of the German courts illustrate how problematic and controversial the protection of dignity in this sphere is: Reimann "Prurient Interests and Human Dignity : Pornography Regulation in West Germany and the United States" 1988 Journal of Law Reform 201, 231.

material which is harmful to the relations between any sections of the population, it will be deemed to be undesirable. In January 1994 Parliament, to ensure fair elections, repealed both these provisions. However, section 62 of the Internal Security Act 1980 remained on the Statute Book. It prescribes relatively heavy sentences for the utterance of words, or the performance of acts, with intent to "cause, encourage or foment" hostile feeling between different population groups. This section has been repealed by sectiion 14 of Act 205 of 1993. Section 8(5) of this Act provides as follows:

"No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion."

Although it is true that the above provision only relates to gatherings and demonstrations it is significant that it was nevertheless deemed fit to repeal section 62 of the Internal Security Act which had much wider application.

In Annexure B we provide a motivation for a racial hatred paragraph. The provision was adapted from similar criminal law provisions in Canada, Northern Ireland and Ireland. The question is whether it would be appropriate to draw the new structures into this field, which is so closely connected with politics. The accent of the new proposed legislation is on morality and, to a certain extent, religion. These are issues which, we believe, could and should be dealt with by administrative and quasi-judicial structures with specialised knowledge in these fields, and not by the Courts.

The matter of race relations has a legalistic air and it would be much more appropriate for a Criminal Court to deal with it: here the matter of intention and the concomitant rules of procedure would be central to the procedure and once a Court finds that the intention of the accused was to promote or incite racial hatred the requirement of intention could be regarded as a reasonable and justifiable limit to free speech in an open and democratic society.

When an administrative structure prohibits a publication because it promotes racial hatred such prohibition usually amounts to a significant inroad into freedom of expression, because the decision which was taken by the administrative structure would not necessarily accord with the subjective purpose of the author. Speeches and placards at a public gathering or demonstration have direct impact and government could show a compelling interest in limiting free speech in this area. For this section 8(5), quoted above, provides.

We have therefore come to the conclusion that the State has no compelling and substantial interest in limiting free speech further by banning publications and films by way of an administrative structure. An age restriction would be sufficient. As far as Television and Radio are concerned, Schedule 1 of the Independent Broadcasting Authority Act, as well as the Code of the Broadcasting Complaints Commission, have provisions against material which is harmful to race relations. These media, which are mass media, may well be found to be subject to such a limitation, in contrast to the situation in connection with theatres or videos, which are much more exclusive and freedom-of-choice orientated. Obviously, section 8(5) of Act 205 of 1993 has a bearing on all media, including

videos when used during a demonstration or at a gathering, and would therefore counter misuse of these media on such occasions.

In the light of the above development it is our view that the Legislature has expressed itself as to the bounds which will limit freedom of racial speech. It would therefore be totally inappropriate for it to add a wide prohibition on publications, films and videos. If there is a compelling need for further limitation it should be imposed by way of criminal law. We, however, do not see any need further to limit freedom of expression in this field, especially not by way of the proposed Film and Publication Classification Act.

We have discussed the matter with the Commissioner of Police, and he supports our view that the proposed Act should not deal with this matter, but that it should be left to Criminal Law.

If it is deemed necessary to expand the criminal law, the following provision could be considered:

(1) A person who exhibits in public or distributes a film or publishes a publication which, judged as a whole, promotes hatred against a group identifiable by way of race, ethnic origin, colour or religion is guilty of an offence.

(2) Subsection (1) shall not apply to

(a) a *bona fide* technical, professional, scientific, documentary, dramatic, artistic, literary or religious publication or film, or any part thereof, which judged within the context of the whole, is of such a nature;

(b) a publication or film which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

(c) a publication or film which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

A further alternative is discussed in Annexure B.

8.4.8 **State Security.** To ensure fairness before the elections, section 47(2)(e) of the Publications Act 42 of 1974 was repealed in January 1994. The paragraph should have been repealed much earlier: it politicised a structure which was in the main concerned with entertainment and literature.

In spite of a substantially liberal approach by the structures under the Publications Act up to 2 February 1990, and the constant unbanning of publications by committees after that date, we believe that criminal law, applied with sensitivity and understanding for freedom of political speech, is the only measure which should be applicable when the State proves beyond a reasonable doubt that there exists a clear and present danger that state security would be endangered by a publication or film distributed with the purpose of endangering that security.

A survey of judgments of the Publications Appeal Board during the 1980's also reveals that there was seldom, if ever, evidence beyond a reasonable doubt that a film or publication would lead or contribute to, for example, a riot or terrorism. There is, for example, no evidence that the screening of the film *Cry Freedom* - which was approved by the Publications Appeal Board

with an age restriction and no cuts, and then seized by the Commissioner of Police under the Emergency Regulations - led to or contributed to any violence after it was released when the State of Emergency was lifted in 1990. As pointed out by one of the members of the Publications Appeal Board in his judgment at the time, it would have the opposite effect.[83] His view was vindicated in 1990.

We have decided not to delve more deeply into this subject. Political speech lies at the very heart of democracy and to stifle it under a new Act would conflict with the idea of a symbolic and "historical bridge" between the past and a "future founded on the recognition of human rights" as expressed in the coda to the Constitution of the Republic of South Africa.

Section 19 of the International Covenant on Civil and Political Rights does allow for limitations based on the protection of national security or of public order. However, we believe that it would be in the interests of freedom of speech to leave the matter to the criminal courts where *intention* would be a necessary ingredient of the offence and proof beyond reasonable doubt would be necessary.

8.4.9 **Attacks against religion.** Section 14 of the Constitution provides that every person shall have the right to freedom of conscience, religion, thought, belief and opinion which shall include academic freedom in institutions of higher learning.
Section 47(2)(b) of the Publications Act 1974 provides that a publication or film or any part thereof shall be deemed to be undesirable if it is blasphemous or offensive to the religious convictions or feelings of

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[83]Case no 93/88.

any section of the population. Section 5 of the Publications and Entertainments Act 1963 contained a similar provision. The censorship history of this paragraph has been controversial and characterised by the banning and unbanning (on review) of the same work, and works of particular literary and artistic merit have been prohibited. The blasphemy provision also protects only Judaic and Christian perceptions of God.

Van Deventer[84] deduces, from a survey which he conducted, that there is most sensitivity as far as blasphemy, and the taking of the Lord's Name in vain, are concerned, (55,3% and 48,8%), as against sensitivity to sexual conduct and nudity (11% and 7,7%). Criminal sexuality (42.8%) was placed third in this ranking.

In Northern Irish, Irish and Canadian legislation religious groups are also protected against hate speech. The accent is on the nature of the attack and not on the reaction.

If religious feelings are to be protected the question is whether it would be justifiable within the limits set by the Constitution to retain the present provision, which reads, in part, as follows:

> "blasphemous or offensive to the religious convictions of any section of the population."

The common law offence of blasphemy protects only the Christian and Judaic perceptions of God.[85] The British

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[84]"Die Beoordeling van Erotiese Publikasiebeheer" (Thesis, UOFS 1994).

[85]Publications Control Board v Gallo (Africa) Ltd 1975(3) SA 665(A) 671.

