

# PUBLICATIONS CONTROL IN SOUTH AFRICA: A NEW ERA

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## ABSTRACT

The South African publications control system has, during the past two to three years, shown much greater tolerance than it has been given credit for. To lessen negative perceptions, the public should be informed about the current state of affairs and the concessions already made in the current application of the existing legislation. This article also provides details of arguments considered during the drafting of the new Film and Publications Bill, as well as details of, and comments on the proposed procedures with regard to future classification of publications and films. The meaning and effect of classifications, age restrictions and new proposals such as adult premises, are also explained.

## INTRODUCTION

Publications control has always been a controversial subject. In a broad sense censorship includes all restrictions affecting freedom of expression. Apart from restrictions by law, there are also many other restrictions of a non-legal nature. Examples include media monopolies where the recipient may be exposed to one perspective only, and



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restrictions of an economic nature where editorial policies of publications are formulated to attract certain readers who in turn attract advertisers.

Becker and Roberts (1992:424) describe Siebert, Peterson and Schramm's well-known categories of media control systems that exist in the world. The first category includes the Authoritarian system which is found in totalitarian societies where dictators or rulers maintain total control, trusting neither media professionals nor the public to make their own decisions; and the Soviet system which was based on the practices of the pre-Gorbachev era in the Soviet Union. Here the sole function of the media was to teach and perpetuate communist

ideals. The second category includes the Libertarian system where there are no controls and where contrasting ideas, forms of entertainment, and arts compete in the marketplace; and the Social Responsibility system which recognizes the impossibility of totally free and open media in contemporary societies. As the price for freedom this system assigns ethical responsibilities to the media as the protector of freedom and Government encroachment on freedom of the media can be prevented only if the media show social responsibility.

However, publications control is far more complicated than the above oversimplified exposition. In the United States, for example, there is a great variety of forms of controls. Some of them are official laws, others are unofficial, growing out of traditional practice, out of the profit motive, or out of the desires of some individuals to have particular kinds of content in the media - or to keep particular kinds of content out of the media. Some of these controls are direct, others are indirect.

In the United States the Supreme Court has to rule on censorship matters, such as clarifying the definition of obscenity. However, definitions that will stand the test of judicial scrutiny are extremely difficult to develop. It is therefore exceedingly difficult today to prove that anything is obscene. This problem is addressed in the proposed new South African Film and Publications Bill. Another serious unresolved problem is how to prevent the thrusting of offensive mate-

rial on unwilling persons or children. Almost everyone agrees that those who do not want to read or see something should not be forced to do so. To address this issue the United States' legal statutes and courts tend to give the greatest freedom to those forms of communication that require the most conscious effort and sophistication on the part of the receiver; and tend to give least freedom to those forms of communication that require the least conscious effort on the part of the receiver to become exposed to the message. Thus, a book that must be bought and read or a motion picture shown in a theater where an entrance fee is charged, are much freer of controls than a billboard on a public highway or a motion picture shown on television (Becker & Roberts, 1992:428).

Over the years the media in South Africa have displayed a lack of objective and informed views on the matter of publications control. Since 1990 the confusion has increased after the important changes that took place with regard to the enforcement of the current Publications Act (1974). The media display an ignorance in their reports about the official structures of censorship and often confuses the Publications Committees who take initial decisions, with the Publications Appeal Board. The South African publications control system has lately shown much greater tolerance than it has been given credit for and the biased way in which the media often reports on these matters creates negative perceptions. Articles in the *Mail & Guardian* of 17 May 1996 and in *Rap-*

port of 19 May 1996 focus for example, on the absence of a stipulation in the present Act that publishers, distributors or their representatives should have a right to make submissions at the Committee stage of proceedings. Although it is true that no such provision is made in the present Act, this concession has already been granted to publishers and distributors for some time.

