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15 July, 2015

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WRITTEN SUBMISSION BY THE FREEDOM OF EXPRESSION INSTITUTE ON THE FILM AND PUBLICATION BOARD'S DRAFT ONLINE REGULATION POLICY 2014

INTRODUCTION

1. The FXI is a not for profit non-governmental organisation which was established in 1994 primarily to promote and advance freedom of expression and associated rights. The FXI envisions a society where everyone enjoys freedom of expression and the right to access and disseminate information and knowledge. Our mission is to fight for freedom of expression and eliminate inequalities in accessing and disseminating information as well as knowledge in South Africa and beyond.

2 FXI welcomes this opportunity availed by the Film and Publication Board to make written submissions towards the Draft Online Regulation Policy ("the draft policy").

3 The FXI wishes to highlight that it is part of the SOS Coalition which represents a broad spectrum of civil society stakeholders committed to the broadcasting of quality, diverse, citizen-orientated public-interest programming. The FXI fully supports the submissions made by the SOS Coalition more especially the suggestion put forward on the appropriate measures in which to approach online regulation. Notwithstanding the representations given by the SOS Coalition, these submissions by the FXI are limited to specific legal irregularities interfacing online regulation and free expression.

The draft policy

4. On 4 March 2015 the Film and Publications Board published the Draft Online Regulation Policy ("**the draft policy**") in the Government Gazette (Volume 597 Pretoria, No 38531). The objectives of the policy is to create a regulatory classification and compliance monitoring framework, giving effect to section 18 (1) and (2) of the Films and Publications Act 65 of 1996 ("**the Act**"), which deals with classification of films and games in South Africa, by enabling effective regulation and speedy classification of digital content by the Board, and to create an opportunity for co-regulation between the Board and the industry for the classification of digital content distributed on mobile and digital platforms.

5. The policy purports to apply to any person who distributes or exhibits online any film, game or certain publication in South Africa. This includes online distributors of digital films, games, and certain publications, whether locally or internationally. The policy provides that it is not permissible to distribute digital content in South Africa unless such content is first classified and the classification is displayed on the content. Under the draft policy, the Film and Publication Board would have the power to refer any self-generated video that is found to contain classifiable elements for classification to its classification committee, instruct the distributor to take down the unclassified content and only reinstate it after having complied with the FPB classification decision.

Summary of submissions

6. FXI is of the view that any extension of online regulation should be carefully examined for any ways in which it could directly limit freedom of expression and access to information. FXI accepts that regulation may be required but any regulation must be consistent with the Bill of Rights. Accordingly, these submissions focus on the constitutional impact of the draft policy.

7. The Films and Publications Review Board in its decision in **Out in Africa / XXY (1/2009)** at para 15 began by emphasising the need for public functionaries like the Film and Publications Executive Committee, the Examiners, and the Review Board to be conscious of the fact that they are bound by decisions of the Constitutional Court and other courts, and must exercise their discretion in a manner that is consistent with those decisions. Similarly, the Film and Publications Board and Council must exercise their discretion in the creation of

policy, directives or regulations in a manner that is consistent with the jurisprudence surrounding the right to freedom of expression. Any regulation of expression must be undertaken with this jurisprudence in mind.

8. We note that we cannot properly assess the impact of the draft policy until the final Films and Publication Amendment Bill 2014 is promulgated.

9. FXI makes the following submissions:

9.1 We acknowledge the board's role in classification as set out in the Film and Publications Act and appreciate the intention to manage content that may be undesirable or harmful to children and incite hatred or violence against vulnerable and marginalised groups/ individuals.

9.2 We note however the importance of freedom of expression and the impact the policy will have on the right to freedom of expression in that any policy that regulates protected expression on the internet is likely to infringe the right to freedom of expression.

9.3 We note that any limitation on a right within the bill of rights is subject to reasonable and justifiable limitation under section 36(1), which we accordingly set out and analyse in our submissions.

9.4 We finally note specific provisions within the policy which not only impacts on the right to freedom of expression but would prove to be practically impossible and note our reccommendations.

