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Our Reference: FPB Online
Date: 14 July 2015

Film and Publication Board
For Attention: Tholoana Ncheke / NFT Mpumlwana
By Email:policy.submissions@fpb.org.za

Dear Sir / Madam,

RE: DRAFT ONLINE REGULATION POLICY /2014 ("DRAFT POLICY"): SUBMISSIONS

1 We refer to the abovementioned matter, specifically *Government Gazette No. 38531* (Notice 182) of 4 March 2015 ("the Gazette"), as well as your further communication via your website fixing the deadline for representation submissions.[i]

INTRODUCTION

2 Cause for Justice ("CFJ") is a non-profit human rights and public interest organisation founded to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and public awareness. Two of CFJ's core values give it a particular interest in the Draft Policy, namely (1) the responsible exercise of freedom and (2) protection of the vulnerable.[ii]

3 The purpose of this submission document is to express CFJ's views in respect of the need for, the legality of, as well as the constitutionality of the Draft Policy. In a nutshell, CFJ is in agreement that a policy such as the Draft Policy is a necessary measure, in the performance of the FPB's statutory mandate. However, the Draft Policy may not go beyond the confines of the Films and Publications Act, 1996 ("the Act") or any other empowering legislation. Freedom of expression should be guarded and promoted and the current balance with the protection of children's and consumer rights may not be impinged upon beyond what is lawful and necessary (reasonable and justifiable) to achieve the legitimate purposes of the Act.

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SUMMARY OF CONTENTS

4 In what follows, we set out the contextual setting within which the Draft Policy is to operate, followed by CFJ's specific representations in respect of the Draft Policy. CFJ's main points are:

4.1 The Draft Policy is both lawful and rationally connected to a legitimate government purpose(s). Its creation has been sanctioned by Parliament in the Act. It accordingly satisfies the requirements of the rule of law / principle of legality.

4.2 The Draft Policy, once issued in final form, should constitute law of general application capable of limiting freedom of expression.

4.3 It is advisable that the whole process of making the Draft Policy should comply with the requirements/standards of the Promotion of Administrative Justice Act, 2000 (*"PAJA"*).

4.4 Careful consideration should be given to the current scope of the Act, to confirm that it does indeed apply to the online distribution of digital content. If necessary, the Act should be amended to make it applicable to online distribution.

4.5 The registration and classification requirements in respect of "films" and "games" are in line with the Act and accordingly lawful.

4.6 To the extent that the Draft Policy attempts to enforce registration and classification requirements in respect of online "publications", the Draft Policy is unlawful and void. The Council/FPB/Minister may choose to amend the Act to make these requirements applicable to online "publications".

4.7 The Act, and accordingly also the Draft Policy, should not be applied to online distribution of films, games and publications for personal, non-commercial purposes by private individuals *on the same footing as* commercial distribution.

4.8 The proposed application of a removal measure in respect of self-generated content ***"that the Board may deem to be potentially harmful and disturbing to children of certain ages"*** is overbroad and vague. Removal of content on a basis other than classification is unlawful and a disproportionate measure in relation to the government purpose(s) sought to be achieved. CFJ makes a suggestion to cure the unlawfulness/unconstitutionality.

4.9 The protection of children from internet pornography is a legitimate government purpose that requires the Council/FPB/Minister to implement appropriate and proportionate measures to

assist parents in protecting their children from inadvertent exposure. CFJ highlights a number of reasons legitimising the protection of children from exposure to pornography.

4.10 CFJ proposes additional measures to protect children from exposure to pornography.

CONTEXT

The Bill of Rights

5 Section 16(1) of the Constitution of the Republic of South Africa ("RSA"), 1996 ("the Constitution") provides that everyone has the right to freedom of expression, which includes (amongst others) freedom of the media and freedom to receive and impart information and ideas. Excluded from this freedom right is propaganda for war, incitement of imminent violence and hate speech based on race, ethnicity, gender or religion that constitutes incitement to cause harm.[iii]

6 Protected freedom of expression may only be limited 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.[iv]

7 The Act is law of general application and is the product of a limitation analysis undertaken by Parliament to arrive at a balance between freedom of expression and certain other rights, values and norms enumerated in and underlying the objects clause of the Act. Importantly, this balance (acceptance that the Act constitutes a reasonable and justifiable limitation of freedom of expression) was reached through constitutional/democratic debate by the people of South Africa through their elected representatives. As such, CFJ does not take issue with the constitutionality of the Act generally and will focus, where relevant, on certain specific provisions to the extent implicated in the discussion of the legality and constitutionality of the Draft Policy.