The Task Group which was appointed by the Minister of Home Affairs to draft a new Film and Publication Bill considered representations from more than 2000 members of the public, held public hearings and consulted with relevant authorities. They came to the conclusion that the current Act definitely intrudes upon the freedom of adults in an unreasonable manner and does not sufficiently recognise the freedom of speech, artistic creativity and scientific research which are guaranteed by Section 15 of the Constitution. Although it is accepted that the current Act is outdated, the problem remains that it has not yet been declared unconstitutional and that it remains in force and has to be administered (albeit in the spirit of the Constitution) until such time that the new Bill is in place. However, J T Publishing, publishers of *Hustler* magazine and Eugene Marais, owner of a *Hustler* franchise, were recently (May 1996) granted a hearing by the Constitutional Court regarding the rights of magazine publishers to publish and distribute pornographic material. They argued that the present Act should be repealed and replaced on grounds that it infringes on the rights of freedom of expression

and privacy. Judgment in this case has been reserved. A week before this hearing the Constitutional Court ruled that the Indecent or Obscene Photographic Materials Act be scrapped. The offending section of this act stated that a person in possession of any "indecent or obscene photographic matter" will be guilty of an offence carrying a maximum fine of R1 000, or a maximum prison sentence of one year, or both. It should be noted, however, that the draft Bill proposes that the possession of child pornography should still be prohibited by way of criminal law but that prosecutions and search warrants should only take place, or be issued, on the written authority of an attorney-general.

The aim of this article is to inform the reader about the current state of affairs and the concessions already made in the present application of publications control; to provide details of arguments considered during the drafting of the proposed new legislation; as well as details of, and comments on the proposed procedures with regard to future classification of publications and films. It is essential that the public should be informed as to the meaning and effect of classifications and age restrictions, as well as new proposals such as adult premises.

## EXISTING LEGISLATION

Although freedom of speech and publications was accepted in South Africa in the past, freedom should always be accompanied by a fair amount of self-control and social responsibility. How-

ever, since not enough self-control and responsibility could be found in the communication media (Christenson, 1974:315), the previous Government opted to look after the spiritual and moral well-being of the society by trying to keep a balance between the freedom of the individual and the rights of people to read and see what they choose on the one hand, and the concerns of the society, like the dignity and privacy of both the individual and the child, and the security of the State on the other hand. The Government viewed itself thus as the arbiter between the differentiation of commercial interests, freedom of speech, art, science, etc. on the one hand and the concerns of the viewer/reader on the other hand.

The criterion laid down by the existing Publications Act (1974), as amended, is whether material is indecent, obscene, offensive or harmful to public morals or blasphemous or offensive to the religious convictions or feelings of a section of the population, or is prejudicial to the safety of the state, general well-being or peace and good order.

The Act created three autonomous bodies to implement control on undesirable matter, namely the **Directorate of Publications** which performs administrative duties; the **Publications Committees** which examine publications and films and the **Publications Appeal Board** to which a publisher or distributor may lodge an appeal against a decision of a committee. It also made provision for an internal system of appeal from the Directorate to the Appeal

Board.

## CURRENT APPLICATION OF PUBLICATIONS CONTROL

The abovementioned autonomous bodies are, however, not functioning as moral guardians and have no policing function, they only endeavour to reflect the norms of the public and do not try to impose norms. Van Rooyen (1989:10) states that there has been a concerted effort on the part of the Board to make it clear to writers, film-producers and theater-people that the Appeal Board is a court of arbitration for everyone, that it sees itself as a judicial arbiter and not as a prosecutor. It needs to be remembered that the Publications Act is not conceived as having either an educational or an evangelizing function. These tasks are the responsibilities of other societal institutions.

With regard to the test currently in use for determining whether or not controversial material is undesirable, the following considerations are borne in mind:

Although the **likely** reader/viewer of a publication/film/video is a factor which should (in the application of the Act), be taken into consideration, risqué and controversial material cannot be approved on the basis of the argument that such material would not shock this likely reader/viewer. There exists a market for **all** kinds of material (even the crudest forms of child pornography and bestiality) and it would be impossible to find **any** material undesirable on

the basis of this argument.