LEGISLATIVE SCHEME

10. The draft policy is published in terms of the Film and Publications Act 65 of 1996 ("**the Act**").[1]

> *"The objects of this Act shall be to -*
>
> *(a) regulate the creation, production, possession and distribution of certain publications and certain films by means of classification, the imposition of age restrictions and the giving of consumer advice, due regard being had in particular to the protection of children against sexual exploitation or degradation in publications, films and on the Internet: and*
>
> *(b) make the exploitative use of children in pornographic publications, films or on the Internet, punishable."*

11. The Act provides for the establishment of a Film and Publication Board ("**the Board**") that is responsible for the classification of both films and publications and the Council.[2] The Board is an "organ of state" for the purposes of section 239(b)(ii) of the Constitution.

12. The Act provides in essence that no film may be distributed or exhibited in public unless it has been classified by the Board. The classification of publications is, however, not mandatory, but if a complaint is received concerning a particular, hitherto unclassified publication, the Board is required to make a decision whether or not it should be classified.

13. Section 16 and section 18 deal with the classification of publications.

14. Section 16 deals with requests for classification and mandatory classifications:

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[1] The Act repealed the Indecent or Obscene Photographic Matter Act of 1967 and the Publications Act 42 of 1974 and created a new comprehensive regulatory framework for films and publications.
[2] Section 3.

(1) Any person may request, in the prescribed manner, that a publication, other than a bona fide newspaper that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.

(2) Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that—

(a) contains sexual conduct which—

(i) violates or shows disrespect for the right to human dignity of any person;

(ii) degrades a person; or

(iii) constitutes incitement to cause harm;

(b) advocates propaganda for war;

(c) incites violence; or

(d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,

shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.

15. Section 18 provides:

"(1) (1) Any person who distributes, broadcasts or exhibits any film or game in the Republic shall in the prescribed manner on payment of the prescribed fee—

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

(b) submit for examination and classification any film or game that has not been classified, exempted or approved in terms of this Act or the Publications Act, 1974 (Act No. 42 of 1974).

(2) The Board shall refer any film or game submitted under subsection (1) (b) to a classification committee for examination and classification.

16. Section 18(6) provides that broadcasters that are subject to regulation by the Independent Communications Authority of South Africa ("**ICASA**") are exempt from the duty to apply for classification of a film or game, and are not subject to any classification or condition made by the Board in relation to that film or game.

IMPACT OF THE DRAFT POLICY ON FREEDOM OF EXPRESSION

17. Section 16 of the Constitution provides:

> *"(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*
>
> *(c) freedom of artistic creativity*
>
> *(d) academic freedom and freedom of scientific research.*
>
> *(2) The right in subsection (1) does not extend to-*
>
> *(a) propaganda for war;*
>
> *(b) incitement of imminent violence;*
>
> *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

18. The state's regulation of freedom of expression has developed in the context of traditional media such as broadcasting and print. The form and extent of regulation differs according to the type of media. In the context of freedom of expression and defamation law, our courts have recognised that the Internet has created a new terrain for our jurisprudence. In **Tsichlas and Another v Touch Line Media (Pty) Ltd** 2004 (2) SA 112 (W) at p123 the court noted:

> *"The Internet, in the world of instantaneous electronic communication and the consequent dissemination, globally, of information, data, literature, news, articles, pictures, music . . . etc has proliferated so rapidly and exponentially that both statutory and common law have scarcely had time to catch up or come to grips with and assess how to deal with the myriad problems which may arise and which are likely to arise."*

The importance of freedom of expression

19. The Constitutional Court has on countless occasions acknowledged the importance of the right of freedom of expression in a democracy.[3]

20. In **South African National Defence Union v Minister of Defence 1999 (4) SA 468 (CC)** the Court stated:

> *"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."*[4]

21. In ***S v Mamabolo* 2001 (3) SA 409 (CC),** the Court explained that the special importance placed on freedom of the expression in South Africa must be understood in the light of our oppressive history of thought-control and censorship. Freedom of expression and the "*free and open exchange of ideas*" is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. The Court warned that *"we*

[3] See, for example, *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 21; *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7.
[4] *South African National Defence Union v Minister of Defence* 1999 (4) SA 468 (CC) at para 7.

should be particularly astute to outlaw any form of thought control, however respectably dressed."[5]

22. More recently, in **Print Media South Africa & Another v Minister of Home Affairs and Another 2012 (6) SA 443 (CC)**, the Court held:

> *"Embraced by the right is the liberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one's own opinion about expression received, and in this way both promotes and protects the moral agency of individuals. Whether expression lies at the right's core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law's support is owed."*[6]

