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LEGAL RESOURCES CENTRE

SUBMISSION TO THE FILM AND PUBLICATION BOARD

ON THE DRAFT INTERNET REGULATION POLICY

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I INTRODUCTION

1. This is a submission prepared by the Legal Resources Centre ("**LRC**") on the constitutionality of the draft Internet Regulation Policy ("**the draft policy**") published by the Film and Publication Board ("**the FPB**") for public comment. The draft policy has been published in terms of section 4A of the Films and Publications Act 65 of 1998 ("**the Act**"), and is the first formal comprehensive attempt to regulate online content for the public at large.

2. The LRC is one of South Africa's oldest public interest law firms, focusing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. In this regard, the LRC's clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental rights. The LRC has been involved in a number of landmark freedom of expression and access to information cases in South Africa.

3. According to the draft policy, its objectives are to "*create a regulatory* classification *and compliance monitoring framework, giving effect to sections 18(1) and (2) of [the Act], by enabling effective regulation and speedy classification of digital content by the [FPB], and to create an opportunity for co-*

regulation between the [FPB] and the industry for the classification of digital content distributed on mobile and digital platforms".[1]

4. In our view the draft policy is constitutionally problematic in at least three respects:

   4.1. It purports to afford the FPB powers beyond those that it is permitted to exercise in terms of the Act, in particular:

      4.1.1. The power in paragraph 7.4 of the draft policy to order an online distributor to remove content;

      4.1.2. The power in paragraph 7.5 of the draft policy to refer content for classification;

      4.1.3. The powers in paragraph 5 of the draft policy to enter into online distribution agreements and empower online distributors to classify their own content;

   4.2. It is unconstitutionally vague with regard to both the content it covers, and the persons to whom it applies; and

   4.3. The imposition of prior restraint in relation to films, games and "*certain publications*" unjustifiably limits the right to freedom of expression.

5. This submission is structured as follows:

   5.1. First, we set out the scheme of the Act as we understand it and its interplay with the draft policy;

[1] Paragraph 3 of the draft policy.

5.2. Second, we explain why the draft policy exceeds the lawful mandate of the FPB ;

5.3. Third, we deal with the unconstitutional vagueness of the draft policy; and

5.4. Fourth, we detail the draft policy's unjustifiable limitation of the right to freedom of expression through prior restraint.

6. Two notes before we begin: first, we have had regard to the submission prepared by the Right2Know Campaign and echo the concerns that have been raised therein; and second, we note that the focus of this opinion is primarily on the impact that the draft policy will have on members of the general public rather than on members of the industry, although we touch on the latter as well to the extent necessary.

7. We turn now to consider the scheme of the Act and the draft policy.

II THE LEGISLATIVE SCHEME OF THE ACT AND THE DRAFT POLICY

Objects and mandate of the FPB: Sections 2 and 9A of the Act

8. The objects of the Act are set out in section 2 thereof. According to this provision, the Act seeks "*to regulate the creation, production, possession and distribution of films, games and certain publications*" in order to:

8.1. Provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;

8.2. Protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and

8.3. Make the use of children in and the exposure of children to pornography punishable.

9. Whatever else the Act may do, its primary focus is to regulate expression in varying degrees; it is therefore unavoidable, as acknowledged in *Print Media South Africa and Another v Minister of Home Affairs and Another*[2] ("***Print Media***"), that "*because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it*".[3] As such, when considering whether the Act and the draft policy are constitutionally compliant, this should proceed on the basis that there is indeed a limitation of the right with the enquiry then turning to whether this limitation is justifiable.

10. The mandate of the FPB is limited in terms of the Act. Section 9A of the Act only stipulates three functions of the FPB:

10.1. To appoint classification committees to examine and determine, in accordance with any classification guidelines issued by the Council, the

[2] 2012 (2) SA 443 (CC).

[3] Ibid at para 51.

classification of any film, game or publication submitted to the FPB under the Act;

10.2. To determine an application made in terms of sections 22 or 23 of the Act for an exemption in respect of any film, game or publication; and

10.3. To determine an application made under section 18(1) of the Act for registration as a distributor or exhibitor of films, games or publications.

11. Section 11 of the Act goes on to stipulate that the administrative work connected with the performance of the functions, the exercise of the powers and the carrying out of the duties of the Council and Appeal Tribunal shall be performed by the staff of the FPB. It is also worth noting that in terms of the Act, the FPB "*shall perform the functions, exercise the powers and carry out the duties assigned to, conferred on or imposed upon [it] in terms of [the Act] or any other law*".[4] This provision appears to leave open the possibility of the powers, functions and duties of the FPB being contained in some other law apart from that contained in the Act itself. In terms of the Interpretation Act 33 of 1957, "*law*" means: "*any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law*". It does not include a policy as policies do not have the force of law, as we deal with in more detail below.[5]

[4] Section 3(1) of the Act. Emphasis added.

[5] See, for instance, *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) ("***Akani***") at para 7. The question of whether the draft policy is, in fact, a policy or will be promulgated as regulations is therefore important as we highlight below.

