



Government Gazette

Staatskouerant

Vol. 473

Cape Town,
Kaapstad,

2 November 2004

No. 26950

THE PRESIDENCY

No. 1296

2 November 2004

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 18 of 2004: Films and Publications Amendment Act, 2004.

DIE PRESIDENSIE

No. 1296

2 November 2004

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 18 van 2004: Wysigingswet op Films en Publikasies, 2004.



AIDS HELPLINE: 0800-0123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

(*English text signed by the President.*)
(Assented to 28 October 2004.)

ACT

To amend the Films and Publications Act, 1996, so as to make further provision for the prohibition of child pornography; to provide anew for the designation of the Chairperson of the Review Board; to make certain textual alterations; to make further provision regarding the classification of films and publications; to provide for the registration of internet service providers; to provide for an obligation to report offences involving child pornography; and to increase penalties for offences involving child pornography; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 65 of 1996, as amended by section 1 of Act 34 of 1999

1. Section 1 of the Films and Publications Act, 1996 (hereinafter referred to as the “principal Act”) is hereby amended—

(a) by the substitution for the definition of “child pornography” of the following definition:

“child pornography’ includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years—

- (i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in, sexual conduct; or
- (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation;”;

(b) by the deletion of the definition of “degrade”;

(c) by the substitution for the definition of “distribute” of the following definition:

“‘distribute’, in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections 25(a), (b) and (c), 26(1)(a) and (b) and 28(1) and (2), includes to hand or exhibit a film or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;”;

5

10

15

20

25

ALGEMENE VERDUIDELIKENDE NOTA:

- [] Woerde in vet druk tussen vierkantige hake dui skrappings uit bestaande verordenings aan.
-
- Woerde met 'n volstreep daaronder, dui invoegings in bestaande verordenings aan.
-
-

*(Engelse teks deur die President geteken.)
(Goedgekeur op 28 Oktober 2004.)*

WET

Tot wysiging van die Wet op Films en Publikasies, 1996, ten einde verder voorsiening te maak vir die verbieding van kinderpornografie; opnuut voorsiening te maak vir die aanwysing van die Voorsitter van die Hersieningsraad; sekere teksveranderings aan te bring; verder voorsiening te maak aangaande die klassifisering van films en publikasies; voorsiening te maak vir die registrasie van Internetdiensverskaffers; voorsiening te maak vir 'n verpligting om misdrywe wat kinderpornografie behels, aan te meld; en strawwe te verhoog vir misdrywe wat kinderpornografie behels; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

DAAR WORD BEPAAL deur die Parlement van die Republiek van Suid-Afrika, soos volg:

Wysiging van artikel 1 van Wet 65 van 1996, soos gewysig deur artikel 1 van Wet 34 van 1999

1. Artikel 1 van die Wet op Films en Publikasies, 1996 (hierna die "Hoofwet" genoem), word hierby gewysig—
- (a) deur voor die omskrywing van "film" die volgende omskrywing in te voeg:
“besit”, met betrekking tot 'n film of publikasie, sonder om afbreuk te doen aan die gewone betekenis van die woord, ook om in of op 'n rekenaar of rekenaarstelsel of rekenaardatabergingsmedium te hou of te berg, en ook om bewaring, beheer of toesig namens 'n ander persoon te hê;”;
- (b) deur na die omskrywing van "film" die volgende omskrywings in te voeg:
“Internet-adres” 'n webwerf, 'n kennisgivingborddiens, 'n Internet-kletskamer of -nuusgroep of enige ander Internet- of gedeelde netwerkprotokoladres;
'Internetdiensverskaffer' enige persoon wat 'n besigheid bedryf wat op enige wyse toegang tot die Internet verskaf;”;
- (c) deur die omskrywing van "kinderpornografie" deur die volgende omskrywing te vervang:
“kinderpornografie' ook enige beeld, ongeag hoe dit geskep is, of enige beskrywing van 'n persoon, werklik of nageboots, wat onder die ouderdom van 18 jaar is, of wat sodanig uitgebeeld of beskryf word, en wat—
(i) besig is met seksuele gedrag;
(ii) deelneem aan, of 'n ander persoon help om deel te neem aan seksuele gedrag; of
(iii) die liggaam, of dele van die liggaam, van sodanige persoon vertoon of beskryf op 'n wyse of in omstandighede wat, binne die konteks,

Act No. 18, 2004 FILMS AND PUBLICATIONS AMENDMENT ACT, 2004

- (d) by the insertion after the definition of "film" of the following definitions:
"Internet address" means a website, a bulletin board service, an Internet chat-room or newsgroup or any other Internet or shared network protocol address;
'Internet service provider' means any person who carries on the business of providing access to the Internet by any means;" 5
- (e) by the insertion, after the definition of "Minister" of the following definition:
"possession", in relation to a film or publication, without derogating from its ordinary meaning, includes keeping or storing in or on a computer or computer system or computer data storage medium and also having custody, control or supervision on behalf of another person;" 10
- (f) by the insertion after the definition of "Review Board" of the following definition:
"sexual conduct" includes—
 (i) male genitals in a state of arousal or stimulation; 15
 (ii) the undue display of genitals or of the anal region;
 (iii) masturbation;
 (iv) bestiality;
 (v) sexual intercourse, whether real or simulated, including anal sexual intercourse; 20
 (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
 (vii) the penetration of a vagina or anus with any object; 25
 (viii) oral genital contact; or
 (ix) oral anal contact;".