23. The Constitutional Court has repeatedly emphasised the fact that infringements of freedom of expression do not only affect the person wishing to communicate, but also those who wish to receive the information and ideas.[7]

The content of the right to freedom of expression

24. In a number of Constitutional Court cases, the Court has explained that section 16 comprises of two parts:

24.1 The first subsection sets out expression protected under the Constitution. It has an expansive reach which encompasses freedom of the press and other media, freedom to receive or impart information or ideas, freedom

[5] *S v Mamabolo (e.tv and Others Intervening)* 2001 (3) SA 409 (CC), para 37.
[6] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 53.
[7] See for example, *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 at para 48 where the court held that the limitation of section 16 would affect the right of broadcasters to communicate and that of the public to receive information, views and opinions.

of artistic creativity, academic freedom and freedom of scientific research.[8] It is merely illustrative of the kinds of protected expression and is non-exhaustive in character.[9]

24.2 The second part contains three categories of expression which are expressly excluded from constitutional protection.[10] These include hate speech, propaganda for war and incitement of imminent violence. In **Print Media**, the court further explained, that section 16(2) provides an exclusionary list of the varieties of expression not protected by the right.[11]

25. Accordingly, it is accepted that whatever expression is not specifically excluded under section 16(2) must fall under section 16(1) and thus "*benefits from the preserve of the right*".[12] It is protected expression. For this reason, any limitation of protected speech is an infringement of the right to freedom of expression.

Do the regulations / policy cover protected speech?

26. The initial question is whether the draft policy applies to protected speech or expression listed under one of the exceptional categories in section 16(2) of the Constitution.

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[8] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae*) 2006 (1) SA 144 (CC) at para 47 See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) at para 47.
[9] *Print Media* at para 48.
[10] *Laugh It Off* at para 47.
[11] *Print Media* at para 48.
[12] *Print Media* at para 48.

27. Section 2 provides:

> *"This Online Regulation Policy applies to any person who distributes or exhibits online any film, game, or certain publication in the Republic of South Africa. This shall include online distributors of digital films, games, and certain publications whether locally or internationally. Upon approval this policy shall have the full effect and force of law, as stipulated in section 4A of the Act."*

28. There is no definition of distribute or exhibit in the draft policy. In the Act, the term is defined only "*in relation to film or a publication*" and includes to sell, hire out or offer or keep for sale or hire.

29. The draft policy does not define "film, game, or certain publication". However, the definition in the Act is wide and includes:

> *"(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;*
>
> *(b) any writing or typescript which has in any manner been duplicated;*
>
> *(c) any drawing, picture, illustration or painting;*
>
> *(d) any print, photograph, engraving or lithograph;*
>
> *(e) any record, magnetic tape, soundtrack, or any other object in or on which sound has been recorded for reproduction;*
>
> *(f) computer software which is not a film;*
>
> *(g) the cover or packaging of a film;*
>
> *(h) any figure, carving, statue or model; and*
>
> *(i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet."*

30. The policy on its current wording appears to classify all online content that is distributed or exhibited in South Africa. The only exception appears to be television programs or films where it appears that an online distributor may be able to use the classification from the broadcaster.

31. There is no internal restrictions that limit the application of the policy to only speech contemplated in section 16(2) of the Constitution. Consequently, the expression that will be regulated by the draft policy includes protected speech.

What is the impact of the policy on the right to freedom of expression? Does it infringe the right?

32. An important case in this regard is **Print Media South Africa and Another v Minister of Home Affairs and Another** 2012 (6) SA 443 (CC). The Constitutional Court considered whether the sections 16(1), 16(2)(a) and 24A(2)(a) of the Films and Publications Act 65 of 1996 were unconstitutional.

33. The Constitutional Court described the scheme of section 16(2) as one of administrative prior classification. In this type of scheme, control is exercised before publication by an administrative body under the control of the executive branch of government. The Court explained: "*In essence, the person seeking to publish is required to submit the material to the administrative body, which decides whether to grant or deny permission to publish. If the administrative body concludes that the material is prohibited, the prospective publisher is prevented from publishing it. This amounts to a form of prior restraint, which is an inhibition on expression before it is disseminated*."[13]

34. The Court held that a prior-classification scheme applicable to protected speech would be a regulation of expression, and that "*to regulate the right was*

[13] *Print Media* at para 16.

to limit it."[14] Of course, the requirements of the sections regulated expression to varying degrees. "*The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless*." The Court stated firmly that "*the free flow of constitutionally protected expression is the rule and administrative prior classification should be the exception*."[15]

35. Accordingly, the FPB should bear in mind that any policy that regulates protected expression on the internet is likely to infringe the right to freedom of expression. This should be acknowledged in the draft policy.