The Act

8 The object of the Act is to regulate the creation, production, possession and distribution of films, games and certain publications for purposes of:

8.1 Providing consumer advice to enable adults to make informed choices for themselves and their children;

8.2 Protecting children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and

8.3 Making the use of children *in* and the exposure of children *to* pornography punishable.

9 The object referred to in 8.1 above implicates (amongst others) adults' rights to ***human dignity***, ***equality***, ***freedom and security of the person***, ***privacy*** and their ***constitutional obligations*** in respect of their children's rights – and accordingly also ***the state's duty*** to guard and promote these rights.

10 The objects in 8.2 and 8.3 above implicate the ***rights of children*** and ***the state's duty*** towards children. The Act achieves its objectives by way of a system of classification of publications, films and games, to which we return in our discussion of the constitutionality of the Draft Policy.

The Draft Policy

11 The context within which the need for the Draft Policy arose is set out in the *Gazette* and is referred to as "***media convergence***".[v] The objectives of the Draft Policy are:[vi]

- to create a framework to give effect to the Act (specifically section 18(1) and (2)) to the extent that the Act applies to digital/online content (i.e. films, games and publications distributed on online/mobile platforms); and

- to create an opportunity for co-regulation between the FPB and industry for the classification of digital content.

12 The Draft Policy also forms part of a much wider policy framework, consisting of (amongst others):

12.1 The National Planning Commission's National Development Plan 2030 ("NDP");[vii]

12.2 Minister of Communications, Ms Faith Muthambi, Budget Vote Speech on 20 May 2015;[viii]

12.3 The FPB's five-year strategic plan;

12.4 The FPB's Online Content Regulation Strategy;[ix]

12.5 The Films and Publications Amendment Bill, 2014 ("the Bill").[x]

13 It is within the above context that we make the submissions set out hereinbelow.

REPRESENTATIONS

Legality / constitutionality of the Draft Policy

Applicable constitutional principles

14 As noted hereinabove, rights in the Bill of Rights may only be limited by way of law of general application. In the present context it cannot be contested that the regulation of distribution of online/digital content constitutes a form of limitation of freedom of expression.[xi]

15 The making of law on a national level (national legislative authority), as a general rule, lies within the jurisdiction of Parliament.[xii] As noted above, Parliament enacted (and have since amended) the Act as a legislative measure (law of general application) to reasonably and justifiably limit freedom of expression in order to achieve legitimate government purposes, which is to comply with the state's constitutional duties referred to in 9 and 10 above.

16 It often happens that Parliament delegates its law-making/rule-making authority to another state functionary in an Act of Parliament, resulting in delegated or subordinate legislation. Subordinate legislation, as a general rule, qualifies as "law".[xiii] A mere policy or practice generally would not qualify as "law".[xiv]

17 Subordinate legislation may not deviate or derogate from the relevant empowering (original) legislation, as it draws its authority (as law) from the parliamentary act which empowers the functionary to issue the particular subordinate legislation.[xv]

18 In addition, accepting that a particular delegation of law-making authority is lawful, the empowered functionary may not exceed or misconstrue its authority.[xvi] The empowered functionary, as a general rule, may only sub-delegate its authority to the extent that such sub-delegation is authorised by the empowering legislation, whether expressly or impliedly.[xvii] Finally, the empowered functionary may not submit/succumb to the unlawful dictates of (take directions from) another authority, nor may it "pass the buck".[xviii] [xix] The aforementioned comments must however be considered and understood in the light of the Constitution's "Agency and delegation" clause which provides for executive organs of state to lawfully delegate their powers and functions and to exercise powers and functions as agent or delegatee of another executive organ of state.[xx]

19 The Draft Policy would also need to be rationally connected to the achievement of a legitimate government purpose(s).[xxi] In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA*[xxii] the Constitutional Court held that -

"it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement."[xxiii] [xxiv]

20 To the extent that the creation or making of the Draft Policy constitutes "administrative action", the making of the Draft Policy has to comply with the requirements of the *PAJA* and section 33 of the Constitution.[xxv]

21 Lastly, the Draft Policy would have to satisfy the requirements of the limitations clause,[xxvi] as set out in paragraph 6 and 7 above.

Lawfulness and constitutionality of Draft Policy generally

22 In terms of section 4A(1)(a) of the Act:

"The Council shall in consultation with the Minister, issue directives of general application, including classification guidelines, in accordance with matters of national policy consistent with the purpose of this Act."