Amendment of section 4 of Act 65 of 1996**2. Section 4 of the principal Act is hereby amended—**

- (a) by the substitution for subsection (1) of the following subsection: 30
 "(1) The Board shall consist of—
 (a) a [chief executive officer] chairperson and a deputy chairperson, appointed by the Minister as non-executive members; and
 (b) the chief executive officer and such number of senior personnel, chief examiners and examiners as the Minister may determine having regard to the likely volume of applications and complaints which will be submitted to the Board in terms of this Act.";
- (b) by the substitution for subsection (2) of the following subsection: 35
 "(2) [The chief executive officer shall be the chairperson of the Board] In the absence of the chairperson the deputy chairperson shall act as chairperson.";
- (c) by the insertion after subsection (2) of the following subsection: 40
 "(2A) The chairperson or deputy chairperson and such number of the persons contemplated in subsection (1)(b) as is equal to one half of the total number of such persons shall constitute a quorum of the Board."; and 45
- (d) by the substitution for subsection (4) of the following subsection:
 "(4) Decisions of the Board and the executive committee shall be taken by a majority of votes, and in the case of an equality of votes the chairperson of the [Board] meeting shall have a casting vote.".

Amendment of section 5 of Act 65 of 1996

50

3. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) A member of the Review Board designated by the [President] Minister shall act as chairperson of the Review Board during the chairperson's absence.". 85

- neerkom op seksuele uitbuiting, of op so 'n wyse dat dit vir die |
doeleindes van seksuele uitbuiting gebruik kan word;”;
- (d) deur na die omskrywing van “rekenaarprogrammatuur” die volgende omskrywing in te voeg:
“‘seksuele gedrag’ ook—
(i) manlike geslagsorgane in 'n toestand van opwekking of stimulering;
(ii) die onbehoorlike vertoon van geslagsorgane of van die anale gebied;
(iii) masturbasie;
(iv) bestialiteit;
(v) geslagsverkeer, of dit werklik of nageboots is, met inbegrip van anale geslagsverkeer;
(vi) seksuele kontak wat die regstreekse of onregstreekse streling of aanraking behels van die intieme dele van 'n liggaam, met inbegrip van die borste, met of sonder enige voorwerp;
(vii) die penetratie van 'n vagina of anus met enige voorwerp;
(viii) mondeline genitale kontak; of
(ix) mondeline anale kontak;”;
- (e) deur die omskrywing van “verneder” te skrap; en
- (f) deur die omskrywing van “versprei” deur die volgende omskrywing te vervang:
“‘versprei’, met betrekking tot 'n film of 'n publikasie, sonder om afbreuk te doen aan die gewone betekenis van die woord, ook verkoop, verhuur of aanbied of hou vir die doeleindes van verkoop of verhuring en, by die toepassing van artikels 25(a), (b) en (c), 26(1)(a) en (b) en 28(1) en (2), ook 'n film of publikasie oorhandig of vertoon aan 'n persoon onder die ouderdom van 18 jaar, en ook versuim om redelike stappe te doen om toegang daartoe deur so 'n persoon te verhoed;”.

Wysiging van artikel 4 van Wet 65 van 1996

30

2. Artikel 4 van die Hoofwet word hierby gewysig—

- (a) deur subartikel (1) deur die volgende subartikel te vervang:
“(1) Die Raad bestaan uit—
(a) 'n [hoof- uitvoerende beamppte] voorsitter en 'n adjunkvoorsitter, deur die Minister as nie-uitvoerende lede aangestel; en
(b) die hoof- uitvoerende beamppte en die getal senior personeellede, hoofondersoekers en ondersoekers wat die Minister bepaal met inagneming van die waarskynlike hoeveelheid aansoeke en besware wat ingevolge hierdie Wet aan die Raad voorgelê gaan word.”;
- (b) deur subartikel (2) deur die volgende subartikel te vervang:
“(2) [Die hoof- uitvoerende beamppte is die voorsitter van die Raad] In die afwesigheid van die voorsitter tree die adjunkvoorsitter as voorsitter op.”;
- (c) deur na subartikel (2) die volgende subartikel in te voeg:
“(2A) Die voorsitter of adjunkvoorsitter en die getal persone wat gelykstaan aan die helfte van die totale getal persone beoog in subartikel (1)(b) maak 'n kworum van die Raad uit.”; en
- (d) deur subartikel (4) deur die volgende subartikel te vervang:
“(4) Besluite van die Raad en uitvoerende komitee word by meerderheid van stemme geneem, en in die geval van 'n staking van stemme het die voorsitter van die [Raad] vergadering 'n beslissende stem.”.

Wysiging van artikel 5 van Wet 65 van 1996**3. Artikel 5 van die Hoofwet word hierby gewysig deur subartikel (2) deur die volgende subartikel te vervang:**

55

“(2) 'n Lid van die Hersieningsraad deur die [President] Minister aangewys, tree gedurende die afwesigheid van die voorsitter as voorsitter van die Hersieningsraad op.”.

Amendment of section 14 of Act 65 of 1996

4. Section 14 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) As soon as practicable after the end of each financial year the chairperson of the Board shall, from information supplied to [it] the Board by the chief executive officer and the chairperson of the Review Board, compile a report on all the activities of the Board and Review Board during that financial year, and on the financial position of the Board and Review Board as at the end of that financial year.”.

5

Amendment of section 15 of Act 65 of 1996

10

5. Section 15 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

“(a) shall, whenever it becomes necessary for the performance of the functions [the exercise of the powers or the carrying out of the duties] of the Board or the executive committee, convene a meeting of the Board or the executive committee, as the case may be: Provided that a meeting of the Board may only be convened at the request of, or in consultation with, the chairperson of the Board.”.

15

Substitution of section 17 of Act 65 of 1996

6. The following section is hereby substituted for section 17 of the principal Act:

“Classification of publications

20

17. (1) A classification committee shall examine a publication referred to it and shall, with reference to Schedules 1, 2, 3 or 4, read with Schedule 5, or with reference to Schedule 10—

(a) (i) classify the publication as—

(aa) XX, if it falls within either Schedule 1 or 10; or
(bb) X18, if it falls within Schedule 2; or

(ii) where it is necessary to protect children from disturbing or harmful materials, determine that the publication only be distributed to persons of, or above, a specified age and may impose the condition that it only be distributed in a sealed and opaque wrapper which bears a distinct notice of the specified age restriction; and

(b) inform the chief executive officer of—

(i) its decision;

(ii) the reasons therefor;

(iii) the classification, if any;

(iv) in the case of an XX classification based on Schedule 1, of the particular item of Schedule 1 upon which that decision is based; and

(v) in the case of an age restriction, of the conditions imposed.

