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Mr Thembinkosi Ngoma
Parliamentary Portfolio Committee on Communications
Parliament of the Republic of South Africa
Cape Town

Email:tngoma@parliament.gov.za

26 May2016

Dear Mr Ngoma

MMA AND SOS COALITION: WRITTEN SUBMISSIONS ON THE FILMS AND PUBLICATIONS AMENDMENT BILL

1. We refer to the advertisement published by Parliament giving notice of the Films and Publications Amendment Bill [B37 – 2015] ("The Bill") which proposes to make amendments to the Film and Publications Act, 1996 ("the Act") and calling for written representations thereon by members of

the public to be received by 12:00 hours on Friday, 29 April 2016 which date for submission was then extended to 26 May 2016.

2. These submissions are made by Media Monitoring Africa (MMA) and the SOS: Support Public Broadcasting Coalition (SOS, or the Coalition, or SOS Coalition), collectively "the Organisations".

2.1. MMA is a registered non benefit trust operating since 1993. 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.

2.1.1. 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.

2.2. SOS is a civil society Coalition that is committed to, and campaigns for broadcasting services that advance the public interest. While the SABC is its primary focus as the key site of-, and institution established to drive public interest broadcasting, the Coalition also engages in the advancement of community broadcast media in South Africa. The Coalition is made up of a broad range of NGOs, Trade Unions and their Federations, and individuals (academics, freedom of expression activists, policy and legal consultants, actors, script-writers, film makers, producers, directors etc.).

2.2.1. The core principles around which the SOS Coalition organisers include:

- The advancement of meaningful access to broadcasting services that serve and represent the people of South Africa within an African and global context;
- That the SABC and community broadcasters must put the people of South Africa first, and be liberated from political, commercial and other sectarian influence;

- That the SABC and community broadcasters must lead the way in delivering content that is locally produced, showcases South Africa's rich diversity, and promotes the values of the Constitution, including deepening public sector transparency and public participation in decision making;
- That the SABC and Community broadcasters must be more accountable to their audiences which they not only service, but are also owned by;
- The increase of direct and sustainable public investment into the SABC and community broadcasters to enable them to deliver on their mandates to the people effectively.

2.2.2. One of the core activities of SOS involves active engagement with parliament, and specifically the Portfolio Committee on Communications specifically.

3. It is clear that the Organisations are both involved in media-related work on a day to day basis with a particular focus on ensuring that our constitutional right to freedom of expression as well as other constitutional rights and freedoms are protected, particularly (in the case of MMA) the rights of children. For the last 13 years MMA has been running a programme focused on children's rights and the media, where meaningful children's participation has been mainstreamed. Currently, MMA together with the film and Publications board (FPB) and Google South Africa amongst others, is spear heading a digital literacy initiative driven by young people. In addition to which, MMA has been engaged in the process of making submissions which seek to entrench and deepen our democracy since 1993, including submissions on the previous Film and Publications Amendment Act. Our efforts in seeking to bring public interest driven perspectives has been strengthened as a result of the formation of the SOS Coalition.

4. In March 2015, SOS hosted a multi-stakeholder workshop focussed on the Draft Online Digital Policy, with the aim of identifying areas of commonality and principle agreement concerning this issue between civil society, industry and ordinary users of online platforms.

5. In April 2016 MMA hosted a multi-stakeholder workshop focused more broadly on the regulation of digital content, one of the core aims was to deepen an understanding of the issues by, and between these communities, and further establish areas of commonality and principle agreement, as well as highlight areas of difference. A copy of the report is attached to this submission.

6. Consequently, and collectively, the Organisations are well placed to comment on issues of public concern regarding the Bill. In this regard the organisations are to focus on those areas of the Bill which

are of concern to civil society and to the public interest more generally and it does so in the order in which they arise in the Bill below.

7. Approach of the Organisations:

7.1. In broad terms we welcome the shift to include online media and the emerging digital reality. We also need to acknowledge the critical need to address issues of access to the Internet. Already recognized as a facilitative right, access to the Internet is not merely a nice-to-have in a democratic society, indeed if we are to make real in-roads to addressing inequality as identified in the National Development Plan (NDP) as a core national strategic goal, access to fast, reliable, cheap, quality broadband is essential. In this regard, we support government in seeking to realise this goal as a national priority.

7.2. We are only just beginning to realise the potential of the Internet, from employment and entrepreneurship to e-governance and more effective accountability systems and processes. At the same time the Internet is a platform through which a number of risks and potential harms can be mediated. Accordingly it would be unwise and an abrogation of its duties and responsibilities to every person in South Africa if Parliament and government bodies were not seeking ways to ensure we can all benefit from the potential of a digital world while, at the same time, mitigating and taking steps to combat and minimise harm, from cyber security threats and cyber-bullying to classification systems fit for this new era in electronic communications.

7.3. The real challenge of course is how we balance the legitimate needs and interest to regulate in a manner that seeks to realise the benefits of full participation in an online world while also preserving and advancing our constitutional rights to the hard-won corner-stone principles of freedom, equality and dignity in the face of these risks.

7.4. We fear that in the current formulation the balance has not been successfully achieved, with some sections being in violation of our Constitution. Accordingly the submissions made below seek to offer practical positive suggestions as to help ensure the balance errs in favour of our Constitutional principles, but at the same time firmly addresses the risks to those same principles.

