



Promoting human rights and democracy through the media since 1993
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WRITTEN SUBMISSIONS BY MEDIA MONITORING AFRICA (MMA) ON THE FILM AND PUBLICATION BOARD'S DRAFT ONLINE REGULATION POLICY

1. INTRODUCTION

1.1. In Notice No. 182 of 2015 published in Government Gazette No. 38531 dated 4 March 2015, the Film and Publication Board (the 'Board') published the Draft Online Regulation Policy ('Draft Regulations'). In the Notice, the Board invited interested persons to make written representations thereon. The date for submission of written comments was set for 15 July 2015. MMA thanks the Board for the opportunity of making these written submissions and here by requests an opportunity to make oral representations at public hearings as and when they may take place.

2. ABOUT MEDIA MONITORING AFRICA

2.1. MMA's vision is a just and fair society empowered by a free, responsible and quality media. Through a human rights-based approach, MMA aims to promote the development of:

- Media that is transparent, diverse, ethical and accountable to its audiences;
- Critical and constructive communications by the powerful; and;

- Informed, engaged and connected citizenry.

2.2. MMA aims to contribute to this vision by being the premier media watchdog in Africa through promoting a free, fair, ethical and critical media culture in the region. The three key areas MMA seeks to address through a human rights-based approach are media freedom, media ethics and media quality. Established in 1993 to monitor South Africa's first democratic elections, MMA has over 20 years' experience in media monitoring and direct engagement with media, government, civil society organisations and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our work, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.

2.3. A key area of MMA's work since its inception has been focused on building a media policy framework that advances and entrenches our Constitution, the values it seeks to realise and thereby entrench our democracy. In doing so, MMA has made submissions to critical regulatory bodies and policy makers from ICASA and SANEF to parliament.

2.4. One of the core programme areas MMA has focused on is *children and media*. In this regard, MMA has over a decade of experience using innovative approaches that realise meaningful children's participation, build critical media literacy skills and help improve the quality of journalism. Our work with the children is informed by a child rights framework and it is the same approach that informs MMA's submission.

2.5. It is also for this reason that as part of the process, MMA sought to include the views of children on matters that will impact them directly. MMA believes the views of the children are of sufficient importance that they warrant their own submission and we therefore submit that our submission and the one from the children we work with are read together.

3. MMA KEY PRINCIPLES AND ASSUMPTIONS THAT INFORM THE SUBMISSION

- 3.1.** Freedom of expression is a fundamental human right and needs to be protected online as much as it does offline. In this regard, we draw the Board’s attention to the UN Special Rapporteur Report paragraph 69, and note that the approach adopted here is in line with our own Constitution and the limitations clause contain therein.
- 3.2.** Paragraph 69 reads as follows: *“The Special Rapporteur is cognizant of the fact that, like all technological inventions, the Internet can be misused to cause harm to others. As with offline content, when a restriction is imposed as an exceptional measure on online content, it must pass a three-part, cumulative test: (1) it must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); (2) it must pursue one of the purposes set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights , namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and (3) it must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality). In addition, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application”*¹
- 3.3.** The online environment requires a profound shift away from a simple top-down approach to addressing matters involving children. Therefore it is no longer feasible or desirable for such matters to see children as the end product or on the receiving end of top-down regulations or policy. Rather our point of

¹ See the full report available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

departure must be to see children at the centre being influenced by various spheres of influence.

- 3.4.** We have developed the following diagram to help visualise how this might work. The model clearly demonstrates that it is no longer effective nor feasible nor desirable for government or government bodies to seek to fulfil the central role of the parent and/or the child in determining online content choices.



3.4.1.In line with the above, children must be viewed as agents, not simply victims. They are capable of exercising their rights and abilities online and of building their own resilience as well as taking responsible risks.

3.4.2.Given that online and digital is the future for our children, it is also imperative to see risk as not exclusively negative. In the same way as we encourage children to take responsible risk as they grow and develop (for example learning how to be safe when crossing a road) we need to ensure we mitigate but encourage children to take risk online.

3.4.3.It is also important that as much as we need to protect children online we also focus on the opportunities the online and digital platform present for our children. This also informs a view that emphasises the need to look at the positive rights and negative rights online, that is, the right to privacy, access to information and to share opinions and views as well as protection from harm and abuse.

3.4.4.The assumption and principles relating to children also inform MMA's general principles on online and digital content and access. In this regard, we operate from the following assumptions:

3.4.4.1. In line with the UN Special Rapporteur Report of 2011,² internet access should be developed as a basic human right. Further, MMA believes that addressing the digital divide requires not only provision of fast, cheap broadband to all but also the provision and development of digital literacy as an essential life skill not only for children but adults as well.

