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Our reference: Children's Amendment Bill [B18-2020]

Date: 27 November 2020

**Portfolio Committee on Social Development
Parliament of the Republic of South Africa
CAPE TOWN**

For attention: Ms Lindiwe Ntsabo

By email: childrens-amendment-bill@parliament.gov.za
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Honourable Mr Mondli Gungubele, MP,

Honourable Members of the Portfolio Committee on Social Development,

RE: SUBMISSIONS ON THE CHILDREN'S AMENDMENT BILL [B18-2020]

1. We refer to the abovementioned matter, specifically to the notice issued by the Honourable Mr Gungubele, MP, Chairperson of the Portfolio Committee on Social Development ("the Committee"), calling for public comments in respect of the Children's Amendment Bill [B18-2020] ("the Bill").
2. Cause for Justice ("CFJ") hereby thanks the Committee for the opportunity to make these written submissions and to participate in the law-making process.
3. We also confirm our interest in – and request an opportunity – to make a verbal presentation in addition to our written submissions.

BACKGROUND TO CAUSE FOR JUSTICE

4. CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.
5. We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the best interest of children and the public interest.

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6. All five of CFJ's core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human worth/value, (3) protection of the vulnerable in society (social justice), (4) ensuring accountable government action and (5) protecting the family against destructive outside (and inside) forces.
7. CFJ has over the past seven years been involved in matters pertaining to the law (and law reform) on sexual exploitation, and the protection of children from exposure to potentially harmful and disturbing materials and premature exposure to adult experiences.
8. During the course of 2013, 2014 and up to March 2015, CFJ was one of three applicants in the "ICASA // StarSat (formerly TopTV)" judicial review case.¹ The matter was finally disposed of in CFJ and its co-applicants' favour at 'leave to appeal'-stage in the Supreme Court of Appeal in March 2015.
9. In addition, CFJ made submissions to the Films and Publications Board ("FPB") later in 2015 as part of the public participation process on the Draft Online Content Regulation Policy² and is an active participant in the South African Law Reform Commission's ("SALRC") Project 107 - Sexual Offences: Pornography and Children (still on-going).³ CFJ also made submissions on the FPB's Classification Guidelines ("the Guidelines") during its review process in 2018.⁴
10. Furthermore, CFJ has been a stakeholder and active participant in the Parliamentary process⁵ on the Films and Publications Amendment Bill, 2015 ("the FPAB") – now the Films and Publications Act, 2019 ("the FPAA") – and our efforts contributed to the legalising of certain vile and degrading types of pornography being averted.⁶

¹ [Justice Alliance of South Africa v Mncube N.O and Others; In Re: Cause for Justice and Another v Independent Communications Authority of South Africa and Others; In Re: Doctors for Life International WC v Independent Communications Authority of South Africa and Others \(18519/2013\) \[2014\] ZAWCHC 162; \[2015\] 1 All SA 181 \(WCC\); 2015 \(4\) BCLR 402 \(WCC\) \(3 November 2014\).](#)

² [CFJ Written Submissions on the FPB Draft Online Content Regulation Policy \(14 July 2015\).](#)

³ [CFJ Written Submissions on SALRC Issue Paper 30 on Project 107: Sexual Offences \(Pornography and Children\) \(30 November 2015\).](#)

[CFJ Written Submissions on the SALRC Discussion Paper 149 on Project 107: Sexual Offences \(Pornography and Children\) \(2 August 2019\).](#)

⁴ [CFJ Written Submissions on Review of FPB Classification Guidelines \(29 March 2018\).](#)

[CFJ Written Submissions on Draft Revised FPB Classification Guidelines \(25 October 2018\).](#)

⁵ [PMG Films and Publications Amendment Bill \(B37-2015\).](#)

⁶ [CFJ Written Submissions to National Assembly \(26 May 2016\).](#)

[CFJ Oral Representations to National Assembly \(slide pack\) \(30 August 2016\).](#)

[CFJ Written Submissions to National Council of Provinces \(4 September 2018\).](#)

[CFJ Oral Representations to National Council of Provinces \(slide pack\) \(12 September 2018\).](#)

