31 August 2019

TO: South African Law Reform Commission
    C/O Ms D. Clark
    E-mail: dclark@justive.gov.za

SUBMISSION BY MEDIA MONITORING AFRICA:
DISCUSSION PAPER ON SEXUAL OFFENCES (PORNOGRAPHY AND CHILDREN)

For more information, please contact:

WILLIAM BIRD, Director of Media Monitoring Africa
    E-mail: williamb@mma.org.za
    Tel: +2711 788 1278

THANDI SMITH, Head of Policy Programme
    Email: thandis@mma.org.za
    Tel: +2711 788 1278
## CONTENTS

INTRODUCTION ................................................................................................................................. 3

OVERVIEW OF MEDIA MONITORING AFRICA .................................................................................. 3

OVERARCHING CONSIDERATIONS .................................................................................................... 4
  Express recognition of the public interest .................................................................................... 4
  Responsiveness to the changing digital environment ................................................................. 8
  Need for a socio-economic impact assessment ........................................................................... 8

RECOMMENDATIONS CONTAINED IN THE DISCUSSION DOCUMENT ....................................... 9
  Recommendations 1 and 2: Scope of child sexual abuse material ........................................... 9
  Recommendation 3: Reconciliation of different legislation ......................................................... 12
  Recommendation 4: Alignment of definitions ............................................................................ 13
  Recommendation 6: Protection of children from exposure ......................................................... 15
  Recommendation 7: Consensual self-generated child sexual abuse material ............................. 16
  Recommendation 8: Live performances involving child sexual abuse material ......................... 17
  Recommendation 9: Obligation to report commission of offences ............................................ 18
  Recommendation 11: Inter-sectoral management ....................................................................... 18
  Recommendation 12: Data retention and preservation orders .................................................... 20

PROPOSED ADDITIONAL RECOMMENDATIONS ........................................................................ 21
  Cooperation with private sector actors ....................................................................................... 21
  Education and awareness-raising campaigns .............................................................................. 22
  Remedial measures for affected children .................................................................................... 23

CONCLUDING REMARKS .............................................................................................................. 24
INTRODUCTION

1. Media Monitoring Africa (MMA) welcomes the opportunity to provide this submission to the South African Law Reform Commission (SALRC) on the Discussion Paper on Sexual Offences (Pornography and Children) (the Discussion Paper) and the Draft Bill published in terms of the Discussion Paper (the Draft Bill). In addition, MMA has facilitated the drafting of a separate submission – prepared by children themselves and submitted in their own right – which should be read together with this submission.

2. For the purpose of this submission, MMA has focused on the recommendations contained in the Discussion Paper and the provisions of the Draft Bill that are most applicable to our work and expertise. In particular, MMA has drawn on our experience from our various work in protecting and promoting the triad of information rights\(^1\) and the best interests of the child.\(^2\) Where it is necessary to balance competing rights and interests, we stress that the limitation of any right is only permissible where it is reasonable and justifiable to do in an open and democratic society.\(^3\)

3. This submission is structured as follows:

   3.1. First, an overview of MMA.
   3.2. Second, the overarching considerations that should inform the Discussion Document and the Draft Bill.
   3.3. Third, MMA’s submissions regarding the recommendations of the SALRC contained in the Discussion Document.
   3.4. Fourth, additional recommendations proposed by MMA for possible inclusion by the SALRC.

4. We deal with each of these in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

5. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA’s objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.

6. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 20 years’ experience in media monitoring and direct engagement with media, civil society organisations and citizens.

---

\(^1\) The triad of information rights refers to the rights to privacy (section 14 of the Constitution), freedom of expression (section 16 of the Constitution) and access to information (section 32 of the Constitution).

\(^2\) Section 28 of the Constitution.

\(^3\) Section 36 of the Constitution.
MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.

7. For more about MMA, please visit: www.mediamonitoringafrica.org.

OVERARCHING CONSIDERATIONS

8. MMA submits that there are certain overarching considerations that should, as a point of principle, be expressly incorporated into the Discussion Paper and Draft Bill going forward. These overarching considerations are in line with the founding values of the Constitution, and are imperative to ensuring that the Discussion Paper and the Draft Bill are finalised in a manner that pays due regard to striking the appropriate balance between competing rights and interests. Furthermore, these considerations can also serve to promote a safe, secure and trusted internet that is accessible to all persons in South Africa, including children of an appropriate age.

9. As a point of departure, it is necessary to consider the purpose of the Discussion Document and the Draft Bill. While it is certainly intended to protect children, it is constitutionally-required to do so in a right-based manner that balances other relevant rights and considerations in the public interest. In this regard, we submit that the following are of particular relevance: (i) express recognition of the public interest; (ii) that the conduct of children should only be criminalised as a last resort; (iii) the need to be responsive to the changing digital environment; and (iv) the conclusion and publication of a socio-economic impact assessment.

Express recognition of the public interest

10. It is clear from the Discussion Document that its aim, as well as the work of the SALRC through this process, is to serve the public interest, particularly the best interests of the child. This is both much-needed and welcomed. However, MMA is concerned that there is not enough emphasis in the Draft Bill to ensure that the public interest is a foremost consideration, informed by appropriate and relevant factors.

11. It is by now well-established under South African law that the public interest will be informed by different factors that are relevant in different circumstances. We submit that, for present purposes, the following factors would be relevant to the public interest:

11.1. The best interests of the child, including the best interests of the child in the context of criminal proceedings against any child. As explained by the Constitutional Court, the best interests of the child is a self-standing right, independent of the rights contained in section 28(1) of the Constitution.4

“Section 28(1) [of the Constitution] is not exhaustive of children’s rights. Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).”