The system of classification: Sections 16 and 18 of the Act

12. One of the primary functions of the FPB is to regulate the classification of publications, films and games.[6] Section 16 of the Act addresses the classification of publications, and section 18 deals with the classification of films and games.[7] This is a system of administrative prior classification, whereby control is exercised before publication by an administrative body under the control of the executive branch of government.[8]

13. Notably, the system of classification differs between the classification of publications on the one hand, and the classification of films and games on the other. Although it appears from paragraph 3 of the draft policy, quoted above, that it applies only to the classification of films and games as dealt with in section 18 of the Act, section 16 is nevertheless relevant to understand the scheme of classification that the Act puts in place.

14. The classification of publications in terms of section 16 of the Act

14.1. Section 16 of the Act provides for both a voluntary system and a mandatory system of classification.[9] Firstly, section 16(1) provides for a

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[6] The terms "*publication*", "*film*" and "*game*" are all defined in section 1 of the Act.

[7] Sections 22 to 24 also contain particular exemptions from particular aspects of the Act.

[8] *Print Media* at para 16.

[9] Section 16(1) and (2) of the Act reads as follows:

> "*(1) Any person may request, in the prescribed manner, that a publication, other than a bona fide newspaper that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.*
>
> *(2) Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that --*

voluntary process whereby a person "*may request*" that a publication be classified.[10]

14.2. Section 16(2) of the Act then stipulates specific instances when pre-publication classification is mandatory. Following the Constitutional Court's decision in *Print Media*, which we discuss in detail below when examining the constitutionality of prior restraints, section 16(2)(a) of the Act – which primarily concerned sexual content – has been declared unconstitutional and severed from the Act. As a result, the only publications that must be submitted to the FPB prior to publication are those that trigger the grounds listed in section 16(2)(b)-(d) of the Act. Those grounds effectively repeat the contents of section 16(2) of the Constitution which excludes certain classes of speech from constitutional protection:[11] a publication that advocates propaganda for war; that incites violence; or that advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm.

…

(b) advocates propaganda for war;

(c) incites violence; or

(d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition."

[10] This provision applies to the exclusion of *bona fide* newspapers that are published by a member of a body, recognised by the Press Ombudsman, which subscribes and adheres to a code of conduct that must be enforced by that body.

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

14.3. In terms of the Act, therefore, only publications that contain (or may contain) these substantive criteria are subject to mandatory prior classification; for all other publications, prior classification is voluntary. This, however, is not the same for films and games in terms of section 18 of the Act (as well as the draft policy).

15. The classification of films and games in terms of section 18 of the Act

15.1. Section 18 of the Act is particularly relevant because paragraph 3 of the draft policy states that the objective of the draft policy is to give effect to section 18(1) and (2) of the Act. It should also be noted that *Print Media* did not consider the constitutionality of the classification system of films and games in terms of section 18; in this regard, the Constitutional Court was only asked to consider the classification of publications in terms of section 16 of the Act.

15.2. Unlike section 16 of the Act, section 18 does not contain a voluntary process; pre-classification is mandatory for all films and games. Section 18(1) and (2) reads as follows:

> "*(1) Any person who distributes, broadcasts or exhibits any film or game in the Republic shall in the prescribed manner on payment of the prescribed fee --*
>
> *(a) register with the Board as a distributor or exhibitor of films or games; and*
>
> *(b) submit for examination and classification any film or game that has not been classified, exempted or approved in terms of this Act or the Publications Act, 1974 (Act No. 42 of 1974).*
>
> *(2) The Board shall refer any film or game submitted under subsection (1)(b) to a classification committee for examination and classification.*"

15.3. Section 18(1) of the Act does not stipulate at what point the registration and submission for examination and classification must be done; in other words, it does not explicitly state that this must be done prior to classification, but this appears to be implicit from the provision.

15.4. Section 18 then goes on to provide the bases on which a publication will be classified by the classification committee as a "refused classification", "XX" or "X18".[12] Notably, for the purposes of classification, the

[12] Section 18(3)-(6) reads as follows:

"*(3) The classification committee shall in the prescribed manner, examine the film or game referred to it and shall --*

(a) classify the film or game as a "refused classification" if the film or game --

(i) contains child pornography, propaganda for war or incites imminent violence; or

(ii) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,

unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary, is of scientific, dramatic or artistic merit or is on a matter of public interest;

(b) classify the film or game as "XX" if it depicts --

(i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;

(ii) bestiality, incest, rape, conduct or an act which is degrading of human beings;

(iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;

(iv) explicit infliction of sexual or domestic violence; or

(v) explicit visual presentations of extreme violence,

unless, in respect of the film or game, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified "X18" or classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age inappropriate materials;

(c) classify the film or game as "X18" if it contains explicit sexual conduct, unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified with reference to the

classification committee will consider whether "*judged within context, the film or game is, except with respect to child pornography, a bona fide documentary or is of scientific, dramatic or artistic merit*" in order to lower the rating. For the purposes of a film or game that would be classified as a "refused publication" in terms of section 18(3)(a) – this being a publication that 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 – the classification committee is also required to consider whether the film or game is on a matter of public interest in addition to the other factors mentioned above, although section 18(3)(a) does not indicate what classification the film or game should receive in the event that one of these factors apply.

15.5. It is important to highlight that, unlike with the prior classification of publications, the prior classification of films and games is not triggered

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relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age inappropriate materials; or

(d) if the film or game contains a scene which may be disturbing or harmful to, or age inappropriate for children, classify that film or game with reference to the relevant guidelines issued by the Board by the imposition of appropriate age restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.