23 The final two paragraphs on page 7 (of 20) of the Draft Policy indicate that the Draft Policy, once published in final form, will constitute directives, as contemplated in section 4A of the Act.

24 In our view, the legislature has lawfully delegated its law-making power to the Council to issue directives, subject thereto that it must be done in consultation with the Minister and in accordance with matters of national policy that are consistent with the purpose of the Act.

25 We are furthermore of the view that the Council has not, nor has it been empowered (in terms of the Act) to place further restrictions/limitations on the right to freedom of expression (by way of directives) beyond the scope of what has been provided for in the Act itself. To the extent that the Draft Policy directs how the Act is to be implemented in the online/digital space and does not impinge upon freedom of expression beyond what is provided for in the Act, it should be lawful and have the full effect and force of law upon being issued by the Council.[xxvii] The Draft Policy would accordingly also be rationally related to the achievement of a legitimate government purpose(s) – see in this regard our discussion of the objects of the Act and the Draft Policy in paragraphs 8 to 11 above, as well as paragraphs 54 and 55 hereinbelow in the context of the distribution of pornography.

26 We note that the Draft Policy ostensibly has been prepared by *the FPB*, whereas the power to issue directives has been delegated to *the Council* in terms of the Act. Depending on the basis upon which the FPB has prepared the Draft Policy, there may or may not be a risk of

- unlawful sub-delegation to the FPB by the Council,
- an exceeding of its own authority by the FPB,[xxviii]
- adherence by the Council to the unlawful dictates of the FPB, and/or
- "passing the buck" by the Council.

27 We are however of the opinion that if the true state of affairs are that the FPB has prepared the Draft Policy in the capacity as agent of the Council and *the Council* will take the final decision to approve and issue the Policy (directives), i.e. not merely rubber-stamping what the FPB has prepared, the potential risks highlighted above would be diminished.

28 We however have to raise a question mark and cautionary note at this juncture: It is not expressly clear that the classification scheme of the Act, in its current form, applies to online distribution of films, games and publications. The Act applies to publications distributed *"in the Republic"* and persons who distribute films or games *"in the Republic"*.[xxix] To the extent that there is uncertainty as to whether the act of uploading or posting digital content to the worldwide web indeed constitutes distribution *"in the Republic"* and whether a person who so uploads content can be said to distribute the content *"in the Republic"*, there is a risk that the Act and accordingly also the Draft Policy may well not apply to online distribution of digital content. We assume, for purposes of our further discussion of the Draft Policy and related matters that it could apply to the distribution of online content that is received by persons who are physically present in the RSA.

Lawfulness of registration and classification requirements

29 The registration requirement in clause 5.1.1 of the Draft Policy, *in so far as it applies to "films" and "games"*, is a confirmation of and therefore in line with sections 18(1)(a) and 24A(1) of the Act.

30 The prohibition against online distribution of unclassified digital content in clause 5.4.2 of the Draft Policy, *in so far as it applies to all "films", all "games" and "publications" in respect of which any person has requested a classification*, is a confirmation of and therefore in line with section 24A(2)(a) of the Act.

Unlawful application to "publications"

31 We have noted the objectives of the Draft Policy hereinabove.[xxx] One objective is to give effect to sections 18(1) and (2) of the Act. The application clause of the Draft Policy (clause 2) refers to "any person who distributes or exhibits online any film, game, or ***certain publication*** in the [RSA]." (***own emphasis***) This term, "***certain publication***", features a number of times in the text of the Draft Policy.

32 It is important to note that section 18 of the Act deals only with "films" and "games" (as defined in section 1 of the Act). Whereas it is correct that section 18(1) has a registration and a submission-for-classification requirement, these requirements do not apply in respect of "publications" (as defined in section 1 of the Act).[xxxi]

33 We are accordingly of the view that the Draft Policy, once published in final form, will be unlawful and unenforceable to the extent that it places registration and classification obligations on online distributors of "publications" in the RSA. If the Minister/Council/FPB wishes to persist with these requirements in respect of online publications (other than and in addition to films and games), the Bill would have to amend the Act to make provision for this.[xxxii]

Television films and television programmes

34 The definition of "film" in the Act is wide enough to encompass both feature films and programmes of any length. The pre-distribution classification requirement in clause 6.1 of the Draft Policy accordingly is a confirmation of and in line with sections 18(1), 24A(1) and 24A(2)(a) of the Act.