11.2. The right to freedom of expression, which has been described by the Constitutional Court as a *sine qua non* for every person’s right to realise his or her full potential as a human being. It is both an important right in itself, as well as an enabling right. In this regard, the value of the right to freedom of expression has been explained as follows:

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”

11.3. The rights to dignity and privacy, which often need to be balanced against the right to freedom of expression. Striking the correct balance is all the more important when dealing with children, particularly children who have been victims of crime, or who have been witnesses or offenders during court proceedings. Of particular relevance to the work of the SALRC in finalising the Discussion Paper and the Draft Bill, the following guidance from the Supreme Court of Appeal should be taken into account:

“It is reasonable indeed not only that there should be protection of the identity of persons who have been victims of crime while they are children, but also that this and the other protections of them as witnesses and offenders should extend even when they reach adulthood. Their dignity and right to privacy require no less. The same applies to those who were witnesses to crime as children or were children when they were offenders. This entails no serious sacrifice of the principle of freedom of expression. Identity may be especially important in the sphere of public life and affairs. Children play no role in public life and affairs and, ordinarily, even once they have grown up, what happened to them as victims of crime, what crimes they witnessed and what crimes they may have committed are not, legitimately, publicly relevant.”

---

5 *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others* [1996] ZACC 7 at para 26.

6 *Centre for Child Law and Others v Media 24 Limited and Others* [2018] ZASCA 140 at para 86.
11.4. **The reasonableness of the limitation of any right**, in line with section 36 of the Constitution. As the Constitutional Court has previously explained, when assessing the justifiability of the limitation of any right, “one really need not go beyond the test of reasonableness”.⁷ In balancing competing rights and interests, and applying the test for a justifiable limitation of a right in terms of section 36 of the Constitution, it is important to bear in mind that there is no hierarchy of rights in the Constitution.

11.5. **The relevant context**, which must necessarily include a consideration of all relevant facts at the particular time. In respect of child pornography, for example, the Constitutional Court has explained that the “overarching enquiry, objectively viewed, is whether the purpose of the image is to stimulate sexual arousal in the target audience”.⁸ The Constitutional Court went on to explain that this entails considering the context of the publication or film, considered from the perspective of the reasonable viewer.⁹ Specifically, the Constitutional Court explained that:

“Indeed, it is not possible to determine whether an image as a whole amounts to child pornography without regard to the context. It is probably that other parts of the film or publication alleged to contain child pornography may indicate whether the predominant purpose of the material, objectively construed, is to stimulate sexual arousal among its target viewers. The [legislation] should be interpreted to allow consideration of such contextual evidence when it is relevant since the statute does not, in my view, preclude it.”

12. The abovementioned are all important considerations that need to be balanced in the public interest, and which will have a manifest impact on the interpretation and implementation of the draft Bill. In this regard, MMA urges the SALRC to ensure that these considerations are expressly contained in the Draft Bill to ensure that all relevant stakeholders are provided with the appropriate guidance in the public interest.

**The conduct of children should only be criminalised as a last resort**

13. MMA submits that, in recognition of the vulnerability and immaturity of children, it ought to follow that the conduct of children should only be criminalised as a measure of last resort. The import of this vulnerability and immaturity has been expressly recognised by the Constitutional Court, which has stated as follows:¹⁰

---


⁸ De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others [2003 ZACC 19 at para 38.

⁹ Id.

“The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children’s greater physical and psychological vulnerability. Children’s bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.

… We distinguish them because we recognise that children’s crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.”

14. In respect of the approach to be taken in the Discussion Document and the Draft Bill, MMA makes several submissions in this regard:

14.1. First, when dealing with consensual conduct between two children within the appropriate age range, this should not constitute a criminal offence. MMA submits that this should be decriminalised altogether to ensure that children do not have to engage with the criminal justice system for consensual conduct; in the alternative, at a minimum, consent that is informed, voluntary and unambiguous should be an available defence to be raised.

14.2. Further, the law should distinguish between first offenders and repeat offenders, taking into consideration whether the conduct was motivated by malice and the consequent harm that may have arisen from the conduct. MMA therefore urges the SALRC to include a recommendation for the relevant state functionaries to engage Child Line, in order to ensure that children are afforded the necessary support and guidance where they may fall foul of the law.

14.3. In circumstances where children are indeed found to be in contravention of the law, every effort must be taken to ensure that the process followed is one that is restorative and rehabilitative, with appropriate measures taken to ensure that the affected children are able to meaningfully reintegrate into society thereafter. MMA supports the pursuance of diversion and other restorative programmes that pay due regard to the special circumstances of children.

15. MMA submits that unduly punitive measures, that ignore the vulnerability and immaturity of children, would not serve the best interests of the child. This underscores the need for there to be effective education and awareness-raising campaigns, in order to ensure that children are indeed aware of the rights, duties and consequences contemplated in the Draft Bill and the SOA. The failure to do so may result in a child inadvertently falling foul of the Draft Bill owing to immaturity and a lack of awareness, with dire consequences as a result of this.
Responsiveness to the changing digital environment

16. It is, of course, necessary to recognise that the Draft Bill will need to be responsive to the changing digital environment, including in ensuring that such approach also caters for future developments that may arise going forward. The digital era has made it possible for every person with access to the internet – including children – to publish content online, and share it with vast audiences. As these audiences are amplified, it becomes an arduous, if not impossible, task to fully contain the spread of the information once it has been placed online.

