

FPB AMENDMENT BILL:CRITICAL INPUTS FROM PARLIAMENTARY PUBLIC HEARINGS



the doc

Department:
Communications
REPUBLIC OF SOUTH AFRICA

SA Communications Forum[1]

Comments/Inputs

- (a) Child Sex Abuse Material is the preferred terminology to Child Pornography
- (b) Powers of Compliance monitors in section 15(A) are too broad and open to abuse. No basis was provided for this proposition

Response by FPB & DOC

- It is suggested that the current term be retained as it is in line with the principal act dealing with sexual offences (Criminal Law Amendment Act) and therefore cross reference be made to the definition contained therein.
- A comparative analysis was done with the UK, Canada, New Zealand, Singapore, the USA and Australia. In these jurisdictions, online content is monitored by individual members of the public who are able to issue a complaint to the relevant authority, which will then be acted upon. Similar provisions are introduced in the Bill in section 18E.
- With respect to section 15A, to ensure that the right to dignity and privacy is upheld, the section makes it obligatory for the consent of the owner of the premises/online medium to be obtained prior to any inspection.



SA Communications Forum [2]

Comments/Inputs

- (c) definition of ' hate speech too broad, suggestion made on the definition.

Response by FPB & DOC

- It is suggested that this definition be replaced with the definition of 'prohibited content' which would include the provisions of section 16(2) of the Constitution and sections 16(2), (4) and 18(3) of the Act.



SA Communications Forum [3]

Comments/Inputs

- (d) insert the words 'for commercial purposes' in the definition of distribute

Response by FPB & DOC

- The Bill has been revised accordingly. A distinction is made between commercial online distributor and non-commercial online distributor.
- Only commercial online distributors will be required to register and classify films, games and publications.
- FPB will only have jurisdiction over non-commercial distributors (ugc) in respect of complaints and take down notices, they will not be required to pay a distribution fee or submit content for classification.



SA Communications Forum [4]

Comments/inputs

- (e) section 18(8) seeks to impose restrictions on ICASA
- (f) section 18E does not accord the respondent of illegal content an opportunity to be heard before content is taken down.

Response by FPB & DOC

- This section has been deleted.
- Cross reference to section 77 of the Electronic Communications and Transactions Act has been made which outlines the procedure to be followed regarding take down notices and provides the other party and opportunity to respond.



SA Communications Forum [5]

Comments/Inputs

- (g) SA Communications forum supports accreditation of foreign rating systems and establishment of an independent classification authority as proposed in section 18(c)

Response by FPB & DOC

- FPB has been advised against the establishment of an independent classification body for film classification as this would result in the FPB outsourcing its mandate. The Bill now makes provision for co-regulation which entails self classification by online distributors using FPB guidelines and under the regulatory supervision of FPB.



Right 2 Know [1]

Comments

- (a) " We reject legislation that is overly restrictive and which frames the internet primarily as a threat. Onerous legislation will stifle the empowering, democratizing potential of the internet".

Response by FPB & DOC

- The comment is noted. The Bill has been revised to ensure that it is technology-neutral in line with international trends.
- The Bill continues to emphasise the importance of self-regulation and co-regulation as mechanisms complementing the policy framework. This will ensure that industry or operators, the social partners, non-governmental organisations or associations, regulators and Government all play their respective roles in the attainment of the objectives this Law.



Right 2 Know [2]

Comments

- (b) Fees & pre-classification capacity are a barrier to Freedom of expression
- (c) Legislation designed to protect children from harmful content, while indeed necessary, should not see them merely as passive victims and must take into account their rights and freedoms to participate online and in decisions that affect them. A progressive approach to protecting children and other vulnerable groups online would prioritize education and internet literacy as a means of empowerment.

Response by FPB & DOC

- The tariffs are currently under review to ensure that they are not a barrier for entry.
- FPB budgets annually for public awareness campaigns focusing on learners and educators. FPB has also partnered with the likes of South African Communication Forum on digital media literacy programmes and participates in a number of industry engagements such as the I-Week, GOOGLE and SACF web rangers programme which looks at technology developments and ways to enable children to have a safe and empowering experiences when engaging in online activities.



Right 2 Know [3]

Comments

- (d) Pre-publication censorship is unconstitutional.

Response by FPB & DOC

- The Bill as currently addresses this point in line with the Constitutional Court Judgement to ensure that it is in line with the Constitutional Provisions and all limitations related thereto.



NAB, ICASA, SABC, e.tv. and Association of Christian Media [1]

Comments

- (a) The provisions of s18(7), s18(9) & 18(9) of the Bill seek to:
- Limit the exemption afforded broadcasting licensees by way of section 18(6) of the FP Act
- instruct ICASA not to renew a broadcasting licence of a licensee who is not registered with the FPB
- "In our view these provisions are *ultra vires*, and in violation of section 192 of the Constitution"

Response by FPB & DOC

- Sections 18 (7) to (9) have been deleted in order to uphold the exemptions afforded to broadcasters in relation to broadcasting services and further uphold the independence of ICASA with specific reference to section 192 of the Constitution.