Law Commission's finding in 1985 confirms this view.[86] The majority of the members of the Commission advised that the crime of blasphemous libel should be repealed. This has, as yet, not been done and the offence has survived two challenges before the European Commission of Human Rights.

In Canada an interim report of the Federal, Provincial/Territorial Working Group on Multicultural and Race Relations in the Justice System has also recommended that the blasphemous libel provision in section 296 of the Criminal Code be repealed. The hate speech provision, however, includes religious groups.

Even if blasphemy as common law offence is constitutional, given its survival after scrutiny by the European Commission of Human Rights,[87] we are of the opinion that it would be unconstitutional to include it *eo nomine* in a new Film and Publication Act. It would protect the interests of Christians and Jews in a specific manner. If there is to be some form of protection, it must be effected in such a manner that the same criterion would apply to all religious groups.

Our investigations have shown that especially Islamic and Buddhist countries have strict rules concerning religion - Egypt,[88] Pakistan, India,[89] Thailand,

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[86] Law Commission, No 145 (18 June 1985); Reville "Obscenity, blasphemy and the Law" 1990 Journal of Media Law and Practice 42.

[87] Gay News Ltd and Lemon v United Kingdom 5 European Human Rights Reports 123; R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 All ER 306 (QB); Choudhury application (no 17439/90); Poulter 1991 Public Law 371.

[88] Emerging from Task Group member Prof Morkel and Mr Tredoux's interviews with authorities there.

Singapore,[90] Malaysia and the Republic of China - and that deviations from religious customs as portrayed in films and books are often regarded as a public order issue. The 1977 South African hearing of the appeal on *The Message* also illustrated how strong are the feelings among a large section of the South African Muslims about a film which conflicts with Islamic principles - conceding, however, that evidence was led that opinions differed on the acceptability of *The Message*. In countries such as the USA, Germany, France, Belgium, Spain, The Netherlands, Portugal, Australia, New Zealand, Sweden and Denmark religion plays no part in the classification of films and books, and in Canada it would only be relevant in the case of hate speech. Ireland and England still have the offence of blasphemy in their law.[91] Accordingly, the British Board of Film Classification denied classification to the film *Visions of Ecstasy*, the screening of which would, in their view, have amounted to blasphemy. However, the issue of "offence" to religion does not arise in English law and accordingly *The Last Temptation of Christ* was allowed to be screened.

It is of interest to note that, in September 1994[92] the European Court of Human Rights found that its Charter was not violated by the seizure of the film

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[89]Emerging e.g. from interviews of the Chairperson with two retired Chief Justices of India, Justices Bagwati and Mishra.

[90]Emerging from Task Group member Dr Coetzee's interview with the authorities there.

[91]We are indebted to Ms M Sutherland from the Department of Foreign Affairs for her assistance in collecting most of this information from our Missions in these countries. The same applies to the Missions, who have taken much trouble in collecting the information for us.

[92]Case of Otto Preminger Institute v Austria (11/1993/406/485) (22 Sept 1994).

Liebeskonzil by Austrian authorities. The Court, however, indicated that, although a margin of appreciation is left to the national authorities, such limitations are subject to strict supervision and must be convincingly established. The Court states in para 50 of its judgment:

> "As in the case of 'morals' - a concept linked to 'the rights of others' - it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (cf the Müller and Others v Switzerland judgment of 24 May 1988, Series A no 133, p 20, § 30, and p 22, § 35); even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.
>
> The authorities' margin of appreciation, however, is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one where there has been an interference with the exercise of the freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance of the freedoms in question. The necessity for any restriction must be convincingly established (see, the most recent authority, the Informationsverein Lentia and Others vs Austria, judgment of 24 November 1993, Series A no 276, p 15, 35)."

The Court found justification for the limitation in the fact that since a very high percentage of Austrians are Roman Catholics (78%) and in the Tyrol, 87%, there was (at the time, 1985, at least) a pressing social need to preserve religious peace. The film included a violent and abusive denunciation of what was presented as Catholic morality. "Consequently, at the material time at least, there

was a pressing social need for the preservation of religious peace; it has been necessary to protect public order against the film and the Innsbruck Courts had not overstepped their margin of appreciation in this regard"" (para 52 of the judgment). The fact that the content of the film was sufficiently known by the public made the proposed screening, according to the Court, of the film sufficiently "public" to cause offence (para 54).[93]

The following paragraph 56 is also particularly relevant:

> "56. The Austrian courts, ordering the seizure and subsequently the forfeiture of the film, held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. Their judgments show that they had due regard to the freedom of artistic expression, which is guaranteed under Article 10 of the Convention (see the Müller and Others v Switzerland judgment referred to above, p 22, p 33) and for which Article 17a of the Austrian Basic Law provides specific protection. They did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. The trial courts, after viewing the film, noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ (see paragraph 16 above). The content of the film (see paragraph 22 above) cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts.
>
> The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object

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[93]This is an approach which denies the requisite that a person must at least be presumed to have seen a film before his or her feelings may be taken into account. It could therefore be argued that the approach is legally questionable. Conversely, it is the very fact of public knowledge which causes the outrage.

> of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.
>
> No violation of Article 10 can therefore be found as far as the seizure is concerned."

It could be argued that the Austrian criterion of "justified indignation" which was accepted as valid by the European Court of Human Rights in the *Otto Preminger Institute* case[94] does give validity to a criterion which is similar to that of the term "offensive". However, the judgment places much emphasis on the fact that Roman Catholicism is the faith of 78% of the population and, in the Tyrol where the seizure of the film took place, the percentage is 87%. The homogeneity as to faith was therefore an important, if not deciding, factor. Although it is true that the last South Arican census figures indicate a Christian sector of 70-80% in the population there are more or less 2000 denominations among the Christians. South Africa also, for example, has a considerable number of Jews, Hindus and Muslims.

Accordingly, if there is to be some form of protection of religious convictions, the criterion for what is to be counted as a sufficient attack should at least be the same criterion for all religious sectors - although even such a notion may be fraught with dangers, as the kinds of attack could differ to such an extent and the perceived reaction could be so different, that there could once again be inequality.

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[94](11/1993/406/485) (22 Sept 1994).

Yet we believe that the state has a compelling and substantial interest, from a public order point of view, to grant some form of protection. From an idealist's point of view, one could argue that religion does not and should not need state protection in so far as the content of the religion is concerned. However, in practice, probably as a result of the protection which the South African State has given to religious feelings in the past, the expectations of many citizens in this regard are high. To ignore these expectations would be unrealistic.

It must, in conclusion, be borne in mind that the definition of the offence of blasphemy also accentuates the nature of the attack. Burchell and Milton[95] define the offence as follows:

"Blasphemy consists in unlawfully, intentionally and publicly acting *contemptuously* towards God."

We have therefore decided that where an attack on religion reaches the level of the promotion of hatred against a religious group in a publication or film, it should be prohibited. Section 20 of the International Covenant on Civil and Political Rights supports this approach. We believe that if the necessary safeguards are built into the criterion, the proposed provision should also satisfy the requirements of section 33(1) of the Constitution.