17. However, in the face of these challenges, it is also important to note that the internet presents the opportunity for children to unlock opportunities, and grow and develop as individuals through the ability to access large tranches of information. As indicated above, in determining appropriate responses, it is necessary to ensure that this is done through a rights-based lens that does not unduly throttle access to the internet.

18. Lastly in this regard, it is also necessary to consider the technological feasibility and effectiveness of the recommendations contained in the Discussion Document. For example, and as set out in further detail below, Recommendation 6 raises concerns of not being technically practicable to implement. As such, it is key to the practicality and the enforceability of the recommendations in the Discussion Document and the Draft Bill to ensure that these are duly cognisant of the changing digital environment, and are suitably technologically-neutral to ensure that they can be applied notwithstanding developments in technology.

Need for a socio-economic impact assessment

19. Following the establishment of the Socio-Economic Impact Assessment System (SEIAS) by Cabinet in February 2007, it has been a requirement since 1 October 2015 that any Cabinet memorandum seeking approval for draft policies, bills, or regulations must include a socio-economic impact assessment compiled and approved by the SEIAS Unit.\textsuperscript{11} The SEIAS, which replaces the Regulatory Impact Assessment, aims to “minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes”, and “to anticipate implementation risks and encourage measures to mitigate them”.\textsuperscript{12}

20. In terms of the SEIAS Guidelines, the system applies to “new or to be amended primary legislation, although the impact assessment need not be published for matters affecting national security.”\textsuperscript{13} Given the complex and multi-faceted issues with which the Draft Bill will be addressing, a socio-economic impact assessment is an important step in crafting an

\begin{enumerate}
\item Id at page 4.
\item Id at page 8.
\end{enumerate}
appropriate framework that avoids unintended consequences. Furthermore, in line with the SEIAS Guidelines, MMA submits that the socio-economic impact assessment should be made public, once completed, so that relevant stakeholders have an opportunity to provide submissions on the impact assessment.

RECOMMENDATIONS CONTAINED IN THE DISCUSSION DOCUMENT

21. The Discussion Document contains twelve recommendations, as well as the Draft Bill. In this regard, MMA has focused on the recommendations to the extent that these fall within the expertise of MMA. These recommendations are dealt with in turn below.

Recommendations 1 and 2: Scope of child sexual abuse material

22. MMA is in support of the amendment in terminology to “child sexual abuse material” (CSAM). However, MMA emphasises the importance of ensuring that the definition is appropriately circumscribed to make clear precisely what would fall within this definition. This is particularly important, given that the definition will effectively define the scope of the offence contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA) and/or the Films and Publications Amendment Act 65 of 1996 (FPA).

23. Under international law, CSAM is dealt with in different ways.\(^{14}\) For instance:

23.1. Optional Protocol to the Convention on the Rights of the Child (CRC) on the Sale of Children, Child Prostitution and Child Pornography:\(^{15}\) Child pornography is defined in article 2(c) as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”. Article 3 goes on to stipulate the states parties ensure that certain acts are fully covered under the criminal law, whether committed domestically or transnationally, and irrespective of whether this is committed by an individual or on an organised basis. Of particular relevance, article 1(c) includes the following: “[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2”.

23.2. Budapest Convention on Cybercrime:\(^{16}\) Article 9 contains a more comprehensive definition and criminalisation of child pornography. Article 9(1) requires states parties to adopt legislative and other measures to criminalise the following intentional conduct: producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring

\(^{14}\) See, for example, EPCAT International, ‘Child sexual abuse material or child pornography’, undated, accessible at ecpat.org/wp-content/uploads/legacy/SECO%20Manifestations_CSAM.pdf.

\(^{15}\) Accessible at https://violenceagainstchildren.un.org/content/optional-protocols-crc.

\(^{16}\) Accessible here: https://www.coe.int/en/web/cybercrime/the-budapest-convention.
child pornography through a computer system for oneself or for another person; possessing child pornography in a computer system or on a computer-data storage medium. Article 9(2) further provides that child pornography includes pornographic material that visually depicts a minor engaged in sexually explicit conduct; a person appearing to be a minor engaged in sexually explicit conduct; realistic images representing a minor engaged in sexually explicit conduct.

23.3. **Lanzarote Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse:** Article 20 requires states parties to take legislative or other measures to criminalise the following intentional conduct: producing child pornography; offering or making available child pornography; distributing or transmitting child pornography; procuring child pornography for oneself or for another person; possessing child pornography; knowingly obtaining access, through information and communication technologies, to child pornography. The term “child pornography” is defined as “any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes”. Importantly, article 21 goes further to set out offences concerning the participation of a child in pornographic performances. Article 21 therefore further requires states parties to take legislative or other measures to ensure that the following intentional conduct is criminalised: recruiting a child into participating in pornographic performances or causing a child to participate in such performances; coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes; knowingly attending pornographic performances involving the participation of children.

23.4. **ILO Convention 108 on the Worst Forms of Child Labour:** Article 3(b) includes child pornography within the list of the worst forms of child labour. This includes “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performance”. In addition to requiring member states to sanction such conduct, article 7(2) further requires states to take effective and time-bound measures to support children who have been the victims of such child labour, including measures to prevent the engagement of children in the worst forms of child labour; provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration; ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour; identify and reach out to children at special risk; and take account of the special situation of girls.

