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**For the attention of:**
Film and Publication Board
c/o Mr Pandelis Gregoriou
Legal and Regulatory Affairs
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**CONSULTATIVE HEARING: FILMS AND PUBLICATIONS ACT 65 OF 1996**
**SUBMISSION BY MEDIA MONITORING AFRICA**

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## Introduction //

1. Media Monitoring Africa ("MMA") appreciates the invitation received from the Film and Publication Board ("FPB") to provide both written and oral submissions for purposes of the upcoming consultative hearing. This consultative approach – spanning across the different sectors such as civil society, distributors, platforms and government entities – is imperative in securing a legal framework that is both rights-based and effective.

2. Notably, the FPB is currently at a crossroad, and is faced with critical decisions regarding its role, functions and mandate going forward. In doing so, it is crucial for the FPB to strike an appropriate balance between the competing rights and interests that may arise, for instance the right to freedom of expression, on the one hand, and the protection of children on the other. As our courts have repeatedly emphasised, there is no hierarchy of rights contained in the Constitution,[1] and any limitation of a right must necessarily be reasonable and justifiable in an open and democratic society.

## 3. *Media Monitoring Africa*

3.1 By way of background, MMA was established nearly 30 years ago, and has evolved over the years into an innovative organisation that implements successful media strategies for change. MMA acts as a watchdog, taking on a role to promote ethical and fair journalism which supports human rights. MMA's vision is to create

[1] Constitution of the Republic of South Africa, 1996.

a responsible, quality media that engages an informed citizenry in Africa and the world, with a particular focus on media ethics, quality and freedom.

3.2 MMA uses technology, data tools and successful media strategies for change. However, in doing so, MMA also recognises that technology is not a silver bullet, and there remains a need for human involvement to ensure transparency, accountability and fairness. There are two key projects, among various others, that are key examples of this: (i) Web Rangers, wherein the FPB is a core partner, which is a digital literacy programme designed to allow young people to gain critical skills and knowledge around online safety;[2] and (ii) Real411 (discussed below), spearheaded by MMA together with a cross-section of key stakeholders, which provides a complaints to report certain online harms, and uses both technical tools and expert moderators to harness the benefits of both efficiency and human oversight.[3]

3.3 For more information about MMA, please visit: https://mediamonitoringafrica.org.

## 4. ***The "5-C's": Overview of MMA's recommendations***

5. At the outset, and in order to frame the submissions that follow, the crux of MMA's submission rests on what may be described as the "5-C's":

5.1 ***Communication:*** It is imperative for the FPB, together with the Department of Communications and Digital Technologies ("DCDT"), to improve the lines of communication with stakeholders and the public more broadly. While MMA notes with appreciation that the FPB has been open to engaging with stakeholders on a one-on-one or sector specific basis, there remains a broken chain of communication with stakeholders and the public on a consistent, timeous and meaningful basis, particularly in respect of legal and policy decisions. Additionally, MMA is concerned that the line of communication between the FPB and the DCDT is not an effective one, leading to the FPB being left out of key decisions and not being apprised of upcoming developments, thereby leading to a disjunct between what the FPB conveys to stakeholders and decisions that are ultimately taken by the DCDT.

5.2 ***Clarity:*** The legal framework regulating the classification of content and the FPB's role in this regard has become a labyrinth of complex and confusing provisions to maneuver. This concern is further exacerbated by the inconsistent use of terms, overbroad definitions and overly technical terminology. MMA's submission in this regard is two-fold: (i) for the FPB to review the current framework to make it simpler, more accessible and appropriate to the current digital context; and (ii) that as the FPB moves forward with the outcomes of this consultative hearing, to must ensure that whatever instruments are developed serve to provide more clarity rather than to further complicate the already complex framework that exists.

[2] For more information, see: https://webrangers.co.za.

[3] For more information, see: https://www.real411.org.

5.3 ***Capacity-building:*** The FPB has consistently raised capacity constraints as being a perennial challenge affecting its ability to meet its mandate. These constraints are far reaching, and extend from financial to human resources to technical expertise. In the light of these constraints, MMA would caution the FPB against straying beyond its core mandate, this being to classify films and publications, in an (almost certainly ill-fated) attempt to play any role in overseeing online content of its own volition. Whereas social media platforms engage thousands of content reviewers and complex review systems powered by artificial intelligence ("AI"), the FPB simply does not have capacity to undertake any form of similar exercise. Additionally, a further imperative step in this regard is for the FPB to engage on a much wider scale with members of the public, particularly children, parents and the elderly, to build a fundamental knowledge base regarding online safety; in this regard, the FPB is strongly encouraged to continue to work closely with civil society (as it has, for instance, been doing with MMA as a core partner in the Web Rangers programme) to expand its reach.

5.4 ***Convergence:*** In the current converged media landscape, this has necessitated regulators, including the FPB, to re-consider the ways in which online content can approached. This requires new and innovative strategies, while also acknowledging that its role is circumscribed to certain functions. In considering any role that the FPB may play regarding online content, it is important for the FPB to base its strategy both on international good practice and the technical feasibility of what it may intend. Undoubtedly, this is one of the most significant aspects that has arisen regarding amendments to the FPB's mandate, making it critical for the FPB to carefully scrutinise how it performs this role with this convergence in mind.