35 It is understood that the deeming provision (the first clause 6.2) is a measure that relaxes the classification burden that rests upon the FPB and/or online distributors who have opted into the self-classification option. As such, it constitutes an exceptional measure *in favour of* the online distributor. Accordingly, although the reference to media content that "has generated controversy in another jurisdiction or is likely to have a high profile on release" (in clause 6.3) could be viewed as questionable, the discretion given to the FPB to subject such content to the normal classification scheme is not a regressive or impinging measure.

Child exploitative media content and classification of self-generated content

36 Clauses 7.1 to 7.3 (in respect of child exploitative content) are in line with the Act and therefore lawful. However, the measure proposed in clause 7.4 (in respect of self-generated content) is more questionable.

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

Unlawfulness / Unconstitutionality

37 When viewed in the light of the prohibition against the distribution of unclassified films and games,[xxxiii] the abovementioned removal measure is not problematic *ex facie*. However, in our opinion the Act should not be applied to online distribution of films, games and publications for personal, non-commercial purposes by private individuals on the same footing as commercial distribution. Otherwise, the Act and/or the Draft Policy may be attacked on the basis of overbroadness, irrationality and/or unreasonable and unjustifiable infringement of freedom of expression.

38 Furthermore, the Council would, as a general rule, not be authorised to give the FPB a broad, unqualified discretion, such as the one proposed in clause 7.4 of the Draft Policy, to limit freedom of expression.[xxxiv]

39 The removal measure itself is overbroad and vague in its proposed application to ***"content that the Board may deem to be potentially harmful and disturbing to children of certain ages"***. It is out of sync with the classification scheme, which is the measure contemplated in the Act for the protection of children.

40 What is suggested (removal on a basis other than classification) seems grotesquely disproportionate to the government purpose sought to be achieved (i.e. the protection of children).

Suggested cure for unlawfulness / unconstitutionality

41 The Act should be amended to the extent required to provide for requests for classification of self/user-generated content. The current scheme applicable to "publications"[xxxv] could be effective, proportionate, reasonable and justifiable in this context. Clause 7.5 of the Draft Policy would also fit into such a scheme. The structure of the proposed scheme could conceivably function as follows:

41.1 A private individual would upload/distribute a film, game or publication (digital content) online;

41.2 Someone, potentially an official of the FPB, would view the digital content;

41.3 The viewer would report the digital content to the FPB requesting that it be classified or the FPB would of its own accord refer the digital content to a classification committee for classification;

41.4 The digital content would be classified;

41.5 Depending on the classification, the digital content may then either –

41.5.1 be removed, in the case of a "refused" or "XX" classification; or

41.5.2 be removed and replaced with the version containing the FPB logo and classification decision; and

41.5.3 in the case of an "X18" classification, be limited in the scope of its distribution by applying an opt-in system, to mirror the situation applicable outside of the online-sphere where "X18" material are only accessible within a licensed and registered adult premises.

41.6 To curb abuses / recurring offenses by certain private individuals (e.g. distribution of "refused" or "XX" material), the Act should be amended to authorise the FPB to *declare* persons to be distributors of films, games and publications, thereby subjecting serial offenders to the compulsory registration and submission-for-classification requirements or by authorising the FPB to direct that the person must submit all digital content intended to be distributed to the FPB for classification.

42 The implementation of the abovementioned scheme would require an amendment of the Act to distinguish between the classification of "films" and "games" (current section 18) and the classification of user-generated films and games that are distributed online for personal, non-commercial purposes.

PORNOGRAPHY: Limitation of freedom to distribute

43 One area of particular concern is the online distribution of pornography. Pornography constitutes protected expression for purposes of section 16(1) of the Constitution.[xxxvi] The Act and the Draft Policy's (which purports to give effect to the Act in the online space) regulation of the online distribution of films, games and publications through its classification scheme and concomitant consequences, constitute a limitation(s) of the right to freely distribute pornography.[xxxvii]

Limitations in the Act

44 The Act and the Draft Policy limit the free distribution of pornography in a number of ways. Apart from the obvious measures, such as the criminalisation of "child pornography" and of conduct in relation to the sexual exploitation of children, the Act contains the following specific measures in relation to pornography:

44.1 Requiring persons who distribute films, games or publications classified as "X18" to obtain a licence to conduct the business of adult premises and to only distribute such materials from within premises forming part of a building, coupled with a concomitant criminal prohibition;[xxxviii]