---


23.5. **African Union Convention on Cyber Security and Personal Data Protection**:\(^{19}\) Article 1 defines child pornography as “any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct” where the production of such visual depiction involves a minor; such visual depiction is a digital image, computer image or computer-generated image where a minor is engaging in sexually-explicit conduct or when images of their sexual organs are produces or used for primarily sexual purposes and exploited with or without the child’s knowledge; such visual depiction has been created, adapted or modified to appear that a minor is engaging in sexually explicit conduct. Article 29(3)(1) requires states parties to, among other things, make it a criminal offence to do any of the following: produce, register, offer, manufacture, make available, disseminate and transmit an image or a representation of child pornography through a computer system (sub-article (a)); procure for oneself or another person, import or have imported, and export or have exported an image or representation of child pornography through a computer system (sub-article (b)); possess an image or representation of child pornography in a computer system or on a computer data storage medium; facilitate or provide access to images, documents, sound or representation of a pornographic nature to a minor.

24. There is significant guidance that can be garnered from these and other relevant international instruments, particularly in respect of defining the scope of the conduct being prohibited. As mentioned, it is necessary to understand the purpose behind the Discussion Paper and the Draft Bill. In fulfilling the requirement of the best interests of the child, the response cannot be to unduly restrict the rights of children or others in order to pursue a solely protectionist mandate. Rather, it is also necessary to have regard to the importance of freedom of expression both on- and offline, the sexual development of children, and the provision of relevant and appropriate materials to enable to children to self-actualise.

25. Further, in considering the approach of the Draft Bill in comparison with the key international instruments on CSAM and child pornography, regard must also be had to the rehabilitative and restorative considerations of children who are affected by CSAM and child pornography, both as victims and potentially even as perpetrators. Key elements that can be adduced from the above instruments which are relevant to the Draft Bill include the following:

25.1. **Conduct and intention**: The instruments referred to above are not consistent in the scope of conduct that constitutes CSAM or child pornography, or whether or not intention is a requirement. This appears to vary across the different instruments. We submit that while there is utility in casting a wide scope of conduct, this should be circumscribed by appropriate exclusions and defences within the legislation to ensure that the scope is relevant and responsive to the harms being addressed.

25.2. **Jurisdiction:** Various of the instruments referred to above indicate that they apply regardless of whether the offence was committed locally or transnationally. This is particularly important when dealing with content online, as the internet transcends ordinary national borders. As such, it is necessary for the Draft Bill to ensure that it appropriately sets out the jurisdiction to which it will apply.

25.3. **Rehabilitation:** In addition to being punitive, the Draft Bill should also include rehabilitative measures for children affected by CSAM or child pornography, both in terms of victims and potentially child offenders. These measures will serve to ensure that the Draft Bill also has a restorative effect in enabling affected children to reintegrate into society.

25.4. **Technology neutral:** The Draft Bill needs to ensure that it is technology neutral, so that it does not have to be updated each time there is a new technological development. In this regard, the use of terms like “computer system”, as seen in certain of the international instruments, is already outdated as it excludes, for instance, mobile systems.

25.5. **Duty on the state:** Various of the instruments referred to above require the state to take legislative and other measures to protect and prevent child pornography. As such, it is not sufficient simply for the state to legislate issues regarding CSAM and child pornography; the state should also be expected to take measures to raise awareness, build capacity and ensure that sufficient mechanisms are in place to deal with CSAM and child pornography effectively and holistically.

26. Aspects of these elements are dealt with further in the submissions below.

**Recommendation 3: Reconciliation of different legislation**

27. MMA supports the reconciliation of the legislation, in order for the SOA to be the primary legal instrument that deals with CSAM. This will not only require the amendment of existing legislation, such as the FPA, but also the amendment of pending legislation, such as the Cybercrimes Bill.

28. In this regard, we propose the following:

28.1. The Draft Bill should include a schedule listing the various legislation, regulations and policies that would need to be amended in order to rationalise them with the amendments to the SOA. This will be important and necessary for legal certainty.

28.2. In the rationalisation of the different legislation, it must be ensured that the best interests of the child are treated with the paramount importance, and additionally that the appropriate balance is struck between competing rights and interests, including the right to freedom of expression.
28.3. For the avoidance of doubt, the Draft Bill should make clear that, in respect of CSAM and pornography, the SOA supersedes any other law that may be in conflict.

29. As a general point, MMA is concerned by the plethora of legislation currently being considered, seeking to regulate online content. The reconciliation of the SOA and the FPA will be a welcome measure, but more needs to be done to ensure that this issue is dealt with in a holistic and streamlined manner, that does not give rise to confusion or uncertainty, particularly in respect of children who may be at risk of falling foul of the legislation.

30. However, it should also be noted that the Film and Publication Board (FPB) already has in place certain mechanisms to deal with issues of CSAM and pornography, including delivering talks to learners and other stakeholders. As such, MMA submits that the FPB should retain its awareness-raising mandate, as it will in any event continue to have a role in respect of the classification of content in terms of the FPA. The relevant legislation should make clear that the FPB and the South African Police Services (SAPS) – who will be tasked with the implementation of the SOA – must work together, including through the conclusion of a memorandum of understanding (MOU), to ensure that the efforts are streamlined and coordinated. Given both the extent and the importance of this issue, the effective engagement between the FPB and SAPS within their roles will be crucial to enforcing the FPA and the SOA.

Recommendation 4: Alignment of definitions

31. MMA is concerned that the approach of removing the requirement of intention in the definition of CSAM and pornography will risk giving rise to strict liability in respect of some of the offences set out in the SOA. Such an approach may have the unintended consequence of being criminalised, even in circumstances of innocent sharing of content.

32. The following may be considered by way of example:

32.1. A parent takes a photograph of their naked child in a bathtub, and shares this photograph with their elder 14-year old child via WhatsApp and posts the photograph on social media.