5.5 ***Cooperation:*** The recommendations above are fundamentally underpinned by the need for the FPB to adopt a multi-stakeholder approach that ensures cooperation across stakeholder groups, including civil society, online platforms, distributors, technical experts, content providers and government. While these different groups will undoubtedly have differing views, it is only by understanding these views and the practical implications that they may have that the FPB will be in a suitably placed position to make informed decisions. As set out in more detail below, MMA urges the FPB to work together with it to leverage the established reach of the Real411 platform, which has already brought together various stakeholders from civil society, technical experts, media law practitioners, self-regulatory media bodies, Chapter 9 bodies and online platforms.

6. Drawing on the "5-C's", MMA's submission is structured as follows: (i) the FPB's duty to respect, protect, promote and fulfil fundamental constitutional rights; (ii) overarching matters of procedural concern; (iii) the ambit of the FPB's mandate in a converging media environment; (iv) processes and procedures within the FPB's complaints mechanisms; and (v) engagement with online platforms and other stakeholders through the Real411. These are dealt with in turn below, with specific recommendations following each section.

7. MMA further notes that it has also supported the submission made by the Press Council, the South African National Editors' Forum, the Interactive Advertising Bureau of South Africa and the SOS Coalition regarding the journalistic exclusion. As such, MMA does not intend to repeat these submissions here, save to emphasise that it must be a matter of priority for the FPB to recognise the role of media self-regulatory bodies to safeguard the immutable principles of media freedom and editorial independence.

**Duty to respect, protect, promote and fulfil fundamental constitutional rights //**

8. ***Freedom of expression***

8.1 As an organ of state, the FPB is required to respect, protect, promote and fulfil the rights in the Bill of Rights,[4] which for purposes of the FPB's mandate is fundamentally tethered to the right to freedom of expression.[5] This coheres with the Constitutional Court's approach in Print Media and Another v Minister of Home Affairs and Others,[6] which in dealing with the FPB's scheme of classification emphasised that "[c]entral to this matter is the right to freedom of expression, to be considered in the light of the government's objective to regulate, through classification, publications that may constitute, among other things, indecent material".[7]

8.2 In essence, what the Constitutional Court recognised here was that freedom of expression stands as the starting point for the FPB in effecting its mandate, which then in turn must be considered against other competing rights and interests through regulation. The reason for this is clear: as the Constitutional Court explained in Print Media:[8]

> "Embraced by the right is the liberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one's own opinion about expression received, and in this way both promotes and protects the moral agency of individuals. Whether expression lies at the right's core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognises an elemental truth that it is human to communicate, and to that fact the law's support is owed."

8.3 In the context of the FPB's role in classifying and/or regulating content, the Constitutional Court further stressed the following: (i) that the free flow of constitutionally protected expression is the rule, while administrative prior classification should be the exception;[9] and (ii) because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it.[10]

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[4] Section 7(2) of the Constitution.

[5] Section 16 of the Constitution.

[6] 2012 (6) SA 443 (CC).

[7] Id at para 39.

[8] Id at para 53.

[9] Id at para 52.

[10] Id at para 51.

8.4 As the second respondent in the Print Media matter, the FPB is undoubtedly aware of the Constitutional Court's decision and particularly its emphasis on the importance of freedom of expression being what underpins the FPB's mandate. However, the reason for reiterating it here is important: in seeking to strike a balance between freedom of expression and other competing rights and interests, the FPB has been seen to veer too far in the direction of seeking to protect and insulate the public from lawful content to the detriment of the public's right to receive and impart information and ideas of all kinds.

8.5 Importantly, 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 those that offend, shock or disturb … Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[11] In a society that encourages a marketplace of ideas, and the opportunity for the public to air and debate those ideas rather than have them stifled, an unduly restrictive approach to freedom of expression – even one that may be underpinned by a well-meaning intention – ultimately results in the right of the public being infringed, not fostered.

## 9. ***Rights of the child***

9.1 This position is similarly true when considering the rights of children, taking into account their evolving maturities and right to receive and impart information or ideas that may contribute to their growth, identity and self-actualisation. While the FPB has indicated on a number of occasions that protecting children is one of its key priorities, MMA would caution the FPB against doing so in a manner that undermines the individual rights and liberties to which children themselves are constitutionally entitles. As so eloquently explained by Sachs J in S v M:[12]

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.
>
> Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood."

[11] Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA294 (CC) at para 26.

[12] 2008 (3) SA 232 (CC) at paras 18-19.

9.2 One of MMA's concerns in this regard is the requirement that ISPs must indicate in its application form all measures to steps taken to ensure that not exposed to pornography. However, the Regulations do not define what it considers to be "pornography" outside of the context of child sexual abuse material ("CSAM"), which may easily be conflated with content of a sexual nature that may serve to be informative and educational to a child seeking information in this regard. MMA submits that children of an appropriate age should be able to seek and explore content of a sexually explicit nature, which is important for the development and understanding of their own sexuality.

9.3 This submission in no way takes away from a parent or caregiver to exercise their discretion over what material may be accessed by a child in their care; rather, MMA's principal point is that neither states nor regulators should ban lawful content solely out of a protective instinct that they may consider appropriate. This position is akin to parental guidance warnings on television programmes, whereby responsible parent or guardian is trusted to make a determination on what they consider appropriate for the child in their care to view. The same should be true for online platforms as well, with greater emphasis being placed by the FPB on educating parents and children regarding online harms and the tools available to address this.