36. There are three primary areas where the draft policy impacts freedom of expression:

36.1 Distribution Agreements and self-classification

36.1.1 The policy requires anyone intending to distribute a film, game or publication to comply with section 18(1) of the Act. This means that the person must apply for registration as a film, game, or publications distributor.[16] They must also pay the prescribed fee set by the Minister from time to time.[17] It is an

[14] *Print Media* at para 50 – 51.
[15] *Print Media* at para 52.
[16] Paragraph 5.1.1.
[17] Paragraph 10.

offence to distribute online content unless the distributor is registered and has paid the fee.[18]

36.1.2 A distributor who intends on distributing a film, game or publication which is in digital form on the internet or other mobile platforms may bring an application to the Board for the conclusion of an online distribution agreement, in terms of which the distributor, upon payment of the fee may classify its online content on behalf of the Board, using the Board's classification Guidelines and the Act.[19] In order for the distributor to classify itself, the policy requires the distributor to have a classification and rating system in place that would be consistent with the Act and the Board's Classification Guidelines.[20] The policy further requires the distributors to be trained and certified by the Board. In order for the Board to meet this training requirement, the policy states that the Board shall develop material for a classification course and shall deliver classification training for online distributor's classifiers.

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[18] "*No online content distributor shall be authorized by the Board to distribute online content in the Republic of South Africa unless it has registered with the Board as an online distributor and has paid the prescribed online distribution licensing fee as determined by the Minister, and any other fees that the Minister may determine from time to time.*"

[19] Paragraph 5.1 provides:

"5.1.1 Any person who intends to distribute any film, game, or certain publication in the Republic of South Africa shall first comply with section 18(1) of the Act by applying, in the prescribed manner, for registration as film or game and publications distributor.

5.1.2 In the event that such film, game or publication is in digital form or format intended for distribution online using the internet or other mobile platforms, the distributor may bring an application to the Board for the conclusion of an online distribution agreement, in terms of which the distributor, upon payment of the fee prescribed from time to time by the Minister of DOC as the Executive Authority, may classify its online content on behalf of the Board, using the Board's classification Guidelines or the Act."

[20] Paragraph 5.2.

36.1.3 The Board is also empowered to withdraw an online distributor's registration certificate and direct that all media content is submitted to the Board for classification.[21]

36.1.4 These provisions essentially determine who may lawfully distribute online content in South Africa. A person's right to freedom of expression is limited to the extent that they may not be able to secure registration or afford the prescribed fee.

36.1.5 The danger is that certain smaller companies or organisations will be inhibited from providing information online because of their reluctance to comply with these onerous requirements and to establish their own classification system.

36.1.6 Similarly, the freedom of expression right to receive information would be reduced if international distributors chose not to participate in the proposed scheme. These distributors would be unauthorized and sanctions would presumably follow. The South African public would no longer have access to this information.

36.2 Pre-distribution classification of online television films and programmes

36.2.1 The policy states that all digital content in the form of television films and programmes streamed online via the internet shall first be submitted to the Board for pre-distribution classification.[22]

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[21] Paragraph 9.3.

[22] Paragraph 6.1 provides: "*All digital content in the form of television films and programmes streamed online via the internet shall first be submitted to the Board for pre-distribution classification.*"

36.2.2 The Board retains authority to call for the classification of a particular item of media content where the item has generated controversy in another jurisdiction.[23]

36.2.3. These provisions create administrative prior restrictions of expression. These provisions amount to an inhibition on expression before it is disseminated.

36.3 Take down provisions for potentially "harmful" user-created content

36.3.1 The policy purports to give the Board the power to order the take down of user-created content that may be "*potentially harmful and disturbing to children of certain ages*".[24]

36.3.2 This is a much broader category of speech than child pornography, or the specific speech excluded from section 16(2) of the Constitution.

36.3.3 Such conduct would constitute a negative infringement of the right to freedom of expression as the existing expression will be removed.

