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Promoting human rights and democracy through the media since 1993

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TO: **THE FILM AND PUBLICATION BOARD**
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E-mail: clientsupport@fpb.org.za

DRAFT FILMS AND PUBLICATIONS AMENDMENT REGULATIONS, 2020:
WRITTEN SUBMISSION BY MEDIA MONITORING AFRICA

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INTRODUCTION

1. Media Monitoring Africa ("MMA") provides this submission on the Draft Films and Publications Amendment Regulations, 2020 ("the Draft Regulations"), in response to the call for submissions published by the Minister of Communications and Digital Technologies ("the Minister"). The Draft Regulations raise issues on which MMA has been consistently engaged, including through the following work:

    1.1. In April 2016, MMA hosted a multi-stakeholder workshop focused on the regulation of digital content. Through this workshop, one of the core aims was to deepen an understanding of the issues by and between the relevant stakeholders, and further establish areas of commonality and principle agreement.

    1.2. In May 2016, MMA prepared a written submission on the Films and Publications Amendment Bill B37-2015.[1] This submission raised three key concerns: first, the potential for unconstitutional infringements of fundamental rights; second, regulatory impact assessment considerations; and third, the need for children's participation.

    1.3. Currently, MMA – together with the Film and Publication Board ("FPB") and Google South Africa, among others – spearheads the Web Rangers programme. Web Rangers is an international digital and media literacy programme designed to empower young people with critical skills on how to use the internet and social media responsibly and confidently.

2. This submission is structured as follows:

    2.1. **First**, an overview of MMA.

    2.2. **Second**, our submissions regarding the overarching considerations to be taken into account in the Draft Regulations.

    2.3. **Third**, our submissions regarding the specific provisions of the Draft Regulations.

3. These are dealt with in turn below. MMA notes that these submissions are not necessarily exhaustive of all MMA's concerns with the Draft Regulations, but rather constitute those which have been considered to be among the most pressing.

[1] MMA and SOS Coalition, *Written submissions on the Films and Publications Amendment Bill* (26 May 2016): https://mediamonitoringafrica.org/submission/.

OVERVIEW OF MEDIA MONITORING AFRICA

4. MMA is a not-for-profit entity that has been monitoring the media since 1993. We aim 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.

5. In the last 27 years, we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA continues to challenge media on a range of issues, always with the overt objective of promoting human rights and democracy through the media. In this time, MMA has consistently sought to deepen democracy and hold media accountable through engagement in policy and law-making processes.

6. MMA has made submissions relating to public broadcasting, online content regulation, cybercrimes, data protection and various other matters relevant to the exercise of freedom of expression and other information rights, both on- and offline. In this regard, MMA has presented on a number of occasions to the National Assembly and the National Council of Provinces. In addition, MMA has made submissions to broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa ("ICASA"). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available.

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

OVERARCHING CONSIDERATIONS

Importance of the right to freedom of expression

8. As a point of departure, MMA notes that the Draft Regulations have significant consequences for the exercise of rights online, particularly the right to freedom of expression as contained in section 16 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). In terms of section 16(1) of the Constitution, the right to freedom of expression includes the right to receive and impart information of all kinds, save for that which is prohibited in terms of section 16(2) of the Constitution.

9. Importantly, the Constitutional Court has explained that the right to freedom of expression is applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb".[2] This extends "even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not

[2] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) at para 49.

require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."[3]

10. Importantly, the internet has become a critical forum for robust discussion. While content may at times appear unpleasant or unpalatable to some, it is imperative that we continue to safeguard the importance of the right to freedom of expression online. Indeed, the right to freedom of expression lies at the cornerstone of democracy, and seeking to sanitise the expression of the public may unduly stifle the right to freedom of expression. Given that the right to freedom of expression – unlike certain other rights – does not require regulation to give it effect, it follows that regulating the right amounts to a limitation of it.

11. Accordingly, MMA submits that the Draft Regulations should include a provision reflecting its recognition of the importance of the right to freedom of expression, and the need to strike an appropriate balance with other competing rights that interests that is reasonable and justifiable in an open and democratic society in accordance with section 36 of the Constitution. To the extent that the Draft Regulations limit the right to freedom of expression, such limitation should be narrowly circumscribed and constitute the least restrictive means to achieve the intended purpose.