9.4 As part of the strategy in this regard, MMA urges the FPB to engage in a meaningful child participation process going forward, in an effort to ensure that key issues are informed by the perspectives of the children who are directly affected by these. Having worked with children to share their views with the South Africa Law Reform Commission's process on CSAM, and more recently with the Information Regulator on the privacy rights of children under the Protection of Personal Information Act 4 of 2013, MMA is well positioned to support the FPB in such a process.

**Recommendations**

- Develop a set of guiding principles to be adopted by the FPB to serve as an overarching framework to assist in the balancing of competing rights and interests in a constitutionally compliant manner.
- Engage an appropriate constitutional expert to facilitate training for the relevant persons at the FPB, particularly those responsible for classification decisions or complaints mechanisms, to raise greater awareness about what the Constitution requires for a limitation of a right to be justifiable.
- Develop an awareness-raising strategy, including resource materials and workshops, to develop media and information literacy skills, which should include both the importance of the right to receive and impart information or ideas, as well as the measures that can be taken to protect against online harms. As a starting point, the FPB may consider focusing on particular groups, such as children, parents, teachers and the elderly.

- Develop a train-the-trainer curriculum, both in-person and online, to upskill members of the public to provide training within their own communities, thereby expanding the reach of the awareness-raising strategy.

- Partner with civil society organisations, academics and others assist the FPB in fulfilling this aspect of its mandate, with a view to empowering the public to make their own informed decisions about the content that they and/or their children may view, without the FPB usurping this discretion through an unduly stringent classification regime.

- Develop an ongoing approach to ensure meaningful participation of children in consultation processes, and continue to work with civil society to support critical media and digital literacy programmes such as Web Rangers.

**Procedural matters //**

10. As the FPB is undoubtedly aware, there have been a number of procedural concerns that have been raised over a number of years, and which have really come to the fore during the process of the Films and Publications Amendment Act 11 of 2019 ("FPAA") and the draft Film and Publication Amendment Regulations, 2020 ("Regulations"). While it is not our contention to belabour this point, it is important for us that we highlight the following:

11. ***Provisions of the FPAA rendered a nullity without the Regulations***

11.1 It had consistently been our understanding that the FPAA and the draft Regulations would be published at the same time. The reason for this is self-evident: the two are intertwined, and the FPAA is dependent of the Regulations to give effect to it.

11.2 The result of the failure to do so has meant that a significant part of the FPAA is essentially rendered a nullity as it cannot be enforced without the Regulations. Indeed, it has now been nearly 15 months since the commencement of the FPAA, and there remains no indication of the cause of this lengthy delay, whether the Regulations have been finalised, what amendments have been made to the Regulations following the public consultations, or what the intended timeline is for the Regulations to be gazetted.

11.3 It is imperative that this be dealt with as a matter of urgency, including with clear and timeous updates being provided to the public. The lack of coordination between the FPAA and the Regulations have created an invidious position of uncertainty and inconsistent treatment amongst different stakeholders, which runs contrary to the rule of law and the principle of legality.

12. ***Concerns regarding definitions and inconsistent use of terms***

12.1 As MMA has previously submitted during the public consultation process on the Regulations, the importance of terms being defined clearly and used consistently cannot be over-stated. A failure to do may have the unintended consequence of a functionary having an almost unfettered discretion in interpreting a particular provision, and in turn may result in stakeholders receiving differing decisions from different functionaries due to a lack of clarity in the law. This undermines the fundamental tenet that the law must the fair and applied evening. For present purposes, there are three further issues that bear highlighting:

12.1.1 ***Definitions at odds with section 16 of the Constitution:*** In this regard, there are two definitions of particular concern: (i) the definition of "***prohibited content***", which cannot justifiably go beyond scope of section 16(2) of the Constitution, as such expression may be limited but cannot be outright prohibited; and (ii) the definition of "***harmful***", which is concerningly restrictive of the right to freedom of expression for the use of highly subjective terms (such as the use of the term "distress" in the definition), and runs contrary to the constitutional principle that prohibitions in law must have sufficient specificity to guide individuals on the types of content with may or may not be broadcast or published.[13]

12.1.2 ***Definitions at odds with other legislation:*** There are two notable examples of this: (i) the definition of "***hate speech***", which does not cohere with section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;[14] and the offence of the distribution of "***private sexual photographs and films***", which sets out vastly different elements of the crime than those contained in section 16 of the Cybercrimes Act 19 of 2020.

12.1.3 ***Definitions at odds with technological developments:*** MMA is concerned by the extent which the FPAA and the Regulations cross-refer to the Electronic Communications and Transactions Act 25 of 2002 ("ECTA"). It must be borne in mind that, as a 2002 piece of legislation, ECTA is now 20 years old and is a prime example of the regulatory lag with the law not keeping up with technological developments. For instance, the FPAA uses both the terms "***internet access provider***" and "***internet service provider***", whereas only the latter term is defined. Additionally, while some internet service providers ("ISPs") are also internet access providers ("IAPs"), ISPs refer to companies that provide internet services, such as email providers, whereas IAPs refer to companies that provide access to internet.[15] Both of these are types of internet intermediaries, and the FPB should be cognisant of the different roles performed by different intermediaries.

[13] Islamic Unity Convention, *supra*.

[14] See, in this regard: Qwelane v South African Human Rights Commission and Another 2021 (6) SA 579 (CC).