7.5. We note that the Bill does not appear to take into consideration or recognise children as diverse people with different needs and desires, risk profiles, access and critically, stages of development. When legislating around children it is essential that in addition to recognising

their diversity, and developing capacities, that children's agency is also taken into consideration. We are fortunate in South Africa, that in other areas we already have progressive legislation that deals with children, including the Children's Act and Child Justice Act, which we can look to for guidance on how these elements can be included.

7.6. In addition to some of the most progressive legislation and a truly exceptional clause focused on children (Section 28) in our Constitution, we are also fortunate to have some world-class expertise and experience in the children's rights sector and we, therefore, submit that this expertise is directly engaged by the FPB, the Department of Communications (DoC) and supporting public institutions to contribute directly to the revision of the Bill to address existing omissions.

7.7. We note, in particular, the serious omission in the Memorandum of the Objects of the Bill which lists in clause 4 the bodies consulted that no children's rights experts or groups were consulted.

8. **Core concerns:** We have three core concerns about the Bill in general. Firstly, the potential for unconstitutional infringements on fundamental rights. Secondly, Regulatory impact assessment considerations and, thirdly, the need for children's participation.

8.1. **Potential unconstitutional infringements**: We are extremely concerned that in its current form the Bill would significantly infringe on people's rights to access information and to freedom of expression in a manner that would see such limitations in violation of Sections 32 and 16 the Constitution, respectively. Much of this appears to be positioned within the aim of "protecting children from harmful and disturbing content"[1]. The potential violations are deepened as the Bill seeks to impose pre-publication classification in a manner that appears at odds with the Constitution, and unreasonably broad in light of precedent-setting principles set down by both the Constitutional Court and its lower courts. This is particularly so, given that the core aim of the Bill is to require pre-publication classification for not only films, publications and games (subject to certain limited exceptions) but also potentially to everything uploaded onto the Internet, including user-generated content.

8.2. In this regard we draw attention to the Constitutional Court ruling in *Print Media South Africa and Another v Minister of Home Affairs and Another*,[2]where it ruled that the existing provisions of

[1]Paragraph 1.1 of the Memorandum on the Objects of the Bill.

[2]*Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 SA 443 (CC).

section 24A(2), requiring prior classification of films, games and certain publications (subject to certain very specific exceptions) constituted an unconstitutional prior restraint on publication.

8.2.1. In that case, the Constitutional Court made it clear that only publications referred to in section 16(2) of the Act, that is publications that fall outside of the newspaper or magazine exemption, and which contain expression that falls within the ambit of section 16(2) of the Constitution were able to be subjected to classification prior to being published[3].

8.3. Given the seriousness of a Bill which contains provisions at odds with a Constitutional Court ruling which focused on directives on prior restraints on publication, we submit the Bill should be returned to the Minister for removal and/or revision of the offending provisions.

8.4. We are further of the view that the ambit of the Bill in respect of the classification regime ought to remain as the original drafters of the Act intended, namely to cover feature-length films and series, games, and only certain publications (namely those publications falling within the ambit of section 16(2) of the Constitution), whether distributed in South Africa through cinemas, video hire/sales outlet stores or over the Internet and that the broad attempt to require prior classification of *ALL* online content (our emphasis) is not only impractical but unambiguously unconstitutional as per the Constitutional Court set out in section 8.2, above.

8.5. **Concerns about the Socio Economic impact of the Bill**. There can be little doubt, assuming the Constitutional concerns are addressed, that the impact of the bill would be significant. The question as to just how significant is not clear.

8.5.1. Given the importance of the issues the Bill seeks to address, as well as the fact that it will have a profound impact on a range of sectors and industries, including those of the FPB itself, it is essential that the potential impact of the proposed amendments in the Bill are closely assessed, and a legislative and regulatory impact assessment report is produced and placed on public record by the Minister of Communications and/or the FPB itself prior to and in order to inform the enactment of the Bill.

8.5.2. It would appear that our government is already ahead of us in this regard. The Department of Performance Monitoring & Evaluation (DPME) have been working on a framework, in this regard. "In South Africa, Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation and regulations in February 2007. The approval followed a study

[3] Ibid. At paragraph [88].

commissioned by the Presidency and the National Treasury in response to concerns about the failure in some cases to understand the full costs of regulations and especially the impact on the economy."[4]

8.5.3. The value of such a system is to be welcomed and government commended for its progressive response, in this regard.

8.5.3.1. The guidelines state, "to implement the Cabinet decision, from 1 October 2015 Cabinet Memoranda seeking approval for draft policies, Bills or regulations must include an impact assessment that has been signed off by the SEIAS Unit."5In October 2015 Cabinet adopted the DPME guidelines on a Sociology Economic Impact Assessment System (SEIAS).

8.5.4. In terms of the SEIAS Guidelines The responsibilities for the Department of Communication (DOC) include:

"In short, departments are responsible for the following.

1. Departments must ensure that their policy-making processes conform with SEIAS, starting with the initial impact assessment immediately after the mandate to develop a process is received.

2. Departments should make sure that the effort expended on the impact assessment is proportional to the likely impact of the new regulations or regulatory changes.

3. Both the initial and final impact assessments must use the formats and methods established by guidelines issued by the DPME.

4. Departments must publish the draft final assessment with the policies, legislations or regulations when it goes for public comments and consultation, unless it can provide sound reasons not to, which will generally relate to security and confidentiality.