44.2 Placing a criminal prohibition on the distribution of unclassified content and content classified as "refused" or "XX";[xxxix]

44.3 Placing a criminal prohibition on the distribution of content classified as "X18" or which contains depictions, descriptions or scenes of "explicit sexual conduct" to persons under the age of 18 years.[xl]

Limitations in the Draft Policy

45 The Draft Policy does not contain any measures designed to deal specifically with pornography, but confirms the general scheme of the classification regime and tailors it for the online space in a number of respects, e.g.:

45.1 Affirming the registration requirement for online distributors of films and games (clause 5.1.1, section 18(1)(a) read with section 24A(1) of the Act);

45.2 Affirming the requirement for classification prior to distribution online (clauses 5.4.2 and 6.1, section 18(1)(b) read with section 24A(2)(a) of the Act);

45.3 Providing for self-classification by online distributors of content to be distributed (clause 5.1.2);

45.4 In the case of online distribution of television films, providing for 'deemed' classification where films have been classified by an authorised classification system (clause 6.2).

Suggestion for additional measures

46 Two further measures which in our opinion should be added to the Draft Policy, in the context of pornography, is a blocking mechanism in respect of online content containing

degrading/dehumanising explicit sexual conduct and an opt-in mechanism in respect of explicit sexual conduct. These measures would give effect to section 24A(2), on the one hand and sections 24A(4) and section 24 (read with section 24A(3)) of the Act, on the other.

47 As there is a criminal prohibition against distributing material containing degrading/dehumanising explicit sexual conduct ("XX" material), distribution of such material may legitimately be blocked.

48 Furthermore, as material containing explicit sexual conduct ("X18" material) may only be distributed in/from a licensed adult premises and may not be distributed to a child, online users who are 18 years or older should be given an opportunity to opt-into websites or platforms where these materials are distributed (hosted). Such in opt-in mechanism would effectively mirror/mimic the operations of licensed adult premises outside of the online space. The Council/FPB should also consider and direct how to apply the requirements of section 24(2) of the Act in the online space.

Limitations analysis

49 The crisp question is to what extent the abovementioned limitations are reasonable and justifiable. The answer is dependent on a consideration of all relevant factors, including (at least) the following:

49.1 The nature of the right that is limited;

49.2 The importance of the purpose of the limitation;

49.3 The nature and extent of the limitation;

49.4 The relationship between the limitation and its purpose;

49.5 The possibility of employing less restrictive means to achieve the purpose.

50 For the purposes of these submissions, we will focus our attention only on the first two factors listed hereinabove. In our view, those measures contained in the Draft Policy that constitute limitations of freedom of expression, do not go beyond the scope of the Act and therefore do not introduce new or further infringements on the right to freedom of expression.

51 Accordingly, to the extent that these measures are constitutionally questionable (i.e. not reasonable and justifiable), their constitutionality (or lack thereof) will be linked to and be dependent on the constitutionality of the relevant provisions of the Act which they purport to implement in the online sphere.

52 As such, any potential unconstitutionality would not be the result of the introduction of the Draft Policy, but rather would flow from the current provisions of the Act. We are however at the Council/FPB's disposal in the event that either body would require CFJ's inputs in respect of the constitutionality of provisions requiring prior registration and/or pre-distribution classification of online content or any other provision of the Act or Draft Policy.

Nature of the right

53 In *De Reuck* the Constitutional Court, after identifying the core values of freedom of expression, held that the limitation of pornography (more specifically child pornography), "does not implicate the core values of the right" and that pornography is, "for the most part, expression of little value which is found on the periphery of the right". The Court also acknowledged that child pornography is not afforded constitutional protection in many democratic societies.[xli]

Purpose of the limitation

54 The purposes of the limitations are set out in the objects clause of the Act and in the Introduction and Objectives of the Draft Policy. In the specific context of pornography, the main purpose would be protecting children from exposure to disturbing and harmful materials and from premature exposure to adult experiences (including pornography).

55 The protection of children from pornography is a legitimate societal and government purpose, for a number of reasons, including (amongst others):

55.1 Due to the proliferation of entry points and access points to the internet, parents cannot as a matter of logic and pragmatism be burdened with and be expected to carry the sole responsibility to protect children from exposure to pornography online. The state should provide the regulatory framework and take such action as is reasonably necessary to assist parents in protecting their children from inadvertent exposure to adult content.