32.2. The parent does so innocently, with no intention of engaging in CSAM or pornography. However, in terms of section 4(a)(i)(f) of the Draft Bill, this would constitute CSAM as a display of genital organs, as well as pornography in terms of section 4(a)(iii)(f) of the Draft Bill, as the intention of the parent is irrelevant in terms of the Draft Bill.

32.3. The parent, who has intentionally displayed the photograph on social media and via WhatsApp, is guilty of an offence of displaying CSAM or pornography in terms of section 19(a) of the Draft Bill, which simply requires the unlawful and intentional exposure or display of CSAM or pornography. In this case, while the parent did
indeed intend to display the content, there was nevertheless no intention to create or engage in CSAM or pornography.

32.4. Furthermore, in sharing the image with their 14-year old child, the parent is also guilty of an offence of enticement to view or making CSAM or pornography accessible to children in terms of section 19A(1) of the Draft Bill. Section 19A(1) requires, in broad terms, that: “A person (‘A’) who unlawfully and intentionally advertises, provides access to or distributes to a child (‘B’), or entices B to view any of the items or categories listed in section 19 through any means, with or without the consent of B, is guilty of the offence of enticing a child to view [CSAM] or pornography”.

32.5. The inclusion of the word “unlawful” in sections 19 and 19A is of no assistance, given that the breadth of these offences, coupled with the lack of intention required in the definitions of CSAM and pornography, in itself renders the innocent act of the parent in sharing the photograph of their child to be unlawful.

33. The above scenario is clearly untenable and needs to be remedied in the Draft Bill. Innocent sharing, such as that described above, should certainly not be criminalised or treated as criminal conduct. From a point of principle, we consider it inappropriate that an image innocently captured and shared should fall within the definition of CSAM and pornography. Further, the intended outcome and effect of the display or distribution of the image is what is relevant, not the mere act of displaying or distribution.

34. Clearly, the intention regarding the type of content being created is directly relevant, and is an inquiry that must necessarily inform the measures taken against the person. By ignoring intention, it also risks diminishing the seriousness with which intentional purveyors of CSAM and child pornography should properly be treated. We therefore urge the SALRC to revise these provisions of the Draft Bill to appropriately cater for these issues and provide clarity.

35. MMA proposes that this could be remedied by amending the pertinent definitions as follows:

35.1. By distinguishing between the initial creation and/or display of the image or other material in circumstances where this is done without the intention to engage in CSAM or child pornography, on the one hand, and the subsequent uses of the image or other material in a manner that would constitute an offence in terms of sections 19 and/or 19A of the Draft Bill.

35.2. By creating a list of exclusions that would not constitute offences in terms of the legislation. This would include, for example, the innocent creation, display or distribution of an image or other material depicting the genitals, anus or breasts of a child without the intention to engage in CSAM or child pornography. This exclusion is relevant, as it ensures that the initial act is taken out of the remit of the SOA, but further conduct may still be criminalised where the requisite intention arises.
35.3. Further to the list of exclusions, regard should also be had to exclude consensual acts by children of creating, displaying or distributing an image or other material of their own genitals, anus or breasts. This is contemplated as permissible in terms of the Discussion Document, and would therefore be contrary for such conduct to be criminalised in terms of the Draft Bill.

35.4. The definitions should also include certain exemptions, in line with the FPA. We submit that the definitions, particularly the definition of “child pornography”, should provide for an exclusion in the following terms: “unless such material is a bona fide documentary or is of scientific, literary, artistic or educational merit or is on a matter of public interest’’. This is discussed further below.

36. Lastly in this regard, we note that the amended definitions of “CSAM” and “pornography” in the Draft Bill do not entirely align. For example, sub-section (f) in the definition of CSAM proposes an amendment to include breasts, while the definition of pornography does not contain a similar amendment – despite this being similarly relevant to both definitions. This amendment is a useful opportunity to allay some of the confusion that has been caused by the FPA and the SOA in the past, and should therefore ensure that the definitions and scope of the legislation are clear and consistent.

Recommendation 6: Protection of children from exposure

37. MMA emphasises that it is necessary to distinguish between pornography and other forms of sexual content. Children will – and should – seek relevant sexual material to understand their sexuality, identity and personality. Sexuality is a core element to who we are as people, and children of the appropriate age should not be given the incorrect impression that this is something that is either bad or of which to be ashamed.

38. In this regard, the burden should properly rest on the government, particularly the Department of Basic Education (DBE), to ensure that children have access to relevant and appropriate sexual materials, to avoid children needing to seek out information online that might lead them to inappropriate forms of pornography.

39. As indicated, MMA submits that the pertinent definitions should be amended to include an exemption in the following terms: “unless such material is a bona fide documentary or is of scientific, literary, artistic or educational merit or is on a matter of public interest’’. This specific inclusion of “educational merit” is intended to ensure that the DBE and other relevant functionaries are able to make relevant content of a sexual nature available to children as part of the curriculum, to enable children to have access to age-appropriate content instead of seeking access to pornography online.

40. As such, MMA submits that if the SALRC is to retain the amendment that the definitions apply regardless of whether the materials are “intended to stimulate erotic feelings or not”, this should be caveated through the inclusion of the above mentioned exemptions, following a similar approach to the FPA, to ensure that the provision does not unduly curtail the right to
freedom of expression, and still permits artistic freedom, appropriate educational materials and other relevant content that would be to the benefit of children.