² See: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

3.4.4.2. In this regard, we again direct the Board to the following section in the UN Special Rapporteur's Report:³

"85. Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population.

86. At the international level, the Special Rapporteur reiterates his call on States, in particular developed States, to honour their commitment, expressed inter alia in the Millennium Development Goals, to facilitate technology transfer to developing States, and to integrate effective programmes to facilitate universal Internet access in their development and assistance policies.

87. Where the infrastructure for Internet access is present, the Special Rapporteur encourages States to support initiatives to ensure that online information can be accessed in a meaningful way by all sectors of the population, including persons with disabilities and persons belonging to linguistic minorities.

88. States should include Internet literacy skills in school curricula, and support similar learning modules outside of schools. In addition to basic skills training, modules should clarify the benefits of accessing information online, and of responsibly contributing information. Training can also help individuals learn how to protect themselves against harmful content, and explain the potential consequences of revealing private information on the Internet."

3.4.5. In addition, the role of online and digital access can and should be utilised to entrench and deepen democracy and democratic functions. In this regard, MMA encourages e-governance initiatives.

³ In this regard, we again direct the FPB to paragraphs 85 to 88 of the UN Special Rapporteur's Report available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

3.4.6. Despite the overwhelmingly positive elements of online access and digital content, it is equally important that effective, accessible, speedy and affordable mechanisms are developed and implemented to help deal with, and address complaints and concerns by users/citizens as well as enable all people to take reasonable steps to help protect themselves, or those in their care online.

4. OVERALL CONCERNS

4.1. The first issue that must be raised is to ask the question; what is the problem that the regulations seek to address? While the regulations offer some insight into this through a description of the apparent mandate of the Board, as well as the focus on protecting children, nowhere is the actual problem or problems clearly spelled out or indeed supported by documented evidence. The impact of this is a lack of clarity in different sections and indeed the intentions of the Board and the regulations.

4.2. Despite this critical limitation, MMA would like to thank the Board for opening discussions around online content and debates about children's safety online. MMA believes that these are critical issues and the debates that surround them need to be heard. Like any other critical stakeholder, MMA believes that anything that is considered harmful and/or jeopardises the best interest of the child⁴ should be taken very seriously.

4.3. In terms of the process MMA is concerned that the Board appears to be running this process with proposed changes to the Film and Publications Act 65 of 1996. As outlined in the Draft regulations the Board has submitted proposed changes to the Minister. As we have not yet had sight of the proposed amendments it makes informed comments on the Draft Regulations that much more challenging. In addition, we strongly believe that the Board should be waiting for the legislative amendments to take place before discussing the Draft

⁴ A child according to the South African Constitution is anyone under the age of 18 years of age. The full definition can be found here: <http://www.justice.gov.za/legislation/acts/1996-108.pdf>

Regulations. As it stands it seems the Board is putting the cart before the horse. Nevertheless, given the critical importance of the issues raised in the Draft Regulations MMA has sought to address some key concerns.

4.4. MMA is worried that apart from not waiting for the proposed amendments to be realised through an open public process, the impact of issuing the regulations now will lead to confusion among the public. The sense of confusion is likely to be deeper as the core question is whether the document at hand is a draft policy or draft regulations? In so doing, the Board has also failed to draw the line between its role and that of policy makers.

4.5. Equally, by seemingly putting the cart before the horse, by confusing policy with regulations and as a result of some profoundly unfortunate drafting, some of the key debates that should be being engaged have been marginalised. The overwhelming perception as reflected in media is of a Board that is seeking to undermine freedom of speech and to shut down and control the Internet.

5. POLICY VS. REGULATIONS?

5.1. MMA's understanding is that the key distinction between policy and regulation is that 'policy'⁵ is usually what a government ministry hopes to achieve and the methods and principles it will use to achieve them while 'regulations' are administrative in nature and they give more details on matters contained in the original legislation.

5.2. It is understandable that the Board wishes to initiate a policy process and make suggestions to the Minister. However, it is very confusing that without the right policies being adopted, it has undertaken first to develop regulations. There are also a lot of sections in the Draft Regulations (to be discussed later) that seem to be policy imperatives and do not deal with regulatory matters. MMA suggests

⁵ Policy usually goes through an entire process to become legislation. To see the entire process and how regulations are enacted go to: <http://www.etu.org.za/toolbox/docs/govern/policy.html>

that the Board carefully considers the correct use of this language and carefully draws from what it is mandated to do and what the Minister is expected to do.