(4) Where a film or game has been classified as a "refused classification" or has been classified as "XX" or "X18", the chief executive officer shall cause that classification decision to be published by notice in the Gazette, together with the reasons for the decision.

(5) Where a film or game submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that film or game to a police official of the South African Police Service for investigation and prosecution.

(6) A broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall, for the purposes of broadcasting, be exempt from the duty to apply for classification of a film or game and, subject to section 24A(2) and (3), shall, in relation to a film or game, not be subject to any classification or condition made by the Board in relation to that film or game."

by the substantive content of the film or game. It is therefore not just films containing, for instance, propaganda for war that must be submitted for prior classification. Section 18(1) of the Act makes it clear that any person who distributes, broadcasts or exhibits a film or game in South Africa must submit it for examination and classification, unless it has been classified, exempted or approved in terms of the relevant legislation. The fact that a film or game may be a *bona fide* documentary, of scientific, dramatic or artistic merit or on a matter of public interest has no bearing on whether or not it is required to be submitted for prior classification; it is only relevant at the stage of determining what classification should be given to the film or game after it has been submitted. We return to the problematic meaning of "*distribute*" below.

The scheme of the draft policy

16. There are several aspects with the draft policy that we will consider in more detail below. However, for the purposes of this section, we simply sketch our understanding of the scheme of the draft policy. We acknowledge that the draft policy has been published together with an explanatory memorandum, but note that while the explanatory memorandum has some value in understanding and interpreting the draft policy, it nevertheless has no binding legal effect.

17. As appears from paragraph 2 of the draft policy, the draft policy applies "*to any person who distributes or exhibits online any film, game, or certain publications in the Republic of South Africa*".[13] Paragraph 2 goes on to provide that this

[13] Emphasis added.

includes online distributors of digital films, games and certain publications, regardless of whether this is done locally or internationally.[14] As mentioned, the draft policy's stated objective is to give effect to section 18(1) and (2) of the Act.[15]

18. The scheme contemplated by paragraph 5.1 of the draft policy is as follows:[16]

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[14] Paragraph 2 of the draft policy reads in full as follows:

> "*This Online Regulation Policy applies to any person who distributes or exhibits online any film, game, or certain publication in the Republic of South Africa. This shall include online distributors of digital films, games, and certain publications, whether locally or internationally. Upon approval this policy shall have the full effect and force of law, as stipulated in section 4A of the Act.*"

[15] Paragraph 3 of the draft policy.

[16] Paragraph 5.1 of the draft policy reads in full as follows:

> "*5.1. In order to ensure the uniform classification of content and the effective regulation of digital content distribution by the Board in the Republic of South Africa, the following policy is hereby enacted:*
>
> *5.1.1 Any person who intends to distribute any film, game, or certain publication in the Republic of South Africa shall first comply with section 18(1) of the Act by applying, in the prescribed manner, for registration as film or game and publications distributor.*
>
> *5.1.2. In the event that such film, game or publication is in a digital form or format intended for distribution online using the internet or other mobile platforms, the distributor may bring an application to the Board for the conclusion of an online distribution agreement, in terms of which the distributor, upon payment of the fee prescribed from time to time by the Minister of DOC as the Executive Authority, may classify its online content on behalf of the Board, using the Board's classification Guidelines and the Act; or*
>
> *5.1.3 Upon payment of the prescribed fee for each title submitted, submit electronically each digital game or film by providing the Board with a link from which the Board will access the online game or film for classification.*
>
> *5.1.4 Where it is convenient and practical to do so, the Board may dispatch classifiers to the distributors' premises for the purposes of classifying digital content. In such an event the classification shall be deemed to be the classification process of the Board, and the distributors shall ensure that the work of classifiers takes place unhindered and without interference.*
>
> *5.1.5 In the event that an online distributor arranges to have online content classified by the Board's classifiers in terms of clause 5.1.4, the distributor shall first satisfy the Board that it has storage facilities to store all classified content for audit and related purposes.*
>
> *5.1.6 The dispatching of classifiers in terms of clause 5.1.4 shall be subject to the Board and the online distributor concluding an agreement in terms of which the online distributor, amongst others, indemnifies the Board for any claim, loss or damage arising from the classification services being rendered at the online distributor's premises.*

18.1. Paragraph 5.1.1 of the draft policy makes it mandatory for any person who intends to distribute "*any film, game or certain publication*" in South Africa to comply with section 18(1) of the Act by applying for registration as "*film, game or publications distributor*".

18.2. A person who falls under the broad umbrella of paragraph 5.1.1 then has two choices:

18.2.1. Self-classification: If the film, game or publication is in digital form or format intended for distribution online using the internet or other mobile device platforms, the distributor may bring an application to the FPB for the conclusion of an online distribution agreement in terms of which the distributor, upon payment of the prescribed fee (which is to be determined from time to time by the Minister of Communications) may classify its own online content on behalf of the FPB;[17] alternatively

18.2.2. Submission to the FPB for classification: On payment of the prescribed fee for each title submitted, the person may submit electronically each digital film or game by providing the FPB with a link from which the FPB will access the online game or film for

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5.1.7 For the purposes of this policy, the words 'online' and 'digital' are used interchangeably.

5.1.8 The terms 'distributor' and 'content provider' are also used interchangeably.

5.1.9 Online distributors of digital content classified in terms of either clause 5.1.2 or 5.1.3 shall ensure that, in all content distributed via the various media distribution platforms, they display the Film and Publication Board classification rating and logo, as prescribed in Regulation 21 of the Regulations to the Act …".

