

REPUBLIC OF SOUTH AFRICA

INTERNET AND CELL PHONE
PORNOGRAPHY BILL

(As introduced in the National Assembly)

(The English text is the official text of the Bill)

(The Honourable Malusi Gibaba)
(Deputy Minister of Home Affairs)

[....._2010]

BILL

To make it illegal for Internet and Mobile phone service providers in the Republic of South Africa to distribute or permit to be distributed pornography, so as to ensure protection for children and women

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

1. Definitions. In this Act, unless the context otherwise indicates –

“Internet service provider” means any person or corporation who carries on the business of providing access to the Internet to persons in South Africa by any means;

“Mobile phone service provider” means any person or corporation who carries on the business of providing mobile phone services to persons in South Africa by any means;

“pornography” means both “child pornography” and “pornography” as defined by section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007

2. Obligations of Internet service providers and Mobile phone service providers: Any Internet service provider or Mobile phone service provider who distributes, or allows to be distributed through the Internet or through a mobile phone in the Republic of South Africa, any pornography, shall be guilty of an offence and liable, upon conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

3. Extra-territorial jurisdiction: (a) Any citizen or permanent resident of the Republic of South Africa 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.

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

4. **Presumptions and proof:** In any prosecution in terms of this Act the same presumptions and standards of proof as are provided for in sections 30B(1) and 30B(2)(a) of the Films and Publications Act No 65 of 1996 (as amended) shall apply and the words ‘child pornography’ in that Act shall include ‘pornography’ as defined in this Act.

5. **Amendments to the Films and Publications Act No 65 of 1996 (as amended):**
 - (1) Section 24B shall be amended by the addition of subsection (4):

“(4) Section 24B(1) shall not apply to Internet service providers or Mobile phone service providers.
 - (2) Section 27A is hereby repealed.
 - (3) The reference to section 27(1)(a) in section 30(4) shall be deleted.

6. **Registration and other obligations of Internet service providers and mobile phone service providers.-**
 - (1) Every Internet service provider and mobile phone service provider shall-
 - (a) Register with the Film and Publication Board established by section 3 of the Films and Publications Act No 65 of 1996 (as amended) in the manner prescribed by regulations made under that Act;
 - (b) Report to the South African Police Service the presence and particulars of any person who to its knowledge is distributing or assisting in distributing pornography in any manner on the Internet or by mobile phone.
 - (c) Take all reasonable steps to preserve such evidence for the purposes of investigation and prosecution by the relevant authorities.
 - (2) Any person who fails to comply with subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

Short Title

7. This Act shall be called the Internet and Cell Phone Pornography Act, 2010, and shall come into force on a date fixed by the President by proclamation in the Gazette.

MEMORANDUM ON THE OBJECTS OF THE INTERNET AND CELL PHONE PORNOGRAPHY BILL, 2010

1. **BACKGROUND:** The Films and Publications Act No 65 of 1996 (as amended) provides criminal sanctions against any person who distributes in any way descriptions or scenes of *child* pornography. There is however no legislation on the statute book to combat the tidal wave of *adult* pornography now being broadcast over the Internet primarily from the USA, and readily available to all including the youngest children, not only through computers but also cell phones. It is estimated that there are 400 million webpages of pornography on the Internet, much of it “hard pornography” containing explicit sexual scenes including every form of perversion and bestiality. Experts in the Internet service industry say that the only way to prevent children viewing this material is to filter it out when it enters South Africa through the tier one service providers, before it is distributed throughout the country.

Some ask why is Internet pornography worse than print, DVD or TV? The answer is found in the 3 As: Anonymity, Availability and Accessibility. It is easy for a child or teenager to view without anybody knowing. In the real world, pornography is kept at a safe distance from children. In the online world, pornographic sites are often parked deliberately next door to educational sites, often with names almost identical.

2. CONSTITUTIONALITY:

(a) This scourge has become so harmful to children, to whom it is readily available once they can use a cell phone, that it is submitted that section 28 of the Constitution requires that the wholesale public broadcasting of this material be banned, leaving adults who wish to indulge in it, to do so only at licensed sex shops and other adult outlets. It is further submitted that were the Bill to face a challenge on the basis of section 16 (Freedom of Expression) the Constitutional Court would have no difficulty in using section 36 to limit that right. (See De Reuck v DPP and Case v Minister of Safety and Security)

(b) The nature of much of the pornographic material broadcast on the internet also blatantly infringes the constitutional rights of women to equality, dignity and protection from hate speech. Much of it is cruel, degrading and violent towards women.

3. OTHER COUNTRIES:

China, the UAE and Yemen have legislated already. Australia and New Zealand are currently seeking to do so.

3. **OBJECTS OF THE BILL:** To protect children from pornography, and to protect women from the indignity of being seen by children as objects of pornography.

4. **CONSULTATION:** The following organizations were consulted:

JASA (Justice Alliance of South Africa)

FPI (Family Policy Institute)

STOP (Standing Together to Oppose Pornography)

ACA (Africa Christian Action)

5. **FINANCIAL IMPLICATIONS FOR THE STATE:** Major expenditure is not expected. The costs of complying with the legislation will fall on the Internet Service Providers.

6. **PARLIAMENTARY PROCEDURE:** It is submitted that this is not a section 76 Bill as it does not fall within an area listed in Schedule 4.