The present "offensive to the religious convictions of any section" is not an intelligible standard and is subject to subjective interpretation. It is, in any case, difficult, if not impossible, to decide whether the "average" members of a section would find material

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[95] Principles of Criminal Law (1991) 559 (our emphasis).

offensive. This is so even if the Appellate Division's[96] narrow interpretation of the word "offensive" is followed. The British Commission's report is particularly relevant here. It could also lead to what could be perceived to be inequality, with one faith being less tolerant than another and finding material "offensive" much "more readily" than does another, "more tolerant" faith. We have therefore decided to recommend that this provision should also not be included in a new Act. It would be unconstitutional in that it is vague and not justifiable in a community where adults should be allowed to enjoy the maximum amount of freedom of choice.

We have adopted an approach which is supported by Northern Irish, Irish and Canadian statutes, which emphasise the nature of the attack and bring the attacks against religion into the ambit of hate speech against sections which are identified with reference to race, ethnic origin and religion. We believe that this would set an intelligible standard and that vicious attacks against religious groups, which could pose a public order issue, would be inhibited in this way. The provision would also have an anti-discriminatory tone to it and in that sense also satisfy the requirement of section 35(1) of the Constitution, which requires laws to be interpreted in a pro-democratic and pro-equality manner, in order to promote the values of an open democratic society.

Here, too, the artistic, scientific and literary exemption should apply, for material which, after proper evidence, appears to be art, science or literature, has an enduring value for civilization and

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[96] Publications Control Board v Gallo (Africa) Ltd 1975(3) SA 665(A).

democracy. As De Tocqueville[97] stated: "in order to enjoy the inestimable benefits that the liberty of the Press ensures, it is necessary to submit to the inevitable evils that it creates." Furthermore, *bona fide* religious works - despite the force of their attack - should be allowed as part and parcel of religious freedom. At the heart of religious belief lies the necessity to be able to differ vehemently from other religions. Moreover, section 14 of the Constitution grants the same protection to conscience, thought, belief and opinion. Persons who exercise these rights should have the freedom to criticize in strong terms the very existence of religion.

We have decided not to define "religion" and to leave that to the Courts. A definition, structured by Profs Dinah Shelton and Alexandre Kiss from the University of Santa Clara could be used, if thought to be necessary.[98] It reads as follows:

For purposes of this law

> "a. 'religion' means the personal commitment to and serving of one or several beings or spiritual masters with worshipful devotion; to a system or systems of belief, faith, creed or worship; to the service of the divine; or to the sacred beliefs, observances and practices of traditional cultures."

Although this definition would encompass a wide variety of religious beliefs, it remains risqué to limit the concept by statutory definition. The dissenters on the 1985 British Law Commission have proposed that the religions be listed and that the

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[97] De la démocratie en Amerique 1 in Oeuvres II 843 (trans. Bradley 1953).

[98] In a paper read by them at the Religious Rights Conference in Atlanta, Georgia (Oct 1994).

list could be added to as new religions appear. Poulter[99] suggests that the matter should be left to the Courts to decide, and we support this suggestion. There are some significant precedents in our case law upon which the Courts could build.[100]

As appeared from representations received and the public hearings, most religious leaders,[101] as well as the African Christian Democratic Party (which gave evidence at all the centres where public hearings were held), expect the state to protect religious feelings. The Freedom of Expression Institute's representations to us - and the Institute speaks for numerous media organisations - makes out a strong case for not giving any protection in this sphere. Conversely, many representations from religious denominations, as well as hundreds of short letters and petitions (at times part of organised campaigns, however), emphasise the importance of religion and of protecting religious feelings. The European Commission of Human Rights[102] has also recognised that "the religious feelings of a citizen may deserve protection against indecent attacks on the matters held sacred by him" and that "such attacks, if they attain a certain level of severity, shall constitute a criminal offence ...". The recent judgment of the European Court on Human Rights, which recognises the protection of feelings of

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[99]1991 Public Law 371.

[100]See Hartman v The Chairman of the Board for Religious Objection & Others 1987(1) SA 922(O) in which Theravada Buddhism was recognised as a religion, in spite of its being non-theistic.

[101]Out of 272 letters from religious groups, 242 demand stricter legislation (the letters, however, concerned the general topic of censorship).

[102]Gay News Ltd and Lemon v United Kingdom 5 EHRR 123.

Roman Catholics in Austria, strengthens this approach.[103]

The International Covenant on Civil and Political Rights, which was recently signed by President Mandela, provides as follows in sections 18, 19 and 20:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but

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[103]Case of Otto Preminger Institute v Austria (11/1993/406/485) (22 Sept 1994).

these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*order public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Section 20(2) is especially relevant. It places the whole matter within the category of the advocacy of religious hatred. However, this seems to be the international trend: the Canadian, Irish and Northern Irish laws do the same and the Indian Cinematograph Act 1952, significantly, prohibits "visuals or words contemptuous of racial, religious or other groups" in section 2(xii) of the 1991 directive of the Minister of Information and Broadcasting.

The minority opinion in the 1985 British Report on "Offences against Religion and Public Worship" also emphasises that the nature of the attack should be the test and not the (often subjective) reaction. In paragraph 5.2 these members[104] say:

" 5.2 The nature of a possible new offence, which we envisage, would be as follows: it would penalise anyone who published grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings. The consent of the Director of Public Prosecutions would be required for the institution of proceedings. The offence should carry a maximum penalty on conviction of 12 months imprisonment and a fine. It is not common for an offence, with

[104]The Chair, Justice Ralph Gibson and Brian J. Davenport, Q.C.

a requirement of consent to prosecute, to be triable either way on indictment or summarily, but we see no reason to provide that such an offence be triable only on indictment.

5.3 It is fundamental that the new offence should not be limited to attacks upon the Church of England or Christianity but should extend to any religion. As to definition of 'religion', major religions could be listed in the statute with power to add to the list by order; or reference could be made to religious groups having places of worship certified under the Places of Worship Registration Act 1855; or the statute could refer to 'religion' without further definition.

5.4 Any offence which is defined in terms of adjectives such as 'abusive' or 'insulting' has a degree of uncertainty. However, these words have for many years been used in the criminal law (e.g. section 5 of the Public Order Act 1936) and their meaning is sufficiently clear. The addition of the qualifying adverb 'grossly' would emphasise the strong degree of abuse or insult necessary for commission of the offence. The degree of uncertainty which would result from such a definition would, in our view, be acceptable having regard to the strict mental element."

Poulter,[105] a Reader in Law from Southampton, has suggested the following amendments to the Public Order Act (amendments emphasised):

"The revised sections in Part III would run as follows, the significant additions and alterations being italicised:

'Racial and Religious Vilification
17 In this Part -
(a) "hatred" *includes contempt* and means hatred against a racial *or religious* group;
(b) "racial *or religious* group" means a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship), ethnic or national origins *or religious belief*.
18(1) A person who uses threatening, abusive, or insulting words or behaviour or displays any written

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[105]Poulter "Towards Legislative Reform of the Blasphemy and Racial Hatred Laws" 1991 Public Law 371.

material which is threatening, abusive or insulting, is guilty of an offence if -

(a) he intends thereby to stir up racial *or religious hatred with the purpose of inciting discrimination, hostility or violence against a racial or religious group*, or

(b) having regard to all the circumstances racial *or religious* hatred is likely to be stirred up thereby *with the result that discrimination, hostility or violence against a racial or religious group is incited*, or

(c) *he intends to outrage the feelings of a significant number of the members of any racial or religious group.*"

Poulter explains as follows:

"The new title of Part III, referring to 'vilification' rather than hatred, is taken from the Anti-Discrimination (Racial Vilification) Act 1989 in New South Wales. Vilification seems a good portmanteau term for summarising the type of conduct which is to be outlawed. It conveys the flavour of abusive, disparaging words or actions which are designed to slander or render loathsome one group or their beliefs in the eyes of others. This new heading would set the tone for what follows in the detailed description of the crime.