25

(2) The chief executive officer shall—

(a) where a publication submitted in terms of section 16(1) has been classified as X18 or XX in terms of a decision of the Board, cause that decision to be published in the *Gazette*;

(b) where a publication submitted in terms of section 16(2) has been reclassified as X18 or XX or freed from all restrictive conditions, including an X18 or XX classification, which was published in the *Gazette*, cause the latest classification to be published in the *Gazette* and, with reference to the previous classification, indicate that it has been substituted or withdrawn, as the case may be.

30

35

45

50

(3) Where a particular issue of a periodical publication has been classified as X18 and subsequent issues are likely to contain material which would, upon submission, cause such issues to be classified as X18, the chief executive officer shall, with the consent of the publisher, classify such subsequent issues as X18.

55

Wysiging van artikel 14 van Wet 65 van 1996

4. Artikel 14 van die Hoofwet word hierby gewysig deur subartikel (1) deur die volgende subartikel te vervang:

“(1) Die voorsitter van die Raad moet so gou as moontlik na die einde van elke boekjaar uit inligting wat aan [hom] die Raad deur die hoof- uitvoerende beampete en die voorsitter van die Hersieningsraad verstrek word, ’n verslag saamstel oor alle aktiwiteite van die Raad en Hersieningsraad gedurende daardie boekjaar, en oor die finansiële stand van die Raad en Hersieningsraad soos aan die einde van daardie boekjaar.”.

5

Wysiging van artikel 15 van Wet 65 van 1996

10

5. Artikel 15 van die Hoofwet word hierby gewysig deur paragraaf (a) deur die volgende paragraaf te vervang:

“(a) moet wanneer dit nodig is vir die verrigting van die werksaamhede [, die uitvoering van die bevoegdhede of die uitvoering van die pligte] van die Raad of die uitvoerende komitee ’n vergadering van die Raad of die uitvoerende komitee, na gelang van die geval, belê; Met dien verstande dat ’n vergadering van die Raad slegs op versoek van, of in oorleg met, die voorsitter van die Raad belê kan word;”.

15

Vervanging van artikel 17 van Wet 65 van 1996

6. Artikel 17 van die Hoofwet word hierby deur die volgende artikel vervang: 20

“Klassifisering van publikasies

17. (1) ’n Klassifikasiekomitee moet ’n publikasie wat na hom verwys is, ondersoek en moet, met verwysing na Bylae 1, 2, 3 of 4, saamgelees met Bylae 5, of met verwysing na Bylae 10—

(a) (i) die publikasie klassifiseer as—

(aa) XX, indien die publikasie binne óf Bylae 1 óf Bylae 10 val; of

(bb) X18, indien dit binne Bylae 2 val; of

(ii) waar dit nodig is om kinders te beskerm teen ontstellende of skadelike materiaal, bepaal dat die publikasie slegs versprei

mag word aan persone van, of bokant, ’n bepaalde ouderdom en kan die voorwaarde oplê dat die publikasie slegs versprei word in ’n verseêlde en ondeursigtige omhulsel wat ’n duidelike kennisgewing van die bepaalde ouderdomsbeperking dra; en

(b) die hoof- uitvoerende beampete inlig omrent—

(i) sy besluit;

(ii) die redes daarvoor;

(iii) die klassifikasie, indien daar is;

(iv) in die geval van ’n XX-klassifikasie gebaseer op Bylae 1, die bepaalde item van Bylae 1 waarop daardie besluit gebaseer is; en

(v) in die geval van ’n ouderdomsbeperking, die voorwaardes wat opgelê is.

(2) Die hoof- uitvoerende beampete moet—

(a) waar ’n publikasie voorgelê ingevolge artikel 16(1) ingevolge ’n besluit van die Raad as X18 of XX geklassifiseer is, daardie besluit in die *Staatskoerant* laat publiseer;

(b) waar ’n publikasie voorgelê ingevolge artikel 16(2) as X18 of XX hergeklassifiseer is of vrygemaak is van alle beperkende voorwaardes,

met inbegrip van ’n X18- of XX-klassifikasie, wat in die *Staatskoerant* gepubliseer is, die jongste klassifikasie in die *Staatskoerant* laat publiseer en, wat betref die vorige klassifikasie, aandui dat dit vervang of teruggetrek is, na gelang van die geval.

(3) Waar ’n bepaalde uitgawe van ’n periodiese publikasie as X18 geklassifiseer is en daaropvolgende uitgawes waarskynlik materiaal sal

25

30

35

40

45

50

55

(4) Any person who intends to publish, distribute or exhibit in public any publication containing a visual presentation or description referred to in Schedule 1 or 2, shall submit such publication for classification, in the manner prescribed by regulations made under section 31(2), prior to its distribution or exhibition.”.

5

Amendment of section 18 of Act 65 of 1996

7. Section 18 of the principal Act is hereby amended—

(a) by the insertion, after subsection (1), of the following subsection:

“(1A) Any person who intends to distribute or exhibit any film—

(a) shall register with the Board as a distributor or exhibitor, or a distributor and exhibitor, of films; and

(b) shall submit for classification any film which is intended for distribution or exhibition in the Republic and which has not been classified or approved in terms of this Act or in terms of the Publications Act, 1974 (Act No. 42 of 1974),

in the manner prescribed by regulations made in terms of section 31(2).”; and

(b) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

“(a) The classification committee shall examine a film referred to it in terms of subsection (2) and shall, with reference to Schedules 6, 7 and 8, read with Schedules 9 and 10, classify that film—

(i) as XX, if it falls under Schedule 6 or 10;

(ii) as X18, if it falls under Schedule 7;

(iii) by imposing any restriction in accordance with Schedule 8;

(iv) as a film which may be distributed or exhibited only after the prescribed age restriction and consumer information, where applicable, have been clearly and conspicuously displayed on all materials advertising that film or, in the case of a home entertainment product, on the cover or packaging of that film; or

(v) as a film without any restrictions if suitable for all ages.”.

