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Our Reference: Draft Classification Guidelines

Date: 25 October 2018

## THE FILM AND PUBLICATION BOARD

**For Attention: Mr Phuti Moyaha**

By Email: [Phuti.Moyaha@fpb.org.za](mailto:Phuti.Moyaha@fpb.org.za)

Dear Sir,

### RE: SUBMISSIONS ON THE DRAFT REVISED CLASSIFICATION GUIDELINES

1. We refer to the abovementioned matter, specifically to the notice published in the Government Gazette of 24 August 2018, calling for public comments in respect of the draft revised Classification Guidelines (“the Guidelines”).
2. Cause for Justice (“CFJ”) hereby would like to thank the Film and Publications Board (FPB) for the opportunity to present you with these written submissions and in so doing to be able to participate in the review of the Guidelines.

### INTRODUCTION

3. As noted in our submissions dated 29 March 2018 on the Discussion Document in respect of the revision of the Guidelines (“March submissions”), 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. Three of CFJ’s core values give it a particular interest in the draft reviewed Classification Guidelines namely, (1) the responsible exercise of freedom, (2) protection and promotion of human dignity / worth, and (3) protection of the vulnerable in society (social justice).
4. Further details about our interest in and involvement in matters pertaining to media content and consumer protection/advice in relation thereto, is as set out in the introduction to our March submissions (attached hereto).

### PURPOSE OF THESE SUBMISSIONS

5. As noted in our March submissions, CFJ is generally supportive of the draft revised Guidelines.

**MANAGEMENT COMMITTEE MEMBERS: RYAN SMIT, GENERAL MANAGER | WYNAND VILJOEN, CHAIRPERSON  
CRAIG SNYDERS, EX-OFFICIO EXECUTIVE MEMBER | DIETER VON FINTEL, EX-OFFICIO EXECUTIVE MEMBER**

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6. The purpose of these submissions accordingly is **not to rehash** our March submissions, but is to express CFJ's views in respect of a particular issue requiring elucidation in the Guidelines, namely:

**The description of the “XX – Restricted Distribution material” (“XX” definition)**

7. The reason why this has become particularly pertinent, is two-fold:

7.1. The minority judgment of the Constitutional Court in the *Print Media* case,<sup>1</sup> which expressed an opinion that certain wording comparable to the wording of parts of the “XX” definition<sup>2</sup> may be vague and overbroad.<sup>3</sup>

and

7.2. On 24 October 2018 the Select Committee on Communications and Public Enterprises (NCOP) decided that the wording referred to by the minority in *Print Media* should not be deleted and amended, but should remain unchanged.<sup>4</sup>

8. As a result of the abovementioned factors, the amplification/elucidation provided to these parts of the “XX” definition in the Guidelines is of particular importance in ensuring that the application of the Films and Publications Act, 1996 is not found to be unconstitutional for vagueness or overbreadth of its provisions.

**STRUCTURE OF SUBMISSIONS**

9. A Proposal for description of XX classification  
    Proposal 1: subclause 9(2)  
    Proposal 2: subclause 25(2)  
    Proposal 3: subclause 37(2)  
B Commentary on proposals

**A PROPOSAL FOR DESCRIPTION OF XX CLASSIFICATION**

10. The Guidelines provide a description of the XX classification and what it encompasses in the following clauses:  
10.1. Films: clause 9 – Restricted Distribution Material - XX;  
10.2. Games: clause 25 – Restricted Distribution Material - XX; and  
10.3. Publication: clause 37 – Presumptively Harmful Material - XX.

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<sup>1</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 113/11) [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (28 September 2012) (“*Print Media*”)

<sup>2</sup> Sections 16(4)(b) and 18(3)(b) of the Films and Publications Act, 1996.

<sup>3</sup> See the judgment of Van der Westhuizen J at paras [104] – [106] setting out the opinion on vagueness and para [108] where the learned judge noted his proposed remedy, namely that “**substantial redrafting is required**” and “[I]t is up to the legislature to rethink the classification scheme”.