36.3.4 The policy does not give further detail as to what user-generated content would be considered "harmful" to children and how such power will be exercised. This provision could be used to unjustifiably limit legitimate expression such as sexual health education or LBGT issues. Children also have the right to

[23] Paragraph 6.3.
[24] Paragraph 7.4 provides: "*With regard to any other content distributed online, the Board shall have the power to order an administrator of any online platform to take down any content that the Board may deem to be potentially harmful and disturbing to children of certain ages.*"

information: this includes information about relationships, sexual orientation, safe sex, sexual abuse, and a whole range of topics involving sex. Content that may be useful to children dealing with sexual orientation, the challenges of puberty, love, longing and abuse could easily become the target of the draft policy.

ARE THE LIMITATIONS JUSTIFIABLE?

37. The right to freedom of expression is not inviolable and is subject to justifiable limitation under a law of general application to the extent that section 36 of the Constitution permits."[25] The fact that the draft policy infringes the right to freedom of expression does not necessarily mean that it is unlawful.

38. Section 36(1) sets careful requirements for such limitations. It provides:

> *"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, including-*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose."*

39. In ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others***[26] the limitation exercise was defined in these terms:

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[25] *S v Mamabolo*. *Print Media* at para 52.

[26] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 35.

> *"The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose." (Footnotes omitted.)*

40. Any policy regulating expression in South Africa must be drafted with section 36 in mind.

Nature of the Right

41. The nature and importance of freedom of expression and access to information is discussed above.

Importance of the purpose of the limitation

42. The focus of the draft policy is to shift the focus of classification from platform or delivery technologies to the media content. The objectives of the policy are:

    42.1 To create a regulatory classification and compliance monitoring framework by enabling effect regulation and speedy classification of digital content by the Court

    42.2 The framework must effect to section 18(1) and 18(2) of the FPB Act;

    42.3 To create an opportunity for co-regulation between the Board and the industry for the classification of digital content distributed on mobile and digital platforms.

43. The guiding principles of the policy are:

> *Principle 2 "communications and media services available to South Africans should broadly reflect community standards, while recognizing a diversity of views, cultures and ideas in the community.*
>
> *Principle 7 Classification regulation should be kept to the minimum needed to achieve a clear public purpose*
>
> *Principle 8: classification regulation should be focused on content rather than on platform or means of delivery*

44. The state does have an interest in the proper regulation of speech. Certain speech can be harmful and infringe the rights of others. The Constitutional Court has noted that "*implicit in [section 16] is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm*."[27] FXI accepts that it is in the public interest that reasonable limitations be applied to expression. However, those limitations must be consistent with the Constitution.

The nature and extent of the limitation

45. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[28]

46. Despite the fact that section 16 contains its own internal limitation of the right to freedom of expression, and delineates the nature and scope of the internal limitation, the policy goes further. The regulation of internet content is so widely-phrased and so far-reaching that it would be difficult to know beforehand

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[27] *Islamic Unity Convention* at para 30.
[28] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 18.

what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. The effect of the limitation is substantial.

Proportionality: The relation between the limitation and its purpose

47. Section 36 requires a causal connection between the law and its purpose. There must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. The limitation must achieve benefits that are in proportion to the costs of the limitation. A law that invades rights more than is necessary to achieve its purpose is disproportionate or overbroad.

48. In ***Case v Minister of Safety and Security***[29] the Constitutional Court noted the approach to over-broad provisions:

> *"Overbreadth analysis is properly conducted in the course of application of the limitations clause. To determine whether a law is overbroad, a court must consider the means used, (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad."*

49. In the analysis, the court must also take into account the chilling effect that overbroad legislation may have, "*discouraging others from engaging in constitutionally protected activities because legislation which on its face prohibits such activity remains on the statute books*."[30]

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[29] *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 at para 49.

[30] *Case* at para 55.

50. The fact that failure to submit for administrative prior classification attracts harsh criminal sanctions as well as the vagueness and overbreadth of the policy may lead to self-censorship and exert a 'chilling effect' on the right to freedom of expression.

51. FXI is of the view that the policy is overbroad and the limitation on freedom of expression is disproportionate to the purpose. The prohibition is far-reaching and covers legitimate speech protected under section 16.

52. Moreover, the fact that the policy seeks to protect children does not mean that it is immune from constitutional scrutiny. On the contrary, the Constitutional Court **Johncom Media Inv Ltd v M and Others** 2009 (4) SA 7 (CC) at paras 29-30 unhesitatingly struck down provisions intended to protect children where that "*purpose could be better achieved by less restrictive means*".