5.3. In addition to this, MMA is also deeply concerned that the Board appears to be undertaking the entire process in isolation without considering what other Departments are doing around this very issue of online content. As such not only is the approach likely to encounter greater resistance and likelihood of failure but it also goes against one of the recommendations made in the National Development Plan (NDP),⁶ which encourages that all policies or regulations are not only in line with the vision presented by the NDP but are not asymmetrical and isolated, and that their impact is evaluated as a key element of their development

5.4. MMA is aware that currently the Department of Justice and Constitutional Development is busy on a campaign and working to reform its policies regarding cyber-bullying and sexting,⁷ and the Draft Regulations have not mentioned any of these efforts or tried to incorporate them onto the regulations. Further to this, the Department of Telecommunications and Postal Services is also doing a policy overhaul of all Information Communication Technologies Policies (ICT Policy Review), thus doing a parallel discussion of the regulations might be detrimental not only for the Board but to the entire ICT policy review process.

5.5. The Board has also not made an effort to provide definitions to critical terms that are used in the Draft Regulations. Failure to provide sufficient definitions can be read as an attempt by the Board to apply whatever definition that suits its interests when it suits them. Failure to define clearly what is meant by "distributor" at the beginning of the draft regulations is not only misleading but further questions the overall logic of the Draft Regulations and the interests that this will later serve.

⁶ Read the full National Development Plan here: <http://www.gov.za/issues/national-development-plan-2030>

⁷ Read this brochure for more details: <http://www.justice.gov.za/brochure/2014-cyber-bullying.pdf>

- 5.6.** It must also be noted that as the regulations stand they have the potential to fundamentally undermine freedom of expression, and as such they are likely to be unconstitutional and illegal. MMA is aware that a number of submissions address these aspects directly and comprehensively.
- 5.7.** Linked to the above challenges, perhaps the most significant and potentially fatal flaw of the regulations is that while they clearly focus on children, there is no evidence that children's views were sought or included in their drafting, intent or purpose. This is very problematic not only because children constitute 35% of the population but also because these draft regulations are centred on "protecting" them.
- 5.8.** There is also currently no recognition of children as diverse people with different needs and desires, risk profiles, access and critically, stages of development. Regulations that fail to incorporate the developing capacities of the child are not only overly broad and prone to failure but also offensive to children. That the regulations have been drafted in such a manner that marginalises children is profoundly disappointing when we consider that in South Africa we have some of the most progressive legislation around children. In this regard, MMA would strongly suggest that the Board draws on the world class expertise in the child rights sector.
- 5.9.** It is also notable that in addition to the lack of clarity of purpose and definition, the Draft Regulations conflate issues that are illegal, such as child abuse online and or child porn with material that may be harmful to children. Clearly, child abuse is not only repugnant but also illegal and a criminal offense and should be dealt with as such. Material that is or may be harmful to children is a profoundly different matter, and one that is largely subjective. What may be considered harmful to a child by some may be seen as positive or even essential by others. One of the key reasons for the existence of the classification regime is in fact a tacit recognition that these issues are subjective and that classification is used to inform and educate users.

5.10. Equally concerning is that the Draft Regulations read like a series of threats, they are presented in a way that instils fear for the use of Internet for children, and are not in any way empowering both for parents and/or children. This is a problem primarily because unlike the child which is synonymous to victim in these regulations, children and parents do not have to be nebulous victims but an enabled and critical solution to internet safety issues. The notion of the online world for our children as offering a range of opportunities is also excluded, resulting in the regulations being imbalanced and again increasing their likelihood of failure to meet their desired impact.

5.11. As the policy stands MMA submits that there are simply too many clauses that are confusing, or overbroad and or patently impractical. In section 6 below we outline some of these, but note that these are not all of the clauses that are flawed.

6. ISSUES PROBLEMATIC IN THE DRAFT REGULATIONS

6.1. MMA refers to section 2 of the draft regulations. The scope of the application of the policy is confusing. It is not clear what the Board is trying to set out in this section as the “policy” is overbroad. Further, the Board is not empowered to apply a policy, it can only formulate regulations.

6.1.1. The section does not set out clearly who the regulations are applicable to. It opts to provide a very generic list that includes anyone and everyone. The problem with such an inclusion is that it is not only unrealistic but sets the regulations and the Board up for failure. It is literally impossible for the Board to:

1. Train all South Africans on its classification requirements;
2. Track everything uploaded everywhere in the world; and,
3. Get buy-in from all countries in the world to buy into the South African classification process.