The appropriate test currently in use encompasses the **reasonable** South African reader/viewer. Such a person is neither a prude nor a libertine and takes all relevant factors like the fundamental tenets of freedom of speech, choice, privacy, etc.; the moral standards of the likely reader/viewer; as well as possible art or other merit of the material, into consideration. A finding of undesirability should therefore be based on tolerance rather than taste. The real test would thus be whether such a reasonable person would tolerate certain material on the shelves of bookshops, cafes and other outlets including street corners and side-walks or in film theaters (Morkel, May 1995:7). This person's tolerance level would determine whether he, even though he may disapprove of such material personally, is prepared to tolerate or abide others seeing or reading it if they choose to do so (Morkel, February 1995:8).

Especially during the past two to three years many concessions were made with regard to the application of the existing Act. In the sphere of films and the printed media erotic material which as little as a year ago would have been unacceptable, is now freely available (Morkel, May 1995:8). Concepts and directions like **indecent, obscene, offensive**, etc. are no longer interpreted literally. However, despite swiftly-changing public mores, substantial changes in tolerance levels and a significant move towards a more open, free and liberal society, a great many rea-

sonable South Africans would still be of the opinion that the contents of magazines like *Hustler* are undesirable and would still demand a rejection of these publications to be distributed in normal outlets like cafes, book shops, cubicles and on street corners. They would regard these publications as a pollution of their society (Morkel, May 1995:8). However, these reasonable South Africans will have to learn to tolerate limited distribution (in registered adult premises) of such material once the draft Bill becomes law. It should always be kept in mind that nudity *per se* can hardly be regarded as pornography, but that the manner in which the nudity is portrayed, may result in it becoming pornographic. The Directorate, Committees and the Appeal Board itself sought to exercise publications control in the spirit of the Constitution and to adhere to the principle of freedom of speech and expression. No right, however, is absolute and unfettered. Section 33 of the Constitution provides for certain limitations of fundamental rights, with the understanding that such limitations will only be appropriate when absolutely necessary (Morkel, February 1995:6). Freedom of speech does not protect for e.g. libel, slander, false advertising, perjury, etc. According to this section of the Constitution children and sensitive, more conservative adults thus also have a right to protection against offensive material, under given circumstances. However, the moral standards of the society is continuously changing and the prevailing mores should be borne in mind. The shock value of certain material decreases as a result of

increasing exposure to it. As the former independent states like Transkei and Bophuthatswana still operate under separate (distinct) legislation, some of the most risqué, controversial and pornographic material imaginable is within easy reach.

## **DRAFTING OF NEW LEGISLATION**

In all or most jurisdictions some form of publications control exists, whether it be direct control or by way of criminal law (Van Rooyen, 1987:2). As the interests and concerns of all people should be protected according to the Constitution, it is accepted that especially children and sensitive, more conservative adults also have a right to "protection" under given circumstances. However, it was decided that the insight of the modern child should not be under-estimated and the roles of the parents and school should be given particular weight (Van Rooyen, 1996:179) Morkel (May 1995:9) is of the opinion that the salient question is not whether there should be control, but rather where and how lines should be drawn.

In the drafting of the new legislation, the emphasis was, as far as possible, on regulation and management of the problem and not on prohibition. The Task Group also made comparisons with regard to how the problem is addressed internationally and consulted with experts in the field in Australia, New Zealand, India, Egypt, Zimbabwe, Canada, Great Britain and the USA.

Provision is made for control over certain films and publications; the establishing of a Film and Publication Board (hereafter the Board) and a Film and Publication Review Board (hereafter Review Board). The former Acts of Publication as well as the Publication Acts of Bophuthatswana, Transkei and Venda are repealed. The main objectives of this Act are to regulate by means of classification, age restrictions and consumer advice, the distribution of certain publications and the exhibition and distribution of films, with due regard to the fundamental rights guaranteed by the Constitution.

The proposed Board and Review Board shall function without any political or other bias or interference and shall be independent from the government and its administration. An open, transparent appointment procedure for members will be followed. There will be participation by the public in the nomination process and an independent advisory panel, appointed by the President, will provide a short list which will take applicable experience or knowledge into consideration. The President will appoint members for a period of five years. The Board and the Review Board will furnish an annual report to the Minister in regard to functions, activities, affairs and financial position, which will be tabled in Parliament.