[CFJ Petition Say No to Porn in SA \(cause page\).](#)

11. CFJ also submitted written comments to the Department of Social Development (“DSD”) on the draft Children’s Third Amendment Bill (“the draft Bill”), on 13 September 2018,⁷ and the Children’s Amendment Bill, 2018 (“the 2018 Bill”) on 30 November 2018.⁸

STRUCTURE OF SUBMISSIONS

12. Our submissions are structured under the following four headings:

A	‘Children and the media’ – Insertion of new section 6B	3
B	‘Offences’ – Amendment of section 305	10
C	‘Genetic Origin of Child’ – Non-amendment of section 294	11

A ‘CHILDREN AND THE MEDIA’ – INSERTION OF NEW SECTION 6B

INTRODUCTION

13. The draft Bill proposed the insertion of a new section 6B – ‘Children and the media’ – into the Children’s Act (“the Act”). It read as follows:

14. **Children and the media**

6B. (1) *The media may not publish child pornography; identify children who have been victims of violence, abuse, exploitation, or who have been charged with or convicted of a crime, without the consent of their parent(s), caregivers, or guardians and the child as contemplated in 6A.*

(2) *The media, parents, and caregivers or guardians must protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences.*

15. DSD removed the proposed section 6B from the 2018 Bill, and a similar section has not been included.
16. We reiterate (as we did in our previous submissions)⁹ that it is critically important – and we submit, an absolute necessity – to create a legislative obligation to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences, and to give content to such obligation in so far as it applies to the media, parents, caregivers,

⁷ [CFJ Submissions on the Children’s Third Amendment Bill \(13 September 2018\).](#)

⁸ [CFJ Submissions on the Children’s Amendment Bill, 2018 \(30 November 2018\).](#)

⁹ Ibid at 7 and 8.

guardians and other accountable persons in relation to the well-being and best interest of children.

Reasons why section 6B must be included in the Bill

17. The harmful impact of exposure to sexual and violent content, especially pornography, on children is well-researched and documented by a wide range of academics, researchers, international experts and child protection organisations.¹⁰ Harms include amongst others poor mental health, sexual compulsivity/addiction, proclivity towards sexism and objectification, sexual aggression and violence, child-on-child sexual abuse, and shaping sexual behaviours.¹¹
18. The FPB's Discussion Document on the Review of the Classification Guidelines ("the Discussion Document"),¹² noted the concerns in respect of children's exposure to violence and sexual conduct in media, broadcasting and online content:¹³

*"Classifiable elements within media content such as violence, sexual content and horror remain a concern and due to children's extensive exposure to different media platforms, they are more likely to be exposed to violent and sexual content on the various platforms."*¹⁴

19. CFJ delivered written submissions in response to the Discussion Document.¹⁵ Scientific research which studies the impact of certain media content on children at various developmental stages, has proven that exposure to violent and sexual content, and especially the combination of both, carries a significant risk of harm to both children and adults.¹⁶
 - 19.1 According to a leading Australian parenting expert,¹⁷ sexual and violent content genuinely influences the behaviour and morality of children (and adults). Such content has a definite impact on the way people behave towards others. While a specific person may not necessarily become "violent" or "sexual" in all instances, their behaviour and their responses are definitely impacted by what they have seen: Their empathy is reduced, their objectification of others is increased, and their morality erodes.

¹⁰ <https://endsexualexploitation.org/publichealth/>; <https://fightthenewdrug.org/get-the-facts/>; https://www.echildhood.org/the_facts; <http://globalkidsonline.net/southafrica/>; <https://www.echildhood.org/statement>

¹¹ <https://endsexualexploitation.org/publichealth/>; <https://fightthenewdrug.org/get-the-facts/>; https://www.echildhood.org/the_facts; <http://globalkidsonline.net/southafrica/>; <https://www.echildhood.org/statement>

¹² [FPB Discussion Document on the Review of the Classification Guidelines \(February 2017\)](#).

¹³ Ibid at page 49.

¹⁴ Ibid.

¹⁵ [CFJ Submissions on the Review of the Classification Guidelines \(29 March 2018\)](#).

¹⁶ Ibid at paragraphs 13 to 20.