6.2. It must however be acknowledged that, the FPB has through its CEO, Mr Themba Wakashe, given SANEF and the IAB and other industry bodies the assurance that current exclusion in the existing Films and Publications Act 65 of

1996 will be extended to the new proposed amendments. As such, the potential threats to media freedom and the practicality of the regulations are significantly reduced but critical challenges remain.

6.3. It is also not clear what the Board means when it states that “upon approval this policy shall have the full effect and force of law”. Upon whose approval? MMA's understating is that, the main aim of submissions and hearings is to influence these decisions not only help approve them. The statement reads as a final decision that discards this process but waits only on those that approve these regulations.

7. OBJECTIVES OF THE POLICY AND THE GUIDING PRINCIPLES FOR AN ONLINE REGULATORY POLICY

7.1. MMA generally agrees with all the principles as set out in section 4. MMA supports, principle 1, 6, 7 and 8 on page 8 of the Draft Regulations. However, the framing of some of the other principles need to be clarified and refined. For example, nowhere in the document or in the definitions does it explain or seek to justify the use of the term “community standards” as applied in principle 2. Whose community? Which community/ies and which standards? It would be useful for the basis for these principles to be clearly articulated. MMA feels it is important to highlight that the Draft Regulations completely contradict several of these principles, upon which the regulations are allegedly based. For example see section 7.3 below.

7.2. MMA finds section 5.1 of the Regulations to be very problematic, this section outlines the uniform classification ‘procedure’, it clearly says that the following policy is hereby enacted. Clearly this must simply be an error in the document.

7.3. Section 5.1.2 is also very confusing, as it is not clear enough that the distributors can apply for an online distribution agreement, whereby they can classify on

behalf of the Board. This is set to cost around R750 000.00⁸ and how the Board came to that figure is not explained. This can be seen as a breach to principle 6 as explained in section 4, which states that the classification regulatory framework should not impede competition and innovation. Based on reported industry feedback, it is not clear how the fees will have any positive impact on encouraging competition and development of new jobs and businesses.

- 7.4.** Section 5.4.1 states that the Board has already entered into transnational agreements with a number of online distributors, however it makes no effort to explain who are these distributors are and what are the terms of the agreements.
- 7.5.** Further to this, section 5.4.2 states that as of the 31st of March 2016, no online distributor shall be allowed to distribute digital content unless such content is classified by the Board. This is a direct limitation to freedom of expression and it impedes on one of the important rights the South African Constitution has sought to protect for many years. This does not only affect ordinary citizens but also those that try to get to them information that will enable them to better enjoy the democracy.
- 7.6.** Again, MMA would like to reiterate the confusion not only in the language used but also in the direction the proposed regulations are going. MMA does not support the proposed uniform classification of content as proposed in section 5.

8. ONLINE DISTRIBUTION OF TELEVISION FILMS AND PROGRAMMES

- 8.1.** MMA is completely against all digital content in the form of television programmes streamed online to be submitted to the Board for pre-distribution classification. This is a direct censorship not only on programmes but also on news that are carried in current affairs programmes and streamed online. This

⁸ See section 3 of SOS Coalition's roundtable report available at: <http://www.soscoalition.org.za/report-sector-roundtable-on-the-film-and-publications-boards-draft-online-regulation-policy/>

also violates principle 1 set out in section 4 of the Draft Regulations, which states that South Africans should be able to read, hear, see and participate in the media of their choice.

- 8.2.** Section 6.3 states that the Board now has power to call in for classification any other content in another jurisdiction if the content has generated controversy. MMA seeks clarity on what the Board means by this, and also challenges its practicality. Also the notion that content should be classified merely because it causes controversy is clearly problematic. The issue of same sex marriage in some countries may be deemed controversial but in South Africa the practice is legal and widely accepted practice.

9. PROHIBITION AGAINST CHILD EXPLOITATIVE MEDIA CONTENT AND CLASSIFICATION BY THE BOARD FOR SELF-GENERATED CONTENT

- 9.1.** MMA would like to raise the following important points:

9.1.1. It is not only impossible to monitor all user-generated content in South Africa but assuming it is possible, to do so would be to ignore already made efforts by most popular online sites to filter or report content that is found offensive. For example, Facebook has now a report button where you can report hate speech, porn or even suicidal messages. These have been very effective.