## **PROPOSED PROCEDURES WITH REGARD TO CLASSIFICATION OF PUBLICATIONS AND FILMS**

In the case of publications, any person may lodge a complaint with the Board that a publication which has been distributed in the Republic be referred to a classification committee for a decision. All films and videos will be classified by the Board. (In the past the Directorate was authorised to refer a publication to a committee. This provision is, however, unconstitutional since the Directorate also appoints the committees and this is in conflict with the principle of fair administrative justice, as guaranteed by the Constitution. The South African community should get involved and not wait upon the State, or in this case the Directorate, to intervene on its own accord.) Furthermore the Board or the executive committee shall not decide upon any application unless a reasonable opportunity has been afforded to the publisher, distributor or his representative, to be heard personally or by way of legal representation. (This is one of the aspects of the present Publications Act which is arguably unconstitutional - i.e. the absence of a stipulation that distributors should have a right to make submissions at the Committee stage of proceedings (Morkel, 1995:3). The committee then classifies the publication or film according to the guidelines provided by the new Bill. The Board furnishes in writing full reasons for its decision as well as the names of the members who partook in the inquiry. After a period of two years has lapsed since the Board has made a decision, any person may apply to the Board for more lenient classification of a publication or film or the withdrawal of such a classification.

A publisher or distributor may also appeal to the Review Board within 30 days of the date on which he or she was notified of the Board's decision. The Chairperson of the Review Board can suspend a decision of the Board or executive committee until the outcome of the appeal and convene a Review Board to allow relevant evidence to be led or handed in. He submits full reasons for decisions of the Review Board. The Review Board may uphold or set aside the decision of the Board or the executive committee. The Review Board may also amend the conditions imposed by the Board or executive committee in favour of the appellant. In the case of an XX or X18 classification by the Review Board, the publisher or distributor may, within 30 days, appeal to the Supreme Court against the classification.

## **CLASSIFICATIONS PROPOSED BY THE NEW FILM AND PUBLICATIONS BILL, 1995**

Sexually explicit material has been divided into three categories, namely prohibition (child pornography, mixture of sex and violence and bestiality); restriction to licensed adult premises; and age restricted material (the furthest publications of this nature are allowed to go is to publish nudity, excluding explicit sexual conduct). A sealed wrapper, if necessary, could be added and, if the cover is too explicit, an opaque wrapper.

### **XX CLASSIFICATION**

According to this classification, a publi-

cation or film shall be classified as XX if, judged within the context of the publication or film as a whole, it contains a visual presentation, simulated or real, of -

- 1 a child who is, or is depicted as being under the age of 16 years, participating in or assisting another person to engage in **sexual conduct** or a lewd exhibition of genitals (Sexual conduct is defined as: erect genitals; masturbation; sexual intercourse including anal sexual Intercourse; the caressing, or touching by any object, of genitals; oral genital contact; or oral anal contact);
- 2 explicit (and in the case of films, explicit prolonged) physically violent conduct concurrent with explicit (or explicit prolonged) sexual conduct;
- 3 explicit sexual bestiality; or
- 4 the explicit infliction of extreme violence.

It is evident from the above that vague and morality-based terminology such as "indecent", "obscene" or "offensive" is now avoided and replaced by words such as "explicit" and "prolonged", which emphasize the discretion which the adjudicator must exercise.

With regard to the first three clauses of this classification, feminists objected that the Bill does not include the degradation of women as a criterion for an XX classification. As in numerous debates in the past, they based their point of view on the inequality which sexually explicit material causes (where women are shown in nude, sexually provocative poses). Although equality and dignity are guaranteed by the Constitution, the

Task Group came to the conclusion that the standard set by the criterion of degradation of women, even if the "substantial risk of harm" requirement is added, is too vague to withstand constitutional scrutiny. It is believed that the proposed criteria prohibiting a mixture of sex and violence and excessive violence, go a long way in protecting dignity (Van Rooyen, 1995: 4 & 7).