NAB, ICASA, SABC, e.tv. and Association of Christian Media [2]

Comments

- (b) The exemption afforded by s18(6) of the FP Act be modified to cater for broadcasters' online content that is already classified:
- *a broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall for purposes of broadcasting be exempted from the duty to apply for classification of a film or game and, shall in relation to a film or game not be subject to any classification or conditions made by the Board in relation to the film or game. The exemption in this section shall apply to all films and games which were previously, or are simultaneously, broadcast on a broadcasting service and distributed online by the broadcaster concerned.*

Response by FPB & DOC

- After our discussions with the broadcasters we have agreed to the following:
- s18(6) A broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall, for the purposes of broadcasting and its online streaming, 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."



NAB, ICASA, SABC, e.tv. and Association of Christian Media [3]

Comments

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Response by FPB & DOC

- However we have been that in order to ensure that the Act is not technology neutral, we propose that reference to streaming be deleted and cross reference to the definition of Broadcasting in the ECA



NAB, ICASA, SABC, e.tv. and Association of Christian Media [4]

Comments

- **e.tv** proposes in this regard that the words " online streaming " be inserted in section 18(6)
- **Multi-Choice** would want the exemption to extend to all ancillary services

Response by FPB & DOC

- After our discussions with the broadcasters we have agreed that the insertion proposed in s18(6) above, will mean that the definition of streaming currently proposed in the Bill will consequently also need to be amended as follows:
- “Streaming means the delivery of films by an online distributor or broadcaster, **[in real time]** including the online streaming or download of films, and catch up services that enable time-shifted viewing online of a film, to the end user of an online delivery medium, including the Internet.”
- As indicated above, we have been advised by legal Counsel to cross reference to definition of Broadcasting to ECA to ensure that the Act is technology neutral.



Interactive Entertainment South Africa [1]

Comments

- (a) The Bill must be read with the Online Policy in mind.
- It is clear that the FPB intends to implement strict controls over the type of content South Africans can consume in the digital space.

Response by FPB & DOC

- The Online Policy has been held in abeyance up until the finalisation of this Bill into an Act, thereafter the FPB will provide regulations and guidelines to implement the Act.
- The Bill seeks to ensure that there is effective mechanisms to protect children from harmful online content and ensure that the online platform is not used to disseminate prohibited and harmful content.



Interactive Entertainment South Africa [2]

Comments

- b) For a body that claims not to be a censorship board, the bill and policy give an alarming amount of censorship powers.
- (c) The creation of games and films are intrinsically a creative and artistic expression.
- Games have been recognised as creative process in other jurisdictions, most notably in ***Brown v. Entertainment Merchants Association***

Response by FPB & DOC

- IESA is raising a valid point that we agree with and moving forward the mandate of the FPB will continue focusing on informing consumers and protecting children from age-inappropriate content which is done through classification.



Interactive Entertainment South Africa [3]

Comments

- (d) Section 18 read with s24A of the Act and the proposed additions and amendments these sections as envisaged by the bill are unconstitutional.
- These sections require administrative prior classification of films and games, and make it a criminal offence not to comply.
- This system of administrative prior classification is unconstitutional due to it being an unreasonable limitation of the freedom of speech.

Response by FPB & DOC

- It is apparent that the interpretation of the constitutional court judgement in *Print Media SA and Another v Minister of Home Affairs 2012 (6) SA 443(CC)* is crucial to this determination. The primary purpose of the FPB is to provide consumers with advice, to protect children from exposure to disturbing and harmful material and from premature exposure to adult experiences. Section 7(2) of the Constitution read with section 28(2) places a direct obligation on organs of state such as the FPB to act in the best interest of the child.



Interactive Entertainment South Africa [4]

Comments

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Response by FPB & DOC

- Assuming that prior classification of films and games is limiting on section 16 of the Constitution, the question is whether such limitation is reasonable and justifiable as required by section 36 of the Constitution. With specific reference to the FPB prior classification of films and games, this question has been answered in the affirmative by the Constitutional Court in the case of *De Reuck v DPP and Others* 2004(1) SA 406(CC);



Interactive Entertainment South Africa [5]

Comments

- (e) The constitutional court case *Print Media v Minister of Home Affairs and another* (CCT 113/11) the court explicitly states that the system of administrative prior classification is unconstitutional

Response by FPB & DOC

- The Print Media case was not against prior classification in general. The case deals with prior administrative classification of protected speech such as the press freedom and the right of the public to receive news and information that is in the public interest without any delays.