**Recommendation 7: Consensual self-generated child sexual abuse material**

41. MMA acknowledges at the outset that this is one of the most complex aspects to be addressed in the Discussion Document and the Draft Bill. It is also one of the most important aspects to ensure is correctly phrased, and serves to address the harm while not unduly stunting the personal growth, development and expression of children. In this regard, MMA highlights the following key issues in respect of the issue of consent:

41.1. MMA submits that consensual self-generated CSAM should not be an offence. As such, MMA submits in the first instance that such material should be decriminalised, in order to avoid any child having to go through the criminal justice system; in the alternative, consensual self-generated CSAM should be a complete defence. MMA is opposed to the option of consensual self-generated CSAM being treated as a lesser offence, as this still stifles the sexual expression and development of a child, and renders a child subject to a criminal record despite the conduct being of a consensual nature.

41.2. There is need for clarity on the meaning of consensual. In order for it to be consensual, the consent must be freely given, in a manner that is specific, informed and unambiguous. This should be expressly set out in the Draft Bill, in order to avoid any coercion, extortion or other transactional exchange being the real underpinning behind the sharing of such material.

41.3. Consent should apply to both the sender and the receiver. However, the Draft Bill should make clear that only the person to whom the CSAM pertains (i.e. the person depicted in the photograph or video) should be permitted to share that CSAM; the receiver should not be permitted to share the CSAM further, unless appropriate consent has been obtained. In this regard, in the event of a dispute, the burden should rest on the receiver of CSAM who has further distributed the image or video to prove that he or she had the appropriate consent to do so.

42. When dealing with some matters, including when dealing with whether CSAM was indeed consensual, it is necessary to take into account the maturity and vulnerability of children. Before the Constitutional Court, in the separate judgment of Skweyiya J in *Le Roux v Dey*, it was stated as follows:20

> “Children are treated differently in our legal and social structures. In effect, we seek to create different “worlds” for our children in an effort to protect them, to help them develop, and to give them a forum to make mistakes and then learn from these mistakes. One is not hard-pressed to find examples of ways in which we treat children differently, or offer them greater

---

We give children a measure of leeway, and in many instances hold them to a lower standard of account, as we accept that they lack the emotional maturity and wisdom to clearly distinguish right from wrong when there is a grey area. In my view, the facts of this case present such a grey area.”

43. We submit that this recognition of immaturity, vulnerability and ease of influence regarding children should be a key consideration that informs the Discussion Document and the Draft Bill, particularly in respect of Recommendation 7. In this regard, MMA submits as follows:

43.1. As indicated above, the Draft Bill should expressly decriminalise the sharing of consensual self-generated CSAM, in the terms set out above.

43.2. The Draft Bill should provide for rehabilitative and restorative measures, taking into account the vulnerability and lack of maturity of children. We would strongly urge that a formalised arrangement be concluded with Child Line, in order for children to have a point of support in the event that they inadvertently find themselves in breach of the Draft Bill.

43.3. The Bill should distinguish between the innocent sharing of CSAM and the intentional, malicious sharing of CSAM. Regard should also be had to the harm that arises from the dissemination of CSAM, and whether a person has committed the same or related offence more than once.

44. Lastly in this regard, the amendment contained in section 56(9) of the Draft Bill should insert the word “or” between sub-sections (c) and (d), to ensure clarity that this is read disjunctively, as opposed to being read as cumulative requirements.

Recommendation 8: Live performances involving child sexual abuse material

45. MMA is concerned that the breadth of Recommendation 8 may undermine the central purpose of this recommendation. In particular, persons may receive CSAM without requesting or wanting to receive it. An example of this may be a video of CSAM shared via a WhatsApp group, which a person inadvertently views without being a complicit participant to the offence. As such, MMA would submit that in respect of viewing CSAM, the Draft Bill should include a requirement of intention, in respect of which the offender must intend to view CSAM and engage with the material in an unlawful manner.
**Recommendation 9: Obligation to report commission of offences**

46. Recommendation 9 contains two elements: first, a general reporting obligation regarding the commission of CSAM offences or the exposure of children to pornography; and second, an obligation on electronic communication service providers and financial institutions that are aware that their systems or facilities are being used in the commission of an offence involving CSAM. While MMA understands the underlying rationale for these recommendations, we raise the following concerns:

46.1. The blanket criminalisation of the failure to report immediately is concerning, particularly as this may involve, for instance, family members dealing with children who have acted in contravention of the Draft Bill. These are complex issues of which the Discussion Document and the Draft Bill need to be appropriately cognisant. Importantly, this underscores the importance for the Draft Bill to carve out exemptions in the public interest, to decriminalise the consensual sharing of self-generate CSAM, and to put in place appropriate mechanisms – such as the submission above regarding Child Line – in order to facilitate this duty in a reasonable and sensitive manner, that does not result in further harm being caused.

46.2. The phrasing of the recommendation gives the impression that there will be a duty to monitor on electronic communication service providers and financial institutions. This creates a risk of violating the right to privacy, as well as running contrary to the purport of section 78 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), which provides that there is no general obligation on a service provider to monitor the data which it transmits or stores, or to actively seek facts or circumstances indicating an unlawful activity. Added to this, given that various communications platforms make use of end-to-end encryption, there would not be a practicable way to give effect to this.

47. MMA therefore urges the SALRC to reconsider the proposed approach to the duty to report, to take into account the countervailing interests that may arise that would mitigate against the imposition of such stringent duties and criminal sanctions as contemplated in section 54A of the Draft Bill.