Absence of an empowering provision for the Draft Regulations

12. MMA is concerned that there is no lawful basis to empower the publication of the Draft Regulations, resulting in uncertainty regarding its legal status. Notably, two different empowering provisions are relied on for the publication of the Draft Regulations by the Minister:

    12.1. In the General Notice, it was stated that the Draft Regulations are published "under section 31 (1) (c), (d) and (e) of the Films and Publications Act 65 of 1996 (Act No. 65 of 1996), as amended".

    12.2. In the text of the Draft Regulations, it is noted that the Regulations are made "under section 31(1) of the Films and Publications Act, 1996 (Act No.65 of 1996)".

13. Accordingly, the Minister has relied on both the Films and Publications Act 65 of 1996 ("the Principal Act") and the Films and Publications Amendment Act 11 of 2019 ("FPAA"). Importantly, although the FPAA was has been signed by the President, its provisions have not yet come into effect.

14. It appears that the Draft Regulations, in various aspects, rely on the FPAA for its validity and enforceability. However, until the FPAA is fully in force, the Draft Regulations remain premature and, in our view, unlawful. Further in this regard, MMA has previously raised serious concerns about the constitutionality of the FPAA. As such, MMA submits that the processes regarding

[3] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 8.

the Draft Regulations should be put on hold until such time as all matters relating the FPAA have been resolved.

Overbreadth of the Draft Regulations

15. In addition to the above, MMA submits that the scope of the Draft Regulations go beyond that which is contemplated in the Principal Act or the FPAA. MMA submits, in particular, that the system of prior registration of all films and games, as well as the classification of all online content, goes beyond that which is contemplated in sections 16 and 18 of the Principal Act. This significantly restricts the exercise of rights online, and appears to be overbroad and unconstitutional. This is exacerbated by the broad definitions contained in the Draft Regulations, including the definitions of "distribute", "film", "game" and "publication".

16. MMA emphasises the need for the Minister and the FPB to have careful regard to the findings of the Constitutional Court in *Print Media South Africa and Another v Minister of Home Affairs and Another*,[4] which included the following in respect of the issue of prior restraints:

16.1. "Under this model of prior classification, control is exercised before publication by an administrative body under the control of the executive branch of government. In essence, the person seeking to publish is required to submit the material to the administrative body, which decides whether to grant or deny permission to publish. If the administrative body concludes that the material is prohibited, the prospective publisher is prevented from publishing it. This amounts to a form of prior restraint, which is an inhibition on expression before it is disseminated."[5]

16.2. "[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice".[6]

16.3. "[U]nder the system of administrative prior restraint, the opportunity for public scrutiny and comment on a fresh publication is denied. An administrative body is more likely to restrict publications when it can classify upfront than when it must take punitive or restrictive action after publication. The greater propensity for prior restraint when controlled by an administrative body is explained by the nature of prior classification itself, where, by restraining upfront, the state is relieved of the greater burden on resources, personnel and time necessitated by policing and possibly prosecuting after material has been made public. Last but not least, an administrative body is mandated and incentivised to classify, which also increases the likelihood of restraint."[7]

16.4. "Deepening the fracture in the right is the fact that throughout the classification process the fate of the publication remains uncertain. In some instances, the very delay in

[4] 2012 (6) SA 443 (CC).
[5] Id at para 16.
[6] Id at para 44.
[7] Id at para 59.

bringing important information to the public's attention makes inroads into the right to freedom of the press and other media. The contents of the publication may even be redundant by then, yet there would be no remedial action open to the publisher. Equally, if a publisher were not to submit material that, on the face of it, fell to be submitted, but would ultimately have emerged unrestrained, he could still be prosecuted for breaching the very duty to submit."[8]

16.5. "[A]n enquiry into the merits of any prior restraint necessitates an adjudication of legal rights, a task that properly falls within the province of a court and not an administrative body. … [A] court interdict as an alternative remains open to any litigant, who can meet its requirements. In my view, it is an appropriate less restrictive means of enforcing a ban on child pornography and protecting children from exposure to harmful or age-inappropriate materials, as well as preventing contravention of the law though an anticipatory mechanism."[9]

16.6. "In my view, the mainstay of the law is to encourage lawful conduct rather than to seek to guarantee the lawfulness by restricting conduct altogether … [S]hould a publisher choose not to pursue the avenues available to gain certainty about the lawfulness of intended publication, then he must bear the risks attendant upon the decision to publish. Such is the cost of free expression."[10]

17. It is central to MMA's submission that the FPB should only be concerned with that content which falls within its scope and mandate for classification in terms of sections 16 and 18 of the Principal Act, and should not seek to impermissibly broaden its authority through the Draft Regulations.