5. Departments are responsible for attaching the final impact assessment to legislation, regulations or policy when submitted for approval by the relevant authorities, whether Cabinet, the Minister or Parliament. Directors General and Ministers are expected to sign for the quality of impact assessments by their departments when they submit them to Cabinet."[6]

8.5.5. It is not clear if such an assessment was undertaken, the only relevant line in the Bill is contained in the memorandum of the Objects, clause 5 which states the financial implications of the legislative process.

8.5.5.1. If a more comprehensive analysis has been carried out in line with the guidelines we respectfully request that it be made public so that all key stakeholders may have an opportunity to engage with it, and that the public consultation process is extended to allow for stakeholders to respond to the proposed provisions of the Bill having had the opportunity to consider any such analysis, so as to give life to a meaningful public participation process as provided for in the Constitution, and confirmed in

[4]SEIAS Guidelines pg 2 Paragraph 2.
[5]SEIAS Guidelines pg 2 Paragraph 2
[6]SEIAS Guidelines pg 9 Paragraph 4.2.

Constitutional and lower Court judgments including *Doctors for Life International v Speaker of the National Assembly*.[7]

8.6. **Children's right to participate**: It is clear that one of the objectives of the Bill is to protect children. Indeed many of the provisions are aimed directly at fulfilling this function. Despite this it does not appear that children's views were solicited in the development of the Bill. Indeed, Section 28 of our Constitution makes express provision for the right of children to participate in matters that affect them.

8.6.1. Given the focus of the Bill and that its impact on young people will be profound, it seems the Bill will not achieve its aims if the voices and vies of young people are not included. The omission of children's views and participation is all the more concerning when we consider that children constitute 35% of the population. We submit, therefore, that for the Bill to achieve its stated aims, it is imperative that a special dispensation in the public participation process that specifically solicits the views of children on this Bill is established.

9. <u>Ad definition. Of child pornography:</u>

9.1. The Bill defines child pornography: *"Child Pornography means an explicit image, however created, or any explicit description of a person, real or simulated, who is depicted, made to appear, look like, represented or described as being under the age of 18 years."*

9.2. We would like to raise two issue in this regard.

9.2.1. The first is around the fact that the definition contained in the Bill is different to that in the Sexual Offences Act of 2007 as amended in September 2015. We support the more refined definition in the Bill as it applies to matters in Bill.

9.2.2. The second issue we wish to highlight is use of the term "child porn." While we fully support the criminalisation of content depicting sex-acts between- and / or the sexual exploitation of minors, we are concerned about the use of this terminology which necessarily and erroneously conflates pornography, being constitutionally protected speech depicting sex-acts between consenting adults, with content depicting the sexual exploitation and abuse of minors, which is criminal.

[7] 2006 (12) BCLR 1399 CC. Note, in particular, *paras* 128-129, 226 and 235.

9.2.3. We submit that the term "Child Pornography" not only conflates constitutionally and legally protected speech with criminal conduct, but that it is also misleading and inaccurate, as outlined in 9.2.2, above. To be clear such content is not pornographic but rather child sexual abuse material.

9.2.4. We, therefore, call on Parliament, and / or the Minister of Communications, and / or the FPB to withdraw and revise this terminology in the body of the Bill and, in cooperation with the relevant government departments and public institutions, all supporting Acts, policies and regulations from "*child pornography*" to *"child sexual abuse material" or* "*child abuse material*," paying particular regard to the definitional points set down in *De Reuk v Director of Public Prosecutions(Witwatersrand Local Division) and Others.*[8]

10. Ad Definition of Digital Film:

10.1. The Bill defines a "digital film" as "any sequence of visual images recorded in such a manner that by using such recording, such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition through the internet or any other electronic medium or device" but still contains the old definition of "film" which is defined as meaning "any sequence of visual images recorded in such a manner that by using such recording such images will be capable of being seen as a moving picture and includes any picture intended for exhibition through any medium or device".

10.2. We submit that the definition of "film" is broad enough to include a "digital film". As it stands therefore the two definitions are so similar that the likely consequences will be confusion as to whether content is a "film" or "digital film." We submit that the definition of digital film should be removed in favour of the definition of Film. We note further that the term film is used in the definition of "distribute" highlighting the redundancy of the term "digital film."

10.3. Thirdly, the Organisations are of the view that the definition of film is required to be amended such that it is clear that user-generated video clips such as those uploaded to social media sites by the millions daily do not fall within the definition of "film" for the purposes of pre-classification. The original intention of the Act, namely to require the pre-classification, in respect of films, to feature films and series distributed through cinema outlets or film hire/sale outlets has been entirely lost due to the rapid pace of technological developments. It cannot be appropriate or lawful, in the digital age, to require the pre-classification of all video content up-linked to the Internet.

[8] 2004 (1) SA 406 (CC).

11. Ad Definition of Distribute:

11.1. The Bill contains a new paragraph (a) in the definition of "distribute" which, in relation to the distribution of a film, game or publication, includes "to stream content through the internet, social media or other electronic mediums".

11.1.1. We note no reference is made to the distribution as being part of a business (see the definition of "distributor" dealt with immediately below).

11.2. The Organisations are of the respectful view that this ought to be clarified and amended

12. Ad Definition of Distributor:

12.1. The Bill contains an amended definition of "distributor" which is defined as meaning "in relation to a film or a game, a person who conducts business in the selling, hiring out or exhibition of films including the streaming of content through the internet, social media and other electronic mediums'. This definition purports to refer to games as well as films but then focuses solely on films.

12.2. While, on the surface, it appears that user-generated content is excluded from the application of this definition through the requirement that such distributors, as defined in the Bill, must "conduct business," there nevertheless remains ambiguity about the scope of the definition's application.