[17] Paragraph 5.1.2 of the draft policy.

classification.[18] The draft policy also states that where it is convenient and practical to do so, the FPB may dispatch classifiers to the distributors' premises for the purpose of classifying the digital content.[19]

19. This means, therefore, that all persons uploading films or games onto the internet (as well as "*certain publications*") are first required either to pay to enter into a distribution agreement with the FPB in order to be able to classify the content themselves or to pay for the FPB to classify the content prior to it being posted online. This is the so-called system of co-regulation that the draft policy intends to implement.

20. For those seeking to enter into an online distribution agreement with the FPB in order to be authorised to classify content themselves, there are a number of requirements and restrictions that are applicable, including:

    20.1. The person is required to satisfy the FPB that the rating system to be used for classification is aligned to the FPB's classification system, and that the person is capable of generating classification ratings;[20]

    20.2. The person seeking to classify content must first be authorised to do so by the FPB, which requires the person to satisfy the FPB that it has a classification and rating system "*in terms of which the classification process and rating system in terms of which the classification process and classification decisions are founded upon the decision-makers*

[18] Paragraph 5.1.3 of the draft policy.

[19] Paragraph 5.1.4 of the draft policy.

[20] Paragraph 5.2 of the draft policy.

consistently applying the Act and the Board's Classification Guidelines, adhering to agreed standards, and applying sound decision-making practices";[21]

20.3. All persons undertaking this classification are required to be trained and certified by the FPB after having completed training approved by the FPB, and may be required periodically to undertake refresher training;[22]

20.4. No online content distributor will be authorised by the FPB to distribute "*online content*"[23] in South Africa unless it has registered with the FPB as an online distributor and paid the online distribution licensing fee as determined by the Minister of Communications, and any other fees that the Minister may determine from time to time.[24] The online licensing fee is paid annually and may be escalated at the rate to be determined by the Minister.[25] Furthermore, notwithstanding these provisions, the FPB shall also have the power to charge a classification fee per title submitted for classification of digital content; the draft policy goes on to state that the classification fee payable shall vary from case to case but will be based on the fee tariff prescribed by the Minister from time to time;[26]

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[21] Paragraph 5.5.2 of the draft policy.

[22] Paragraphs 5.5.4-5.5.5 of the draft policy.

[23] The term is rather unhelpfully defined as: "*in relation to the distribution of films, games and certain publications, means distribution that is connected by computer or electronic devices to one or more other computers, devices or networks, as through a commercial electronic information service or the Internet.*"

[24] Paragraph 10.1 of the draft policy.

[25] Paragraph 10.2 of the draft policy.

[26] Paragraph 10.3 of the draft policy.

20.5. All content providers or online distributors authorised to distribute online content in South Africa are subject to the penalty regime of the FPB in terms of the Act, the draft policy and any other directive that the FPB may issue from time to time.[27]

21. Paragraph 7 of the draft policy is particularly problematic. Supposedly in order "*to minimise the risk of children's exposure to unclassified content on online platforms*", the draft policy purports to afford the FPB various powers. We note the telling fact that the purpose is to protect children from "*unclassified content*", not "*disturbing and harmful content*". Paragraph 7 does the following:

21.1. It creates a new definition of "*user created content*" that includes "*any publication as defined in section 1 of the Act*";[28]

21.2. It records the content of section 24C of the Act which deals with child pornography;

21.3. Paragraph 7.4 of the draft policy purports to afford the FPB "*the power to order an administrator of any online platform to take down any content that the Board may deem to be potentially harmful and disturbing to children of certain ages*";

21.4. Paragraph 7.5 of the draft policy allows the FPB, "*of its own accord*" to refer a video clip online for classification;

21.5. The remainder of the paragraph deals with the process for classification of this user created content.

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[27] Paragraph 14.2 of the draft policy.

[28] Paragraph 7.1 of the draft policy.

22. Having set out the legislative scheme of the Act and the draft policy, we turn next to consider the constitutionality of the draft policy

III THE DRAFT POLICY IS ULTRA VIRES

23. The FPB is a statutory body created in terms of the Act. It has only the functions and powers assigned to it by the Act. As the Constitutional Court stated in *Fedsure*: "*It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.*"[29] This is generally referred to as the legality or *ultra vires* (beyond the powers) doctrine, the upshot of which is that statutory bodies can only perform the powers given to them under the statute in terms of which they are created.

24. This includes the promulgation of regulations and policies.[30] The content of regulations is limited to what is permitted by the empowering legislation. A policy is even more limited in its scope. As was stated by the Supreme Court of Appeal in *Akani*:[31]

> "*The word 'policy' is inherently vague and may bear different meanings … I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should*

[29] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

[30] See, for example, *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at para 50 ("***Affordable Medicines***").

[31] *Akani* at para 7.

> *normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear.*"

25. Similarly, the Constitutional Court held in *Arun Property Development (Pty) Ltd v City of Cape Town* as follows:[32]

> "*Policy is not legislation but a general and future guideline for the exercise of public power by executive government. Often, but not always, its formulation is required by legislation. The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public and to avoid case by case and fresh enquiry into every identical request or need for the exercise of public power.*"

26. The purpose of a policy is therefore solely to guide the exercise of a discretion conferred by law in order to ensure consistent decision making. It cannot unduly constrain the decision-maker's discretion.[33] Nor can it afford a power to an executive body that is not found in the empowering legislation. It is limited to determining how an existing power will be exercised.