The new portions of section 17 and of section 18(1)(a) and (b) are based partly on provisions in the Public Order (Northern Ireland) Act 1987 (incorporating the notion of 'religious' groups) and partly on the wording of article 20(2) of the International Covenant on Civil and Political Rights, which runs as follows: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited." The insertion of the suggested formula about discrimination, hostility or violence may, at least in theory, marginally narrow the current offence for racial groups, while permitting the incorporation of religious groups.

The wording of section 18(1)(c) is broadly based on the specific proposal made by the two Law Commissioners who dissented from the majority report in 1985. Indeed, even the three majority Law Commissioners took the view that the strongest justification in modern times for any sort of blasphemy law was the protection of religious feelings."

We have considered the above in formulating a religious hatred paragraph and we are satisfied that the accent in our proposed schedule 10 is the only justifiable one. One cannot, in an administrative law system (as is proposed by us), introduce intention as is the case with criminal law. However, the section exempts *bona fide* works. Our proposal also finds support in a recent paper read by eminent scholars Dinah Shelton and Alexandre Kiss.[106]

In conclusion, the chairperson pointed out that it is always difficult to provide for limitations on freedom of speech and that, in time, views and tolerance would hopefully change. The following quote from Prof Ronald Dworkin, even if it has value only in later years, is of significance:

> "It is tempting, as I said, to think that even if some liberty of speech must be counted a universal right, this right cannot be absolute; that those whose opinions are too threatening or base or contrary to the moral or religious consensus have forfeited any right to the concern on which the right rests. But such a reservation would destroy the principle: it would leave room only for the pointless grant of protection for ideas or tastes or prejudices that those in power approve, or in any case do not fear. We might have the power to silence those whom we despise, but it would be at the cost of political legitimacy, which is more important than they are.[107]

9 THE PROTECTION OF SCIENTIFIC, ARTISTIC AND LITERARY VALUES

Section 15 of the Constitution guarantees freedom of speech and expression, which shall include freedom of the press and other media, and freedom of artistic creativity and scientific

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[106]Dina Shelton is professor of law at Santa Clara University and Alexandre Kiss is professor of law and vice-president of the International Institute of Human Rights, Strasbourg. They read a paper entitled "A Draft Model Law on Freedom of Religion, with Commentary" at the Religious Human Rights Conference organised by the Religious Rights Programme at Emory University in October 1994 and which was attended by the Chairperson of the Task Group.

[107]Ronald Dworkin "A new map of censorship" 1/2 1994 Index on Censorship 9.

research. Section 33 allows for limitations which are reasonable and justifiable in an open and democratic society based on freedom and equality and which do not negate the essential content of the fundamental right.

We have come to the conclusion that there is no compelling and substantial governmental interest in denying absolute protection to art and science in so far as adults are concerned. Artistic expression is, like political speech, central to the cultural and political vitality of a democratic society. Although "art" is an elusive concept, we believe that once the Board, or Review Board, having heard expert evidence, is convinced that a publication or film amounts to art or literature, it should find in its favour despite its content. The history of censorship has shown world-wide, time and again, that art and literary works have eventually been liberated from earlier restrictions : to mention a few such works - *Lady Chatterley's Lover* (Lawrence), *Tropic of Cancer* and *Tropic of Capricorn* (Miller), *Magersfontein O, Magersfontein!* (Leroux), *Kennis van die Aand* (Brink). The trial of the museum manager in Cincinnati[108] for having held an exhibition of works of the well-known artist, Mapplethorpe, went in his favour.[109] The present Langer case in Ontario will ultimately also have to be decided on the same issue : whether Langer's paintings which allegedly depict child pornography amount to art (although the art exemption is not part of the Criminal Code in the case of the seizure of child pornography, the absence of the exemption will probably be argued to be unconstitutional).

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[108]See Cole in next note, p 739.

[109]See Banks "Conservatism in the 1980's : Art and Obscenity in Cincinnati, the Beauty and the Conflict" 1991 Howard Law Journal p 439; Weinstock "The National Endowment of the Arts funding controversy and the Miller test ..." 1992 Boston University Law Review 803; Cole "Beyond Unconstitutional Conditions ..." 1992 New York University Law Review 675.

Canada, Great Britain, the USA and Germany[110] all exempt the arts from control. Whilst the rather enticing proposition is to regard art only as a factor to be weighed against other factors, we have come to the conclusion that if the preponderance of expert opinion classifies a film or a publication as *bona fide* art or literature, any measure taken by the State to limit its distribution or display to adults would be disproportionate to the slight, if any, possibility of harm. Restrictions on sale and display could, however, be imposed to protect children.

We have chosen "bona fide" as a term to indicate objectively ascertained art or literature, since the USA test of "serious" and "genuine" does not seem to be as well-known in South Africa as "bona fide". "Bona fide" must not be understood to be based on the purpose of the writer from his or her point of view. Objective appraisal by experts should be the test and the publication or film itself should be the object of appraisal. It would obviously not be wrong to allow the artist or author a voice, but his views should be borne out objectively by the work.

The Task Group is aware of the risqué area in which it finds itself and has decided to close its discussion with some quotations,[111] which speak for themselves.

Moshe Cramilly-Weinberger, *Fear of Art: Censorship and Freedom of Expression in Art 159* (1986) (quoting President Eisenhower):

> "As long as artists are at liberty to feel with high personal intensity, as long as our artists are free to create with sincerity and conviction, there will be healthy controversy and progress in art. When artists [in totalitarian states] are made the slaves and tools of the state, when artists become the chief propagandists of a

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[110]Sect 163(3) and (6) Canadian Criminal Code; sect 4(2) British Obscene Publications Act 1959; Miller v California 413 US 15(1973); German Basic Law sect 5(3); Hillgruber "Darf Satire wirklich alles?" 1992 Juristenzeitung 946; Karpen and Hofer "Die Kunsfreiheit des Art 5 III in GG in der Rechtsprechung seit 1985" 1992 JZ 951, 1992 JZ 1060.

[111]Taken from Cole, supra.

> cause, progress is arrested and creation and genius are destroyed."

Numerous American presidents have emphasized the important role art plays in society. The Senate Report accompanying the creation of the National Endowment of the Arts noted that 'President Washington recognized the arts as central to our national well-being and other great Presidents throughout our history have given emphasis to artistic achievement.' When President Johnson proposed the bill to create the NEA, he stated that 'it may well be that passage of this legislation, modest as it is, will help secure for this Congress a sure and honoured place in the story of the advance of our civilization.' In 1963, even before the Endowment was created, President John F. Kennedy proclaimed, 'I see little of more importance to the future of our country and our civilization than full recognition of the place of the artist. If art is to nourish the roots of our culture, society must set the artist free to follow his vision wherever it takes him."