12.2.1. For example: Content platforms such as *Youtube* and *Vimeo* are driven by user-generated content wherein users may also earn an income from advertising and other revenue drawn from driving traffic to their digital content on these platforms through various social and other media platforms. Are these commercial video-bloggers, for example, who may distribute direct links to their *Youtube* videos identifiable as "distributors" in terms of the Bill in the same ways that traditional distributors such as Ster-Kinekor are? Would the same registration principles and fee-structures associated with distributors as envisioned by both the Act and Amendment Bill apply to these and, for example, non-profit distributors of digital learning materials?

12.3. As demonstrated in 12.2.1, above, this entanglement of the application of this definition to the *commercial* distribution of films, as provided for in the Act, with that of the uploading and sharing of user-generated content online and through over the top (OTT) and peer-to-peer technologies such as Bluetooth technology by and between these self-same users has the potential to create ambiguity and confusion about the scope of the Bill's application as regards what it means to be a "*distributor*".

12.4. We are, therefore, of the respectful view that this potential ambiguity must be revised and / or deleted in order to remedy the potential confusion it may cause for Internet users, the FPB and its supporting institutions, as well as law enforcement officials who may place reliance on this definition.

12.5. Further, we are of the respectful view that, in the light of the potential ambiguity that may be caused by how the Bill defines them, that the definitions of "distribute" and "distributor" be revised and / or brought into alignment with each other in order to avoid any definitional distinctions being drawn between the terms.

13. Ad Definition of Hate Speech:

13.1. The Bill now contains a definition of "hate speech".

13.2. The Organisations do not take issue with regulating and indeed prohibiting hate speech which is not protected expression in terms of clause 16(2)(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Indeed we note that the Cybercrimes and Cyber security Bill already seeks to criminalise hate speech, and we respectfully submit that it should be dealt with in the Cybercrimes legislative framework as supported by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the Constitution which already exists and empowers existing law-enforcement agencies and the criminal justice system to take necessary remedial action.

13.2.1. We further note that the public participation process towards the development of a National Action Plan to Combat Racism, Racial Intolerance, Xenophobia and Related Intolerance process is currently underway to develop a responsive framework for addressing the serious matter of Hate Speech and related intolerance from which the Minister of Communications and FPB should take their cue once this process has been concluded so as to avoid the duplication and potential misalignment of processes.

13.2.2. We, therefore, respectfully submit that the definition of Hate Speech be withdrawn, and direct reference be made to the provisions of Constitution and well-established Common Law remedies that pass constitutional muster as regards unprotected speech, and the PEPUDA as regards the criminalisation of unfair discrimination.

13.3. However, the Organisations are concerned that there are numerous problems with the definition of "hate speech" as provided for in the Bill and is of the view that the definition must be changed to bring it in line with, the Constitution. In this regard:

13.3.1. The definition refers to speech which is "prohibited" in terms of section 16(2) of the Constitution. This is not correct. Section 16(2) does not prohibit any speech. Instead it lists expression to which "the right in subsection 16(1) does not extend". Further only one of these, namely expression that falls within section 16(2)(c) Actually constitutes hate speech as such as other kinds of expression listed in section 16(2) are propaganda for war (s16(2)(a)) and incitement of imminent violence (s16(2)(b)).

13.3.2. The definition of "hate speech" in the Bill is defined as including speech which "propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and to promote or propagate hatred against the said person or identifiable group". The Act defines "identifiable group characteristic" as meaning a characteristic that identifies an individual as a member of the group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality. However, these grounds go far beyond the grounds of unprotected speech provided for in section 16(2)(c) of the Constitution which limits the constitutional right to freedom of expression only to the advocacy of hatred based on four specific grounds, namely, race, ethnicity, gender or religion.

13.4. If Parliament wishes to prohibit or even limit hate speech based on: pregnancy, marital status, social origin, sexual orientation, age, disability, conscience, belief, culture, language, birth and nationality, or if it wants to generally prohibit advocacy of hatred against any person irrespective of the basis therefore, it cannot claim the protections of section 16(2)(c) of the Constitution and must satisfy all of the requirements of section 36 (the general limitations clause) of the Constitution. Indeed, in *Print Media South Africa and Another vs Minister of Home Affairs and Another*,[9] the Constitutional Court made it very clear that it does not consider prior restraints on publication of expression falling outside of section 16(2) to be Constitutional as a general rule.

13.4.1. We, therefore, respectfully submit that the definition of Hate Speech be withdrawn, and direct reference be made to the provisions of the Constitution, particularly section 16 (2)(c), and well-

[9] 2012 (6) SA 443 (CC)

established Common Law remedies that pass constitutional muster as regards unprotected speech, and the PEPUDA as regards the criminalisation of unfair discrimination.

14. Ad Definition of "Online Distributor":

14.1. The Organisations stress that the definition essentially revolves around the words "a person who conducts business".

14.2. We note that the Bill does not define the term "conducts business" and the term is not defined in the existing Act.

14.3. The Organisations are of the view that the definition suffers from similar challenges as outlined under "distributor." We also note significant overlap in the definitions between "distributor" and online distributor. We respectfully submit that this definition is too broad as it may also include, anyone who earns any income at all online, including, for example, a blogger who earns minimal amounts by way of advertising on his or her blog site as we have outlined in paragraph 12, above..