27. It appears from the draft policy[34] that the FPB intends to act in terms of its power in section 4A(1) of the Act to "*issue directives of general application, including classification guidelines, in accordance with matters of national policy consistent with the purpose of this Act*". That is plainly a traditional policy power – the FPB may provide guidance on how it will exercise its powers. It is not a regulation-making power and it does not allow the FPB the power to grant itself new powers.

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[32] 2015 (2) SA 584 (CC) at para 47.

[33] See generally *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at paras 9-10.

[34] Para 1, page 7 of the draft policy.

28. The FPB could attempt to convince the Minister to enact the draft policy as regulations under section 31 of the Act. Section 31(f) in particular affords the Minister the general power to "*make regulations generally on any matter required for the better achievement of the objects and purposes of this Act*". As this is not currently the basis on which the FPB has indicated it will act, we do not consider it further at this stage, save to note that the correct procedure would need to be followed if this were to be done.

The power to order the removal of content

29. Paragraph 7.4 reads: "*With regard to any other content distributed online, the Board shall have the power to order an administrator of any online platform to take down any content that the Board may deem to be potentially harmful and disturbing to children of certain ages.*" There is nothing in the Act to suggest that the FPB has this power. Its powers are limited to classification, not to ordering the removal of content, particularly content that has not yet been classified.

30. In our view, this provision is certainly unlawful with regard to publications as there is no obligation to obtain prior classification outside of material covered by section 16(2) of the Constitution (or section 16(2)(b)-(d) of the Act). Paragraph 7.4 goes well beyond what is included in section 16(2). Even in those cases, the appropriate response is criminal punishment for non-compliance. If the legislature intended for the FPB to be able to order that publications be removed, it would have given it that power. It did not.

31. Even with regard to films and games, paragraph 7.4 goes beyond what the Act permits. First, the Act requires an application for classification prior to

distribution. But it does not afford the FPB the power to order the removal of films or games that were not submitted for classification. The pre-release classification provision is enforced by the threat of criminal punishment for non-compliance, not by affording the FPB a power to force removal.

32. Second, section 27A of the Act imposes some obligations on internet service providers. But those do not provide authorisation for paragraph 7.4:

32.1. The draft policy applies to the "*administrator of an online platform*", whereas section 27A only places obligations on a person "*who carries on the business of providing access to the Internet by any means*". There is a vast difference between an internet service provider and a content platform.

32.2. Section 27A is limited to child pornography. Paragraph 7.4 is not.

33. Accordingly, we would submit that paragraph 7.4 of the draft policy is *ultra vires* and unlawful.

The power to refer for classification

34. Paragraph 7.5 reads: "*In the event that such content is a video clip on YouTube or any other global digital media platform, the Board may of its own accord refer such video clip to the Classification Committee of the Board for classification.*" However, it is unclear from where the FPB would derive this power.

35. Section 18 requires the distributor to submit the film for classification. Nowhere – with regard to films, games or publications – does the Act permit the FPB of its own accord to classify material that has not been submitted to it. Nor, we

would submit, should it have that power. If the FPB is of the view that a film has been distributed without being classified, it has an available remedy under the Act to seek prosecution. It cannot, however, classify a film that has not been submitted to it.

36. Accordingly, it is our contention that paragraph 7.5 of the draft policy would also be unlawful.

Online distribution agreements and self-classification

37. The draft policy would empower the FPB to enter into online distribution agreements[35] and to authorise distributors to classify their own content as part of the system of co-regulation created under the draft policy that is not contemplated by section 18 of the Act.[36]

38. The Act requires the FPB to classify films, games and publications. There is no provision that allows it to delegate that power, particularly not to a private person. The FPB cannot abandon that duty, or confer that power on another unless it is authorised to do so by the Act. In the present circumstances, it is not so authorised by the Act.

39. While it may be wise to afford distributors the power to classify their own content (an issue on which we express no opinion), that would require an amendment to the Act. It cannot be accomplished through a policy.

[35] Paragraph 5.1.2 of the draft policy.

[36] Paragraph 5.5 of the draft policy.

IV VAGUENESS OF THE DRAFT POLICY

The legal position

40. It is trite that laws must be written in a clear and accessible manner, and that impermissibly vague provisions violate the rule of law.[37] As stated in *National Credit Regulator*, "*[f]or the 'law' to 'rule', it must be reasonably clear and certain*".[38] Of particular relevance for the concerns with the draft policy mentioned below, the Constitutional Court has stated that "*[t]he law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*".[39] A law – or a policy – that is impermissibly vague will be unlawful and invalid.

41. However, the Constitutional Court also stated that –

> "*The need for clarity does not require absolute certainty. The law must indicate with reasonable certainty to those bound by it what is required of them. When considering vagueness, a court must construe the relevant provision by applying the normal rules of construction, which would include looking at the statute as a whole.*"[40]

42. With this in mind, we turn to examine two central aspects of the draft policy that in our view are unconstitutionally vague: content and people. Both stem from poor definitions (or the absence of definition).[41] While these are not the only

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[37] *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 46 ("***National Credit Regulator***"). See also, for instance, *Affordable Medicines* at para 108; *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 100; *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 27.