55.2 As children are still forming their own value systems and their own convictions about what constitutes healthy sexual preferences and life styles, pornography, which depicts people as sexual objects devoid of human dignity, presents a distinct harm factor for children. Retired Constitutional Court judge, Laurie Ackermann, has expressed the view that Germany probably has the richest and most deeply philosophically grounded scholarship and jurisprudence on human worth (human dignity) and equality in the world.[xlii] The approach of the German courts regarding human dignity is therefore instructive in this context:[xliii]

"…in the course of statutory interpretation, German judges have developed a concept of pornography that views it in the light of the Basic Law's primary injunction to protect human dignity. In a case that centered on the infamous Fanny Hill, the Federal Court of Justice declined to pronounce the book pornographic since it presented sexuality in the broader context of human life. Rather than deploying a subjective standard that attempts to determine the extent to which a particular work offends the viewer or reader,[xliv] the German court analyzed the presentation of sexuality in its human context. Mathias Reimann summarized the characteristically Kantian German approach: The court essentially asks whether the material presents the characters truly as human beings with a value in and of themselves. If the material does, the court will find the sexual explicitness acceptable because sex forms a natural part of life. If, on the other hand, the material basically employs its characters only as objects for other purposes, notably sexual stimulation, the court will find the depiction of sex unacceptable because the work treats the characters not as humans, but only as objects. Such a work denies the characters their human individuality and personhood. The approach of the German court thus concerns itself not with the viewer's prurient interest but—ultimately— with human dignity.[xlv] The regulation of pornography, then— whether done under the limited provisions of the criminal law or the somewhat broader provisions of the youth protection statute— is, like so much else in German constitutional law, centered on the protection of dignity under Article 1."

The devalued perception of human persons enunciated by/through pornography, thus presents a present harm to the developing psyche and "sexual palate" of the child, as well as future harm to self and others through sexual expression bent by pornography's dehumanising/devaluing effect.

55.3 There is a growing body of scientific/research evidence and empirical data regarding the harms to children from or associated with exposure to pornography.[xlvi] These include, for example, sex addiction and other physiological harms, as well as negative behavioural and attitudinal effects.

55.4 Section 28(1)(d) and (2), read with section 7(2) of the Constitution place a duty on the state to protect children from harm.

International best practice

56 We propose that, to the extent that this has not been done comprehensively, the Council/FPB should take full cognisance of international best practice on the regulation of online content to protect children. There is much to learn from the experiences of other nations who may have gone before South Africa in this particular endeavour.

Practically implementable solution

57 CFJ does not have the necessary technical/IT capabilities in its ranks to make substantive submissions regarding the most operationally effective online regulation scheme. We nonetheless point out that whatever system/policy is implemented, it must be effective in practice and practically implementable by all parties involved.

Miscellaneous

58 It is advisable to employ the wording, terminology and defined terms used in the Act, as far as possible throughout the text of the Draft Policy, to avoid the perception of a disconnect between the Draft Policy and the Act.

59 The Act and Draft Policy should be amended to the extent necessary to clarify how it applies to audio content (i.e. content with no visual component), which may be equally harmful and disturbing to children.

60 The reference "in certain circumstances" in clause 6.2 of the Draft Policy is too vague and should be clarified to avoid it being invalid.

61 There is a numbering error on page 14 of 20 of the Draft Policy in that there are two clauses numbered "6.2".

62 The reference in clause 7.2 of the Draft Policy to section "24C" is incorrect and should be replaced with section "24B(1)".

63 The reference "for the purposes of child exploitation" in clause 7.2 of the Draft Policy is superfluous and should be deleted.

64 The cross-reference to clause "5.1.6" in clause 7.10 of the Draft Policy is incorrect and should be replaced with clause "5.1.9".

65 The word "sole" in clause 9.3 of the Draft Policy is overly restrictive and should be removed.

66 The word "own" in clause 9.3 of the Draft Policy is too narrow and should be expanded by adding the words "or any other person's" directly after it, to cover the situation where an online distributor provides false information not in the furtherance of its own commercial interests, but only the commercial interests of (for example) its holding company.

67 The term "belonging to" in clause 9.3 is vague and it should be considered to replace it with wording such as "intended to be distributed by".

68 Although we have a number of other specific submissions, these are less concerning and are accordingly not addressed at this stage.

CONCLUSION

69 We trust that the above submissions are of assistance and look forward to your response thereto (if any) in due course. CFJ remains at the Council's disposal to assist in the further development and/or amendment of the Draft Policy to effectively achieve its intended purposes.