14.4. Secondly, the Organisations are of the view that the lack of territorial jurisdiction in relation to conducting a business in South Africa (as opposed to anywhere else in the world) means that using the definition as a basis for the regulation of online activities is inherently unenforceable without recourse to international treaties that enable such enforcement in place. We remind Parliament, the Minister and FPB of the significant and potential inter-jurisdictional complications that this provision necessarily gives rise to, and request the Minister and FPB to outline in their legislative impact analysis as requested in paragraph 8.5, above, how they intend to enforce the provisions of this Bill in respect of "*Online Distributors"* operating outside the jurisdiction of the Republic of South Africa.

14.5. Thirdly, the Organisations are of the view that the definition is not necessary if the appropriate changes are made to the definition of "distribute" to bring it into alignment with that of "*distributor*" as outlined in paragraph 12.4and 12.5, above.

15. Ad Section 2

15.1. We respectfully submit that section 2(d) & 2(e), in line with our general approach would be better and more appropriately addressed in the Cyber crimes and Cyber-security Bill as the proposed clauses go beyond the mandate of the Film & Publications Board.

16. Ad Proposed Section s9A(2)(d):

16.1. The Organisations are of the view that the whole of proposed section 9A(2)(d) is unnecessary as distributors of films and games (the only kinds of content which it is appropriate to require prior classification per the Constitutional Court's judgment dealt with in 13.4, above) are already required to register with the Board in terms of section 18 of the Act and that all such classification and related matters can be dealt with under the existing provisions of the Act.

16.2. However, the Organisations support the flexibility that is granted in the proposed provisions allowing for accreditation of foreign classification systems for films, games and publications as provided for in proposed section 9A(2)(d)(i) and is of the view that these provisions ought to be incorporated into section 18(1)(b) of the Act such that there is not a duplication of classification procedures being undertaken by the Board of material already classified under similar foreign, but locally accredited systems.

17. <u>Ad Proposed Amendments to Section 16:</u>

17.1. The FPB Amendment Bill proposes to amend section 16(1) of the Films and Publications Act, 1996 ("the Act") by including the word "magazine" and references to the Advertising Standards Authority of South Africa

17.2. Essentially section 16(1) of the FPA Bill aims to exclude newspapers and magazines published by a member of a body that is recognised by the Press Council. This amendment has obviously been proposed with the *Print Media SA* case (discussed in 13.4, above) in mind. Such a body is of course the Press Council of South Africa which body is now defined in a new proposed definition but the term does not find its way into proposed amended section 16.

17.3. We are also of the view that it is essential that the online content published by members of the Press Council must be exempt in terms of section 16 of the PBA but that such material does not fall squarely within the current definitions of a "newspaper" in the Act or the proposed new definition of "magazine" in the FPA Bill.

17.4. Consequently we propose that the proposed amendments to section 16 of the FPA Bill be further amended to read as follows"

"Any person may request, in the prescribed manner, that a publication, other than a publication that is published by a member of the Press Council of South Africa and which member subscribes, and adheres, to a code of conduct that must be enforced by that body, and, other than an advertisement that

falls within the jurisdiction of the Advertising Standards Authority of South Africa, which is being distributed in the Republic, be classified in terms of this section."

17.5. If the above changes are made to section 16(1), then consequential amendments to the proposed existing definition of "Publication" in the Act and in respect of the proposed amendments thereto contained in the FPB Amendment Bill are required to be made. In this regard:

17.5.1. We are of the view that the definition of "Publication" needs to be amended as follows:

17.5.1.1. by amending sub-section (a) of the definition currently contained in the Act such that it reads as follows

"*any newspaper, magazine, book, periodical, pamphlet, poster or other printed matter;*" and

17.5.1.2. by further amending proposed sub-section (i) of the definition proposed in the FPA Bill such that it reads as follows:

"*any website, social media, message or communication, including an audio, visual, or audio-visual (that is, including video) presentation (whether live-streamed, streamed or otherwise) placed on any distributed network including, but not confined to, the internet;".*

17.6. In our view, these fairly straight forward amendments would bring all of the publications (that is, a hard or soft copy newspaper, hard or soft copy magazine as well as all online content) of a member of the Press Council of South Africa (print, broadcasting and/or online) within the exemption provided for in section 16 of the Act from having to be classified under the Act.

18. <u>Ad Proposed Section 18(7), (8) and (9):</u>

18.1. The Organisations notes the carve-out for certain broadcasters in that the exemption from the obligation to classify does not relate to broadcasters who "stream content through the Internet". However, the Organisations are of the view that this is not Constitutional.

18.2. Section 192 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") specifically requires that broadcasting is to be regulated by an independent authority.

18.3. None of the institutions established under the FPB Act or proposed to be created under this Bill provide for an adequately "independent" institution to constitute a regulatory broadcasting authority in line with section 192 of the Constitution. This is particularly because the FPB Council and / or their executives are all appointed by the Minister.

18.3.1. The *Ad-Hoc Committee on the Review of Chapter Nine and Associated Institutions* established in its report, the so-called Asmal Report" that in light of the direct role played by the executive in appointments renders these institutions insufficiently independent in keeping with the letter and spirit of the Constitution.

18.4. ICASA itself has already expressed its position on what kind of Internet streaming does or does not constitute broadcasting for the purposes of being regulated in terms of the Electronic Communications Act, 2005 ("the ECA") as is more fully set out in ICASA's Position Paper In Relation To Internet Protocol Television (IPTV) and Video On Demand (VOD) Services("the Position Paper").[10]

18.5. In paragraph 98 of the Position Paper, ICASA has stated that IPTV services have been determined to be broadcasting services for the purposes of the ECA.