¹⁷ J Coulsen 'The Problem with Exposing Kids to Sexual and Violent Content' <https://ifstudies.org/blog/the-problem-with-exposing-kids-to-sexual-and-violent-content> (2015).

- 19.2 The American College of Paediatricians¹⁸ have found that increased exposure to sexual content among adolescents is correlated with increased sexual activity and risky sexual behaviours.¹⁹
- 19.3 A number of research studies have found that increased exposure to violent and sexually violent content is not only associated with increased violent behaviour, but that aggressive behaviour early in childhood is a reliable predictor of violence and juvenile delinquency later in childhood and adolescence.²⁰
20. The Constitution²¹ emphatically proclaims that children's best interest is of paramount importance in all matters concerning them.²² The Constitution itself would therefore be solidly in favour of creating and imposing a positive obligation on persons with a particularly significant impact on children – including the media, parents, caregivers, guardians and other accountable persons – to protect children from exposure to potentially disturbing or harmful materials (such as violence and explicit sexual content) and from premature exposure to adult experiences (for e.g. explicit sexual content).
21. The action/decision to not include (or not reproduce) the proposed section 6B in the Bill, accordingly, is either a grave oversight or a grave mistake.

Proposal # 1: Re-insert new section 6B in order to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences

22. Re-insert a new section 6B – an improved version of the section 6B proposed in the draft Bill – and ensure that the provision is enforceable. The proposed section 6B in the draft Bill suffered from vagueness in a number of respects which would have made it ineffective to enable compliance and therefore – unenforceable. We accordingly include hereinbelow comments and proposals to address the shortcomings of the original section 6B (which formed part of the draft Bill).

¹⁸ American College of Paediatricians 'The Media, Children, and Adolescents' (2014).

¹⁹ Similarly, regarding exposure to sexual content, Dr Earles argues that it is reasonable to deduce that, if children learn aggressive behaviour from exposure to violent content, children will learn heightened sexual behaviour from exposure to sexual content.

²⁰ T Huffman, 'Violence in Media: Effects on Children & Adolescents' (2012).

According to researchers K Rodenhizer and K Edwards, sexual violence (including sexual violence during dating) are widespread problems among adolescents (and emerging adults) and a growing body of research shows that exposure to sexual content and content that contains sexual violence, are risk factors for these behaviours. (KE Rodenhizer & KM Edwards 'The Impacts of Sexual Media Exposure on Adolescent and Emerging Adults' Dating and Sexual Violence Attitudes and Behaviors: A Critical Review of the Literature' (2017) Sage Publishing.)

²¹ The Constitution of the Republic of South Africa, 1996.

²² Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

COMMENTS AND PROPOSALS MADE IN RESPECT OF SECTION 6B OF THE DRAFT BILL

ACCOUNTABLE PERSONS

(1) Media

Concern

23. Section 6B places certain obligations on the “media”. However, neither the Act includes, nor the draft Bill defined, “the media”. It was therefore unclear who exactly the media is. By extension, it is uncertain to whom these obligations would apply and against whom they would be enforceable.
24. The lack of legal clarity caused by the absence of a definition or description for “media”, will limit the practical effectiveness of the new section and will frustrate achieving its purposes. It will also open the door for abuse by members of the media who may want to avoid the obligations imposed by this section – in that an undefined term leaves itself open to argument and interpretation as to whom it applies.
25. Furthermore, statutory provisions that are vague and unclear as to their application (whether unjustifiably restricted or overbroad) are unconstitutional and will be declared invalid if constitutionally challenged. It is undesirable and potentially costly to attempt to pass legislation containing obvious deficiencies that make it vulnerable to constitutional challenge.

Proposal # 2: Definition/description of ‘the media’

26. The aforementioned deficiency can be addressed by providing a suitable definition or description for “the media”. Therefore, we propose the insertion of a definition for “the media” in section 1 that at least includes:
 - 26.1 Broadcasters who are subject to regulation by ICASA²³ and/or the BCCSA;²⁴
 - 26.2 Creators, producers, distributors and exhibitors of films, games, and publications that are regulated by the FPA;²⁵

²³ Independent Communications Authority of South Africa.