Yours faithfully,

CAUSE FOR JUSTICE: MANAGEMENT COMMITTEE

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[i] http://fpb.org.za/media-centre-fpb/press-release/148-public-consultations-on-the-draft-online-regulation-policy-to-be-extended

[ii] http://causeforjustice.org/core-values/

[iii] Section 16(2) of the Constitution.

[iv] See section 36 of the Constitution, which lists five factors that are relevant for purposes of the "limitation analysis".

[v] See paragraph 5 on page 4, page 8 to 11 of the *Gazette*, as well as page 6 and 8 of the Draft Policy.

[vi] See clause 3 of the Draft Policy.

[vii] See page 395 to 405 of the NDP in relation to "Safety of women, the girl-child, children and the youth".

[viii] "Today, we are honoured to present the DoC's Budget Vote no. 03 to this august House under the theme ***"New Department: New Possibilities".*** The process to establish the Department of Communications has been completed. Our mission is to ***"Create an enabling environment for the provision of inclusive communication services to all South Africans in a manner that promotes socioeconomic development and investment through broadcasting, new media, print media and other new technologies, and brand the country locally and internationally".*** It is a task we take seriously!"

"Our vision as guided by the National Development Plan, envisages an active citizenry that participates in the socioeconomic life of the country. It states that in "2030, South Africans will be more conscious of the things they have in common than of their differences, and that their lived experiences will progressively undermine and cut across the divisions of race, gender, disability, space and class". It is our firm belief that this is achievable when government is at the centre of providing effective and efficient communication to support these aspirations…"

"As more people, especially children access digital content online, challenges arise. We have prioritised the development and adoption of the **Online Content Regulations Policy.** Consultations on this Policy are currently underway. The policy aims to create a framework in relation to online content distribution in the country. Once adopted the policy will bring about a comprehensive and fundamental transformation for online content

regulation in the country. **We call upon all interested parties to work with the Film and Publication Board to ensure that this policy is finalised in order to properly classify digital content and ensure that children are sufficiently protected from exposure to disturbing and harmful content. We anticipate that this policy will serve before Cabinet in the third quarter of this financial year. …"**
"The FPB performs an important and critical function of regulating the production, possession and distribution of films, games and publications, including the protection of children against harmful online content. In this regard, **R82. 4 million** has been allocated to the FPB during the 2015/16 financial year. The money will be used amongst others to increase the entity's visibility through the implementation of cyber safe outreach programme to protect children against harmful content."

[ix] CFJ requested this strategy document from the FPB, but was informed that it is an internal document and that CFJ therefore could not have sight of it.

[x] CFJ requested the amendment bill from the FPB, but was informed that it has not yet been published for public comment and that CFJ therefore could not have sight of it.

[xi] See *Print Media South Africa and another v Minister of Home Affairs and others* (CCT 113/11) [2012] ZACC 22 ("*Print Media*") para [51], part of the majority judgment written by Skweyiya J.

[xii] The Constitution may also in exceptional cases assign national legislative authority to other state functionaries/organs.

[xiii] See *The Bill of Rights Handbook* (Currie and De Waal, Sixth Edition, Fourth Impression, JUTA 2014) (*"Currie & De Waal"*) p 156 and case law cited there.

[xiv] Ibid. See however also *Administrative Law in South Africa* (Cora Hoexter, Second Edition, Reprinted, JUTA 2013) ("*Hoexter*") p 32 with reference to *Akani Garden Route v Pinnacle Point Casino* 2001 (4) SA 501 (SCA) para 7 (standards / quasi-legislation). See also *Hoexter* p 52-53 regarding the characteristics of legislation.

[xv] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), para 58 the court noted that it is "*central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*". In the context of administrative action covered by the *PAJA*, the corresponding grounds for judicial review are found in sections 6(2)(a)(i), 6(2)(e)(i) and 6(2)(f)(i).

[xvi] See *Hoexter* pp 256-259.

[xvii] See *Hoexter* pp 265-273.

[xviii] See *Hoexter* pp 273-276.

[xix] In the context of administrative action covered by the *PAJA*, the corresponding grounds for judicial review are found in sections 6(2)(a)(ii) and (iii), 6(2)(e)(iii) and (iv).

[xx] See section 238 of the Constitution.

[xxi] See *Currie & De Waal* at pp 11-13 and case law cited there.

[xxii] 2000 (2) SA 674 (CC).

[xxiii] Ibid para [85].