18.6. IPTV services clearly constitute "streaming services through the Internet" and therefore there is a direct and blatant contradiction between ICASA's own determination that IPTV services constitute broadcasting for the purposes of the ECA and the provisions of proposed section 18(7) and (9) of the Bill. The contradiction has to be resolved in favour of the Constitutionally-mandated broadcasting regulator, namely ICASA.

18.7. Further, it is also unconstitutional for Parliament to seek to dictate to a Chapter 9 body, such as ICASA, what the ambit of its powers and functions are when these are specifically provided for in the Constitutional provisions laid out in section 192. In the recent case of *EFF v Speaker of the National Assembly and Others*[11]commonly known as the *Nkandla* judgment, the Constitutional Court unanimously laid this issue to rest.

18.8. Consequently, the provisions of proposed section 18(8) are entirely unconstitutional as they presume to instruct ICASA is to when it may or may not issue or renew a broadcasting licence, a determination that may be made only by ICASA in terms of section 192 of the Constitution.

18.9. As such, The Organisations respectfully submit that the Parliamentary Portfolio Committee must remove proposed subsections 18(7) to (9) as these fall foul of the Constitution, and of ICASA's own powers in terms of the Independent Communications Authority of South Africa Act, 2000 ("the ICASA Act") and the ECA.

[10]GN 770 GG 33436 of 3 August 2010.
[11]Case CCT 143/15 and CCT 171/15.

19. Ad Proposed Section 18C(5):

19.1. Proposed section 18C(5) purports to say that no digital film may be distributed in the Republic unless it has been classified and are clearly visible labels indicating the age limit and the nature of content is displayed on or in connection with the film and appearing next to the logo of the Board.

19.2. The Organisations are of the respectful view that this is simply unworkable for the following reasons:

19.2.1. The definition of "digital film" contained in the Bill is "any sequence of visual images recorded in such a manner that by using such recording, such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition through the Internet or any other electronic medium or device". Clearly, this is broad enough to include any video material whatsoever.

19.2.2. User-generated video material is uploaded to the Internet constantly by social media users, among others. Family videos, or video snippets of family occasions would fall within the definition of a "digital film" as defined in the Bill.

19.2.3. Tens of millions of ordinary members of the South African public who make use of social media cannot be expected to:

19.2.3.1. be members of an industry classification body as provided for in section 18C(1);

19.2.3.2. arrange for personal or family video snippets uploaded by them on to social media to be classified in terms of the Act; and

19.2.3.3. ensure that video snippets uploaded by friends and relatives on their own social media platforms have been so classified and

19.2.4. Further, ordinary members of the worldwide public cannot be expected to guess whether or not video material uploaded to social media sites will or will not be viewed in South Africa. Consequently billions of members of the global population who make use of social media cannot be expected to:

19.2.4.1. be members of an industry classification body as provided for in section 18C(1);

19.2.4.2. arrange for personal or family video snippets uploaded by them on to social media to be classified in terms of the Act and to carry the logo of the Board thereon; and

19.2.4.3. ensure that video snippets uploaded by friends and relatives on their own social media platforms have been so classified and carry the Board's logo.

19.2.5. Lastly, this does not take into account the proposed recognition of foreign classification systems as proposed in proposed section 9A(2)(d)(i). It makes no sense to require the Board's logo and consumer advisories if foreign ones can be accredited.

19.3. Consequently, the Organisations are of the view that this provision does not adequately address the mischief the Bill seeks to remedy. We respectfully remind Parliament, the minister and the FPB of the constantly evolving nature of the Internet, and the impracticality of enforcing the this provision in light of the far-reaching scope of the current definition of "distributor" in the Bill.

19.4. We, therefore humbly request the Minister to consult with the FPB to revise this provision and that of the definition of "distributor" as we have argued in paragraph 12, above, in order to ensure the enforceability of this and all provisions relating to users having ready access to content advisories in order to make informed choices.

20. Ad Section 18E

20.1. While we broadly agree with this section, we note that there is currently no mention of the right of reply in the process outlined. Not only does this *lacuna* undermine the long-established principles of natural justice regarding both procedural and substantive fairness, but is also in direct conflict with the constitutional right to just administrative action that is given clear form and expression through its enabling legislation in the Promotion of Administrative Justice Act.[12] Accordingly, we respectfully submit that the section be amended to include a right of reply for those impacted by this section.

21. Ad Section 18F

21.1. As highlighted earlier, the organisations respectfully submit that, in order to prevent duplication, confusion and / or legislation-hopping, existing prohibited and criminalised conduct should not, as a general rule, be included in the Bill except by reference to the relevant empowering statute. We respectfully remind the Committee that, in order to minimise confusion, ambiguity and statutory conflicts which may undermine the rule of law, best-practice has been ably demonstrated both in South Africa and internationally to adhere to the principle of according due deference to existing legislation that seeks specifically to deal with such crimes. Currently this appears to be the proposed Cyber Crimes legislation.

[12] Act 3 of 2000.

21.2. We note however that the issue the section seeks to address, of "Revenge Porn", which we understand to be the distribution of sexually graphic images of individuals without their consent, has not in our reading of the Cybercrimes and Cyber security Bill hitherto been addressed and to that extent we welcome the highlighting of the issue but again respectfully submit that it should be addressed in the Cybercrimes and Cybersecurity Bill.