Application of the Draft Regulations

18. The Draft Regulations draw a distinction between a "commercial online distributor" and a "non-commercial online distributor". In this regard, we note this is a significant divergence from the FPAA in which speaks only of a "commercial online distributor" and a "distributor." The difficulties with the Draft Regulations in their current form is that they repeat earlier versions of the FPAA in which the definitions were so broad as to be all-encompassing.

19. Specifically, we note that:

19.1. A commercial online distributor means a distributor in relation to films, games and publications which are distributed for commercial purposes using the internet. The Draft Regulations do not define the term "commercial purposes".

[8] Id at para 60.
[9] Id at para 68.
[10] Id at para 71.

19.2. A non-commercial online distributor means any person who distributes content using the internet, or enables content to be distributed by a user of online services, for personal or private purposes.

20. MMA submits that this distinction is insufficient. An organisation such as MMA, for example, distributes various content via the internet and through online services in the public interest. This is neither distributed for commercial purposes, nor for personal or private purposes. This position is not unique to MMA, and there is a chasm of organisations that would not be catered for by these definitions.

21. Accordingly, MMA submits that:

21.1. The definitions must be brought in line with the FPAA, particularly through the insertion of a definition for the term "distributor".

21.2. The definition of "commercial online distributor" should be amended to make clear that the distributions of films, games or publications for commercial purposes using the internet is a core business activity of the entity.

21.3. The definition of "non-commercial distributor" should be removed, and the Draft Regulations should make clear that it is dealing specifically with distributors, including commercial online distributors.

22. Furthermore, MMA notes that in various provisions of the Draft Regulations, reference is made to "all persons" or "any persons". In the interests of consistency and certainty, MMA submits that the Draft Regulations should rather consistently use the term "distributor" in order to appropriately circumscribe the scope of application of the Draft Regulations.

Enforceability of the Draft Regulations

23. MMA is concerned that the Draft Regulations create a framework that is unenforceable and unworkable. First, it is trite that the internet is a global medium that transcends national jurisdictional borders. To the extent that the Draft Regulations seek to regulate online content or internet service providers ("ISPs"), it arguably only has jurisdiction over those entities based in South Africa. MMA submits that this creates a disparate and fractured regime that places undue restrictions on persons based in South Africa that do not apply beyond our domestic borders. This approach would be misguided, as it would severely restrict the ability of local online content providers to provide appropriate local content, including in local languages, to stimulate demand for online content.

24. Secondly, the FPB has repeatedly referred to its resource constraints. For instance, in the FPB's Annual Performance Plan for the 2018/2019 fiscal year, with reference to its strategic objective on online and mobile content regulation, the FPB specifically identified insufficient resources as

an area of concern.[11] The FPB also noted the "limited resources at the FPB's disposal and the demanding nature of our mandate".[12] MMA is concerned that the Draft Regulations seek to expand the FPB's mandate and place extraordinary demands of the FPB that it cannot reasonably meet. The consequence of this will be the delay in publication of content, some of which may be in the public interest, in a manner that unduly restricts the free flow of information.

25. MMA stresses that the Minister and the FPB need to reconsider the approach taken in the Draft Regulations to ensure that they can be appropriately and effectively enforced.

Need for legal certainty

26. MMA is concerned the current regulatory and policy framework regarding ICTs and online content in South Africa is confusing, uncertain and uncoordinated, which may be exacerbated by the broad scope of the Draft Regulations. The consequence of this is a lack of legal certainty for members of the public, which needs to be remedied.

27. In particular, the Draft Regulations need to be reconciled with other pieces of legislation, such as the Cybercrimes Bill. There is also the need to clarify the roles, functions and mandate to be fulfilled by different regulatory bodies, particularly as pertains between the FPB and ICASA. In this regard, the Draft Regulations should seek to alleviate some of the regulatory uncertainty, rather than compound it.