[38] *National Credit Regulator* at para 46.

[39] *Affordable Medicines* at para 47.

[40] *National Credit Regulator* at para 48.

[41] The draft policy only contains four definitions under the definition section. There are also certain definitional indicators provided in the content of the draft policy, the most relevant being

aspects of the draft policy that are arguably vague, these are in our view the most concerning with the widest repercussions for the application of the draft policy and the significant legal uncertainty that ensues.

Content

43. What content does the draft policy apply to? As has been mentioned above, section 16 of the Act regulates the classification of publications, and s 18 of the Act regulates the classification of films and games. These sections put in place different schemes and apply different criteria. Although section 9A(2)(c) of the Act states as one of the functions of the FPB to "*determine an application made under section 18(1) for registration as a distributor or exhibitor of films, games or publications*", this is not borne out by section 18(1) itself which only refers to films and games.

44. This, however, becomes muddied in the draft policy. We understand from paragraph 3 of the draft policy that the intention is to give effect to section 18(1) and (2) of the Act. If that were true, it would follow that the draft policy would only apply to films and games. However, the draft policy makes reference, in addition to films and games, to "*certain publications*" (and in some instances, just to "*publications*") without giving any indication of which forms of publications would come under the ambit of the draft policy or on what basis. This is placed upfront in paragraph 5.1.1 of the draft policy, which provides that "*[a]ny person*

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that the terms "*online*" and "*digital*" (paragraph 5.1.7 of the draft policy) and "*distributor*" and "*content provider*" (paragraph 5.1.8 of the draft policy) are used interchangeably. At the public consultation that was held by the FPB on 4 June 2015 in Johannesburg, it was indicated that the draft policy is intended to be read together with the Act, and that the definitions contained in the Act are equally applicable to the draft policy. The policy does not, however, state this, and should certainly be made clear in the draft policy. The FPB did undertake to do so, and this should be followed up.

who intends to distribute any film, game or certain publication in the Republic of South Africa shall first comply with section 18(1) of the Act by applying, in the prescribed manner, for registration as film or game and publications distributor".[42]

45. As noted earlier, paragraph 7 of the draft policy does not refer to "*certain publications*" but to "*user created content*" which is defined broadly in paragraph 7.1 to include "*any publication as defined in section 1 of the Act*". It is unclear whether paragraphs 5 and 7 intentionally refer to different categories of content, or if that is merely a drafting error.

46. In any event, the various terms are problematic for a number of reasons. Firstly, the definition of "*publication*" is broadly defined in section 1 of the Act, and includes, for instance, newspapers, photographs, soundtracks and messages placed on a distributed network (including the internet). Neither the Act nor the draft policy indicates what is meant by "*certain publications*" or carves out a particular category of publications to which the draft policy would be applicable – although this too would be problematic on the current formulation of the draft policy that purports to limit its application to section 18 of the Act.

47. Furthermore, no explanation is provided for why certain publications would have to comply with the draft policy while others would not. In regulating the classification of publications, section 16(2) of the Act only requires there to be mandatory prior classification of the narrow category of content contained in

[42] Emphasis added.

section 16(2) of the Constitution.[43] However, in contrast, the scheme put in place by section 18 read together with the draft policy requires all content falling within its scope to be subject to mandatory prior classification. As is dealt with in more detail below, *Print Media* specifically considered the issue of prior restraint on publications and determined it to be unconstitutional except in relation to the content excluded from constitutional protection by section 16(2) of the Constitution.

48. Put simply, a person posting content to the web other than films or games will be entirely uncertain whether they are required to comply with the draft policy or not. The same is true of the website hosting that content. This failure leads to the differential treatment of certain publications without giving any indication of what publications those would be or on what basis they would be treated differently. In our view, the failure to properly and consistently define which publications the draft policy applies to renders the policy unconstitutionally vague.

49. The defect in the draft policy could, however, be cured simply the deletion of the reference to "*publication*" from the draft policy, and therefore retaining its scope only in relation to films and games. That would, however, attend to this issue, and would not cure the *ultra vires* problems identified above, or the constitutional problems we identify below.

50. Lastly, with regard to publications, the type of content that paragraph 7 allows the FPB to remove is, in our view, incurably vague. Paragraph 7.4 allows the FPB to order the removal of "*any content that the Board may deem to be*

[43] Section 16(2)(b)-(d) of the Act.

potentially harmful and disturbing to children of certain ages." That is both unconstitutionally broad, and unconstitutionally vague. There is no indication of how the FPB will determine what is "*harmful and disturbing to children*". It seems to us that it would be impossibe to review the exercise of the power because it is so wide and unguided.

Persons

51. In addition to being unclear in relation to the content to which it applies, the draft policy is also unclear in relation to the persons to whom it applies. This vagueness stems principally from the disparate definitions of "*distribute*" and "*distributor*" contained in the Act itself.

52. The term "*distributor*" is narrowly defined in the Act and states that "*in relation to a film, means a person who conducts business in the selling, hiring out or exhibition of films*".[44] Although it is unclear why the definition is limited to films and does not apply equally to games, we assume for present purposes that the definition would be read consistently in relation to both forms of content. What is important to note from this definition is that it refers specifically to a person for whom this is their business, and does not appear to be intended to apply to the general public for whom such activities would not be for business-related purposes.