Another argument was that non-violent sexually explicit materials have been proved to be a cause of rape and sexual assault. Some statistics show that women have given evidence that pornography was used by men who assaulted or raped them. This approach is even supported by findings of the USA Attorney-General's 1986 Commission. The report has, however, not been accepted by the USA Courts and was criticized as unscientific in its approach. There is no empirical evidence that obscene materials cause antisocial attitudes or deviant behaviour (Hiebert, Ungurait & Bohn, 1991:557). That non-violent sexually explicit material is not harmful to adults has been accepted by the Canadian Supreme Court (Van Rooyen, 1996:179). Furthermore, there exists no convincing evidence as to the causal connection between non-violent sexually explicit material and sex crime. The question remains whether the criminal mind leads to pornography or whether pornography causes or contributes to the criminal mind. This argument is thus not born out by research and has not been accepted by any Court of standing. The draft Bill, however, does give effect to research done by



Donnerstein et al. (1981) in so far as an explicit mixture of sex and violence is prohibited. These researchers have shown that there is evidence that visual material which includes a crude mixture of sex and violence leads to more aggressive sexual behaviour by male viewers. This view has also been recognised by the Canadian Supreme Court. Prohibition of child pornography, prolonged and crude mixtures of sex and violence and bestiality is also in force in Germany, New Zealand and Australia (Van Rooyen, 1995:2).

The Task Group came to the conclusion that the three categories which fall in the XX classification amount to the hardest form of pornography and that the banning of these categories do not deprive society of much. It should also be borne in mind that as far as pornography is concerned, the draft Bill does not prohibit the written word, although it was proposed that the sale of written pornography should be limited to adult premises (Van Rooyen, 1995:8; 1996:187).

Most research pertaining to pornography focuses on short-term, perceivable effects on individuals. Long-term, cultural effects are often not taken into account. According to Severin & Tankard (1988) the Cultivation Theory focuses on the long-term effects that the media can have on recipients' perceptions. A mass culture is presented which forms the basis of reality construction, values, emotions, opinions, attitudes and eventually behaviour. In the case of pornography it could be proposed that certain

distortions concerning sexuality are presented. This may contribute to establishing a culture of sexuality in which certain norms, attitudes and behaviour are presented as standard practice. It may thus be possible that prolonged exposure may lead to integration of these factors into the perceptual framework of some recipients, especially children or individuals who have not been exposed to other forms of sex education.

With regard to the prohibition of extreme violence in the XX classification, the Cultivation Theory may also apply. Although television no longer falls under the new Act and control mechanisms for television are provided in the Independent Broadcasting Authority Act (1993), it should still be noted that a South African longitudinal study carried out over a number of years, found that exposure to television violence had indeed made children more aggressive in numerous ways. It was also found that the effect was a long-term, rather than a short-term process (Conradie, Heyneke & Botha, 1987). It should be borne in mind that violence seems to be endemic in the South African society, that people therefore are increasingly exposed to real-life violence, and that the mass media has an escalating impact during times of socio-political change. It is therefore of the utmost importance that consumers should be warned about the contents of films, television programmes, magazines, books, etc. In the past we tended to give far more attention to sex and nudity as detrimental factors in anti-social behaviour than to

violence.

Further evidence of the detrimental effects of exposure to violence on videos comes from a Parliamentary Commission in Britain that came to the following conclusion:

"These violent videos appeal to the base instincts in human nature and arouse sadistic feelings by dwelling in great detail on the infliction of pain, presenting it as pleasurable. There is a very real danger that exposure to such scenes of cruelty may dull the viewers' sensitivity to pain and distress and encourage the growth of perversion" (Barlow & Hill, 1985:156)

In 1993, a young boy in South Africa lost his temper when the domestic servant switched channels while he was watching the film *Robocop* and he promptly shot her dead with his father's gun (SABC News Bulletin, 18 September 1993).

If research findings and incidents like the one mentioned above are taken into account, as well as the overwhelming public opinion against certain forms of violence in South Africa, then the prohibition of extreme violence in the new draft Bill is certainly justified.