9.1.2. The Draft Regulations are not lucid when they refer to children, it is as if all the children in South Africa are the same age, and have similar interests and cultures. The Draft Regulations seem to ignore that there are various perceptions to what is acceptable behaviour. When it comes to content, and more specifically to children-appropriate content, children are not homogenous. MMA strongly believes that the determination of what is appropriate for an individual child is best left to the parents, guardians and teachers that know the child.

9.1.3. MMA strongly believes that there needs to be a clear distinction between child abuse material and age-appropriate content. Child abuse material includes cyber

bullying, sexting and child pornography. We believe that the Board does not have the ability to handle child abuse material and should be encouraging other Departments such as South African Police Services (SAPS) and the Department of Justice and Constitutional Development to handle these matters adequately.

10. CHECKS AND SAFEGUARDS

10.1. MMA notes that section 9.2 states that the Board shall retain the power to monitor the Industry classification decisions. We do not believe that the Board has this authority, and would ask on what basis it is drafted.

11. COMPLAINTS AND PROTECTIONS

11.1. In line with the principles noted in section 3, MMA submits that both a complaints procedure and protection mechanism are developed to address the different needs of users.

11.2. The proposed merger of the Press and Online content into one body, as well as the existing Broadcasting Complaints and Compliance Commission will provide a positive and efficient mechanism to address complaints and concerns raised regarding and relating to news and journalistic content.

11.3. What is less clear is who will be responsible for and will deal with other complaints not covered by these existing bodies. MMA submits that there is a need for a national reporting 'hotline' funded by the relevant industry bodies and operated on the basis of co-regulation to meet these and related needs. Such a mechanism would also be in a position to refer complaints to the SAPS in the case of cyber-bullying or child abuse material, or the relevant journalism related bodies in the case of news or journalistic related complaints or the Consumer Commission in the case of consumer related affairs.

11.4. What is clear is that the issue of who receives complaints, how the bodies are constituted and who funds and has oversight of these bodies needs to be the subject of broader discussion and engagement.

11.5. It is also imperative that the flip side to complaints, that is, protection mechanisms are examined and developed. In as much as users need an efficient, speedy and cost effective mechanism to address complaints they also need to be informed in order to easily to utilise mechanisms for online protection both of themselves and those they care for.

11.6. What is also clear from international experience is that as South Africa becomes a more digital society there will be a greater need to develop a multi-stakeholder approach to resolving complaints and developing protection mechanisms.

12. CONCLUSIONS AND RECOMMENDATIONS

12.1. While MMA welcomes the raising of critical issues, the Regulations in their current form are impractical, illegal, overbroad and will not achieve their stated aims. Accordingly, MMA calls for the Regulations to be withdrawn.

12.2. MMA submits that the Board has a critical role to play in informing and educating users as well as promoting the application of classification systems.

12.3. MMA further submits that given the focus on children, future proposed regulations must include meaningful children participation in their development and application if they are to be successful and in line with the rights obligations as set out by the Board and Department of Communications.

12.4. Further, MMA submits that future regulations are drafted taking into consideration existing efforts and processes, for example moves by the Department of Justice and Constitutional Development as well as the ICT policy Review and the NDP. MMA also submits that the Board undertake critical research on the challenges presented as fact and broad trends in the Draft Regulations in order to determine their real scale and implications in the South African context. This will ensure evidence based policy and regulations development not based on fear mongering and rumours.

12.5. MMA submits that in addition to the negative elements and challenges equal emphasis is placed on the opportunities presented by an online world. In this regard, it is again imperative that other developments relating to online and context issues are considered. For example, what opportunities exist in the digital place around local content development? Not just television and other audio visual content, but local games and apps and sites specifically aimed at affording children in Africa opportunities to make the best use of the online world.

12.6. What mechanisms can be developed to encourage South African digital skills and how can the industry be transformed to reflect the South African reality?

MMA submits that in addition to delaying the regulations until the amendments to the Films and Publications Act of 1996 are passed, the Board should seek to host a conference of national symposium aimed at addressing and looking for ways to build on the enormous opportunities presented by a digital world.

12.7. While the future of digital is not at all certain, with its fast changing pace and new innovations that could change patterns and behaviour possible at any moment, what is certain is that the future is digital. What is clear is that the changes already experienced from only 5 years ago are profound, from a trend of voice dominated to data dominated internet usage, from limited access through computers to a continent dominated by access through the mobile phone. If we opt to adopt conservative Acts in relation to the digital world and only focus on the negative we will miss possibly the biggest positive growth our citizens have ever experienced. As a continent where according to UNICEF by 2050 one in three children will be an African child, unless we ensure we focus on building our children's resilience and opportunities presented we will be denying our children and continent the future we all dream of.

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