After having quoted these presidents, Cole says:

> "Art, like universities, the press, and public demonstrations, is a frequent target of political repression by totalitarian governments, reflecting those governments' judgments that it is a forum for dissent and opposition."

The following paragraphs by Marjorie Heins[112] are also enlightening:

> " Pornography in visual art began with the ancients. From African art to Greek antiquities, images of erect phalluses abound. The satyr, a familiar figure in Greek mythology, is pictured often; almost always with an impressive erection.
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> Sexuality has also been a staple of Eastern art, the erotic religious sculptures of India being one vivid example. Among the many treasures of pornographic Asian art

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[112] Sex, Sin and Blasphemy (1993) 137.

is Hokusai's *Dream of the Fisherman's Wife*, which depicts an attentive octopus caressing a blissful nude woman with all of its tentacles, while also studiously performing cunnilingus. A sex manual from first-century China called *The Art of the Bedchamber* described female homosexuality and masturbation in elaborate detail.

Not just nudity and sex, but scenes of torture, sadomasochism, flagellation, bestiality and rape in classical art are virtually numberless. Such sexually charged works are found in major museums all over the world; many of them have explicitly religious themes. Sexuality, masochism, and religious ecstasy are all mixed together in Western art, as they are in Western culture.

The seventeenth-century Flemish master Peter Paul Rubens painted many erotic scenes, including lesbian lovers; the French painter Courbet did him one better with his famous *Sleepers* - two naked women, their legs lazily wrapped around each other in the blessed relaxation of postorgasmic sleep. Rembrandt's erotic works include a monk and nun making love in a cornfield, also a couple enjoying themselves famously in a big Dutch bed (the woman has three arms!).

Pornography flourished in both nineteenth-century literature and painting. 'The oft-ogled American pinup girl,' according to one critic, 'has a deeply rooted, if perhaps surprising, genealogy, with a point of origin in certain pictorial conventions of late 19th century academic painting.' These 'establishment' painters created a seemingly endless series of prurient female images: Andromedas in Victorian versions of handcuffs, Salome's strip-dancing before the severed head of John the Baptist; Venuses rolling in their birth waves; female personifications of Hope (kindly blind-folded), Temptation (often with one breast wantonly exposed), and Virtue (ironically stark naked). Indeed, what emerged was a high-flown prototype of soft-core pornography itself, in which women operated as fantasies in the newly emerging - and newly heterosexual - pornographic imagination."

10 ADULT PREMISES

A necessary corollary to freedom of choice by adults is that certain materials which, despite their explicit sexual nature, are not harmful, should be available. Yet they should be available in such a fashion that the opportunity for children to exercise that choice is negated. Although the concept of adult bookshops, theatres and video shops has been subjected to severe

criticism[113] they should be managed rather than prohibited in a freedom-of-choice-for-adults-democracy.

In *America* these shops are subjected to zoning restrictions because their presence tends to cause the depreciation of surrounding property.[114] Domestic areas, schools and religious buildings are usually protected from these shops by local regulations prescribing that the shops may not be sited in domestic areas or, in any case, not within a specific distance from such an area, a school or a temple, mosque or church.[115] In *Canada*, under Provincial legislation, zoning is also allowed. In *Germany* our researcher[116] has reported that a similar zoning policy applies under Federal law. Adult shops are not allowed in areas which are purely domestic ("reine Wohngebiete").

Our information from overseas' missions has indicated that certain local zoning restrictions do apply in France; Spain and Portugal have rules in regard to display and an entry ban on children; Australia has "restricted premises" but there are no local zoning restrictions. However, Mr John Dickie, Australia's chief censor, has indicated in a recent letter[117] to us that certain suburban and country councils will not grant permits to operate a business which sells restricted category 2

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[113]The mayor of New York has promised that he would work towards moving these shops to industrial areas - which seems to be an unrealistic dream - Toobin "X-Rated" The New Yorker (Oct 3/94) 70.

[114]Smith "Zoning Adult Entertainment : A Reassessment of Renton" 1991 California Law Review 119.

[115]See for example the Buffalo Zoning Ordinance § 511, a copy of which was made available to us by Mrs Andrea Moore, from a Buffalo firm of attorneys.

[116]Prof C.H. Heyns, on sabbatical from the University of Pretoria, in Heidelberg (1994): in regard to zoning: Fickert and Fieseler Baunutzsverordnung § 3, 4, 4a; Reimann "Prurient Interest and Human Dignity : Pornography Regulation in West Germany and the United States" 1988 Journal of Law Reform 201, 217; see Harrer Jugendschutzgesetze (3 Aufl); Brockhorst-Reetz Repressive Masnahmen zum Schutze der jugend im Bereich der Medien Film, Video und Fernsehen; BVerfG 1990-11-27-Europaïsche Grundrechte 3, which confirmed the validity of the legislation.

[117]28 September 1994.

publications.

Once it is accepted as constitutionally valid, which in our view it is, the sale of sexually explicit material, with the exceptions listed in the draft Bill, should be available to adults. The problem is that some US communities have rebelled against there being outlets and have limited such shops to non-domestic areas and even to light industrial areas. We have good reason to believe that rural communities, as well as suburban domestic communities, in South Africa would have similar problems with these outlets. However, we believe that once this kind of material is constitutionally valid, it would be unconstitutional for a local authority completely to prohibit these outlets, unless the community is almost exclusively a domestic community.

Therefore, we believe that some form of regulating control should vest in the local authorities. The Businesses Act 1991 requires only a limited number of categories of businesses to be licensed. These businesses include the providing of turkish baths, escort services, keeping or conducting a night club or discothèque and keeping or conducting a cinema or theatre (Schedule 1, Item 2 of the Act).

We believe that adult bookshops, videoshops and cinemas should be added to this list. The concept is a novel one for most cities and towns in South Africa. Some control as to numbers and locality would be necessary. The zoning regulations and powers would not, as is the case in the USA, Canada and Germany, be sufficient to ensure that, for example, these shops would not be established in domestic areas.

We therefore propose that the list in Schedule 1, Item 2 of the Businesses Act should be amended so as to allow for the licensing of such shops and cinemas.

The shops and cinemas would, in any case, have to be within enclosed fixed premises, have a notice barring entry by children

and management would be subject to strict penalties if these rules are violated.

We also believe that postal and mail order business of material of this nature (for example, depicting explicit sexual conduct as defined in the draft Bill) should not be allowed. We have considered the guarantee of free commercial activity in section 26 of the Constitution, but have come to the conclusion that a mail order business of soft to hard pornography would be open to substantial abuse and that it would be a legitimate Parliamentary concern to prohibit such sales. Obviously this does not include the distribution of material with the usual age restriction of 18, but relates to material which has been classified as X18. If an adult chooses to buy a X18-magazine or hire such a video, he or she must enter the outlet and either view it there or take it home. Once he or she has taken this step, the matter becomes a matter of personal responsibility, based on the protection of privacy in section 13 of the Constitution. However, we believe that there is no practical manner in which a manager of a mail order business can establish whether the material is ordered by an adult or is delivered to that adult. We foresee that this limitation could be challenged constitutionally, but we also believe that it would be irresponsible for Parliament to ignore the practical difficulties of policing a mail-order business in this connection.