### **X18 CLASSIFICATION**

According to this classification, a publication or film shall be classified as X18 if it contains a visual presentation, simulated or real, of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of erect genitals; or any of the acts defined in the XX classification. The draft Bill also prohibits the cutting of films

without the consent of the distributor. If a film gets a R18 classification, no cuts may be made. If a distributor would, however, prefer a lower restriction, he or she would have to concede to cuts. This practice is followed in most countries. It is unlikely that a film (or publication) with **bona fide** artistic or dramatic merit will be classified XX or X18, and the R18 classification any way implies that no cuts may be made (Van Rooyen, 1995:8).

A necessary corollary to adults' freedom of choice is that certain materials - despite their explicit sexual nature - but which 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 (Van Rooyen, 1996:189). The X18 classification thus gave rise to the inclusion of the concept of **ADULT PREMISES** in the draft Bill, where the following restrictions will apply:

A publication or film classified as X18 shall be distributed or exhibited in public only by a person who is licensed by a licensing authority to conduct such business. Such a distributor or exhibitor shall not allow a person under the age of 18 years to enter the premises. The distributor shall also display at the entrance(s) of the premises that no person under the age of 18 years shall be allowed. Furthermore a publication or film shall only be displayed in such a manner that it can be seen only from within the premises. The distributor or exhibitor shall not distribute a X18

publication or film by way of postal or other delivery unless the delivery is to a person licensed to operate such premises and the delivery is in accordance with regulations made by the Board which shall aim at preventing that such delivery shall be to persons under the age of 18 years. The definition of **distribute** includes non-commercial distribution and handing or screening of XX or X18 material to persons under the age of 18 years.

An international survey of several systems has shown that licensed premises, if well-monitored, contribute to the orderly management of pornography. Currently, law enforcement seems to be problematic as pornography can be bought or rented, albeit illegally, at numerous outlets. Adult premises will be licensed by local authorities and it is unlikely that these authorities would allow such shops to be established in domestic areas. Overseas experience (Canada, Germany and the USA) has shown that these shops are limited to business districts and even light industrial areas because their presence tend to cause the depreciation of surrounding property. The allowing of such premises will be accompanied by strict penalties, and even a loss of a license, for contraventions. In this way pornography would be brought into the open, where it can be monitored. Local communities would have the opportunity to make representations to local licensing authorities and in

this respect local community standards and circumstances will play a role (Van Rooyen, 1995:5).

Local communities will thus be the main regulators in this field as they will also be in a position to persuade shopkeepers not to stock certain material. We have already seen that *Scope* magazine has closed down (the June 1996 edition being the last issue). *Scope* launched girlie magazines in South Africa 31 years ago. As a result of public pressure and fierce anti-porn lobbying some supermarkets and cafes refused to display *Scope* or other girlie magazines. The magazine changed its image and contents six months ago to publish quality articles in stead of explicit photographs of women, but its circulation still dropped from 210 000 to a mere 25 000 (*The Star*, 27 May 1996). The editor, David Mullany, admits that the market - not censorship - has made the magazine impossible to sell (*Mail & Guardian*, 31 May 1996). According to *Beeld* (27 May 1996) the reason why *Scope* lost its readers is because the average South African male loses interest as soon as his curiosity has been satisfied. The fall in sales is believed to have hit all other pin-up magazines.

The Freedom of Expression Institute has expressed its opposition to the concept of Adult Premises. They are concerned that material considered by some as "art", would end up for sale in adult premises only. It must, however, be borne in mind that all decisions which classify a publication or a film as XX or X18 are subject to appeal. Only if the Board, the Review Board and the Su-

preme Court are **ad idem** as to the fact that a publication or film does not amount to art, and it furthermore justifies the X18 category, would it be available at adult premises only (Van Rooyen, 1995:9).

### **R18 CLASSIFICATION**

According to this classification an age restriction will only be imposed if a classification committee or the Review Board is of the opinion that judged as a whole, it is necessary to protect children in the relevant age group against harmful or disturbing material in the publication or film. In the case of publications, it may be specified that it shall only be distributed to persons older than 18 years of age or older than a specified younger age and that the publication shall bear a distinct notice of such restriction. A publication can also, when it is considered to be absolutely necessary, be restricted in so far that it shall only be distributed in a sealed and, if necessary, opaque wrapper which shall also, if applicable, bear the above notice. This restriction limits unintentional confrontation with or casual exposure of children and more conservative adults to sexually provocative covers of publications in bookshops, cafes, etc.