²⁴ The Broadcasting Complaints Commission of South Africa.

²⁵ Films and Publications Act, 1996, as amended.

26.3 Creators, producers, distributors, and exhibitors of advertisements that fall under the jurisdiction of ASASA;²⁶ and

26.4 Members of the Press Council of South Africa.²⁷

(2) Other Accountable persons

Concern

27. The proposed new section 6B(2) required the “media, parents, and caregivers or guardians” to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences. We submit that in this instance, the list is unnecessarily limited. Therefore, we suggest that the list be extended to place this duty to protect children on all other persons and/or entities that work directly with – or in the furtherance of the best interests of – children.

Proposal # 3: Inclusion of other accountable persons

28. In this regard, we refer to section 110 of the Act, which requires certain persons to report child abuse and child neglect. We propose that the duty to protect children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences be extended to the persons referred to in section 110 of the Act, which already recognises that these persons have a higher duty of care in relation to children than other members of the general public.

“POTENTIALLY DISTURBING AND HARMFUL MATERIALS”

Concern

29. Section 6B(2) referred to “potentially disturbing and harmful materials”. The phrase is too vague and so open for interpretation that it will not be implementable/enforceable in practice. The necessary clarification, which will cause the phrase to pass the threshold of law and pass constitutional muster, can be provided by linking the phrase to an objective description/measuring stick.

²⁶ The Advertising Standards Authority of South Africa.

²⁷ Including the Press Ombud and the Appeals Panel.

Proposal # 4: Clarifying the meaning of ‘potentially disturbing and harmful materials’

30. In this regard, since the phrase concerns “materials”, we suggest that the FPA classification scheme, as found in the FPA²⁸ and the FPB Classification Guidelines (“the Guidelines”),²⁹ provides an appropriate and suitable objective standard.
31. The Guidelines are subject to review every four years. The review process entails comprehensive public consultation in order to ensure that the norms, values, and standards reflected in the Guidelines are consistent with those of the South African public and in line with constitutional norms and values. Its content accordingly is established by way of a democratic and participatory process. The Guidelines give meaning to what “potentially disturbing and harmful materials” mean by indicating the suitability/appropriateness of varying media content for children of different ages. The Guidelines assign age classifications to different materials based on a wide range of relevant factors to determine what kind of materials are potentially disturbing and harmful to children at which ages.
32. We accordingly propose that subsection 6B(2) be amended to include referencing to the FPA classification scheme and the Guidelines for purposes of determining the meaning of “potentially disturbing and harmful materials”.

“PREMATURE EXPOSURE TO ADULT EXPERIENCES”

Comment

33. Section 6B(2) referred to “adult experiences”. There are numerous experiences and actions that are legally reserved for adults – such as voting, consuming alcohol, having a driver’s licence, etc. – that are not harmful to children to the extent that children observe adults partaking in such experiences or actions.
34. In our opinion, it is clear that the “adult experiences” contemplated here, are those experiences that are sexual in nature (including displays of non-sexual nudity) or relate to what is traditionally commonly referred to as “vices” (such as substance abuse).
35. Again, the context of the subsection in our opinion makes it clear that what is contemplated is not the premature exposure to real life adult experiences, but rather exposure to media content that contains (depictions of) adult experiences.

²⁸ FPA, section 16 and 18.

²⁹ <http://www.fpb.org.za/classification-guidelines/>

Proposal # 5: Clarifying the meaning of ‘premature exposure to adult experiences’

36. With regard to “premature exposure”, the FPA classification scheme and the Guidelines are again of great assistance, since they provide a measuring stick for the suitability/appropriateness of varying media content for children of different ages. The Guidelines assign age classifications to different materials based on a wide range of relevant factors to determine at what age exposure to what kind of content, would be premature.
37. We accordingly propose that subsection 6B(2) be amended to include referencing to the FPA classification scheme and the Guidelines for purposes of determining the meaning of “premature exposure to adult experiences”.