10

15

25

30

Amendment of section 20 of Act 65 of 1996, as amended by section 6 of Act 34 of 1999

8. Section 20 of the principal Act is hereby amended by the deletion, in subsection (3), of the proviso.

Amendment of section 25 of Act 65 of 1996

9. Section 25 of the principal Act is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) distributes any publication in conflict with any condition imposed on such a publication in terms of section 17;”.

Amendment of section 26 of Act 65 of 1996

10. Section 26 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) exhibits in public or distributes any film which has not been classified by the Board [, or which has been classified as XX in terms of a decision of the Board which has been published in the Gazette];”;

50

(b) by the insertion in subsection (1) after paragraph (a) of the following paragraph:

“(aA) exhibits in public or distributes or broadcasts any film which has been classified as XX in accordance with Schedule 6 or 10;”;

55

bevat wat, by voorlegging, sal veroorsaak dat sodanige uitgawes as X18 geklassifiseer sal word, moet die hoof- uitvoerende beampete, met die instemming van die uitgewer, sodanige daaropvolgende uitgawes as X18 klassifiseer.

(4) Iemand wat voornemens is om enige publikasie wat 'n visuele aanbieding of beskrywing bedoel in Bylae 1 of 2 bevat te publiseer, te versprei of in die openbaar te vertoon, moet sodanige publikasie voor die verspreiding of uitstalling daarvan vir klassifikasie voorlê op die wyse voorgeskryf deur regulasies wat kragtens artikel 31(2) uitgevaardig is.”.

Wysiging van artikel 18 van Wet 65 van 1996

10

7. Artikel 18 van die Hoofwet word hierby gewysig—

(a) deur die invoeging na subartikel (1) van die volgende subartikel:

“(1A) Enigiemand wat voornemens is om enige film te versprei of te vertoon—

(a) moet by die Raad as 'n verspreider of vertoner, of 'n verspreider en vertoner, van films regstreer; en

(b) moet enige film wat vir verspreiding of vertoning in die Republiek bestem word en wat nog nie ingevolge hierdie Wet of ingevolge die Wet op Publikasies, 1974 (Wet No. 42 van 1974), geklassifiseer of goedgekeur is nie, vir klassifikasie voorlê,
op die wyse voorgeskryf in die regulasies wat ingevolge artikel 31(2) uitgevaardig is.”; en

(b) deur in subartikel (4) paragraaf (a) deur die volgende paragraaf te vervang:
“(a) Die klassifikasiekomitee moet 'n film wat ingevolge subartikel

(2) na hom verwys is, ondersoek en moet, met verwysing na Bylaes 6, 7 en 8, saamgelees met Bylaes 9 en 10, daardie film klassifiseer—

(i) as XX, indien die film onder Bylae 6 of 10 val;

(ii) as X18, indien die film onder Bylae 7 val;

(iii) deur enige beperking ooreenkomsdig Bylae 8 op te lê;
(iv) as 'n film wat versprei of vertoon kan word slegs nadat die voorgeskrewe ouderdomsbeperking en verbruikersinligting, waar toepaslik, duidelik en opsigtelik vertoon is op alle materiaal wat daardie film adverteer of, in die geval van 'n tuisvermaakproduk, op die omslag of verpakking van daardie film; of

(v) as 'n film sonder enige beperkings, indien dit vir alle ouerdomme geskik is.”.

Wysiging van artikel 20 van Wet 65 van 1996, soos gewysig deur artikel 6 van Wet 34 van 1999

8. Artikel 20 van die Hoofwet word hierby gewysig deur in subartikel (3) die voorbehoudsbepaling te skrap.

40

Wysiging van artikel 25 van Wet 65 van 1996

9. Artikel 25 van die Hoofwet word hierby gewysig deur paragraaf (c) deur die volgende paragraaf te vervang:

“(c) enige publikasie versprei in stryd met enige voorwaarde wat so 'n publikasie ingevolge artikel 17 opgelê is.”.

45

Wysiging van artikel 26 van Wet 65 van 1996

10. Artikel 26 van die Hoofwet word hierby gewysig—

(a) deur in subartikel (1) paragraaf (a) deur die volgende paragraaf te vervang:

“(a) enige film wat nie deur die Raad geklassifiseer is nie [, of as XX geklassifiseer is ingevolge 'n beslissing van die Raad wat in die Staatskoerant gepubliseer is,] in die openbaar vertoon of versprei;”;

(b) deur in subartikel (1) na paragraaf (a) die volgende paragraaf in te voeg:

“(aA) enige film wat ooreenkomsdig Bylae 6 of 10 as XX geklassifiseer is in die openbaar vertoon of versprei of uitsaai;”;

5

15

20

25

30

35

Act No. 18, 2004 FILMS AND PUBLICATIONS AMENDMENT ACT, 2004

(c) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) exhibits in public or distributes or broadcasts any film which has been classified as X18 contrary to the provisions of section 24;”; and

(d) by the substitution in subsection (1) for paragraph (e) of the following paragraph:

“(e) without the approval of the chief executive officer, exhibits in public during the same screening session, or distributes on the same film, an advertisement or a trailer of a film with a more restrictive classification than the featured film;”.