<sup>4</sup> The definitional elements in sections 16(4)(b)(i) and (ii) and 18(3)(b)(i) and (ii).

11. The draft Guidelines proposes the following amendments in respect of the above clauses:
  - 11.1. Clause 9: none;
  - 11.2. Clause 25: insertion of “and sexual violence” at clause 25(2)(ii); and
  - 11.3. Clause 37: none.

### **Amplification of interpretations**

12. We are generally supportive of the three current descriptions of the XX classification. However, for the reasons noted in paragraphs 7.1 and 7.2 above, we propose that the descriptions are amplified in order to provide necessary clarification and guidance in respect of the interpretation and application of the XX classification. Subclause (2) of each of clauses 9, 25 and 37 provides guidance in respect of the interpretation of the XX classification in relation to films, games and publications.
13. Words underlined with a solid line below, indicate proposed insertions in the text of the draft Guidelines.

### ***Proposal 1: amendment and amplification of subclause 9(2)***

#### **Insertion of subclause 9(2)(vii)**

14. Presenting a human being as an object for sexual gratification or stimulation, or exploiting the human body by reducing a human being to the sum of his or her body parts for purposes of sexual conduct, which includes but is not limited to depictions of multiple simultaneous penetrations of the orifices of the human body, sexual conduct involving more than two persons, prostitution, and/or sexual conduct for financial or other reward, favour or compensation; and

#### **Insertion of subclause 9(2)(viii)**

15. Depictions wherein a human being is subjected to degrading, inhuman or cruel treatment, which includes but is not limited to sexual violence (as defined), explicit sexual conduct accompanied by explicit violence, torture, sexual intercourse with a human corpse, or spitting, vomiting, urinating, ejaculating or defecating on a human being.

### ***Proposal 2: amendment and amplification of subclause 25(2)***

#### **Insertion of subclause 25(2)(viii)**

16. Presenting a human being as an object for sexual gratification or stimulation, or exploiting the human body by reducing a human being to the sum of his or her body parts for purposes of sexual conduct, which includes but is not limited to depictions of multiple simultaneous penetrations of the orifices of the human body, sexual conduct involving more than two persons, prostitution, and/or sexual conduct for financial or other reward, favour or compensation.

#### **Insertion of subclause 25(2)(ix)**

17. Depictions wherein a human being is subjected to degrading, inhuman or cruel treatment, which includes but is not limited to sexual violence (as defined), explicit sexual conduct accompanied by explicit violence, torture, sexual intercourse with a human corpse, or spitting, vomiting, urinating, ejaculating or defecating on a human being.

**Proposal 3: amendment and amplification of subclause 37(2)**

**Insertion of subclause 37(2)(vii)**

18. Presenting a human being as an object for sexual gratification or stimulation, or exploiting the human body by reducing a human being to the sum of his or her body parts for purposes of sexual conduct, which includes but is not limited to depictions of multiple simultaneous penetrations of the orifices of the human body, sexual conduct involving more than two persons, prostitution, and/or sexual conduct for financial or other reward, favour or compensation.

**Insertion of subclause 37(2)(viii)**

19. Depictions wherein a human being is subjected to degrading, inhuman or cruel treatment, which includes but is not limited to sexual violence (as defined), explicit sexual conduct accompanied by explicit violence, torture, sexual intercourse with a human corpse, or spitting, vomiting, urinating, ejaculating or defecating on a human being.

**B COMMENTARY ON PROPOSALS**

**Constitutional context: Promotion and protection of constitutional rights and values**

20. The promotion and protection of human rights and constitutional values are at stake when adult content, explicit sexual conduct, violent sexual conduct, conduct that is degrading of human beings and/or violates/disrespects human dignity, are depicted. In short, constitutional rights and values requires:
- 20.1. The inherent dignity or worth of all people must be protected and respected,<sup>5</sup>
  - 20.2. People must be protected from all forms of violence,<sup>6</sup>
  - 20.3. People may not be treated in cruel, inhuman or degrading ways,<sup>7</sup> and
  - 20.4. The children's best be of paramount importance in all matters concerning children.<sup>8</sup>

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<sup>5</sup> Section 10 of the Constitution, 1996 provides that "[e]veryone has inherent dignity and [has] the right to have their dignity respected and protected."

