

**NOTES OF JOHN SMYTH'S ADDRESS TO THE GOVERNMENT
SEMINAR JULY 27 2010**

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Blocking Internet Porn

The Legal Issues

JASA Name

My name JOHN SmYth – I'm a constitutional lawyer - I'm responsible for the Bill drafted and presented to Dep Min Malusi Gigaba at his request. If you've come armed with rotten eggs and potatoes because you don't like that Bill, now is your chance!

We've had a *trickle* of hate mail, there's been some vigorous debate in the press and media. SABC Special Assignment/Cape Argus corres/ BBC website/ many IT sites/ etv and SAFM yesterday etc

But we've had a *flood* of support and encouragement.

Now let me tell you where I'm coming from: 20 years as an adv at English Bar. 1979 appd QC.

Early 80s, videos appeared as a new form of home entertainment.

But history repeats itself.....no sooner than videos out, than what we called 'video nasties' appd. Explicit sex, and gratuitous violence. eg "Chain saw massacre'

I spent a large slice of my time advising on the **Video Recordings Bill** which checked, controlled and classified videos so they could not be rented or sold to children.

In 1984 I was invited to Australia by a group of their parliamentarians to advise them on the same issue.

I've been in SA for 9 years and first on behalf of DFL and for the last 3 ½ years on behalf of JASA worked almost exclusively on Con law. In 2005 I addressed the Con Ct as amicus curiae in person; in 2006 I was responsible for the direct access case to Con Ct DFLvs Parliament when the Ct said every controversial bill must be subjected to public hearings at every stage as it passes through Parl. That's important here.....there will have to be public hearings in respect of this legislation; every stakeholder will have his say.

Last year JASA won 2 important constitutional matters in the High Court. A month or so ago we started another – 14 year old boy imprisoned for 3 years for no reason.

Other cases in the pipeline.

2 out of those 3 cases already in court are against the State, taking them to task for ignoring their *constit obligations, holding them accountable*.

In spite of that, perhaps because of that, the DM happy to call on us to assist the Gov. by drafting a bill and writing an OPINION as to whether mandatory blocking of porn would be constitutional.

To that issue I now turn and I can deal with it in 3 minutes. Our Constitution provides:

- **14. Privacy.**-Everyone has the right to privacy, which includes the right not to have-
- (d) the privacy of their communications infringed.
-
- **16. Freedom of expression.**-(1) Everyone has the right to freedom of expression,

- which includes-
- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (e) freedom of artistic creativity; and

Ms Cele y'day is quite right that Freedom of X is an important right in every democracy. The rt to free speech and a free press for example are essential in any true democracy.

PRIVACY is also an important rt.

On the other hand there are 2 other very important rts.

28. Children.-(1) Every child has the right-

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

- **(2) A child's best interests are of paramount importance in every matter concerning the child.**
- **10. Human dignity.**-Everyone has inherent dignity and the right to have their dignity respected and protected

Children and Dignity.

Ms Cele is also rt that a balancing exercise is reqd when rts conflict.

Constit has a built in mechanism to deal with this:

- **s.36 Limitation of rights.-(1)** The rights in the Bill of Rights may be limited only in

terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.....

Here is the Constit putting into legal language what several speakers have sd:
No rt is absolute; when there is a conflict of rts, limitation of rts is necessary.

So how does this balance play out:

Freedom of Expression & Privacy

('fringe' or 'peripheral' rights for those wanting

Pornography (De Reuck Case)

vs

Dignity and Children's interests

Core values/Pillars of Constitution

You don't have to be a rocket scientist or even a lawyer to deduce that the precedents we already have in the Con Ct would lead the Ct to say the rts of children and dignity must TRUMP the peripheral rts to watch porn. The point has been reached in our society where the internet and cell phone has made porn so readily available to children, and so difficult for parents to control, even given that there are parents who wish to protect their children, that the State must step in. I was asked on TV yesterday whether this approach would not simply drive porn underground. My response is "The deeper the better"

In another case the Con Ct said that:

In *Bannatyne v Bannatyne 2003 (2) SA 363 (CC)* para 24 the court held that:

"While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the state to create the necessary environment for parents to do so.

This Court has held in the Grootbaum housing case that the state:

“. . . must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s. 28.”

Quickly and very shortly, 2 other legal points:

Defence of Reasonableness.

Defence of Internet service provider or Mobile service provider who has taken all reasonable steps: It shall be a defence to any person charged with an offence under section 3, to prove that he has taken all reasonable steps to prevent the distribution of pornography through the Internet or through a mobile phone.

We shall hear after this, undoubtedly technically possible. Cost insignificant, but the best that can be achieved is an internet free of 85% or 90% of porn.

Therefore, there must be a defence for the ISP which has done everything reasonable to filter out porn, but that 10% slips thro. Accordingly the slide shows the clause we have drafted to provide this.

Secondly, what are the important structures from the legal point of view when it comes to putting the legislation into practice?

1. An ISP managing body **totally independent** of Government set up by the ISPs with experts and advisors entirely of their choosing.
2. Enforcement agency set up by Government - Policing and Prosecution.

2 bodies. Must endeavour to work together amicably. If at any point, a conflict arises, the Cts are there to decide whether the ISP has done everything reasonable to prevent some porn website getting through the filters.