[15] Association for Progressive Communications ("APC"), 'Frequently asked questions on internet intermediary liability', 19 May 2014 (updated 5 August 2020).

12.2 MMA submits that on the information before it, the FPB is knowingly placing itself at risk of a constitutional challenge through its failure to address these concerns. In turn, and until such time that it is remedied either through the FPB proactively seeking to amend the law or through a court judgment – the public is also rendered at risk of the right to freedom of expression being unduly infringed. This should by no means be treated as a matter of semantics and should be addressed as part of the broader review process.

13. ***Imperative for improved and more timeous communication with stakeholders***

13.1 As a starting point, MMA welcomes the FPB's approach in engaging both in public consultation processes and being willing to meet with stakeholders and stakeholder-groups on an individual basis. However, despite the FPB's willingness to engage, the fact remains that there are often significant interludes in updating stakeholders on developments, timelines and other similar milestones. As such, stakeholders are left in the dark as to what to expect, and therefore left with little to no time to adequately prepare for changes that are to be imminently implemented. There are a number of examples of this, although we highlight just three here:

13.1.1 ***Commencement of the FPAA:*** It took approximately six months between the FPAA being passed by the National Assembly in March 2019 and being signed by the President in October 2019 – and then, inexplicably, took two-and-a-half years before commencing into operation. During this intervening period, stakeholders remained largely in the dark about when the FPAA would commence, whether there were amendments to be made to the version submitted to the President, and what the consequences of this would be. As events ultimately transpired, stakeholders were given a total of three days between the proclamation notice being published and the FPAA coming into operation.

13.1.2 ***Status of the Regulations:*** In a similar vein, and as set out above, there has been no general communication to stakeholders about the status, timeline or cause of the delay regarding the Regulations. Even more concerningly, after stakeholders were given the general impression that there would be further public consultations on the Regulations given the extent of the comments received, there has since been no indication of whether this is still to take place or, if not, to what extent the submissions from the public consultation process have been taken on board. As such, stakeholders are left in the lurch without knowing whether to start putting in place the necessary processes and structures to comply with the Regulations.

13.1.3 ***Establishment of a super regulator:*** Our understanding of the proposed so-called 'super regulator' is primarily borne out of generalised statements that have been made about this. On the one hand, the Minister of Communications and Digital Technologies ("Minister") stated at a media briefing in December 2019 that there would be an "amalgamation" of the FPB, the Independent Communications Authority of South Africa ("ICASA") and .ZADNA, which she referred to as "the new regulator";[16] on the other, the draft White Paper on Audio and Audiovisual Content Services ("AAVCS White Paper") published in October 2020 recommended a "closer working relationship" between the FPB and ICASA, without going as far as recommending a merger of the two.[17] With a matter as significant as this, it should be incumbent on the relevant state authorities to explain its proposed approach and underlying rationale to stakeholders, and for stakeholders to have an opportunity to engage at this stage already. However, the bizarre veil of secrecy that has been adopted leaves stakeholders in the lurch not knowing what the future regulation of the industry might entail.

13.2 In making this submission, the intention is not to lay blame at any particular door; indeed, it is not clear the extent to which the FPB and the DCDT have a clear and effective line of communication. However, there is a clear and urgent need for there to be better communication and engagement on key issues such as these – both in order to enable the FPB and the DCDT to meet their respective mandates, but also in turn to assuage the concerns and confusion that have been foisted on stakeholders and the public more broadly.

**Recommendations**

- Urgently provide stakeholders with an update regarding the timeline, content, further consultation and next steps regarding the Regulations, and how the implementation of the FPAA will be facilitated (if at all) in the meantime.
- Undertake a comprehensive review of the FPAA and Regulations to ensure alignment across the use of terms and definitions, ultimately culminating with an amendment.
- Develop a forum or platform – which should be provided on a defined periodic basis through, for instance, an email mailing list, scheduled stakeholder engagements and/or updates on the FPB's website – to ensure that stakeholders and the public have timeous access to relevant information about the FPB and its legal framework. This measure should be included in the FPB's 2021/2022 Annual Performance Plan ("2021/2022 APP"),[18] as it is not currently no formalised mechanism or specific obligation on the FPB to provide these periodic updates as part of its stakeholder engagement plan.

[16] Tech Financials, 'South Africa to create a super regulator for ICT sector', 19 December 2019.

[17] AAVCS White Paper at para 39.

[18] FPB, 2021/2022 APP at pp 63-73.

**Ambit of the FPB's mandate in a converging digital environment //**

14. The advent of the internet has presented unprecedented opportunities and challenges the world over, with online and social media platforms standing as a forefront illustration of this: on the one hand, the borderless nature of these platforms enable people to learn, engage, communicate and advocate in manner unlike ever before; on the other, it is necessary to recognise that this borderless nature also presents challenges to the unimpeded enjoyment of rights online, notably with regard to seeking redress for online harms as it transcends traditional notions of jurisdiction and law enforcement.

15. Across the globe, regulators, law-makers and broader stakeholder groupings are trying to find ways to both harness and proscribe the power of online platforms that typically operate largely outside of any particular domestic or international law framework. The public's dependence on online platforms for their news, entertainment, education and engagement is increasing at an exponential rate, and at present it remains almost entirely in the hands of the platforms themselves to determine what the public does and does not get to see. However, standards differ from platform to platform, and platforms are hamstrung in their ability to take local context into account.