53. The term "*distribute*", however, is far more broadly defined, and states that "*in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for the purposes of sections 24A and 24B, includes to hand or exhibit a film, game or a*

[44] Emphasis added.

publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such person".[45] The breadth of the definition lies in the use of the words "*without derogating from the ordinary meaning of that word*" and "*includes*", and that it does not limit its application to persons conducting business as is the case with the definition of "*distributor*". The two terms are therefore given different meanings under section 1 of the Act, despite the one being a derivative of the other.

54. Section 18(1) further creates a confusing tension between the two terms in requiring "*[a]ny person who distributes*" a film or game to register as a "*distributor*". In effect, what this does is to impute to all persons falling within the broad definition of "*distribute*" the characteristic of distributing films or games for the purpose of conducting business in line with the definition of "*distributor*". In many instances, this will likely not be the factual case, for instance in relation to someone who simply uploads a video to a social media website to share with his or her friends online.

55. This confusion is then carried through to the draft policy. The policy itself does not define distribute or distributor. However, paragraph 2 indicates that the draft policy applies to any person who distributes the relevant content sought to be regulated by the draft policy. In a similar vein to section 18(1) of the Act, paragraph 5.1.1 requires any person "*who intends to distribute any film, game or certain publication*" to first comply with section 18(1) of the Act "*by applying, in the prescribed manner, for registration as film or game and publications distributor*".

[45] Again, it is unclear why games are not stipulated in the opening wording of the definition but are referred to further on, but we assume that the definition is equally applicable to games.

56. The draft policy complicates the position further by providing that the terms "*distributor*" and "*content provider*" are used interchangeably. This is confusing because, in the ordinary understanding of these words, distributors and content providers perform very different functions. The draft policy also, in some instances, refers to "*a content provider or distributor*",[46] thereby belying its claim of the interchangeable use of these two terms.

57. The definition of "*distributor*" – which is limited to commercial operators – is, arguably, a sensible one and would reasonably circumscribe the application of the Act and the draft policy. The definition of "*distribute*", on the other hand, is overly broad and brings everyone, not just those distributing for the purpose of conducting business, under the ambit of the Act and the draft policy. To the extent that the Act and the draft policy seek to regulate the industry, the definition of "*distributor*" is compliant with this objective. However, the effect of the Act and the draft policy is to make all persons, not just those distributing for the purposes of conducting business, subject to the draft policy, including the distribution of user generated content.

58. This is patently problematic, all the more so given that the draft policy in its present formulation would also apply to publications. In this regard, the judgment in *Hamilton-Brown v Chief Registrar of Deeds* is relevant in stating that "*[t]he section in the Act must be interpreted before the regulation is looked at and, if the regulation purports to vary the section as so interpreted, it is ultra*

[46] See, for instance, paragraph 5.2 of the draft policy. Emphasis added.

vires and void. It cannot be used to cut down or enlarge the meaning of the section".[47]

59. In relation to user generated content, the explanatory memorandum to the draft policy states as follows:

> "*The volume of media content available to South Africans has grown exponentially. There are currently over million web sites and hundreds of thousand apps' available for download on mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content, particularly self-generated content to be classified, it is the responsibility of the platform provider in consultation with the FPB to determine the scope of what must be classified.*
>
> *Accordingly the obligation to classify content will not generally apply to persons uploading online content on a non-commercial basis. Child exploitative and pornographic posting, hate speech and racism may be prosecuted and the content creators be convicted and sentenced, Internet intermediaries, including application service providers, host providers and internet access providers will bear the responsibility of putting in place content filtering systems to ensure that illegal content or content which may be harmful to children is not uploaded in their services.*
>
> *In addition to the above the FPB through its online compliance monitoring work, may refer any self-generated video that is found to contain classifiable elements for classification to its classification committee, instruct the distributor to take down the unclassified content and only reinstate it after having complied with the FPB classification decision. In such an event the costs for classification will be borne by the online distributor. This is aimed at ensuring that the online distributors remain vigilant and that their filtering mechanisms are adequate to protect children against exposure to harmful content and that people with racist ideologies do not use these platforms to undermine Government's social cohesion and transformation agenda.*"

60. We have already mentioned that while the explanatory memorandum may be useful for interpreting the draft policy, it is not binding. Furthermore, the explanatory memorandum in any event seems to confuse the position rather than clarify it. In particular, it is unclear what is meant by "*the obligation to classify content will not <u>generally</u> apply to persons uploading online content on*

[47] 1968 (4) SA 735 (T) at p 737D. Emphasis added.

a non-commercial basis".[48] This leads to an uncertain position in which users will not know if and when the draft policy will be applicable, and when they will attract criminal sanctions for non-compliance. The explanatory memorandum itself acknowledges the impracticality and undesirability of trying to regulate all online content.

61. In our view, the uncertainty that this leads to is also not constitutionally compliant. To the extent that the draft policy intends to protect children, this is catered for elsewhere in the Act. One possibility to remedy this would be to define the term "*distribute*" more narrowly in line with the term "*distributor*", and to limit the scope of application to distribution that is done for business-related purposes. We note, however, that although this could be the definition stipulated in the draft policy as a solution for present purposes, what would properly be required would be an amendment to section 1 of the Act in order to clarify the position and ensure that this is applied uniformly. Furthermore, while this would cure the vagueness in both the Act and the draft policy, it would not necessarily render them constitutional. They still constitute a system of prior restraint against commercial distributors.