The chief executive could grant an exemption if a distributor convinces him or her that he or she has established a method whereby only adults can place orders and that the orders would reach only them.

In conclusion: we have taken note of the successful manner in which some casinos in the former Transkei and Bophutatswana screened soft to hard pornography and that a proper regulation of these theatres served that part of the adult community which chose to view these films. That there has been substantial interest in these adult theatres, appears from the following

statistics provided to us by Ster-Kinekor:

ATTENDANCE FIGURES

ADULT THEATRE CAROUSEL		**SUN CITY**	
DATE	**ATTENDANCE FIGURES**	**DATE**	**ATTENDANCE FIGURES**
January 1993	3532	January 1993	3532
February 1993	9060	February 1993	6636
March 1993	9438	March 1993	5599
April 1993	9037	April 1993	7409
May 1993	9794	May 1993	6711
June 1993	8619	June 1993	7270
July 1993	10563	July 1993	11087
August 1993	9947	August 1993	8983
September 1993	9492	September 1993	6826
October 1993	9049	October 1993	9308
November 1993	7796	November 1993	7615
December 1993	10422	December 1993	9318
January 1994	8464	January 1994	11690
February 1994	7018	February 1994	7268
March 1994	5666	March 1994	3866
April 1994	8272	April 1994	7681
May 1994	8272	May 1994	5230
June 1994	6908	June 1994	6381
July 1994	9443	July 1994	8963
August 1994	7367	August 1994	5949
September 1994	6858	September 1994	6485
October 1994	6399	October 1994	7448

Although most people giving evidence at our public hearings were against adult shops, some conceded that as an alternative, such shops could serve a purpose and at least remove these publications from domestic areas. Rhema Ministries S.A. indeed put this forward as part of their representations and at the hearings emphasised that although they did not regard this proposal as an ideal solution, it would be a practical and realistic solution to the problem.

Ultimately it must be borne in mind that the guarantees of freedom of expression and opinion do lead to certain concessions having to be made by the community. That is why the concept of tolerance should, in this regard, constantly be emphasised. This principle is well-illustrated by the following dictum in the Canadian case of *R v Towne Cinema Theatres Ltd* (1985) 18 C.C.C

(3d) 193 at 205, per Dickson C.J.C.:

> "The cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.
>
> Since the standard is tolerance, I think the audience to which the allegedly obscene material is targeted must be relevant. The operative standards are those of the Canadian community as a whole, but since what matters is what other people may see, it is quite conceivable that the Canadian community would tolerate varying degrees of explicitness depending upon the audience and the circumstances."

11 ENFORCEMENT OF THE ACT

The Task Group is aware that it has proposed a regulatory system which must be policed well. The limits for adults are set at a substantially liberal, freedom-of-choice-inspired, minimum. The protection of children lies at the heart of the draft Bill. The apparent lack of policing was also a matter of special concern to all the members of the public who gave evidence at the public hearings.

It would be unacceptable if all these rules were set up and not policed. Therefore it is proposed that the Board should seriously consider the following steps:

11.1 The appointment of officials who would keep a check on the application of the Act, especially in so far as the enforcement of age restrictions is concerned. In proposing this measure, we realise that such an official could become a symbol of repression, or an Orwellian "Big Brother". Therefore such officials should view their function as primarily consumer- and management-friendly and as protective of children.

11.2 In addition, the community itself must become informed, and

educated to accept moral responsibility. The moral fibre of a community ultimately depends on personal conviction and no state should unduly intrude upon this area of private choice and conviction. At the public hearings in Durban, religious leaders from the Bluff gave evidence of their success in convincing local cafés and super-markets not to stock magazines of a risqué nature.

In our consultation with the Commissioner of Police he stressed the necessity for greater community involvement. The police should not be the complainants or the monitors. The community itself should, if it so chooses, be active. However, we reject measures by the community such as picketing or threats to damage property. A climate of tolerance for freedom of choice and concomitant availability for adults should be fostered. The police would facilitate this by having information available as to how a complaint could be lodged with the Board.

11.3 Managers of theatres, video outlets and bookshops should set up a code of conduct and ultimately make self-regulation the hallmark of their business. The public perception of an adult video shop, or retailer, as dark and malicious should be avoided.[118]

12 TRANSITIONAL ARRANGEMENTS

We have considered various approaches to the limiting and prohibiting measures of the Publications Act 1974 and the Publications and Entertainments Act 1963. Ultimately it seemed impossible simply to strike down decisions under that Act. Such a course of action could, for example, lead to the release of hard-core pornography. It also seemed inappropriate for Parliament to act as a "quasi judicial authority" without examining each publication.

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[118]See Toobin The New Yorker (Oct 3/94) which describes the high standards maintained in Toronto's Yonge Street.

We have therefore decided to propose that all decisions remain valid until repealed or amended by the structures which the draft Bill sets up.

However, it is proposed that all limiting and prohibiting decisions under the 1974 Act should be subject to reconsideration after the commencement of the new Act and that a lapse of two years would not be required.

The Director of Publications (who is also a member of the Task Group) has indicated that a new structure would, in his experience, be able to deal with such applications within a reasonable period after the commencement of the new Act.

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Signed by members of the Task Group:

_____ Ms B Bam

_____ Dr A Coetzee

_____ Adv W Huma

_____ Ms L Jacobson

_____ Adv G Marcus

_____ Prof DW Morkel

_____ Prof AC Nkabinde

_____ Ms F Peer

_____ Mr PE Westra

_____
Prof dr JCW van Rooyen S.C.
CHAIRPERSON

1 December 1994

ANNEXURE A

Television violence and children - by Dr Daan van Vuuren, SABC

1 **Background.** Since the introduction of television concern about the possible negative effects of this medium has been generally voiced by researchers, educationalists, politicians and parents. Studies concerning the impact of television violence outnumber studies in other problem areas by at least 4 to 1. (Comstock *et al*, 1978). The various ways in which legislators have addressed this problem have resulted in heated debates in the United States, where no less than 7 Congressional hearings have focused on the issue of television violence. Recently this issue has again been in the news in the U.S.A. as the Wall Street Journal reported recently: "A number of legislators appeared determined to find ways to regulate television violence, particularly on the broadcast networks, despite obvious First Amendment hurdles".

In South Africa, because of the major problem of violence in our society, the question of television violence is of more than merely passing interest. In 1985 the Human Sciences Research Council predicted that the effects of the mass media would probably escalate in times of rapid socio-political change. (HSRC, 1985).

In addition to consulting the best international research into the impact of television violence on children, the Task Group has commissioned several research projects in South Africa itself.

Generally speaking, three approaches towards the study of television violence have been identified in the literature:

a. The activity approach, which considers that television violence and film violence causes anti-social and aggressive behaviour in children.

b. The catharsis approach, which supposes that aggression in viewers is decreased by their projecting their own aggression into the depicted violence.

c. A zero effect approach, which states that violence on television has no effect on the aggressive behaviour of children. (Botha, 1989).

These three approaches may be sub-classified (McGuire, 1986), into nine theories. Six of these assert that exposure to televised violence has a causal impact on viewers' aggression, four predicting a positive effect, and two a negative effect. (p. 192).