**Recommendation 11: Inter-sectoral management**

48. MMA urges the SALRC to ensure that there is appropriate coordination across government to effectively manage and implement the recommendations in the Discussion Document and the Draft Bill. However, in ensuring coordination and recognising the need for a multi-stakeholder approach, it is also important to emphasise that there must be one central node that takes overarching authority for these issues, to ensure that there is accountability for the fulfilment of the recommendations.
49. Furthermore, in order to achieve coordination more generally, MMA calls on the SALRC to put forward a recommendation to government for the establishment of an Interdepartmental Steering Committee (ISC) on Internet Governance. In respect of children, for example, the Discussion Document already highlights the plethora of laws, policies and government functionaries engaging in issues regarding the protection of children online, but which do so in a manner that is not strategic, coordinated or implemented cohesively.

50. In the absence of a clear government internet governance policy and legislative guidance, an unduly complex structure of oversight is in the process of being created. The result is that that the public, civil society organisations, and members of the media, among others, need to navigate an overly complex regulatory landscape in order to make submissions, conduct their business, and, ultimately, protect and promote fundamental rights. Additionally, this poses significant challenges to government’s coordinated and effective implementation of the existing regulatory provisions, and may result in overlapping mandates or aspects not being assigned or accounted for by appropriate functionaries.

51. With rapid technological developments, including the development of technologies used to perpetrate crimes involving children online, the complex governance structures created by the various pieces of legislation dealing with internet governance may not be amenable to swift and effective responses. The consequence of this is that vulnerable persons may be left exposed to risk and harm, and the state may be seen to have failed its constitutional obligations to respect, protect, promote and fulfil the rights in the Bill of Rights.21

52. A further constitutional imperative relates to cooperative governance and intergovernmental relations. In terms of section 41(1)(c) of the Constitution, “[a]ll spheres of government and all organs of state within each sphere must provide effective, transparent, accountable, and coherent government for the Republic as a whole” and must “co-operate with one another in mutual trust and good faith by coordinating their actions and legislation with one another”.22

53. These concerns have led MMA to propose the ISC on Internet Governance to address relevant matters, including the protection and safety of children online. It is proposed that the ISC be led by the Department of Justice, and also comprise representatives from the following role-players:

53.1. Policy Unit within the Office of the Presidency;
53.2. Department of Justice and Constitutional Development;
53.3. Department of Science and Technology;
53.4. Department of Telecommunications and Postal Services;
53.5. Department of Home Affairs;
53.6. Department of International Relations and Cooperation;
53.7. National Prosecuting Authority;

21 See section 7(2) of the Constitution.
22 See section 41(1)(h)(iv) of the Constitution.
53.8. National Treasury;
53.9. South African Police Service;
53.10. Information Regulator;
53.11. Films and Publications Board;
53.12. Two representatives from opposition parties represented in the National Assembly;
53.13. Two teachers of law, or members of the attorneys’ or advocates’ profession, with knowledge of internet governance laws, appointed following a public call for nominations;
53.14. Two technical experts in internet governance following a public call for nominations;
53.15. Two members of civil society organisations working on internet governance following a public call for nominations.

54. We emphasise that:

54.1. The objects should reflect the broader internet governance mandate and the multidisciplinary, cross-cutting challenges that these issues present.

54.2. Reporting by the ISC should be to Parliament to ensure greater transparency and accountability.

54.3. We propose adding representatives from opposition parties represented in the National Assembly, members of the legal profession, technical experts and civil society representatives, to ensure a diversity of views and expertise.

55. MMA submits that the SALRC is in a unique and opportune position to propose, as part of the work on the Discussion Document and the Draft Bill, the establishment of the ISC on Internet Governance to ensure that the protection of children online, among other key internet governance issues, is appropriately addressed by the state and other relevant stakeholders in a coordinated and effective manner. In doing so, the SALRC would be taking ground-breaking strides in ensuring that the protection of children online is given appropriate attention from the relevant functionaries, and does not continue to be treated in the siloed fashion that is currently the source of much consternation.

**Recommendation 12: Data retention and preservation orders**

56. As a point of principle, MMA is in support of the requirements regarding data retention and preservation orders in respect of the commission of any offence involving CSAM. However, there are also relevant privacy and data protection considerations that arise as well. In this regard, we submit as follows:

56.1. As previously indicated, the Draft Bill should make clear that this provision does not place a duty to monitor on electronic communication service providers or financial institutions, as this would be contrary to the right to privacy and section 78 of ECTA.
56.2. The recommendation should ensure that, to the extent that there are any rights-based implications regarding the data retention and preservation orders, such orders are obtained with the clear oversight of a judicial officer or other independent adjudicator.

56.3. Furthermore, the recommendation should clearly stipulate that any data accessed, stored or otherwise processed as a result of such a data retention or preservation order is to be done in a manner that is compliant with the Protection of Personal Information Act 4 of 2013.

PROPOSED ADDITIONAL RECOMMENDATIONS

57. In addition to the recommendations discussed above as contained in the Discussion Document, MMA further makes an additional three recommendations for possible inclusion by the SALRC: (i) cooperation with private sector actors; (ii) education and awareness-raising campaigns; and (iii) remedial measures for affected children.

Cooperation with private sector actors

58. Article 3 of the African Union Convention on Cyber Security and Personal Data Protection provides that: “Each State Party shall develop public-private partnerships as a model to engage industry, the civil society, and academia in the promotion and enhancement of a culture of cybersecurity.”