5

10

Amendment of section 27 of Act 65 of 1996, as amended by section 8 of Act 34 of 1999

11. Section 27 of the Principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) (a) Any person shall be guilty of an offence if he or she—

- (i) is in possession of;
- (ii) creates or produces or in any way contributes to, or assists in, the creation or production of;
- (iii) imports or in any way takes steps to procure, obtain or access; or
- (iv) knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed,

a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.

20

25

(b) Paragraph (a) does not apply to a person who is in possession of a film or publication containing child pornography if such possession is necessary for the performance of any function in terms of this Act.”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) (a) A person shall be guilty of an offence if he or she, having knowledge of the commission of an offence under subsection (1) or having reason to suspect that such an offence has been or is being committed—

- (i) fails to report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; or
- (ii) fails to furnish, at the request of an official of the South African Police Service, all particulars of such knowledge or suspicion.

35

(b) No prosecution under this subsection shall be instituted without the written authority of the National Director of Public Prosecutions.”;

40

(c) by the substitution for subsection (3) of the following subsection:

“(3) Any person who has under her or his control any material referred to in Schedule 1, 2, 6 or 7 and who fails to take all reasonable steps to prevent access to such materials by a person under the age of 18 years shall be guilty of an offence.”; and

45

(d) by the addition of the following subsection:

“(4) Subject to Schedule 5 or 9, as the case may be, the Board shall refer to the South African Police Service for prosecution any film or publication submitted to it in terms of this Act if it contains child pornography.”.

50

Insertion of section 27A in Act 65 of 1996

12. The following section is hereby inserted in the principal Act after section 27:

“Registration and other obligations of Internet service providers

27A. (1) Every Internet service provider shall—

- (a) register with the Board in the manner prescribed by regulations made under this Act; and
- (b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.

55

- (c) deur in subartikel (1) paragraaf (b) deur die volgende paragraaf te vervang:
"(b) enige film wat as X18 geklassifiseer is strydig met die bepalings van artikel 24 in die openbaar vertoon of versprei of uitsaai;"; en
- (d) deur in subartikel (1) paragraaf (e) deur die volgende paragraaf te vervang:
"(e) sonder die goedkeuring van die hoof- uitvoerende beampete 'n advertensie of 'n lokprent van 'n film met 'n meer beperkende klassifikasie as die hooffilm gedurende dieselfde vertoningsessie in die openbaar vertoon, of op dieselfde film versprei;".

Wysiging van artikel 27 van Wet 65 van 1966, soos gewysig deur artikel 8 van Wet 34 van 1999

10

11. Artikel 27 van die Hoofwet word hierby gewysig—

- (a) deur subartikel (1) deur die volgende subartikel te vervang:
- "(1) (a) Enigiemand is aan 'n misdryf skuldig indien hy of sy—
- (i) in besit is van 'n film of publikasie wat kinderpornografie bevat of wat kinderpornografie of die seksuele uitbuiting van kinders aanraai, adverteer of bevorder;
- (ii) sodanige film of publikasie skep of vervaardig of op enige wyse bydra tot, of bystand verleen by, die skepping of vervaardig daarvan;
- (iii) sodanige film of publikasie invoer of op enige wyse stappe doen om dit te verkry of te bekom of toegang daartoe te verkry;
- (iv) sodanige film of publikasie bewustelik uitvoer, uitsaai of op enige wyse versprei of laat uitvoer, uitsaai of versprei.
- (b) Paragraaf (a) is nie van toepassing op iemand wat in besit is van 'n film of publikasie wat kinderpornografie bevat nie indien sodanige besit nodig is vir die uitvoering van enige funksie ingevolge hierdie Wet."
- (b) deur subartikel (2) deur die volgende subartikel te vervang:
- "(2) (a) Iemand is aan 'n misdryf skuldig indien hy of sy kennis dra van die pleging van 'n misdryf kragtens subartikel (1) of rede het om te vermoed dat so 'n misdryf gepleeg is of gepleeg word en—
- (i) versuum om sodanige kennis of vermoede so gou as moontlik aan 'n polisiebeampte van die Suid-Afrikaanse Polisiediens te rapporteer; of
- (ii) versuum om op versoek van 'n beampte van die Suid-Afrikaanse Polisiediens alle besonderhede van sodanige kennis of vermoede te voorsien.
- (b) Geen vervolging kragtens hierdie subartikel mag ingestel word sonder die skriftelike magtiging van die Nasionale Direkteur van Openbare Vervolgings nie."
- (c) deur subartikel (3) deur die volgende subartikel te vervang:
- "(3) Enigiemand wat enige materiaal bedoel in Bylae 1, 2, 6 of 7 onder sy of haar beheer het en wat versuum om alle redelike stappe te doen om toegang tot sodanige materiaal deur 'n persoon onder die ouderdom van 18 jaar te verhoed, is aan 'n misdryf skuldig."; en
- (d) deur die volgende subartikel by te voeg:
- "(4) Behoudens Bylae 5 of 9, na gelang van die gevval, moet die Raad enige film of publikasie wat ingevolge hierdie Wet aan hom voorgelê is, vir vervolging na die Suid-Afrikaanse Polisiediens verwys indien die film of publikasie kinderpornografie bevat."

Invoeging van artikel 27A in Wet 65 van 1996

50

12. Die volgende artikel word hierby na artikel 27 in die Hoofwet ingevoeg:

"Registrasie en ander verpligtinge van Internetdiensverskaffers

27A. (1) Elke Internetdiensverskaffer moet—

- (a) by die Raad regstreer op die wyse voorgeskryf deur regulasies kragtens hierdie Wet uitgevaardig; en
- (b) alle redelike stappe doen om te verhoed dat hul dienste gebruik word om vir kinderpornografie as gasheer op te tree of om dit te versprei.