16. MMA is by no means unaware of these challenges; indeed, MMA as an organisation works tirelessly in its mission to combat online harms and develop media and information literacy skills across the country and regionally. However, insofar as the FPB's role may go in respect of online harms, this must be approached with due regard to the FPB's legislative mandate and the fact that, as a creature of stature, it would be unlawful for the FPB to seek to exercise any powers beyond this. Rather, and as discussed in more detail with reference to the work of the Real411, MMA strongly advocates for a multi-stakeholder approach that brings together the confluence of difference experience and skills to address the challenges that arise.

17. ***Limitations to the FPB's role regarding online content***

17.1 In the light of the above, there are a number of important limitations to any role that the FPB may seek to play regarding online content:

17.1.1 ***Content regulator:*** The FPB is not a so-called "content regulator" for the internet, as its mandate is narrowly circumscribed to the classification of content by commercial online distributors. The only authority that the FPB holds over non-commercial online distributors – who comprise the vast majority of internet users – is in respect of issuing a take-down notice for the hosting or distribution of prohibited content,[19] although even this is unclear how it could be implemented in practice. It is important for there to be no confusion about this distinction, particularly as there is no universally accepted definition of what falls within the scope of "content regulation", or even what constitutes "content" for that matter.[20]

[19] Section 18E of the FPAA.

[20] For instance, there remains much debate as to whether new forms of online expression – such as likes, retweets and hyperlinks – would constitute content or not.

17.1.2 ***Capacity constraints:*** It is not the role of the FPB to police the internet. The FPB neither can nor should attempt to do so: it is manifestly apparent that the resources required for the FPB to do so would be well-beyond any budgetary allocation it could reasonably expect, but to attempt to do would also be fundamentally inimical to what a regulator in the position of the FPB is empowered to do. The FPB has repeatedly identified resource and capacity constraints as a perennial challenge to its ability to meet its mandate (most recently in the 2021/2022 APP), and it would be both ill-considered and likely ill-fated for the FPB to envisage itself playing a role in this regard.

17.1.3 ***Jurisdiction:*** The FPB does not have any jurisdiction outside of South Africa. While there may be certain options available to the FPB, such as constructive engagements and cooperation, the FPB itself cannot exercise its authority against any person, platform or company outside of the borders of South Africa. Any attempt to do so would be unlawful and without effect. In this regard, given the ease with which online content can be hosted outside of South Africa, the FPB should be cautious in its approach to place any undue burden on those persons who choose to host within South Africa, as this may have considerable adverse effects for local service providers.

17.1.4 ***Blocking and filtering of content:*** It should not be seen as a solution available to the FPB to rely on unfettered blocking or filtering of content,[21] unless this meets the test for a justifiable limitation. While less drastic than an internet shutdown,[22] blocking in particular is still an extreme measure – analogous to banning a newspaper or broadcaster – that would only be permitted in circumstances where this meets the test for a justifiable limitation.[23] According to the UN Special Rapporteur on Freedom of Expression ("UNSR"), website blocking may be justified in certain instances in order to deal with categories of content prohibited under international law, such as CSAM, incitement to commit genocide, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

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[21] According to ARTICLE 19, the difference between "blocking" and "filtering" is a matter of scale and perspective: blocking usually refers to preventing access to specific websites, domains, IP addressed, protocols or services included on a blacklist; and filtering is commonly associated with the use of technology that blocks pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, or the basis of their perceived connection to content deemed inappropriate or unlawful. See: ARTICLE 19, 'Freedom of expression unfiltered: How blocking and filtering affect free speech', 2016 at p 1.

[22] As explained in a May 2022 report by the United Nations ("UN") High Commissioner for Human Rights ("High Commissioner") to the Human Rights Council:

> "Internet shutdowns are measures taken by a government, or on behalf of a government, to intentionally disrupt access to, and the use of, information and communications systems online. They include actions that limit the ability of a large number of people to use online communications tools, either by restricting Internet connectivity at large or by obstructing the accessibility and usability of services that are necessary for interactive communications, such as social media and messaging services. Such shutdowns inevitably affect many users with legitimate pursuits, leading to enormous collateral damage beyond the scope of their intended purposes."

See: UN High Commissioner, 'Internet shutdowns: Trends, causes, legal implications and impacts on a range of human rights', 13 May 2022 at paras 4-5.

[23] ARTICLE 19, *supra* at p 13.

violence, or incitement to terrorism.[24] Further, with regard to filtering, the international law position is that internet intermediaries should never be required to monitor their networks proactively in order to detect possible illegal content, and blanket filtering should be expressly prohibited by law.[25]

17.1.5 ***Encryption:*** Similar to the above, it should not be seen as a solution to seek to erode encryption standards in order to gain access to communications in an attempt to monitor such communications, save in limited circumstances authorised by an independent judicial authority where this constitutes a justifiable limitation in law, and there are no less intrusive means available or proven effective.[26] Some of the ways in which governments have sought to effect this is through key escrow systems – which permit individual access to encryption but requires users to store their private keys with the government or a trusted third party – or through encryption back-door access in commercially available products.[27] However, as has been noted by the UNSR, governments proposing such access have failed to demonstrate that criminal use of encryption serves as an insuperable barrier to law enforcement objectives, and further that such vulnerabilities may lead to invasions of privacy or unauthorised access by other entities.[28]

17.1.6 ***Technology is not a silver bullet:*** While the extent to which the FPB may consider its role regarding online content may be somewhat informed by a reliance on technology – such as AI – to do so, current learnings have repeatedly shown that such technology is not yet at a point where it can be effectively deployed with being balanced with a human-in-the-loop approach. This is due to various factors, including the likely inability of the technological solution to cater for specific contextual scenarios, including language considerations, as well as due to the bias that may be entrenched by the data that underpins its processes.