21.3. We also note that the Bill appears to have drawn on similar proposed legislation in the UK where, in addition to the issue of non-consensual sharing, the element of causing distress is added.[13]

21.4. On the issue of consent we note that there may have been consent when the photograph or film was originally made. As is often the case this content is then shared with the intent of causing embarrassment or harm to the person through its subsequent dissemination, when a relationship has turned sour or for financial gain.

21.5. Accordingly we respectfully submit that the wording should be tightened to ensure that the absence of consent is about the non-consensual sharing and or dissemination of the content, and not about the original creation of the content. (Provided of course it was consensually exchanged within a confidential relationship to begin with.)

21.6. On the inclusion of the term "distress," concerns about the broad, unqualified and potentially over-reaching scope of application of this term have been raised within the context of the drafting of the UK legislation referenced in paragraph 21.4, and are captured here:

"Will the new law provide a remedy for victims who are not distressed by the publication, but angry? Does the inclusion of the word 'distress' send a broader message, that the only valid response to such publication should be distress? Does this reinforce the shaming of female sexuality and stigmatize women who, as was the case for Lawrence, have no desire to apologise for their decision to take the private photographs in the first place? Furthermore, would the requirement of an intention to cause distress be capable of capturing situations where the images are motivated purely by commercial gain? Experts in the field contend that 'the mental element of the offence should be the intentional act of posting private sexual images, without consent, including for the purpose of financial gain.'[14]

[13]See: http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0049/lbill_2014-20150049_en_5.htm See page 34 Paragraph 33.

[14]From: : http://ohrh.law.ox.ac.uk/uk-efforts-to-criminalize-revenge-porn-not-a-scandal-but-a-sex-crime/

21.7. Accordingly we respectfully submit that if an additional criteria is added, and there are many competing views in this regard, that the term "distress" be replaced with the term "harm". Not only is this a more accurate term that lends itself to judicial tests that would meet constitutional muster, but also aligns itself with international practice concerning gender based violence as codified in instruments such as the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW). Article 15 of the Convention is of particular utility to clearly addressing the objects of the Bill, in this regard, in how it describes and locates secondary victimisation within the context of patriarchy and violence against women and children. It, therefore, may well be more appropriate to include in the definition of "harm," as is already well established in our Common Law, harm to reputation; to mobility; emotional wellbeing and financial security.[15]

21.8. We further respectfully submit that irrespective of whether the additional criteria is included, that it is essential that the other elements in the draft UK legislation around defences are also included:

"It is a defence for a person charged with an offence under this section to show that—

(a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

(5) It is a defence for a person charged with an offence under this section to show that—

(a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the individual mentioned in subsection (1)(a) and (b) or another person, and

(b) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b).

(6) A person is taken to have shown the matters mentioned in subsection (4) or (5) if—

(a) sufficient evidence of the matters is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt.

(7) For the purposes of subsections (1) to (5)—

(a) "consent" to a disclosure includes general consent covering the disclosure, as well as consent to the particular disclosure, and

[15] See also: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm specifically, General Recommendation 19 General Comments 6.

(b) "publication" of journalistic material means disclosure to the public at large or to a section of the public. "[16]

22. Ad Section 24A:

22.1. The Bill contains proposed amendments to section 24A.

22.2. In particular the heading of that section has been amended to refer exclusively to prohibitions on possession of films, games and publications (our emphasis) as the words "distribution and exhibition" have been deleted from the heading.

22.3. However the actual wording of section 24A contains prohibitions against distribution and exhibition, and does not, in fact, prohibit possession.

22.4. The Organisations are of the view that these errors must be corrected.

23. Ad Proposed section 24B

23.1. The section raises critical issues, but also serves to illustrate the need to ensure children are not further victimised.

23.2. A case the Centre for Child Law dealt with illustrates the problems that may occur in respect of the criminalisation of children through the Films and Publications Act ('FPB Act')[17]. The Centre assisted a young girl (16) who was charged with the creation and the distribution of child pornography under section 24B of the FP Act. The girl was the victim of grooming in that a 45 year old man solicited naked pictures of her. He gifted her with airtime and promised her a Mini Cooper vehicle if she maintained a relationship with him through sending explicit pictures of herself. She took several pictures of herself naked and sent them to the man. When the pictures were discovered on her phone by her father, her father took it to the police in search of help. The man was charged with and convicted for grooming and possession of child pornography under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('Sexual Offences Act').

23.3. However, because the girl had taken the pictures herself and sent them from her cell phone, the prosecutor deemed it appropriate to charge her as well. It should be noted that creation

[16] See: http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0049/lbill_2014-20150049_en_5.htm See page 35 Paragraph 33.

[17] SP v The State Case number: A713/2014, order handed down by Ebrahim J and Moeng AJ 16 March 2015

and distribution of child pornography are schedule 3 offences in the Child Justice Act which means that they are considered the most serious type of offences. The possibility of diversion is extremely limited for Schedule 3 offences. She was convicted on both charges and received a sentence of imprisonment, suspended for three years. It should be noted that because she was convicted on more than one charge and received a sentence of more than 6 months imprisonment, she would go on the National Register for Sex Offenders for life, regardless of the fact that her sentence was suspended.

23.4. The conviction and sentence was overturned on appeal but the case caused deep concern that children, who are in fact victims, could be criminalised. It should be noted that in terms of section 56(5)(a) of the Sexual Offences Act, a child cannot be convicted for "sexual exploitation"[18] if the child consented to and received compensation for the sexual exploitation. This is precisely because the child is being coerced and is a victim.