Need for a socio-economic impact assessment

28. Following the establishment of the Socio Economic Impact Assessment System ("SEIAS") by the Cabinet in February 2007, 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.[13] 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".[14]

29. In terms of the SEIAS Guidelines, the system applies to "significant regulations … and major amendments of existing legislation, regulations, policies and plans that have country coverage with high impact."[15] MMA submits that the Draft Regulations have a significant impact on the

[11] FPB, *Annual Performance Plan* (2018) at page 32: https://www.fpb.org.za/wp-content/uploads/2018/04/FILM-AND-PUBLICATION-BOARD-ANNUAL-PERFORMANCE-PLAN.pdf.
[12] Id at page 4.
[13] Department of Planning, Monitoring and Evaluation, *Socio-Economic Impact Assessment System (SEIAS): Guidelines* (May 2015) at page 3: http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf.
[14] Id at page 4.
[15] Id at page 8.

right to freedom of expression and the regulation of online content, and accordingly fall within the scope of the SEIAS Guidelines.

30. As such, it is apparent that a socio-economic impact assessment needs to be done, and must further be made publicly accessible to enable all stakeholders to gauge the impact that the Draft Regulations will have and comment thereon. To date, MMA has not had sight of any such socio-economic impact assessment. As this is a self-imposed Cabinet obligation, MMA submits that further deliberations on the Draft Regulations should be halted until this has been completed and made publicly accessible, and comments thereon have been fully considered.

SUBMISSIONS ON SPECIFIC PROVISIONS OF THE DRAFT REGULATIONS

Submissions on regulation 1: Definitions

31. MMA is concerned with a number of definitions contained in the Draft Regulations. Of particular concern, MMA submits that:

31.1. The definition and use of the term "harmful" is overbroad and vague, and unduly restricts the right to freedom of expression. For instance, the Cambridge Dictionary defines the term "distress" to include feelings of worry, sadness or pain, which are highly subjective considerations. The Constitutional Court has previously declared prohibitions which are not sufficiently specific enough to guide individuals on the types of content which may or may not be broadcast to be unconstitutional.[16] As such, MMA submits that this definition and its use in the Draft Regulations should be deleted.

31.2. The Draft Regulations include a definition of "hate speech", but this term is not used anywhere in the Draft Regulations except in the definitions section. Accordingly, MMA submits that this definition should be deleted.

31.3. The definition of "prohibited content" is inconsistent with section 16 of the Constitution, and should be revised. In this regard, the cross-reference to sections 16(2), 16(4) and 18(3) of the Principal Act (presumably as amended by the FPAA to bring it in line with the *Print Media* judgment) does not cohere with the definition of prohibited content, as this includes content that may subject to a classification but is not outright prohibited. Rather, the definition should be amended to refer only to the prohibited speech contemplated in section 16(2) of the Constitution, as well as child sexual abuse material (which is referred to in the Draft Regulations as "child pornography").

31.4. The definition of "rating" includes the aim of protecting children from exposure to disturbing and harmful materials and from premature exposure to adult experiences. As dealt with above, MMA submits that the definition of harmful is overbroad and vague. Furthermore, there is no definition of the words "disturbing" or "adult

[16] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC).

experiences". MMA submits that the definition needs to be amended to use more precise language in a manner that does not unduly restrict the right to freedom of expression.

32. MMA submits that it is imperative to clearly and narrowly define the terms used in the Draft Regulations, as this has broader implications for the application and constitutionality thereof.

Submissions on regulation 2: Registration as a distributor or exhibitor

33. First, MMA notes that neither the term "exhibit" nor "exhibitor" is defined in the Draft Regulations, and submits that the term "distribute" and its appropriate variations should be used consistently throughout.

34. Secondly, as mentioned above, MMA is deeply concerned at the overbreadth of the registration requirements. In the current framing, with reference to the definition of the term "distribute" as contained in the Draft Regulations, it appears that even MMA would have to submit an application for registration as a distributor of films or games for videos shared via our online platforms. This is an untenable position, as MMA does not distribute content that would be subject to classification by the FPB. MMA submits that this provision should be revised in two key respects:

    34.1. The Draft Regulations should define the term "distributor", as contained in the FPAA, to make clear that this provision only applies to a person "who conducts the business of distributing films, games or publications" as a core business activity.