It is generally accepted by scholars in the field that the number of violent episodes seen on television in, for example, the USA and some European countries, is unacceptably high. (Comstock *el al*, 1978, McGuire, 1986, Fauconnier, 1990).

In South Africa the number of violent incidents per hour varies from 6,3 in 1989 to 3,9 in 1991 with the present figure around 6 in prime-time television. Other countries, such as the Phillippines, report 16,6 violent incidents per hour, and the USA, 8,3 such incidents per hour. In contrast television in the United Kingdom reflects only 1,68 such incidents per hour.

What are the effects on children of this exposure to violence?

2 **Results.** After considering a large number of studies reported in the literature, Roberts and Maccoby (1985) came to the following conclusion:

> "However, when those studies are examined in terms of how the direct viewing of violence (as opposed to merely viewing television or stating a preference for

violent shows) impacts viewers, there is consistent evidence that children and adolescents who view televised portrayals of violence obtain higher scores on various indices of aggression than those who do not". (p 573).

More recently, in an extensive survey of the literature, Comstock and Paik (1991) identified three factors regarding children and television violence:

"We advocate, then, a three-factor explanation of the influence of television and film violence on antisocial and aggressive behaviour:

1 **Non redundancy.** When violent portrayals are non redundant with real-life experience or what is experienced through the media, they may influence behaviour. In effect, they provide new information. When such effects occur, one would expect the portrayal to have been particularly compelling to the viewer. This implies that highly promoted, emotional, dramatic narratives are particularly likely to have such effects, because they would have the advantages of high attention, arousal, and involvement.

2 **Social cognition.** By presenting repetitive, inevitably somewhat redundant portrayals of aggression, retributive justice, and violence, such portrayals contribute to the development of expectations and perceptions. These expectations and perceptions will guide behaviour when an event, person, activity, or other cue makes them pertinent. Television helps formulate scripts and scenarios; these are the maps that provide the crude and uneven paths for behaviour

3 **Developmental.** Violent portrayals not only encourage concurrent increases in such behaviour among children, but they also may contribute to the acquisition of fairly stable enduring traits. We agree with Eron and Huesmann (1987) that the role of television in establishing traits occurs primarily before adolescence. The contribution of television to traits apparently begins remarkably early, because Meltzoff (1988) found that children as young as 14 and 24 months would imitate what they saw on a television screen, and that they could do so even after a 24-hour delay". (Comstock, Paik, 1991, p 284).

It is important to mention that age has been found to be an important factor regarding exposure to television violence:

early exposure to television violence correlated positively with aggressive behaviour 10, 20 and 30 years later. Eron and Huesmann (1987) explain this phenomenon as follows:

> "However, the continued viewing of these (violent) programs probably contributed to the development of certain attitudes and norms of behaviour and taught these youngsters ways of solving interpersonal problems which remained with them over the years. Observation of aggressive sequences on the television screen provided scripts which then were continually rehearsed and easily elicited when the subjects found themselves in situations bearing some resemblance to the ones observed on the screen." (p. 196)

As far as erotica on television is concerned Zillman *et al* (1974) found that under some conditions aggressive behaviour may be enhanced by erotic content of television material. More recently, Comstock and Pail (1991) have come to the conclusion that "Mild erotica typically has no effect or decreases aggression, more compelling erotica often increases aggression." (p. 173).

To put the above mentioned conclusions by eminent overseas researchers into perspective, it is important to note that the research points to very modest effect sizes. Although studies indicate statistically significant differences, a very small percentage of the variance in viewer aggressiveness could be related to television viewing. (McGuire, 1986, p. 196).

Results of the same order were found in South Africa. For example, Botha (1990) found, in an extensive study on secondary school children, that television viewing indeed made the pupils more aggressive in various ways. The greatest effect, although still small, was found with regard to physical and verbal aggression. It would also appear that the effect of television viewing is long term rather than short term.

The power of the mass media, and especially television, should be regarded, according to current thinking as highly conditional, depending on a variety of contingent and/or contributory third variables. (Roberts and Maccoby, 1985). The position of media effects researchers should then rather be that the effects are not powerful but important nonetheless. (McLeod, Kosicki, Pan, 1992).

At the present time a longitudinal study by Botha and Van Vuuren (1994), on the impact of television violence on the aggressive behaviour among children from various South African townships, is being conducted. The vexing problem of the usage, interpretation, and effects of a medium such as television on the developing population of South Africa will be addressed in this study.

3 **Conclusion.** The issue of television violence is an on-going problem which society, broadcasters and legislators should address together. Only with the help of the best research and sound information will it be possible to deal with this problem.

At the present time broadcasters have specific guidelines on the practical implementation aimed at diminishing the amount of film and television violence. However, an eminent researcher and social psychologist at Yale University, Professor William J McGuire, argues forcefully against the possible harmful effects of censorship: "Any restriction of public information, artistic expression, entertainment, and the like is worrisome because banning one type of material provides precedent and example for prohibiting other types." (McGuire, 1986, p. 196).

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Meltzoff, A.N. Imitation of televised models by infants. *Child Development* 59, 1221-1229, 1988.

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ANNEXURE B

Promotion of Hatred. Section 47(2) of the Publications Act 42 of 1974 contained provisions which were presumably intended to prevent the fomentation of racial hostility. The provisions provided:

> "47 (2) A publication, film or public entertainment is deemed to be undesirable if it or any part of it ...
>
> (a) brings any section of the population of the Republic into ridicule or contempt; or
>
> (b) is harmful to the relations between any sections of the population of the Republic; ..."

Significantly, however, these sections were repealed prior to the first democratic elections in April this year. The motivation for their repeal was obvious. Free and fair elections could not be held in the face of provisions which facilitated the censorship of matter which potentially could have a vital bearing on the political process. The question that must be posed, therefore, is whether any new statute should contain similar provisions.

Liberal South African lawyers have argued for such laws. Professor John Dugard has suggested that "in a racially diverse society there is clearly a need for laws which prohibit incitement to racial hatred."[1]

The African National Congress, now the majority party in the new parliament, has long held the view that there ought to be such laws. The Freedom Charter, adopted in 1955 and for many years the cornerstone of ANC policy provides that the preaching and practice of national, race, or colour discrimination and contempt shall be a punishable crime. The draft Bill of Rights published by the ANC's Constitutional Committee in 1990 contains the

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[1] J Dugard Human Rights and the South African Legal Order (1978) at 177. Similar sentiments have been expressed by the late Professor A.S. Mathews. (AS Mathews Law, Order and Liberty in South Africa (1971) at 211).

clearest pronouncement by the organisation on the subject of racial defamation. Article 4 of the Bill provides that "there shall be freedom of thought, speech, expression and opinion, including a free press which shall respect the right of reply." However, paragraphs 3 and 4 of Article 14 specifically envisage a deregation from these guarantees. They provide:

> "14 (3) The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed.
>
> (4) With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group."