23.5. Accordingly we respectfully submit that the law should be clear that a child who is a victim of sexual exploitation for the purpose of creating and / or distributing child sexual abuse material, should not also be criminalised. There should be an explicit provision that states that a child may not be charged even if the child consented to or profited from the creation or distribution of the child pornography. They should instead be treated as a victim and provided with the proper therapeutic intervention.

23.6. Although the proposed amendment to the definition of "child pornography," may limit the possibility of children being charged, we are also concerned about the possibility that children who are in intimate relationships, and consensually send each other pictures may be criminalised under the current provisions. In the matter of *Teddy Bear Clinic v Minister of Justice and Constitutional Development*[19]the Constitutional Court found that sexual experimentation between adolescents who are between the ages of 12 and 16 is developmentally normative and may not be criminalised. The law reform following the judgment explicitly states that the age of consent to sexual activity is 16 and adolescents who are between 12 and 15 who engage in consensual sexual activity may not be criminalised. In addition, any person who is 16 or 17 who engages in consensual sexual activity with an adolescent below the age of 16 may not be charged if the age difference between the two children is less than 12 years. [20]

[18]Section 17 of the Sexual Offences Act.
[19]2014 (2) SA 632 (CC).
[20]See sections 15 and 16 of the Sexual Offences Act, as amended on 7 July 2015.

23.7. It follows that consensual exchange of intimate pictures as part of a personal relationship between these age groups of adolescents should not be criminalised. On a proper interpretation of "sexual exploitation" as part of the definition of "child pornography", prosecution should not be possible where the creation and exchange of intimate photos were purely consensual. It would be preferable if this was clearly stated in the legislation in a manner similar to, and which makes direct reference to sections 15 and 16 of the Sexual Offences Act (as amended on 7 July 2015).

23.8. We agree, however, that any inappropriate conduct, such as distribution of an intimate picture that was shared while the relationship lasted but distributed as "revenge" after the breakdown of the relationship, should remain criminalised. Similarly, creation of explicit images without consent or with coercion should remain criminalised, irrespective of whether it is a child that committed the offence. However, as outlined throughout this section, deference to existing and specific law should be accorded in the formulation and enactment of this Bill.

24. Ad Proposed section 24F &24G

24.1. We draw attention to our common position on the general principle that the crimes referred herein should be dealt with under the Cybercrimes and Cyber-security Bill, and further that the limitations on freedom of speech as contemplated in 24G are brought in line with existing and well-established constitutional requirements.

24.2. Our additional concern in regards these clauses is that there is some level of ambiguity. While media, as contemplated in Section 16, are excluded from classification, it is not clear that those same media as contemplated in 24F and 24G are similarly excluded. It is often the case that news media may, visually and in word, report on, depict and incidence of child abuse, whether emotional, physical or sexual. Most frequently this occurs when cases before the courts are being reported. Similarly media also report on examples of hate speech uttered by others, either in court reporting or during events. It clearly cannot be the intention of these clauses for such reporting which is in the public interest not to be reported.

24.3. Accordingly we respectfully submit that this ambiguity needs to be clarified, and that the necessary exclusions of legitimate instances of online media coverage in the public interest and distribution of the content for purposes of artistic creation and academic research are not criminalised.

25. Ad Proposed section 27A(2)(a):

25.1. The Organisations note the inclusion of the words “or advocating racism and hate speech” in the proposed substitution of section 27A(2)(a).

25.2. The Organisations note that “racism” is not defined in the Act or in the Bill and that it constitutes expression that is protected in terms of 16(1) of the Constitution.

25.3. We note however that this does not mean to suggest racism should be condoned. We also note that government has already been working on addressing hate speech both In the Cyber Crimes legislation as well as specific legislation aimed at Hate speech more broadly. Accordingly and in keeping with our general submission we again respectfully submit that criminal acts in principle should be dealt with in specific legislation.

25.4. The Organisations respectfully suggest that Parliament limit prohibited speech to the grounds referred to in section 16(2) and in particular to hate speech which is not protected expression in terms of clause 16(2)(c) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

25.5. Consequently, the Organisations are of the respectful view that the words “racism and” be deleted from the proposed insertion to section 27A(2)(a).

26. <u>Ad Sections and Proposed sections: 24, 24A, 24B, 24C, 24E, 27A:</u>

26.1. The Organisations are concerned that all of the offences provided for in sections or proposed sections 24, 24A, 24B, 24C, 24E and 27A and which relate to crimes committed over the Internet are dealt with in one way of another by the Cybercrimes and Cybersecurity Bill (‘the Cybercrimes Bill”).

26.2. The organisations are of the view that the Cybercrimes Bill is specifically designed to define and criminalise certain types of online content. Consequently what the Bill (and the Act) ought to focus on are crimes which are committed by way of films, publications and games NOT distributed via the Internet as those are dealt with in detail in the Cybercrimes Bill.

26.3. Having a plethora of essentially similar crimes but with different definitions etc is a recipe for allowing potential criminals to take advantage of differing definitions and competing jurisdictions to avoid liability.

27. The Organisations thank the Portfolio Committee for the opportunity of making these written submissions on the Bill **and hereby formally requests an opportunity to make oral representations too.**

28. Please do not hesitate to contact the Organisations should you have any queries or require any further information.

FOR MORE INFORMATION PLEASE CONTACT

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