53. Child safety, one of the primary objectives of the proposed policy, is very important. However, there are other more effective strategies and mechanisms to ensure the protection of children in the online environment that do not require pre-publication censorship and also does not infringe children's right to access information, moreover the existing legislation with the appropriate sanctions.

54. The policy includes within its overbroad compass a vast array of incontestably constitutionally protected categories of expression. It is disproportionate to whatever constitutionally permissible objectives might underlie the policy.

55. It will also impose a serious administrative burden and resource strain on the

Board and Council which may not be proportionate to the harm it seeks to protect against.

56. The proposal to regulate all online content is ambitious. The policy is silent on how the classification of on line content will be monitored and evaluated. This is important is relation to the doctrine of effectiveness in that the policy's impact needs to be effective, relevant and sustainable.

57. New content is posted online via various platforms every second. The FPB will not be able to prevent this publication. It is likely that the majority of online users will not apply to the FPB for pre-classification of content, nor pay the subscription fee prior to publication. The draft policy then requires appropriate sanctions to be imposed.

A less restrictive means to achieve the purpose.

58. The purpose for which the limitations in the policy are imposed is effectively achieved by the existing limitations on free speech in section 16 of the Constitution as well as other legislation.

58.1 Defamation and privacy claims;

58.2 The Act also has specific sections dealing with the responsibilities of internet service providers. The draft policy merely reiterates these obligations:

58.2.1 Section 24C Obligations of internet access and service providers.

58.2.2 And Section 27A registration and other obligations of Internet service providers.

58.3 The Electronic Communications and Transactions Act 25 of 2002, provides protection of 'service providers' who are regarded as conduits rather than as principals in the dissemination of information. Under section 77, a person may lodge a notification of unlawful activity with an internet service provider which controls the hosting websites requesting that the material be removed. In terms of section 75(1)(c), an internet service provider receives a take-down notification referred to in section 77 must act expeditiously to remove or to disable access to the data.

58.4 The Criminal Law (Sexual Offences and Related Matters) Amendment Act', No 32 of 2007, criminalises and prosecutes individuals for the exposure to or display of child pornography.

58.5 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits hate speech and sets up Equality Courts to hold inquiries as well as allows for case dealing with the publication, advocacy, propagation or communication of hate speech to be referred to the Director of public Prosecutions for institution of criminal proceedings.

OTHER SUBMISSIONS ON THE DRAFT POLICY

Clarity on status of policy

59. The Policy purports to be a "draft online regulation policy". The status of the policy is unclear. It provides that it is enacted under section 4A of the Act with the aim to "i*ssue directives on how the Board must regulate distribution of online content*" in South Africa.

60. The Act expressly confers on the Council the power to issue directives and guidelines. The Council's powers under section 4A (1) include the power to issue directives of general application, including classification guidelines, in accordance with matters of national policy consistent with the purpose of this Act. The Council may also exercise and perform such other functions, powers and duties as are conferred or imposed on the Council by or under this Act or any other law. (Section 4A (1) (g)) It is accordingly not in dispute that the Council has the power to make policy in general.

61. However, the policy of the HPCSA is lawful only if it is compatible with the Act. It may not conflict with any express provision of the Act and nor may it be adopted for a reason that is inconsistent with or irrelevant to the purpose of the Act.

62. The principle was clearly set out in **Strubens v Minister of Agriculture 1910 TPD 903.**[31] In this case, the administrator adopted a policy that authorised the slaughter of cattle brought illegally into the Transvaal for the reason of inflicting an additional penalty on an offender. Since the object of the statute was to

[31] Cited with approval in *Jackson v Adams 1957 (2) SA 50 (SR) 56*.

prevent stock disease, the court held that the reason for adopting the policy was improper and therefore that the policy was inconsistent with the objects of the statute.[32] The court set aside the policy.

63. The powers of the Council to issue directives must be seen in contrast to:

63.1 The broad powers of the minister in section 31(1)(e) and (f) to make regulations on any matter that may be prescribed under this Act or any matter required for the better achievement of the objects and purposes of this Act.

63.2 The powers of the Board to issue guidelines in section 31(3) which the Board and the Review Board will apply in order to determine what is harmful or disturbing in terms of Schedules 3 and 8 in the Gazette.

64. To the extent that the policy purports to be regulations, this is unlawful. The law-making power to make regulations is for the Minister.