South Africa has had laws dealing with incitement to racial hostility since the first measure was introduced by section 29(1) of the Native Administration Act 38 of 1927 which made it a criminal offence to utter any word or do any other act or thing whatever with intent to promote "any feeling of hostility between natives and Europeans." Laws dealing with racial hostility were progressively entrenched in a variety of statutes, most significantly in ones dealing with "**political**" offenses. Thus, part of the definition of "**communism**" in the Suppression of Communism Act 44 of 1950 included doctrines or schemes which aimed at "the encouragement of feelings of hostility between the european and non-european races of the Union." Part of the definition of "**terrorism**" in the Terrorism Act 83 of 1967 included encouraging "feelings of hostility between the White and other inhabitants of the Republic." These laws were blatantly

abused. Virtually without exception, these laws were used to prosecute anti-apartheid activists.[2]

Given the history of abuse of such laws in South Africa, it is necessary to approach the issue with extreme caution. If the new statute is to contain such provisions, they must be narrowly circumscribed and contain safeguards against abuse.

International Obligations. The President has recently signed two international conventions which have a direct bearing upon the subject. Although these conventions have not yet been ratified, they provide an indication of South Africa's future international obligations in this area. The two conventions in question are the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. Relevant extracts from these conventions are set out below.

> **"INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**
>
> The States' Parties to this convention,
>
> Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves ... to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. ...
>
> Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.
>
> **Article 1**
>
> 1 In this convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of

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[2]See generally G.J. Marcus Racial Hostility: The South African Experience published in S. Coliver (Ed) Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination (1992) at 208 annexed hereto).

nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. ...

Article 2

1 States' Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and to this end: ...

(c) each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulation which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation. ...

Article 4

States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) shall declare as an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination and shall recognise participation in such organisations or activities as an offence punishable by law;

(c) shall not permit public authorities or public institutions, national or local, to promote or incite

racial discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combatting prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups. ..."

"**INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Article 20

1 Any propaganda for war shall be prohibited by law.

2 Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Also of relevance to the present discussion is the Convention on the Prevention and Punishment of the Crime of Genocide, relevant provisions of which provide:

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or time of war, is a crime under international law which they undertake to prevent and to punish. ...

Article 3

The following acts shall be punishable: ...

(c) Direct and public incitement to commit genocide. ..."

Most of the major democracies throughout the world have laws dealing with incitement to racial hatred. It is accordingly recognised that such laws constitute a permissible limitation upon the guarantee of freedom of expression. The form of such laws varies, however. Most countries have criminal statutes which prohibit the promotion of racial hatred. The efficacy of these laws is controversial. Trials frequently attract unwarranted publicity which serve only to exacerbate the problem.

The Constitution. Any proposed law will have to comply with the requirements of the Constitution. The Constitution of the Republic of South Africa came into operation on 27 April 1994.

Section 251(1) of the Constitution. The Constitution is the "supreme law of the Republic and any law or act inconsistent with its provisions shall, unless either provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

Section 4 of the Constitution. The Chapter on Fundamental Rights is binding upon all legislative and executive organs of State at all levels of government and applies "to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution."

Section 7 of the Constitution. The Constitution creates a Constitutional Court which has exclusive jurisdiction (subject to section 101(6), and now section 95(2), as amended) to declare an act of parliament invalid.

Sections 98(2)(a), (b) and (c) and Section 100 of the Constitution. In terms of section 101(3)(a) of the Constitution, a provincial or local division of the Supreme Court shall have jurisdiction in respect of "any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3."

Of direct relevance to the present opinion is section 15 of the Constitution which provides:

> "15 (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research."

In order to understand the scope of protection afforded by the constitutional guarantee of freedom of expression, it is necessary to appreciate the conceptual structure of the

Constitution. The basic principle is that no right guaranteed by the Constitution is absolute. All such rights are subject to limitation provided that there is compliance with the limitations clause embodied in Section 33 of the Constitution. It is the limitations clause, therefore, that becomes determinative of the extent of the protected right.

The notion that constitutionally protected rights are not absolute is entirely consistent with the approach adopted in other countries and in international human rights instruments. The way in which the limitation is determined varies according to the particular legal system. The South African Constitution bears a striking similarity to the Canadian Constitution which has adopted the format of guaranteeing certain fundamental rights, all of which are subject to limitation. Thus, section 1 of the Canadian Charter of Rights and Freedoms provides:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 33 of the South African Constitution is, in certain significant respects, a hybrid between the Canadian and German models. Section 33 provides:

> "33 (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
>
> (a) shall be permissible only to the extent that it is -
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (iii) shall not negate the essential content of the right in question,
>
> and provided further that any limitation to -
>
> (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, insofar as such right relates to free and fair political activity,

shall in addition to being reasonable as required in paragraph (a)(i), also be necessary."

The decision of the Canadian Supreme Court in *R v Oakes* (1986) 26 DLR (4th) 200 provides a useful guide for the interpretation of the limitations clause and has already been followed by South African Courts. In that case, the Court held that the "onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation." (at 225). The Court then went on to observe:

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognised, then the party invoking s1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test'. ... Although the nature of the proportionality test will vary depending on the circumstances, in each case Courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair, 'as little as possible' the right or freedom in question ... Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of

'sufficient importance'." - (at 227).

The formulation of any law must, accordingly, have due regard to the strictures of the Constitution. The formulation of the proposed clause primarily draws its inspiration from Canada where a criminal provision dealing with the promotion of hatred survived a constitutional challenge. It should be emphasised, however, that even in Canada the matter is highly controversial. In the case in question[3] the constitutional validity of the law in question was upheld by a majority of four to three.

The Proposed Clause. Bearing in mind the above considerations, it is proposed to include a clause in the new Act along the following lines:

"XX (1) A classification committee shall prohibit the distribution of a publication or the exhibition of a film in public which, judged as a whole -

(a) promotes or incites hatred against any identifiable group;

(b) advocates, promotes or incites genocide.

XX (2) For the purposes of this section -

(a) 'identifiable group' means any section of the public distinguished by race, national or ethnic origin, colour or religion;

(b) 'genocide' means anything calculated to destroy in whole or part any section of the public by killing members of any section of the public or inflicting on members of such section conditions of life likely to bring about the physical destruction of such section.

XX (3) Section 32(1)(a) shall not apply to any publication or film

(a) of a **bona fide** technical, professional, scientific, educational, literary, dramatic or artistic nature;

(b) in which there is a **bona fide** discussion,

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[3] R v Keegstra [1990] 3 SCR 697 (SCC).

argument or opinion on a matter pertaining to religion, belief or conscience;

(c) constituting a **bona fide** discussion, argument or opinion on a matter of public interest."

The proposed clause is substantially narrower than that suggested in the ANC's draft Bill of Rights. It seeks, however, to conform with international standards.

The categories of persons who may be the target of the promotion of hatred are also narrowly defined. The identification of race, national or ethnic origin and colour is based primarily upon Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination. The categories could be considerably broadened. For example, section 8 of the Constitution prohibits unfair discrimination on the grounds of "race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language." To include all these categories would constitute an unwarranted limitation of the freedom of expression. Religion has been included because of the pervasive problem of religious intolerance.

Because racial issues have dominated South African political life, it is important that such discussion should not be stifled altogether. For that reason, specific exemptions are set out in the section. In this way, it is hoped that a reasonable balance can be struck between the evil of the promotion of hatred and the legitimate discussion of matters of public interest.