55

Act No. 18, 2004 FILMS AND PUBLICATIONS AMENDMENT ACT, 2004

- (2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall—
 (a) take all reasonable steps to prevent access to the child pornography by any person;
 (b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and
 (c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.
- (3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.
- (4) Any person who fails to comply with the provisions of this section shall be guilty of an offence.”

5

10

15

Amendment of section 28 of Act 65 of 1996

- 13.** Section 28 of the principal Act is hereby amended by the deletion of subsection (3).

20

Amendment of section 29 of Act 65 of 1996

- 14.** Section 29 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Any person who knowingly broadcasts or distributes a publication which, judged within context—”.

Amendment of section 30 of Act 65 of 1996

25

- 15.** Section 30 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

“(1) Any person found guilty of a contravention of section 25(a), (b) or (c), 26(1)(a), (aA), (b) or (f), 26(4), 27(2) or (3), 27A, 28(1) or (2) or 29 may be sentenced to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”;

- (b) by the insertion after subsection (1) of the following subsection:

“(1A) Any person found guilty of a contravention of section 27(1) may be sentenced to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.”;

- (c) by the substitution for subsection (3) of the following subsection:

“(3) Any person found guilty of a contravention of any other section of this Act may be sentenced to a fine or to imprisonment for a period not exceeding six months.”; and

- (d) by the addition of the following subsection:

“(4) (a) If any person who has contravened or failed to comply with section 26(1)(a), (aA), (b), (c), (d), (2) or (3) or 27A(1) agrees to abide by a decision of the executive committee of the Board and deposits with the Board such sum as the executive committee of the Board may determine but not exceeding the greater of two thousand rand or twice the prescribed classification costs on each such contravention or failure to comply, the executive committee of the Board may, after conducting an enquiry, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited.

35

40

45

50

(b) There shall be a right of appeal to the Minister from any determination or order of the executive committee of the Board under paragraph (a), as long as that right is exercised within a period of three months from the date of such determination or order.

- (2) Indien 'n Internetdiensverskaffer kennis dra dat sy dienste gebruik word om vir kinderpornografie as gasheer op te tree of om dit te versprei, moet sodanige Internetdiensverskaffer—
- (a) alle redelike stappe doen om toegang tot die kinderpornografie deur enige persoon te verhoed;
 - (b) die teenwoordigheid daarvan, asook die besonderhede van die persoon wat sodanige Internet-adres onderhou of as gasheer daarvoor optree of dit versprei of op enige wyse daartoe bydra, aan 'n polisiebeampte van die Suid-Afrikaanse Polisiediens rapporteer; en
 - (c) alle redelike stappe doen om sodanige bewyse te bewaar met die oog op ondersoek en vervolging deur die toepaslike owerhede.
- (3) 'n Internetdiensverskaffer moet, op versoek deur die Suid-Afrikaanse Polisiediens, die besonderhede voorsien van gebruikers wat toegang tot 'n Internet-adres wat kinderpornografie bevat, verkry het of gepoog het om toegang daartoe te verkry.
- (4) Enigiemand wat versuim om aan die bepalings van hierdie artikel te voldoen, is aan 'n misdryf skuldig.”.

Wysiging van artikel 28 van Wet 65 van 1996

13. Artikel 28 van die Hoofwet word hierby gewysig deur subartikel (3) te skrap.

Wysiging van artikel 29 van Wet 65 van 1996

20

14. Artikel 29 van die Hoofwet word hierby gewysig deur in subartikel (1) die woorde wat paragraaf (a) voorafgaan deur die volgende woorde te vervang:

“Enigiemand wat wetens 'n publikasie uitsaai of versprei wat, binne verband beoordeel—”.

Wysiging van artikel 30 van Wet 65 van 1996

25

15. Artikel 30 van die Hoofwet word hierby gewysig—

(a) deur subartikel (1) deur die volgende subartikel te vervang:

“(1) Enigiemand wat skuldig bevind word aan 'n oortreding van artikel 25(a), (b) of (c), 26(1)(a), (aA), (b) of (f), 26(4), 27(2) of (3), 27A, 28(1) of (2) of 29 is strafbaar met 'n boete of met gevangenisstraf vir 'n tydperk van hoogstens vyf jaar of met beide 'n boete en sodanige gevangenisstraf.”;

(b) deur na subartikel (1) die volgende subartikel in te voeg:

“(1A) Enigiemand wat skuldig bevind word aan 'n oortreding van artikel 27(1) is strafbaar met 'n boete of met gevangenisstraf vir 'n tydperk van hoogstens tien jaar of met beide 'n boete en sodanige gevangenisstraf.”;

(c) deur subartikel (3) deur die volgende subartikel te vervang:

“(3) Enigiemand wat skuldig bevind word aan 'n oortreding van enige ander artikel van hierdie Wet is strafbaar met 'n boete of met gevangenisstraf vir 'n tydperk van hoogstens ses maande.”; en

(d) deur die volgende subartikel by te voeg:

“(4)(a) Indien enigiemand wat artikel 26(1)(a), (aA), (b), (c), (d), (2) of (3) of 27A(1) oortree het of versuim het om daaraan te voldoen, toestem om te berus by 'n besluit van die uitvoerende komitee van die Raad en by die Raad die som deponeer wat die uitvoerende komitee van die Raad bepaal, maar wat nie meer is nie as twee duisend rand of tweemaal die voorgeskrewe klassifikasiekoste op elk van sodanige oortredings of versuim om te voldoen, kan die uitvoerende komitee van die Raad, nadat die komitee 'n ondersoek ingestel het, die saak summier bepaal en kan hy, sonder regsverrigtinge, by wyse van straf die verbeuring van die hele of enige deel van die bedrag aldus gedeponeer, beveel.

(b) Daar moet 'n reg tot appèl wees na die Minister teen enige bepaling of bevel van die uitvoerende komitee van die Raad kragtens paragraaf (a), solank daardie reg uitgeoefen word binne 'n tydperk van drie maande vanaf die datum van sodanige bepaling of bevel.