    34.2. The Draft Regulations should make clear that the registration requirement is only applicable to those distributors that distribute content which is subject to classification in terms of the Principal Act.

35. Third, MMA submits that the registration requirements are unduly onerous. In particular, MMA submits that it is irrelevant to the FPB whether the tax affairs are in order, or whether there is general compliance with all laws and regulations that may generally be applicable. Indeed, the only law that is subject to scrutiny by the FPB is the Principal Act. As such, MMA submits that these provisions should be deleted, and replaced with a requirement for a declaration that there has been compliance with the FPA.

36. Fourth, MMA submits that it is impermissible to charge a mandatory fee for the registration of entities that do not – and have no intention of – distributing content that may be subject to classification by the FPB. This underscores MMA's submission that the registration requirement should apply only to those who distribute content that is subject to classification in terms of the Principal Act. MMA is further concerned that the prescribed fees are not included in the Draft Regulations, making it impossible to ascertain how onerous this requirement precisely is.

37. MMA submits that this provision of the Draft Regulations is a severe encroachment on the right to freedom of expression, and needs to be urgently addressed. In our view, in terms of the current formulation of this provision, this appears to constitute an impermissible form of prior restraint that is arguably unconstitutional and unduly onerous. It is imperative that this provision be tailored to apply only to those distributors who conduct the business of distributing films, games or publications, and further to limit its application to the distribution of content that is subject to classification.

Submissions on regulation 3: Renewal of registration certificate

38. Further to the above, MMA is concerned that the registration certificate is only valid for a period of one year, whereafter all documents set out in sub-regulation 2.1 have to be re-submitted and further payment of a prescribed fee must be made. MMA submits that any such registration should be a once-off process, unless there are reasonable grounds to believe that such registration should be revoked on good cause shown.

Submissions on regulation 6: Compulsory submission of publications

39. MMA notes that the compulsory submission of publications contemplated in section 16(2) of the Principal Act does not apply to members of the Press Council of South Africa ("PCSA) or the Advertising Regulatory Board ("ARB"). However, MMA also notes that the definition of "publication" provides for "any content made available using the internet, excluding a film or game".

40. In this regard, with the convergence of print and digital media, MMA is concerned that certain entities may be members of the PCSA or the ARB, but would still have to submit online films or games to the FPB for compulsory examination and classification at a fee. In MMA's view, this is an arbitrary distinction. In order to address this, the Draft Regulations should automatically exempt members of the PCSA or the ARB from having to submit any content – whether it constitutes a publication, film or game – to the FPB for compulsory examination and classification.

Submissions on regulation 10: Application for classification of exempted films

41. Sections 22 and 23 of the Principal Act provide for various exemptions. However, it is unclear from the provisions of regulation 10 whether such exempted films still have to be submitted for classification "if it is intended for general distribution or exhibition". MMA submits that the wording of this provision should be made clear in order to give appropriate effect to the exemptions contained in sections 22 and 23 of the Principal Act.

Submissions on regulation 11: Application for classification of games

42. MMA is deeply concerned by the provisions regarding the classification of games. In terms of section 18(3)(a) of the Principal Act, read with the FPAA, the only basis on which the FPB may classify a game as a "refused classification" is if contains child pornography, propaganda for war

or incites imminent violence, or advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm. Except for child pornography, this does not apply to content which, judged within context, is a *bona fide* documentary, is of scientific, dramatic or artistic merit, or is on a matter of public interest.

43. However, the Draft Regulations appear to seek to expand the grounds on which a classification can be refused. This includes requiring the submission of a written report confirming that the game does not or will not contain any of the following:

    43.1. Explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;

    43.2. Bestiality, incest, rape, conduct or an act which is degrading of human beings;

    43.3. Conduct which constitutes incitement of or encourages harmful behaviour;

    43.4. Explicit infliction of sexual or domestic violence;

    43.5. Explicit presentation of extreme violence; or

    43.6. Explicit sexual conduct.

44. MMA submits that these provisions are *ultra vires* the Principal Act. While such content may be subject to an appropriate classification, it is impermissible for the Draft Regulations to seek to exclude such content altogether. MMA is particularly concerned by the vagueness of certain of these provisions, such as the reference to "harmful content" or "extreme violence", which are framed in highly subjective language and can result in the banning of legitimate content. There is no basis for the Draft Regulations to require such a declaration on the abovementioned content, and should therefore be removed from the Draft Regulations.