17.2 While this may be trite to members of the FPB, MMA emphasises this nonetheless to underline the manner in which the FPB's role regarding online content should be circumscribed. These limitations to the FPB's role fundamentally underpin MMA's submissions that follow.

[24] UNSR, 'Report to the General Assembly A/66/290', 10 August 2011 at para 81.

[25] ARTICLE 19, *supra* at p 19.

[26] UNSR, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/29/32', 22 May 2015 at para 43.

[27] *Id* at para 44.

[28] *Id* at para 42.

18. ***Uncertainty regarding the FPB's authority over online content distributors***

18.1 The expansion of the FPB's mandate to online content has certainly been one of the most controversial aspects of the FPAA and the Regulations. Indeed, there was significant public outcry in respect of this, with this having been labelled as "internet censorship" and "thought control" reminiscent of the apartheid-era. Notwithstanding whatever efforts the FPB may have sought to take to dispel this, it still appears to remain the prevalent perception. And understandably so: the nuance between commercial online distributors and non-commercial online distributors, and the FPB's differing authority over the two, is masked within the complex labyrinth created by the FPAA and the Regulations.

18.2 Clarity must therefore be an imperative for the FPB. It is critical for the FPB to make clear the distinction between its role regarding commercial online distributors and non-commercial online distributors, both internally and with the public. The FPB has a very narrowly circumscribed role with regard to non-commercial online distributors (which still gives MMA cause for concern as has been raised in the past), and it would be a grave misstep for the FPB to make any attempt to expand beyond this. MMA would therefore urge the FPB to engage in open and constructive multi-stakeholder consultations to develop a better and clearer understanding of its role in this regard, and thereafter to develop guidelines to provide clarity and consistency in the way in which it performs this role.

18.3 As MMA has previously submitted, the definition of "commercial online distributor" should be amended to make clear that this is the core business of the distributor. For instance, the position in respect of small-scale bloggers or so-called "micro-influencers", to the extent that it is considered appropriate for such persons to fall within the FPB's mandate, should not be subject to the same onerous requirements required of larger commercial enterprises. In addition to the amendment of the definition, MMA would encourage the FPB to develop guidelines on the threshold requirements, including financial thresholds, in order for a distributor to fall within this definition. In doing so, it may be prudent for the FPB to approach this by way of a sliding scale, in recognition that there are many different types of persons or entities that may be considered to be commercial online distributors, who may fall along different points of this scale necessitating the FPB to adopt a nuanced approach to its role in respect thereof.

19. ***Intermediary liability***

19.1 MMA is deeply concerned by the imposition of intermediary liability through the FPAA and the Regulations, which fall well out of step with ECTA, global good practice and international standards. As a starting point, it is by now well-established that it is untenable for online intermediaries, including ISPs, to actively monitor content that is transmitted, stored or referenced on their networks, which would simply be untenable. The obligations on ISPs arise in several provisions in the Regulations:

19.1.1 ***Protection of children against child pornography and pornography:***[29] The Regulations require that every ISP indicate in their application form all measures or steps taken or put in place to ensure that children are not exposed to child pornography or pornography. Firstly, MMA would urge the FPB to amend the use of the term "child pornography" to CSAM in line with international best practice. Furthermore, as already mentioned, the term "pornography" is not defined, with this being a failure in the Regulations to acknowledge that there are innumerable instances where children should be able to access lawful sex-related information for the development of their sexual identity. An unduly restrictive approach that the FPB seeks IPSs to impose may serve to hinder the rights of children rather than protect them.

19.1.2 ***Duty to furnish information:***[30] The FPB's requirement that ISPs are compelled to furnish it with information of the identity of a person in contravention of certain provisions of the FPAA. Firstly, the FPB is not an identified member of the security services as contained in Chapter 11 of the Constitution, and therefore has no authority to exercise such power. Secondly, an ISP should properly only be required to do so in limited circumstances, specifically where this this has been authorised by a competent judicial authority.

19.1.3 ***Take-down notice:***[31] The requirement that ISPs or non-commercial online distributors must comply with a take-down notice issued in terms of section 77 of ECTA is directly at odds with the framework created under ECTA. For instance, ECTA limits the lability of ISPs where *inter alia* it has not initiated or modified the data contained in the transmission;[32] and provides that there is no general obligation on ISPs to monitor the data transmitted or stored, or actively seek facts or circumstances indicating unlawful activity.[33] Moreover, with regard to take-down notices, the practical implication of ECTA is that such notices are only enforceable against ISPs that are members of the Internet Service Providers' Association ("ISPA"), and does not extend to other ISPs or members of the public more broadly.

[29] Regulations 28.2 and 28.3 of the Regulations.

[30] Regulation 30.3.1 of the Regulations.

[31] Regulation 30.3.2 of the Regulations.

[32] Section 73 of ECTA.

[33] Section 78 of ECTA.