Act No. 18, 2004 FILMS AND PUBLICATIONS AMENDMENT ACT, 2004

(c) The imposition of a penalty under paragraph (a) shall not be regarded as a conviction in respect of a criminal offence but no prosecution for that offence shall thereafter be competent.”.

Insertion of sections 30A and 30B in Act 65 of 1996

16. The following sections are hereby inserted in the principal Act after section 30: 5

“Extra-territorial jurisdiction

30A. (a) Any citizen or permanent resident of the Republic who commits any act outside the Republic which would have constituted an offence under this Act had it been committed within the Republic, shall be guilty of the offence which would have been so constituted and liable to the penalty prescribed for such offence in this Act. 10

(b) No prosecution under this section shall be instituted without the written consent of a Director of Public Prosecutions.

(c) For the purpose of this section, any court in the Republic and any Director of Public Prosecutions shall have jurisdiction. 15

Presumptions and proof

30B. (1) If in any prosecution in terms of this Act it is proved that—

(a) any message or communication, including a visual presentation, was placed on any distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that it was so placed by the registered subscriber or user; 20

(b) access was gained or attempted to be gained to child pornography on a distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that such access was gained or attempted to be gained by the registered subscriber or user. 25

(2) If in any prosecution it is necessary to prove that—

(a) any application for registration or classification in terms of this Act has or has not been made to the Board; or

(b) any publication or film has or has not been submitted to the Board in terms of this Act; or

(c) any decision or classification has or has not been made or that any restriction or condition has or has not been imposed by the Board in terms of this Act; or

(d) a certificate of exemption has or has not been issued, granted, withdrawn, cancelled or suspended by the Board; or

(e) a decision or classification of the Board has or has not been suspended by the Review Board,

a certificate, issued under the authority of the executive committee of the Board, shall, upon its mere production, be *prima facie* proof of such fact.”. 30

Amendment of Schedule 1 to Act 65 of 1996

45

17. Schedule 1 to the principal Act is hereby amended—

(a) by the deletion of items (1)(a) and (2);

(b) by the substitution for item (1)(c) of the following subitem:

“(c) bestiality, incest or rape.”.

(c) by the the substitution for item (1)(d) of the following subitem: 50

(c) Die oplê van 'n straf kragtens paragraaf (a) mag nie beskou word as 'n skuldigbevinding ten opsigte van 'n kriminele oortreding nie, maar geen vervolging vir daardie oortreding sal daarna regsbevoeg wees nie.”.

Invoeging van artikels 30A en 30B in Wet 65 van 1996

16. Die volgende artikels word hierby na artikel 30 in die Hoofwet ingevoeg:

5

“Ekstra-territoriale jurisdiksie”

30A. (a) Enige burger of permanente inwoner van die Republiek wat enige daad buite die Republiek pleeg wat 'n misdryf kragtens hierdie Wet sou uitgemaak het indien daardie daad binne die Republiek gepleeg is, is skuldig aan die misdryf wat aldus uitgemaak sou gewees het en strafbaar met die straf wat vir sodanige misdryf in hierdie Wet voorgeskryf word.

10

(b) Geen vervolging kragtens hierdie artikel mag ingestel word sonder die skriftelike instemming van 'n Direkteur van Openbare Vervolgings nie.

(c) By die toepassing van hierdie artikel het enige hof in die Republiek en enige Direkteur van Openbare Vervolgings jurisdiksie.

15

Vermoedens en bewyse

30B. (1) Indien daar in enige vervolging ingevolge hierdie Wet bewys word dat—

(a) enige boodskap of kommunikasie, met inbegrip van 'n visuele aanbieding, op enige verspreide netwerk, met inbegrip van die Internet, geplaas is deur middel van die toegang wat aan 'n geregistreerde intekenaar of gebruiker verskaf of verleen word, word daar vermoed, behoudens teenbewys wat redelike twyfel veroorsaak, dat dit aldus deur die geregistreerde intekenaar of gebruiker geplaas is;

20

(b) toegang verkry is of dat daar gepoog is om toegang te verkry tot kinderpornografie op 'n verspreide netwerk, met inbegrip van die Internet, deur middel van die toegang wat aan 'n geregistreerde intekenaar of gebruiker verskaf of verleen word, word daar vermoed, behoudens teenbewys wat redelike twyfel veroorsaak, dat die geregistreerde intekenaar of gebruiker sodanige toegang verkry het of gepoog het om dit te verkry.

25

(2) Indien dit tydens enige vervolging nodig is om te bewys dat—

(a) enige aansoek om registrasie of klassifikasie ingevolge hierdie Wet by die Raad gedoen is of nie gedoen is nie; of

30

(b) enige publikasie of film ingevolge hierdie Wet aan die Raad voorgelê is of nie voorgelê is nie; of

35

(c) die Raad ingevolge hierdie Wet enige beslissing of klassifikasie gemaak het of nie gemaak het nie of dat hy enige beperking of voorwaarde opgelê het of nie opgelê het nie; of

40

(d) 'n sertifikaat van vrystelling deur die Raad uitgereik, toegestaan, ingetrek, gekanselleer of opgeskort is of nie uitgereik, toegestaan, ingetrek, gekanselleer of opgeskort is nie; of

(e) 'n beslissing of klassifikasie van die Raad deur die Hersieningsraad opgeskort is of nie opgeskort is nie,

moet 'n sertifikaat wat op gesag van die uitvoerende komitee van die Raad uitgereik is, by blote voorlegging daarvan, as *prima facie*-bewys van sodanige feit dien.”.

45

Wysiging van Bylae 1 by Wet 65 van 1996

17. Bylae 1 by die Hoofwet word hierby gewysig—

(a) deur items (1)(a) en (2) te skrap;

50

(b) deur item (1)(c) deur die volgende subitem te vervang:

“(c) bestialiteit, bloedskande of verkragting;”; en

(c) deur item (1)(d) deur die volgende subitem te vervang:

"(d) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or".