The Freedom of Expression Institute is also opposed to any form of classification of publications. However, in the light of the opposition from a section of the public to magazines with nudity in them, the Task Group has had no choice other than to make provision for age restrictions on these magazines. Some magazines like *Playboy* and *Hustler* even

support the concept of age restrictions. The draft Bill also has confirmed the present state of affairs in so far as nudity and sex are concerned in magazines such as *Hustler*, *Playboy* and *Penthouse*. Material in this category which contains more explicit detail or exceedingly crude and vulgar material, would have to be sold from licensed premises. In short, this amounts to a distinction between pubic and genital nudity.

### **F18 CLASSIFICATION FOR PERIODICAL PUBLICATIONS**

According to this classification a periodical publication shall be classified as F18 if the following six issues of such publication are likely to contain material which falls within the scope of the X18 classification and the publisher or his representative consents to such an order.

### **ART AND SCIENCE EXEMPTIONS**

According to this classification the XX or X18 classification shall not apply to a **bona fide** technical, professional, educational, scientific, documentary, literary or artistic publication or film. It is thus unlikely that a publication or film which has any merit, will be restricted or prohibited.

Similar exemptions are to be found in the American, Canadian, German and British Laws (Van Rooyen, 1995:10).

### **PROMOTION OF RELIGIOUS HATRED**

A publication or film which promotes

hatred against the religious convictions of a section of the population of the Republic, shall be classified as XX. This restriction will not apply to a publication or film which is exempted or which amounts to a **bona fide** discussion, argument or opinion on a matter pertaining to religion, belief or conscience or to a matter of public interest.

The criterion of the "promotion of religious hatred" was adopted from Canadian and Irish laws and support for this approach was found in a recent judgement of the European Court of Human Rights.

Burns (1995:6) raised critique against this clause. She is of the opinion that if films and publications which promote racial hatred are left to criminal law, religion could also be left to criminal law. The Task Group, however, decided that it would seem more fitting to deal with religion by way of an administrative system than by way of the criminal law, which involves punishment of the accused. Religion would also seem to be a subject which could more appropriately be dealt with by community orientated committees than by lawyers (Van Rooyen, 1995:6) The author agrees with some other researches (e.g. Van Deventer & Breytenbach, 1995) that sensitivities in this area are so acute, that some form of regulation should be available.

## FINAL REMARKS

Currently there is strong resistance against the flooding of South African

markets with pornographic material. It is apparent from the many articles which are regularly published in magazines and newspapers, the petitions handed to the Task Group and even the protest marches which are taking place, that the tolerance levels of many reasonable South Africans are being transgressed. There also exists public confusion in this area, an example of which is the complaints that were lodged with the Broadcasting Monitoring and Complaints Committee against programmes like *Spektrum* and *Monitor* for broadcasting of "explicit" examples of pornography during a **debate** (*Monitor*, 13 May 1996).

Although public opinion is an important factor, it must be borne in mind that the Fundamental Rights Chapter of the Constitution protects the interests of the minority and the individual, and that majorities are no longer relevant in this respect as they will not always be able to take the right decisions. So even if a majority may oppose a fundamental right, the individual's rights enjoy preference. The main source of concern seems to be that more and more offensive material will be permitted in magazines and films. It could, however, be argued with confidence that except in so far as the X18 category is concerned, the draft Bill has substantially confirmed the present state of affairs in so far as nudity and sex are concerned in magazines such as *Hustler*, *Playboy* and *Penthouse*. Material in this category which contains more detail, would have to be sold from licensed premises; and here, the local licensing authorities, which would be

sensitive to prevailing local mores and circumstances, would play an important role. The "legalisation of pornography" would thus depend on local standards and circumstances. Although many would feel that the content of some magazines has already gone too far, it would be unreasonable for Parliament to limit the existing rights of these publishers. To pass more restrictive legislation on these and similar publications, would also amount to an unreasonable limitation on the freedom of choice of adults.

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