**Recommendations**

- Develop a position paper, to be adopted by the FPB following a public consultation process, that sets out the ambit of the FPB's role regarding online content and the limitations in respect thereof, as well as its approach to its evolving role with regard to technical feasibility, constitutional rights, global good practices and international standards.
- Revise the definition of "commercial online distributors" to make clear that this is the core business of the distributor.
- Develop a sliding scale and threshold requirement to provide for differential treatment of different distributors based on their size and reach, which may for instance include small-scale bloggers and so-called "micro-influencers" to the extent that it is considered appropriate for such persons to fall within the FPB's mandate.
- Review and revise the requirements on ISPs regarding content transmitted, stored or referenced on their network, in circumstances where the current provisions are both technical unfeasible and legally problematic, including
- Pending the review and revision of the requirements on ISPs, develop a position paper on the role that ISPs can and/or should play regarding content on their network, taking into account ECTA, global good practice and international standards.
- Provide clear guidance to ISPs on what they are required to do in respect of pornography, taking into account that various forms of sex-related information online that should lawfully be accessible to adolescents.
- Expand the level of engagement and work with international bodies on critical issues like CSAM, with a view to this in turn enabling the FPB to establish clear guidelines and accountability mechanisms working with the relevant security and police services.
- Amend any provision that seeks to empower the FPB to compel ISPs to provide it with information, and make clear that ISPs can only be required to do so where this has been authorised by a competent judicial authority.
- Pending this amendment, provide a public undertaking that the FPB will not seek exercise any unlawful powers in this regard.
- Publish transparency reports of all take-down notices issued, the circumstances under which this arose, whether any grievance or appeal procedure was lodged against this, and the outcomes that resulted from this.
- Revise the take-down procedure contemplated to remove any application to ISPs or non-commercial online distributors who are not members of ISPA, taking into account that in the absence of being authorised by a competent judicial authority, this cannot be effected by a mere take-down notice alone.

**Processes and procedures for complaints mechanisms //**

20. For purposes of this submission, MMA focuses specifically on the take-down notification procedure, but these general principles for accountability and transparency should equally be borne in mind in respect of the other complaints mechanisms in which the FPB engages. Clear processes and procedures for handling complaints, as well as the legal requirements that must be met, will serve to foster trust and credibility amongst stakeholders when engaging with the FPB through such complaints processes.

21. As a point of departure, and linked to the submissions above, it may be helpful to consider the role of ISPs regarding online content as being effected through three possible ways: (i) moderating content prior to publication; (ii) moderating content after notification; or (iii) proactive moderation of content.[34] With regard to options (i) and (iii), MMA submits that such moderation should not be required of online platforms save in certain, limited circumstances. This might include, for example, where ISPs have knowledge of existing CSAM sites and done in cooperation with appropriate bodies.[35] In contrast, however, option (ii) aligns with global good practice and international standards, provided it complies with the following standards at a minimum:[36]

21.1 ***Notification***, involving both the user responsible for the notification, as well as the person who has uploaded the content, with the latter being provided with an opportunity to input into the decision-making process.

21.2 ***Basis for the complaint***, whereby the user is required to provide reasons as to why the content is considered unlawful or harmful, and the person who uploaded the content is provided with the reason for the content being flagged.

21.3 ***Opportunity to respond***, requiring the user who uploaded the content to be provided with sufficient time to provide any information justifying why the content should not be taken down.

21.4 ***Determination of the outcome***, which may involve external expertise, after which the user who uploaded the content should be notified if the content has been taken down, why this is the case, and the availability of grievance or appeal mechanisms. It is critical that the person is provided with adequate reasons for the content having been removed, both to avoid such transgressions in the future and/or as a basis for lodging a grievance or appeal.

21.5 ***Interim measures***, where it is appropriate in the circumstances to remove content that has been flagged on an interim basis until a determination has been made. This may arise, for instance, where there is a potential risk of immediate and irreversible harm as a result of the content's availability.

[34] Global Partners Digital ("GPD"), 'Content regulation in the digital age', undated at pp 12-13.

[35] For more information, see: https://www.interpol.int/en/Crimes/Crimes-against-children/International-Child-Sexual-Exploitation-database.

[36] GPD at p 13; APC, 'Content regulation in the digital age', February 2018 at p 14.

21.6 ***Clear legal and procedural standards***, which is a fundamental tenet of legal certainty and the rule of law. In particular, it is important for all parties to the process – particularly the person who uploaded the content and the decision-maker – to have a clear understanding of what content can be raised through this mechanism, what threshold requirements such content should meet, what justifications are available to avoid the removal, what legal standards are to be applied, what necessary steps, timelines and supporting information should be submitted, and what processes are to be followed when seeking to lodge a grievance or appeal.

22. While there may be instances to depart from this procedure depending on the content, context and speed with which this is being disseminated, MMA notes that the circumstances under which such departure may be deemed permissible should similarly be made clear to users, and should still follow the complete process once the interim measures have been taken.

**Recommendations**

- Develop a clear code for the application of complaints procedures, including the criteria for a valid complaint, the steps to be taken and processes to be followed, determination of outcomes, interim measures and threshold requirements.

**Engaging with online platforms through the Real411: A multi-stakeholder approach //**

23. Cognizant of the challenges referred to above, the Real411 was borne out of a recognition for the need to develop a strategy that balances the importance of freedom of expression online while also protecting users against online harms and violence – and particularly to do so in a transparent and accountable manner. Spearheaded by MMA, and bringing together various stakeholders across the media and civil society sectors, the Real411 was first launched in partnership with the Electoral Commission of South Africa ("IEC") during the 2019 Local Government Elections to address harmful mis- and disinformation during the election period. Since then, the Real411 has burgeoned into a self-standing complaint reporting mechanism, addressing further issues such as hate speech, incitement to violence and harassment through its platform.