65. However, were the policy to be enforced as regulations, the regulations must too be consistent with the Act:

> *"'Underlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the Legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.*
>
> *. . .*
>
> *The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider*

[32] Baxter, L (1984) "Administrative Law" Juta & Co, Ltd p418.

than the object of the Legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it.'

Therefore, where a regulation conflicts with an Act of Parliament or its contents are unreasonable, it is ultra vires at common law and may be struck down by the courts."[33]

66. One of the difficulties in providing comments on the draft policy is that the amendment to the Film and Publications Act has not been finalized or enacted. It is therefore difficult to know whether the policy will be consistent with the new Act, or what provisions in the policy are anticipating legislative changes.

Vagueness and detail in definitions

67. Many of the concerns raised in these submissions rest on the definitions in the draft policy. The broad definitions extend the application of the draft policy further than is perhaps intended. We have highlighted some of the difficulties with the definitions above.

68. The draft policy deals with new terrain when regulating online content. Careful note should be taken to tailor the definitions so as to be as clear and concise as possible. It may not be appropriate to incorporate definitions from the Act into the policy.

69. Two further issues arise out of the vague and broad terms used in the draft policy:

[33] *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) at paras 26-27.

69.1 The vague language of the draft policy creates the possibility of selective prosecutions. The provisions could be used selectively to target specific users and online media outlets.

69.2 The vagueness in the draft policy also has implications for the rule of law. The Constitutional Court has emphasised that *"[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner*."[34] A person should be able to know of the law, ascertain the extent of their rights and obligations and be able to confirm his or her conduct of the law.[35] The law cannot fulfil its role to regulate and to order if it cannot be understood. [36]

70. The definition of "distributor" is particularly problematic.

71. Distribute and Distributor are defined in the Act

> *"**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 24A and 24B, includes to hand or exhibit a film, game 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.*
>
> ***distributor** in relation to a film, means a person who conducts business in the selling, hiring out or exhibition of films.*

72. The policy repetitively makes reference to a distributor of 'on line content' but has failed to define who qualifies as a distributor. In this type of space, there are various players who might be deemed as distributors i.e. internet service

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[34] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at para 47.
[35] *President of the Republic of South Africa v Hugo1997* (4) SA 1 (CC) at para 12.
[36] *Savoi and Others v National Director of Public Prosecutions and Another* [2013] 3 All SA 548 (KZP) at para 31.

providers (ISP's), these are companies that provide individuals and other companies access to the Internet and other related services such as Web site building and virtual hosting a distributor can be defined as the ISP; there are also users of ISP platforms who upload their own content on such spaces. An example of the type of content that can be uploaded on the latter is self-generated content (SGC) or user-generated content (UGC), this type of content can be defined as media content that is created by users of an online system or services and is subsequently made available via media websites. The creators of the latter can be anyone ranging from production companies to individuals of society.

73. As can be noted above creators of UGC and ISP's are vastly different and take on differing roles and as such they cannot be defined as one of the same thing. Though superficially one might infer that they both participate on the distribution sphere but their roles differ.

74. The above differentiation highlights the importance of the need for an explicit definition of what constitutes a distributor. The policy as discussed above places certain obligations on a distributor which has an onerous effect, it is thus prudent to define a distributor because differentiation needs to be drawn between a lay man 'distributor' and an ISP for practical effect.

75. The term “user-created content” is used only in paragraph 7 dealing with child exploitative media content. In this section, the definition is extended to include drawings, pictures or any other visual presentation.[37]

RECOMMENDATIONS AND CONCLUSION

76. The FXI submits that the Film and Publications board is exceeding its mandate with the current online draft policy and in the appreciation of the need for online regulation we suggest that the Film and Publications board engage with alternative and appropriate bodies who’s mandate is more fitting.

77. The FXI based on the above submissions notes the unconstitutionality of the Draft policy in its current state and calls on the Film and Publications board to go back to the drawing board and reconstruct appropriate policy that involves proper consultation with its stakeholders and draft a right driven, evidence based proportionate regulations for online content.

78. The FXI appreciates the opportunity to make these representations to the Film and Publications board of South Africa and stresses that the comments above are made in the spirit of contributing to strengthening the responsible exercise of the right to freedom of expression on online platforms and promotion of the right to freedom of expression in South African.

79. If any additional information is require on the submissions made, please contact the FXI using the details provided below;

[37] Paragraph 7.1.

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