Amendment of Schedule 2 to Act 65 of 1996

18. Schedule 2 to the principal Act is hereby amended by the substitution for item (2) of the following item: 5

"(2) it describes predominantly and explicitly any or all of the acts mentioned in Schedule 1 or item (1)."

Substitution of Schedule 3 to Act 65 of 1996

19. The following Schedule is hereby substituted for Schedule 3 to the principal Act: 10

“SCHE

AGE RESTRICTIONS FOR PUBLICATIONS

A classification committee or the Review Board may impose any or both of the following conditions on the distribution of a publication if, judged within context, it is necessary to protect children in the relevant age group against harmful or disturbing material in the publication: 15

- (a) 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;
- (b) that it shall only be distributed in a sealed and, if necessary, opaque wrapper which shall also, if applicable, bear the notice referred to in paragraph (a).".

15

20

Amendment of Schedule 6 to Act 65 of 1996

20. Schedule 6 to the principal Act is hereby amended—

- (a) by the deletion of item (1);
- (b) by the substitution for item (2) of the following item:
"(2) bestiality, incest or rape;"
- (c) by the substitution for item (3) of the following item:
"(3) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm;"; and
- (d) by the deletion of item (4).

25

30

Substitution of Schedule 10 to Act 65 of 1996

21. The following Schedule is hereby substituted for Schedule 10 to the principal Act:

“SCHE

35

PROMOTION OF HATRED

(1) A film or publication which, judged within context, advocates hatred that is based on race, ethnicity, gender or religion and constitutes incitement to cause harm, shall be classified XX.

- (2) Item (1) shall not apply to—
- (a) a *bona fide* scientific, documentary, artistic, dramatic, literary or religious film or publication, or any part thereof which, judged within context, is of such a nature;
- (b) a film or publication which amounts to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (c) a film or publication which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.”.

40

45

"(d) eksplisiete seksuele gedrag wat die reg van enige persoon tot menswaardigheid skend of oneer aandoen, of wat 'n persoon verneder of wat neerkom op aanhitsing om leed te veroorsaak; of".

Wysiging van Bylae 2 by Wet 65 van 1996

18. Bylae 2 by die Hoofwet word hierby gewysig deur item (2) deur die volgende item te vervang: 5

"(2) dit oorheersend en eksplisiet enige van of al die handelinge in Bylae 1 of item (1) gemeld, beskryf.".

Vervanging van Bylae 3 by Wet 65 van 1996

19. Bylae 3 by die Hoofwet word hierby deur die volgende Bylae vervang: 10

"BYLAE 3

OUDERDOMSBEPERKINGS VIR PUBLIKASIES

'n Klassifikasiekomitee of die Hersieningsraad kan een of beide van die volgende voorwaarde ten aansien van die verspreiding van 'n publikasie ople indien dit, beoordeel binne verband, noodsaaklik is om kinders in die toepaslike ouderdomsgroep teen skadelike of ontstellende materiaal te beskerm: 15

- (a) Dat dit slegs versprei mag word aan persone wat ouer as 18 jaar is, of ouer as 'n vermelde jonger ouderdom, en dat die publikasie 'n duidelike kennisgewing van sodanige beperking moet dra;
- (b) dat dit slegs versprei mag word in 'n verseêlde en, indien noodsaaklik, ondeursigtige omhulsel wat ook, indien toepaslik, die kennisgewing bedoel in paragraaf (a) moet dra.".

15

20

Wysiging van Bylae 6 by Wet 65 van 1996

20. Bylae 6 by die Hoofwet word hierby gewysig— 25

- (a) deur item (1) te skrap;
- (b) deur item (2) deur die volgende item te vervang:

"(2) bestialiteit, bloedskande of verkragting;";

- (c) deur item (3) deur die volgende item te vervang:

"(3) eksplisiete seksuele gedrag wat enige persoon se reg tot menswaardigheid skend of oneer aandoen of wat 'n persoon verneder of wat neerkom op aanhitsing om leed te veroorsaak;" en 30

- (d) deur item (4) te skrap.

30

Vervanging van Bylae 10 by Wet 65 van 1996

21. Bylae 10 by die Hoofwet word hierby deur die volgende Bylae vervang: 35

"BYLAE 10

BEVORDERING VAN HAAT

(1) 'n Film of publikasie wat, beoordeel binne verband, haat voorstaan wat gebaseer is op ras, etnisiteit, geslagtelikheid of godsdiens en wat neerkom op aanhitsing om leed te veroorsaak, moet as XX geklassifiseer word. 40

(2) Item (1) is nie van toepassing nie op—

- (a) 'n bona fide wetenskaplike, dokumentêre, kuns-, dramatiese, literêre of godsdiestige film of publikasie, of enige deel daarvan, wat, beoordeel binne verband, van sodanige aard is;
- (b) 'n film of publikasie wat neerkom op 'n bona fide bespreking, beredenering of opinie oor 'n aangeleentheid wat betrekking het op godsdiens, geloof of gewete; of
- (c) 'n film of publikasie wat neerkom op 'n bona fide bespreking, beredenering of opinie oor 'n aangeleentheid van openbare belang.'.

40

45

50

Act No. 18, 2004 FILMS AND PUBLICATIONS AMENDMENT ACT, 2004**Repeal of Schedule 11 to Act 65 of 1996**

22. Schedule 11 to the principal Act is hereby repealed.

Short title

23. This Act is called the Films and Publications Amendment Act, 2004.

Herroeping van Bylae 11 by Wet 65 van 1996

22. Bylae 11 by die Hoofwet word hierby herroep.

Kort titel

23. Hierdie Wet heet die Wysigingswet op Films en Publikasies, 2004.