45. The Draft Regulations further require that the application must include mechanisms to "remove the bars or impediments preventing players graduating to more advanced levels or advancing further"; where it is not possible to comply with this, an explanation for such non-compliance must be provided. It is unclear what the purpose or consequences of this provision would be. MMA submits that this falls outside the scope of classification permitted in terms of the Principal Act, and should be deleted.

<u>Submissions on regulation 13: Re-classification of publications, films or games</u>

46. Regulation 13(2) provides that a member of the public who is aggrieved or offended by a classification decision in respect of a publication, film or game may request the re-classification. MMA notes in this regard that the enquiry should not be one of being aggrieved or offended, but rather should be circumscribed to complaints made on the basis that the classification was wrongly made in terms of the law. Furthermore, MMA is concerned that the Draft Regulations provide for anonymous complaints to be submitted, and may be subject to abuse.

Submissions on regulation 15: Foreign or international classification system

47. While the Draft Regulations provide for an application for the accreditation of any foreign or international classification system in relation to the classification of films or games, the Draft Regulations require that there be "alignment of the foreign or international ratings to the applicable ratings in terms of the Act, Regulations and the Classification Guidelines of the FPB".

48. This raises several concerns. First, it appears to undermine the purpose of a foreign or international classification system if such system simply imposes the same requirements as that of the FPB. Rather, such system should be acceptable if it imposes an appropriate classification regime. Secondly, section 18D only requires alignment with the Principal Act and the Classification Guidelines, and does not permit the Draft Regulations to require compliance with all regulations as well.

49. Furthermore, MMA is concerned that any approval is only valid for one year. This is both administratively cumbersome and unduly costly, as the annual renewal can only be made on payment of the annual prescribed fee. MMA submits that such approval should remain valid unless revoked on good cause shown.

Submissions on regulation 16: Submission of online content for classification

50. This provision is of significant concern to MMA. Effectively, in its current formulation, this provision requires the prior classification of all online content by any person – other than a member of the PCSA or the ARB – who wishes to distribute any online publication, film or game. This provision is unconstitutional and *ultra vires* the Principal Act, and cannot be sustained. In its current formulation, it falls foul of the Constitution, the *Print Media* judgment and the Principal Act. This also appears again to have been taken from one of the earlier drafts of the FPAA.

51. MMA submits that this provision should be amended as follows:

    51.1. The Draft Regulations should insert a definition for the term "distributor" in line with the definition contained in the FPAA.

    51.2. The provision should apply only to distributors who conduct the business of distributing films, games or publications as a core business activity.

    51.3. The provision should only apply to content that must be submitted for classification in terms of sections 16 or 18 of the Principal Act.

    51.4. The provision should expressly reference the applicable exclusion for content that constitutes a *bona fide* documentary, is of scientific, dramatic or artistic merit, or is on a matter of public interest.

52. MMA submits that it is imperative that this provision be appropriately circumscribed to avoid unduly restricting the right to freedom of expression and the free flow of information online.

Submissions on regulation 17: Self-classification of films, games and publications

53. Regulation 17 sets out the procedure for an application for self-classification of films, games and publications by commercial online distributors. As mentioned above, MMA submits that the requirements are unduly onerous. In particular, MMA submits that it is irrelevant to the FPB whether the tax affairs are in order, or whether there is general compliance with all laws and regulations that may generally be applicable. Indeed, the only law that is subject to scrutiny by the FPB is the Principal Act. As such, MMA submits that these provisions should be deleted, and replaced with a requirement for a declaration that there has been compliance with the FPA.

54. Furthermore, the provision requires the distributor to provide the FPB with a product list of all publications, films and games offered for sale or hire through the online medium on a monthly basis. MMA submits that this is overly broad and unduly onerous. In terms of section 18C(4) of the FPAA, the only relevant disclosure pertains to a demand by the FPB to make available all classification decisions in relation to films, games and publications for auditing purposes. This provision should be amended in accordance with section 18C(4) of the FPAA; alternatively, should the FPB persist with this monthly disclosure requirement, distributors should only be required to submit that content which requires classification as contemplated in terms of sections 16 and 18 of the Principal Act.