59. Similarly, MMA urges that it is imperative for the efficacy of the Discussion Document and the Draft Bill for there to be engagement with relevant private sector actors – particularly social media platforms – to seek a common approach and a framework for cooperation. In this regard, the SALRC should include a recommendation for the relevant government entities to enter into an MOU with the relevant social media platforms, in order to seek commitment regarding CSAM and child pornography. Given the speed with which information is shared on social media, as well as the amplified audience that it is capable of reaching, the ability to curb the spread of CSAM and pornography is directly dependent on the willingness of the social media platforms to cooperate.

60. While social media platforms tend to address child pornography in their terms of service, this is not necessarily in line with the Constitution, the Draft Bill or the approach recommended by the Discussion Document. Further, the processes sometimes tend to lack accountability and transparency for the decisions taken. As such, fostering cooperation and engagement can ensure that issues regarding CSAM and child pornography are, by necessity, treated with the appropriate seriousness that is required.
**Education and awareness-raising campaigns**

61. The importance of education and awareness-raising cannot be gainsaid. Without this, the provisions of the Draft Bill cannot in good faith be implemented, particularly against children, as there can be no expectation of knowledge or understanding of the law. In this regard, article 4 of the African Union Convention on Cyber Security and Personal Data Protection provides as follows in respect of education and training:

> “Each State Party shall adopt measures to develop capacity building with a view to offering training which covers all areas of cybersecurity to different stakeholders, and setting standards for the private sector.

States Parties undertake to promote technical education for information and communication technology professionals, within and outside government bodies, through certification and standardisation of training; categorisation of professional qualifications as well as development and needs-based distribution of educational material.”

62. In this regard, MMA submits as follows:

62.1. Learners at schools, at the appropriate ages to be determined by persons with relevant expertise, should be taught about the implications of the SOA and the creation and distribution of CSAM and pornography. Such learners should also be clearly made aware of the implications of contravening the legislation.

62.2. Learners at schools, at the appropriate ages to be determined by persons with relevant expertise, should be provided with relevant educational content of a sexual nature, taking into account the different configurations of human relationships, including same-sex relationships.

62.3. Furthermore, learners should also receive broader digital literacy training as part of the school curriculum. Thus far, those schools that do offer digital literacy have tended to focus on the dangers of the internet, without appropriately promoting the opportunities for personal development that the internet can offer as well. Appropriate digital literacy training can ensure that learners are able to make informed and responsible decisions online.

63. Further in this regard, MMA draws attention to section 9 of the Prevention and Combating of Hate Crimes and Hate Speech Bill, as an example of a law which stipulates detailed obligations for the state to raise awareness in the legislation itself. MMA submits that a similar consolidated provision should be included in the Draft Bill, emphasising the following elements:

63.1. The government, the South African Human Rights Commission, the Commission for Gender Equality and other relevant stakeholders should be imposed with a duty to promote awareness of the prohibitions regarding CSAM and pornography, aimed at the prevention and combating of the offences in the SOA.
63.2. The President should designate one or more Cabinet members to cause programmes to be developed in order to conduct education and information campaigns to inform the public about the prohibitions regarding CSAM and pornography, aimed at the prevention and combating of the offences in the SOA.

63.3. Measures should be implemented to ensure that all public officials who may be involved in the investigation and prosecution of offences regarding CSAM and pornography are educated and informed about the offences in the SOA, the exemptions and the relevant defences.

63.4. Support mechanisms should be established to ensure that persons are able to lodge complaints, and seek the necessary support, when dealing with CSAM and child pornography. In this regard, we reiterate the need to establish formalised relationships with entities such as Child Line, that are appropriately equipped and trained to deal with such matters.

63.5. Public officials should be trained on the prohibition, prevention and combating of CSAM and child pornography, as contemplated in the SOA. This training should include social context training as well.

63.6. The South African Judicial Education Institute should develop and implement training courses, including social context training courses, for judicial officers presiding over cases regarding CSAM and child pornography, as contemplated in the SOA.

64. As with the Prevention and Combating of Hate Crimes and Hate Speech Bill, these requirements regarding education and awareness-raising campaigns should be legislated to ensure that these obligations are treated appropriately, as binding, and require accountability for compliance with these obligations.

**Remedial measures for affected children**

65. As indicated above, article 7(2) of the ILO Convention 108 on the Worst Forms of Child Labour requires states, in addition to criminal sanctions, to also take effective and time-bound measures to support children who have been the victims of such child labour. In this regard, this would include, for instance:

65.1. Measures to prevent the engagement of children in child pornography;
65.2. Necessary and appropriate direct assistance for the removal of children from situations in which they are engaged in child pornography;
65.3. Measures for the rehabilitation and social integration of children who have been engaged in child pornography;
65.4. Access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from situations in which they were engaged in child pornography;
65.5. Identification and steps to reach out to children at special risk; and
65.6. Measures that take account of the special situation of girls.

66. While the Draft Bill is generally focused towards offenders in terms of the SOA, we submit that further attention should be addressed to the victims of such offences. As such, we would submit that a similar provision, in line with the measures set out above, should be included in the SOA to provide for the rehabilitation and restoration of children who have suffered as a result of CSAM and child pornography as contemplated in the Draft Bill.

CONCLUDING REMARKS

67. MMA reiterates our appreciation for the opportunity to participate in this process. We note that the Discussion Paper and the Draft Bill are both important developments in promoting a safe, secure and trusted internet, and have an important role to play in protecting and promoting the triad of information rights and the best interests of the child. MMA urges the SALRC to address this matter as one of urgency, and strive to ensure that there are appropriate measures in place to protect children against CSAM and child pornography.

68. MMA remains available and willing to provide any additional assistance to the SALRC going forward. Kindly confirm receipt of this submission.

MEDIA MONITORING AFRICA
Johannesburg, 31 August 2019