“MUST PROTECT”

Concern

38. Subsection 6B(2) required that the media, parents, caregivers and guardians “must protect” children from exposure to potentially disturbing or harmful materials and from premature exposure to adult experiences. The phrase “must protect” is vague because there is no indication or guidance as to the manner in which these persons “must protect” children – i.e. the standard of actions or measures to be taken to comply with this obligation is not specified. Without an objectively measurable or specified standard for compliance, also considering that in the present circumstances there is no sanction attached to non-compliance with the obligations created by the subsection, subsection 6B(2) will have very little value as it will be up to each of the identified persons/groups to determine subjectively whether they are complying with the law. Such legislative text falls short of the requirements in order to constitute law.

Proposal # 6: Giving meaning to ‘must protect’ in order to enable compliance and enforceability

39. It is accordingly imperative that a subsection that provides a standard for compliance, should be added to subsection 6B(2). The purpose would not be to stipulate all possible actions and measures that each of the specified persons may conceivably take, but to set a standard or bar for compliance with the legislative obligation. Without such addition/insertion, the subsection will not be sufficiently practically implementable and enforceable to pass constitutional muster.
40. The additional subsection may require that –
- 40.1 Each person or entity on which a duty to protect children as contemplated in section 6B rests, are obliged to take such steps and implement such measures as are reasonable in their particular circumstances to fulfil their duty to protect children within the meaning of

section 6B. The contemplated steps and measures will include, although it would not be limited to –

- 40.1.1 A directive that each of the abovementioned media regulatory authorities must, being guided by the classification scheme in the FPA and the Guidelines, revise and include practical measures in their codes of conduct/good practice, to give effect to the obligation to protect children as contemplated in section 6B(2) read with the FPA classification scheme and Guidelines; and
- 40.1.2 The insertion of an express obligation that all persons who are required to protect children as contemplated in section 6B, must comply with all other applicable legal and ethical obligations and duties imposed on them with regards to the protection of children in terms of law and the rules governing relevant professions, practices, industries, services, products, goods, and media, and other created or produced content.

B 'OFFENCES' – AMENDMENT OF SECTION 305

Concern

- 41. For the reasons set out above, we propose the insertion a new section 6B – specifically, an improved version of the section 6B proposed in the draft Bill – in the Act, for the purposes of imposing an obligation to protect children on the identified accountable persons. However, the Act must provide for the enforcement of these new obligations. If an enforcement mechanism is not provided for, non-compliance will not result in any consequences being meted out by the Act, for the offending/contravening party.
- 42. Without consequences (including a sanction), the enforceability of the legislative obligation will be significantly reduced. There will effectively be no duty to comply, as there would be no incentive for the accountable person(s) to take the steps necessary to give effect to the obligation.
- 43. Express acknowledgment of non-compliance, coupled with a proportional sanction for non-compliance with statutory obligations, often serves as effective incentive to bring about compliance with the law.
- 44. Section 305 of the Act provides the mechanism whereby the obligations created by the Act are enforced. This section lists the sections of the Act that, if not complied with, constitute a contravention of the Act. Should a new section 6B be inserted in the Act, section 305 must be amended to include the new section.

Proposal # 7: Section 305 to be amended to include the contravention of new section 6B as an offence

45. We propose that section 305 be amended to include non-compliance with new section 6B as an offence. We specifically propose that section 6B be included in section 305(1)(c) of the Act.

C 'GENETIC ORIGIN OF CHILD' – NON-AMENDMENT OF SECTION 294

Comment

46. We welcome and support the decision to not amend section 294 of the Act – as proposed in the 2018 Bill – for the reasons set out in our submissions on the 2018 Bill.

CONCLUSION

47. In summary:

47.1 We propose the insertion of a new section 6B, subject to the clarification of certain terms contained in the section and the elaboration of the section as set out above;

47.2 We propose that section 305 be amended to include non-compliance with section 6B as an offence;

47.3 We support the non-amendment of section 294 of the Act.

48. We trust that the above submissions are of assistance to the Committee and look forward to your response thereto (if any) in due course.

49. We request an **opportunity to make oral submissions/a verbal presentation** during any future consultations that may be held in relation to the Bill.

50. CFJ remains at the Committee's disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes: The promotion and protection of the best interest of children in South Africa.

Yours faithfully,

Liesl Pretorius

Legal Advisor: Law and Policy