55. Lastly in this regard, MMA reiterates its concern that the prescribed fees have not been published together with the Draft Regulations, and further submits that a successful application for self-classification should not be made subject to annual renewal unless the application has been revoked on good cause shown.

Submissions on regulation 19: Training and awareness-raising

56. The Draft Regulations provide for the training of representatives of commercial online distributors. While this is relevant, MMA submits that the Draft Regulations should include broader considerations for training and awareness-raising for members of the public, including children. The Draft Regulations have significant consequences for the exercise of rights online, and should be appropriately explained to all persons who are or may have duties or entitlements in terms of the provisions.

Submissions on regulation 22: Procedure for classification committees

57. Regulation 22(7) of the Draft Regulations refers to “contentious material”. This term is not defined in the Draft Regulations. Rather, this provision should be amended to refer specifically to content that is subject to classification in terms of section 18 of the Principal Act.

Submissions on regulation 23: Child pornography

58. MMA submits that this provision requires clarity. In particular, it provides that the classification process shall be stopped, unless the classification committee "is satisfied that the image or scenes evokes aesthetic rather than erotic feelings". However, the definition of child pornography contained in the Draft Regulations – which cross-references section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("CLAA") – states that it is irrelevant to the definition whether the content is intended to stimulate erotic or aesthetic feelings or not.

59. There is therefore a contradiction between the definition of child pornography and the application of this definition in regulation 23. Given the importance of appropriately handling content that constitutes child pornography – or child sexual abuse material, which is the preferred terminology – and the need to preserve the dignity of the affected child, it is important that this be clarified to avoid any confusion or misapplication of this provision.

60. Further in this regard, MMA notes an absence in the Draft Regulations of the critical role played by the FPB in helping to combat child sexual abuse material. Our practical experience with the FPB has highlighted how the FPB plays a vital role in helping to bring child sexual abuse material to the attention of the relevant authorities, as well as to help educate the general public on this issue. MMA submits that the Draft Regulations should make clear the roles and responsibilities of the FPB in combatting child sexual abuse material.

Submissions on regulation 24: Application for an exemption

61. Regulation 24 provides that any person or institution may, in respect of publications, films or games, apply for an exemption from full classification and from section 24A of the Principal Act. In order for to be eligible for the exemption, the content must include educational or cultural materials endorsed by learning institutions, films on skills demonstrations or instructions, music, sports, physical exercise, design and spiritual events.

62. MMA has several submissions in this regard. First, the provision should make clear that it only applies to that content which is required to be classified in terms of sections 16 and 18 of the Principal Act. This is to avoid any confusion or ambiguity that the Draft Regulations may apply more broadly to content that falls outside of the scope of the Principal Act.

63. Secondly, the Draft Regulations should provide a non-exhaustive list of content that could be submitted for exemption, and expressly include content that is on a matter of public interest. This is in line with the exclusion contained in sections 16 and 18 of the Principal Act, and would be a relevant and useful addition for public benefit organisations acting in the public interest.

64. Thirdly, MMA is again concerned by the onerous requirements in applying for such an exemption. MMA reiterates that the tax affairs or general legal compliance of the applicant is irrelevant to that which must be considered by the FPB, which is only empowered to monitor compliance with the Principal Act. MMA also repeats its concern that the Draft Regulations do

not contain a schedule of prescribed fees, and it is therefore not possible to comment on the appropriateness of imposing such a fee.

Submissions on regulation 28: Internet service providers

65. First, MMA notes that the definition of "internet service provider" is not defined consistently between the Principal Act, the FPAA and the Draft Regulations. The Principal Act, as amended by the FPAA, defines an internet service provider as "any person who carries on the business of providing access to the internet by any means". On the other hand, the Draft Regulations define an internet service provider with reference to sections 70 and 77 of the Electronic Communications and Transactions Act 25 of 2002 ("ECTA"), wherein section 70 defines the term "service provider" as "any person providing information system services". While there is a need to ensure consistency in the definitions, MMA is further concerned that both definitions are broad, and do not clearly identify the specific entities that are the focus of the requirements.