[xxiv] In the context of administrative action covered by the *PAJA*, the corresponding grounds for judicial review are found in sections 6(2)(e)(vi) and 6(2)(f)(ii).

[xxv] In addition to the *PAJA* review grounds noted above, the making of the Draft Policy (both the decision and the process) would need to be administratively just, i.e. reasonable and procedurally fair, so as to not fall foul of the remaining review grounds in section 6(2) of the *PAJA*.

[xxvi] Section 36 of the Constitution.

[xxvii] If however the Draft Policy is something other than the directives contemplated in section 4A of the Act, such as government policy in the wider sense, the Draft Policy will arguably not have the force and effect of "law", but may still be enforceable to the extent that the Act or some other empowering legislation provides for its creation (see endnote xiv hereinabove). The Minister may for example, as an alternative, decide to rather issue the Draft Policy as Regulations in terms of section 31(1)(f) of the Act. In terms of the section, *"The Minister may make regulations generally on any matter required for the better achievement of the objects and purposes of this Act."*

[xxviii] The FPB's functions are set out in section 9A(2) of the Act.

[xxix] See sections 16(1) and 18(1) of the Act.
[xxx] See 11 above.
[xxxi] See section 16 of the Act in relation to the voluntary submission of "publications" for classification.
[xxxii] It is arguable whether such amendment will pass constitutional muster, in the light of the Constitutional Court's decision in *Print Media*.
[xxxiii] See section 24A(2)(a) of the Act.
[xxxiv] See the Constitutional Court's decision in *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) and the discussions in *Hoexter* at pp 47-48, 264-265, 397 and *Currie & De Waal* at pp 161-162.
[xxxv] Section 16(1) of the Act.
[xxxvi] See *De Reuck v Director of Public Prosecutions (WLD)* 2004 (1) SA 406 (CC) ("*De Reuck*") at para [48]-[49] and *Print Media* at para [49].
[xxxvii] See *Print Media* at para [51] and *De Reuck* at para [50].
[xxxviii] See section 24, read with section 24A(3) of the Act.
[xxxix] See section 24A(2) of the Act.
[xl] See section 24A(4) of the Act.
[xli] *De Reuck* at para [59].
[xlii] See *Human Dignity: Lodestar for equality in South Africa* (Laurie Ackermann, JUTA, 2012) at p 13.
[xliii] **Kommers, Donald P.; Miller, Russell A. (2012-11-01). *The Constitutional Jurisprudence of the Federal Republic of Germany***: Third edition, Revised and Expanded (Kindle Locations 13428-13480, 13758-13767). Duke University Press. Kindle Edition. See also attached hereto "Annexure A – German law on pornography".
[xliv] This was the approach of the U.S. Supreme Court in Memoirs v. Massachusetts, 383 U.S. 413 (1966).
[xlv] Mathias Reimann, "Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the U.S.," University of Michigan Journal of Law Reform 21 (1987– 88): 201– 53, at 229. The discussion in this section relies heavily on this article.
[xlvi] Some of these materials include:

Coy, Maddy and Horvath, Miranda A. H. (2011) Lads mags, young men's attitudes towards women and acceptance of myths about sexual aggression. Feminism & Psychology, 21 (1). pp. 144-150. ISSN 0959-3535 http://dx.doi.org/10.1177/0959353509359145 Available from Middlesex University's Research Repository at http://eprints.mdx.ac.uk/6595/.

"Basically... porn is everywhere" - A Rapid Evidence Assessment on the Effects that Access and Exposure to Pornography has on Children and Young People. By Miranda A.H. Horvath, Llian Alys, Kristina Massey, Afroditi Pina, Mia Scally and Joanna R. Adler. (2014) (http://www.childrenscommissioner.gov.uk/publications/basically-porn-everywhere-rapid-evidence-assessment-effects-access-and-exposure)

Eric W. Owens, Richard J. Behun, Jill C. Manning & Rory C. Reid (2012): The Impact of Internet Pornography on Adolescents: A Review of the Research, Sexual Addiction & Compulsivity: The Journal of Treatment & Prevention, 19:1-2, 99-122 **To link to this article:** http://dx.doi.org/10.1080/10720162.2012.660431

Justice Alliance of South Africa, Cause for Justice, Doctors for Life International NPC v ICASA, On Digital Media (Pty) Ltd and others Case no 18519/2013 (WCC). See the Rule 53 record, i.e. the complete record of the public participation process before ICASA, as well as the court record, i.e. the court papers prepared and filed by the parties in the case.