<sup>6</sup> Section 12 of the Constitution provides that "[e]veryone has the right to freedom and security of the person, which includes the right – (c) to be free from all forms of violence from either public or private sources and (e) not to be treated or punished in a cruel, inhuman or degrading way."

<sup>7</sup> Ibid.

<sup>8</sup> Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

21. The right to freedom of expression is a constitutional right. However, all rights in the Bill of Rights may 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.<sup>9</sup>
22. Balancing the exercise of rights that may come into conflict in certain factual scenarios is always a difficult and delicate matter which should be informed and guided by the objective normative value system contained in the Bill of Rights.<sup>10</sup> This system is based on the founding values of human dignity, equality and freedom.
23. Retired Constitutional Court judge, Laurie Ackermann's commentary on the protection of human dignity, which references the rich and deep philosophically grounded German scholarship and jurisprudence on human dignity (worth) and equality, is informative.<sup>11</sup>
24. In basic terms, when considering any expression (whether film, game, publication or otherwise), the essential question is "...whether the material presents the characters truly as human beings with a value in and of themselves."<sup>12</sup> If "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."<sup>13</sup>
25. Likewise, the FPB should ultimately concern itself with human dignity and the protection of the other constitutional rights referred to above.<sup>14</sup> A more detailed discussion of the constitutional context and what the Bill of Rights demands in the context of expression of explicit sexual conduct is contained in our submissions<sup>15</sup> on the Films and Publications Amendment Bill (and particularly Annexure A<sup>16</sup> thereto).
26. The FPB (as with all other organs of state) is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights<sup>17</sup> and in formulating the contents of the Guidelines give expression to the spirit, purport and objects of thereof.<sup>18</sup>
27. The Guidelines accordingly should ensure that the inherent dignity of all people is protected and respected, that people are protected from all forms of violence, that people are not treated in

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<sup>9</sup> Section 36 of the Constitution.

<sup>10</sup> See *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)* at [54]-[56] and [43]-[44].

<sup>11</sup> *Human Dignity: Lodestar for equality in South Africa* (Laurie Ackermann, JUTA, 2012) at p 13.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> See para 20 above.

<sup>15</sup> <http://causeforjustice.org/wp-content/uploads/2018/09/CFJ-Oral-submissions-to-NCOP-on-the-FPAB.pdf>

<https://causeforjustice.org/wp-content/uploads/2018/09/CFJ-Written-Submissions-to-NCOP-on-FPAB-B37B-2015.pdf>

<sup>16</sup> [https://causeforjustice.org/wp-content/uploads/2018/10/Annexure-A\\_Expression-of-Explicit-Sexual-Conduct.pdf](https://causeforjustice.org/wp-content/uploads/2018/10/Annexure-A_Expression-of-Explicit-Sexual-Conduct.pdf)

<sup>17</sup> Section 7(2) of the Constitution.

<sup>18</sup> Section 39(2) of the Constitution.

cruel, inhuman or degrading ways, and that children's best interest remains the paramount consideration in all matters concerning children.

28. Our proposed amendments will ensure that the FPB fulfil its constitutional obligations and that the Guidelines are constitutionally compliant.

## **CONCLUSION**

29. We hereby want to thank the FPB for the opportunity to make these written representations as part of this review process.
30. As noted hereinabove, we have been an interested party and stakeholder in this field since 2013 and remain so to this day.
31. We are at the Board's disposal for purposes of offering assistance in relation to the further conduct of the review process and any other matters that the Board may deem appropriate.

Yours faithfully,

**Liesl Stander (Preparer)**

and

**Ryan Smit (Reviewer)**

***Legal Advisor: Law and Policy***

***Director: Law and Policy***