62. The vagueness of the draft policy mentioned above also has ramifications for the issue of the imposition of prior restraints, which we turn to consider next.

[48] Emphasis added.

V PRIOR RESTRAINTS

63. As we have mentioned above, the Constitutional Court in *Print Media* considered the constitutionality of the prior restraints imposed on publications as contained in section 16 of the Act. The Court came to the conclusion that imposing a prior restraint – other than on publications containing content mentioned section 16(2) of the Constitution – was an unjustifiable limitation on the right to freedom of expression. It is obvious that a system of prior restraint on non-section 16(2) content limits the right to freedom of expression. The only question was whether or not administrative prior restraint could be justified under section 36(1) of the Constitution.

64. Skweyiya J accepted that protecting children from harmful material "*is surely an important purpose*" but that it was necessary to determine whether pursuing that purpose "*through deterrence under threat of punishment*" would be more appropriate than "*prevention through the upfront restriction of free action*".[49] The Court noted the serious negative effect of systems of prior restraint:

64.1. It shifts the "*locus of control*" over what expression becomes public from the right-bearer to the administrator;[50]

64.2. "*[T]he opportunity for public scrutiny and comment on a fresh publication is denied*";[51]

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[49] *Print Media* at para 57.

[50] Ibid at para 58.

[51] Ibid at para 59.

64.3. The "*administrative body is mandated and incentivised to classify, which … increases the likelihood of restraint*";[52] and

64.4. At best, it delays the publication of information, especially considering that there is no timeframe for classification.[53]

65. Skweyiya J concluded that there were sufficient less restrictive means to achieve the purposes of the prior restraint system. Primarily, he found that judicial restraint was an adequate alternative. In addition, he recognised that the voluntary classification system provided for in section 16(1) "*not only provides a means of obtaining legal certainty, but also restores to publishers the discretion to make informed choices about whether or not to publish.*"[54]

66. In sum, the Constitutional Court stated that "*[i]n my view, the central* constitutional *deficiency lies in the administrative and compulsory nature of the Act's prior classification scheme, in circumstances where there are less restrictive alternatives for achieving important legislative purposes*".[55] This led the Court to go beyond the relief sought by the applicants, and instead concluded that severance was the only appropriate relief.

67. Interestingly, the majority of the Court did not discuss the scope of the ban in section 16(2)(a). The minority, however, held that it was necessary to consider the description of content that could be banned even under a system of judicial prior restraint: "*Judicial prior restraint based on unacceptably vague criteria*

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[52] Ibid.

[53] Ibid at para 60.

[54] Ibid at para 70.

[55] Ibid at para 72.

would not be an acceptable less restrictive measure to achieve the purpose of the legislation."[56] Van der Westhuizen J in his minority judgment held that the description in section 16(2)(a) was impermissibly vague.[57]

68. *Print Media* offers clear authority for the undesirability and impermissibility of administrative prior restraints on free speech. We would submit that the reasoning in *Print Media* offers strong support for any challenge to the draft policy.

69. It is our view that the imposition of a prior restraint for the distribution of films and games by members of the industry is arguably justifiable. Given that commercial distributors will be aware of the relevant criteria and have an interest in certainty about the legality of their content before it is released, it *may* be preferable to have a mandatory system of prior classification. However, on balance it seems to us that – even in the context of commercial distributors – a system of voluntary classification, coupled with the possibility of judicial restraint and punishment for non-compliance will – as in the case of commercial publishers considered in *Print Media* – adequately serve the purpose.

70. While there may arguably be some rationale for mandatory prior restraint of industry-generated conduct, there can be no justification for applying that approach to user-generated conduct. The effect will undoubtedly be to prevent expression. It will either prevent people from publishing content because they do not want to (or are unable) to submit it for classification, or they will publish it

[56] Ibid at para 92.

[57] Ibid at para 106.

with the risk of punishment merely for the act of not first seeking approval from the FPB.

71. We stress that this flaw is not solved by shifting the classification burden to the online distributor. If anything, it makes it worse. A private company is equally likely to err on the side of caution and over-classify material in order to avoid the possibility of punishment. Moreover, private distributors are not accountable in the same way that a public body like the FPB is.

72. While section 18 of the Act is itself problematic, the draft policy goes further than the Act because it attempts to impose administrative prior restraint on publications. The Constitutional Court has already found that is unconstitutional (at least for non-section 16(2) of the Constitution content). Moreover the vagueness of the draft policy – only some of which is a result of the Act – also results in violations of the right to freedom of expression. The lack of clarity about what publications are subject to classification, who is bound by the policy, and the vagueness of the criteria for the FPB to exercise its powers are themselves violations of the right to freedom of expression for the reasons expressed by the minority in *Print Media*.

VI CONCLUSION

73. In our view, in light of the considerations set out above, we would submit that both the draft policy and the legislative system of prior restraint on which it rests would not pass constitutional muster if tested, and serious revisions are needed. We urge the FPB to take serious account of both the LRC's

submissions as well as that of other civil society organisations that have expressed concern at the draft policy.

74. Should there be further opportunity for submissions on the draft policy, be it written or oral, we would request that we be invited to participate in any such process. Please feel free to contact us at avani@lrc.org.za should you have any queries or if we are able to offer any further assistance.

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