66. In this regard, MMA notes that a distinction should be drawn between conduits and hosts. As explained by the Association for Progressive Communications, conduits are technical providers of internet access or transmission services, and do not interfere with the content that they are transmitted other than for automatic, intermediate or transient storage needed for transmission.[17] Hosts are providers of content services, such as online platforms and storage services.[18] MMA submits that the Draft Regulations should make clear whether they apply to conduits, hosts or both.

67. Secondly, MMA is concerned by the onerous registration requirements for the registration of ISPs. As set out above, MMA submits that the tax affairs or general legal compliance of the applicant is irrelevant to that which must be considered by the FPB, which is only empowered to monitor compliance with the Principal Act. MMA also repeats its concern that the Draft Regulations do not contain a schedule of prescribed fees, and it is therefore not possible to comment on the appropriateness of imposing such a fee.

68. Thirdly, MMA is concerned by the requirement that ISPs must indicate in the application form all measures or steps taken to ensure that children are not exposed to pornography. The Draft Regulations do not contain a definition of "child" or "pornography". MMA submits that children of an appropriate age may seek to explore content of a sexually explicit nature, which is important for the development and understanding of their own sexuality. MMA also draws reference to the judgment of *Teddy Bear Clinic v Minister of Justice and Constitutional Development*, in which the Constitutional Court found that sexual experimentation between adolescents who are between the age of 12 and 16 is developmentally normative.[19] MMA submits that this should be appropriately catered for in the Draft Regulations.

[17] Association for Progressive Communications, *Frequently Asked Questions on Internet Intermediary Liability* (May 2014): https://www.apc.org/en/pubs/apc%E2%80%99s-frequently-asked-questions-internet-intermed.
[18] Id.
[19] 2014 (2) SA 632 (CC).

69. Fourthly, MMA submits that the Draft Regulations should be amended to ensure that ISPs are required to provide information on all measures or steps taken to limit and act against child sexual abuse material.

Submissions on regulation 30: Complaints

70. MMA notes that the Draft Regulations seek to enable the FPB to issue a take-down notice to a non-commercial online distributor or ISP in accordance with section 77 of ECTA. However, the take-down provision in section 77 of ECTA pertains specifically to "unlawful activity", whereas this provision of the Draft Regulations refers to content that may need to be classified but is not necessarily unlawful. Furthermore, section 77 is a specific procedure that is applicable to ISPs, not to members of the public more broadly who would fall into the definition of a "non-commercial online distributor". MMA submits that this provision needs to be appropriately reconciled with section 77 of ECTA.

71. Furthermore, MMA submits that the Draft Regulations should make it expressly clear that on receipt of a take-down notice, an opportunity will be provided to respond to the complaint before being required to furnish information or comply with the take-down notice. This is in line with the principles of procedural fairness and *audi alteram partem*, and should be appropriately upheld by the FPB.

72. With regard to the distribution of private sexual photographs and films, MMA is concerned by the disjunct between the FPAA, the Draft Regulations and the Cybercrimes Bill. A key issue that should be addressed is that of consent, particularly in respect of circumstances where there may have been consent at the time that the photograph or film was taken, but there was no such consent for the subsequent distribution thereof. The Draft Regulations should make clear that there must have been both general consent covering the disclosure, as well as consent to the particular disclosure. Further in this regard, MMA has previously submitted, with reference to draft legislation from the United Kingdom, that the following defences should be included:

> "(4) It is a defence for a person charged with an offence under this section to show that—
>
> (a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and
>
> (b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.
>
> (5) It is a defence for a person charged with an offence under this section to show that—
>
> (a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the individual mentioned in subsection (1)(a) and (b) or another person, and
>
> (c) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b).

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

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

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

73. Lastly, we submit that the provision should include reference to the public interest override that applies to content, save for child pornography, relating to content which, judged within context, is a *bona fide* documentary, is of scientific, dramatic or artistic merit, or is on a matter of public interest.

CONCLUDING REMARKS

74. MMA appreciates the opportunity to provide this submission to the FPB and would welcome the opportunity to make further oral submissions. Notwithstanding the important strides that have been made, there is still work to be done to address the constitutional concerns and ensure congruence in the legal framework. Accordingly, MMA urges the Minister and the FPB to reconsider its current approach to the Draft Regulations, and appropriately implement the submissions set out above.

MEDIA MONITORING AFRICA
Johannesburg, 17 August 2020