24. The complaints mechanism developed for the Real411 has been developed with the Constitution at front of mind, and principally seeks to give effect to the rights in the Bill of Rights as well as the underlying values of openness, transparency and accountability that the Constitution requires of us all. In this regard, there is a five-stage process:

24.1 ***Submission of complaints:*** Any member of the public is entitled to submit a complaint via the online portal. There are certain parametres to the complaints mechanism: (i) only online content will be reviewed; (ii) the content must pertain to one or more of the stipulated digital offences, namely harmful false information, hate speech, incitement to violence and harassment; and (iii) in order for a complaint to result in the Real411 seeking recourse in respect of it, it must meet

the constitutive elements of the offence as set out on the portal and in line with the laws of South Africa.

24.2 ***Expert review:*** On receipt of a complaint, the initial review is undertaken by three experts in the field: a media expert, a legal expert and a technical expert. The three experts assess the complaint against the pre-defined constitutive elements that meet the requirements of our Constitution and legislation. Each of the reviewers provide their assessment of the complaint, including the context and reach that frame the complaint. The reviewers receive ongoing training to ensure that they are fully apprised of the latest developments in respect of the online harms being addressed.

24.3 ***Secretariat review:*** The final step in the review process is for one or more members of the Secretariat to consider the views of the experts and finalise the outcome. The members of the Secretariat are advanced legal practitioners with expertise in media law, freedom of expression and online rights, and therefore bring a wealth of experience in assessing the balance of the competing rights and interests. As part of this review, the member of the Secretariat also recommends the proposed action that can be taken in response to the complaint, and may further facilitate such action based on proposed recourse.

24.4 ***Publication of the outcome:*** Upon finalisation of the complaint by the Secretariat, the outcome is automatically published on the Real411 website, and a notification is sent to the complainant. The platform is fastidious in ensuring that personal information is not unlawfully revealed through the complaints process, and that there is a clear explanation, based in law, of how the outcome was reached. This element is fundamental to the Real411's process, as unlike other complaints mechanisms it creates a clear, concise and publicly accessible record of complaints received and the underlying basis for the adjudication thereof.

24.5 ***Appeal mechanism:*** As a final step, any aggrieved party may appeal the outcome of a complaint to the appeal mechanism. This is chaired by a retired judge, who at present is former Constitutional Court judge, Justice Zakeria Yacoob. The purpose of this is an accountability mechanism to ensure that the outcome of the complaints received do not depend on a single view based on the particular reviewer's experiences and lived reality, and that the outcome is one that is balanced against the various competing rights and interests that arise.

25. At its core, this world-first initiative has consistently placed its emphasis on transparency, accountability and diverse expert input, which in turn has provided an effective complaints mechanism that judiciously safeguards constitutional rights and values. Flowing from this, MMA has fostered deep and trusted relationships with the various social media platforms with which it engages, for instance by being listed as a 'trusted flagger' so that complaints submitted by MMA via the Real411 platform are escalated for review. Additionally, MMA has entered into a memorandum of understanding ("MOU") with the South African Human Rights Commission ("SAHRC") to engage in strategies to address online harms, and hate speech in particular, including through the support of the Real411.

26. MMA submits that there are clear and obvious synergies between the mandate of the FPB and the work already being done through the Real411. Simply put, the FPB does not have the capacity at present to address online harms at the pace and scale that these present, including through a lack of human, financial and technological resources. As such, MMA submits that a more effective measure would be for the FPB to leverage off solutions that have already been developed in the public to address the precise same concerns that the FPB has regarding online content. As other constitutional bodies such as the IEC and the SAHRC have already done, the FPB could similarly play its part through the Real411 platform to address online harms meaningfully and effectively, in a manner that is fundamentally rights-based, and which gives rise to an open line of communication with social media platforms to engage constructively on ways in which such harms can be addressed.

**Recommendations**

- Engage with MMA to discuss partnering on the Real411, taking into consideration the particular emphasis that the Real411 espouses regarding its constitutional underpinning.
- By leveraging the partnership regarding the Real411, engage with online platforms to develop cooperative measures to address online harms rather than by relying solely on regulation to do so.

**Conclusion //**

27. The role of the internet and the convergence of the media landscape is a complex and challenging matter, particularly for regulators and other stakeholders who are required to find innovative solutions in order to secure an appropriate balance between competing rights and interests. It is precisely for this reason that MMA's submission is underpinned by the "5-C's" – communication, clarity, capacity-building, convergence and cooperation – and MMA would urge the FPB to ensure that these factors underpin its work from a procedural, substantive and strategic perspective.

28. At this critical juncture in the evolution of the FPB's role, the FPB has an opportunity to be at the vanguard of developing an approach to classification that is practical, reasonable and effective in the digital era, while not compromising fundamental rights in the process of doing so. MMA submits that this is not something to be taken lightly, but can only be done with the support, cooperation and expertise of the range of stakeholders and members of the public who are well-positioned to assist the FPB in attaining this outcome.

29. MMA reiterates its appreciation for being provided with the opportunity to make this submission and to present at the oral hearings. Please do not hesitate to contact us if we can provide any further information.

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