Interactive Entertainment South Africa [6]

Comments

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Response by the FPB & DOC

- The court further said that where administrative prior classification may be required, in order for the limitation in section 36 of the Constitution to be satisfied, the enquiry will be whether there are less restrictive means to achieve the legislative objective. Where the court finds that such less restrictive means exists, administrative prior restraint will be found to be unconstitutional.



Interactive Entertainment South Africa [7]

Comments

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Response by the FPB & DOC

- The Court did not pronounce section 18 of the Act to be unconstitutional. In fact the court did not find that entire section 16 of the Act is unconstitutional, but found that only section 16(2) which required magazines that contain sexual conduct to be subject to prior distribution classification to be unconstitutional. The Court went further and redrafted the remainder of section 16.



Interactive Entertainment South Africa [8]

Comment

- (f) Administrative prior classification for media that would receive an X18 or higher rating should be subject to administrative prior classification.

Response by the FPB & DOC

- In line with international trends, prior classification of films and games is used widely in various parts of the world to advise and inform adults of the content and to protect children.
- This can only be done effectively if the content is classified prior to the distribution thereof as the objective is to inform and protect prior to distribution.
- This is administrative in nature and a legal mandate provided to similar bodies like the FPB.



Interactive Entertainment South Africa [9]

Comments

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Response by the FPB & DOC

- As indicated, there is a direct responsibility on organs of state such as the FPB to act in the best interest of the child.
- Thus most responsible societies engage in the prior classification of films and games.
- FPB prior classification decisions are arrived at after a reasoned and transparent process.
- The law provides for the right of appeal to the independent Appeal Tribunal.



Interactive Entertainment South Africa [10]

Comments

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Response by the FPB & DOC

- **The Interactive Entertainment South Africa and Google** submit that they have ratings standards that universally recognised and are higher than FPBs.
- This is a progressive stance and in line with the recent developments.
- However, in the absence of a framework that creates uniformity on the application of the South African classification guidelines, those rating standards may cause confusion and uncertainty in the South African market, hence the need for FPB to be satisfied that these meet the legislative and regulatory requirements of South Africa.
- This has been accepted as the international norm, where the sovereignty of the country is respected.



Jewish Board of Deputies, Cause for Justice and Emma Sadler Social Media Law [1]

Comments

- All of the above entities support the Bill and propose stricter penalties for hate speech, revenge porn and sexual violence against children online
- **Cause for Justice** calls for a single classification system in the Country.

Response by FPB & DOC

- Government agrees with these proposals and moving forward we intend to strengthen the appropriate and progressive relationship with FPB, industry, non-governmental organisations, law-enforcement agencies, the citizens and all other relevant stakeholders challenges and opportunities; and in particular to ensure the effectiveness of industry and regulatory measures
- We will also encourage and support mutually respectful dialogues between all relevant and key stakeholders on policy issues related to classification systems.



Jewish Board of Deputies, Cause for Justice and Emma Sadlier Social Medial Law [2]

Comments

- **Jewish Board of Deputies** would like to see Internet service providers and administrators of social media being held accountable and forced to release the identity of perpetrators of hate speech online.
- **Emma Sadlier** assisted with alignment of the definition of sexual conduct and child pornography with the definition in the Sexual Offences Amendment Act

Response by FPB & DOC

- A provision has been included compelling internet service providers to furnish the FPB or SAPS with information of the person who disseminates prohibited content which includes hate speech.



Media Monitoring Africa & SOS Coalition [1]

Comments

- The voice of children was not represented during the development of the Bill and it is still not represented at the public hearing before parliament

Response by FPB & DOC

- We subsequently engaged the Centre for Justice and Crime Prevention, who together with UNICEF Unite for Children who produced the South African Kids Online: A glimpse into children's internet use and online activities on 21 September 2016.
- The Department of Social Development which is responsible for children policy in South Africa was also willing to come forward with us to share their views on these matters.
- As previously indicated, we will continue to work with children in the formulation on the online regulation policy.
- FPB submits that over the years it has worked with learners in schools, parents and care-givers throughout the country.
- In 2012, FPB travelled the country speaking to learners and parents on the impact of media content and classification as part of the 2012 review of the Classification Guidelines.



Media Monitoring Africa & SOS Coalition [2]

Comments

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Response by FPB & DOC

- These engagements also revealed some of the legislative gaps necessitating legislative review.
- In 2014 FPB commissioned UNISA to conduct a study on the impact on media content on children where a number of learners were selected as a sample population for the qualitative and quantitative research.
- The findings of the study were summarised earlier in this report.



Media Monitoring Africa & SOS Coalition [3]

Comments

- The provisions relating to revenge porn must be tightened to include prohibition against dissemination even in instances where there was consent during the creation of such photograph or film.

Response by FPB & DOC

- A provision has been inserted wherein it is an offence to disseminate such private content irrespective of whether the individual(s) depicted therein consented to the creation of the said film or photograph.
- The revised Bill makes provision for ISPs to provide the identity of the offenders.



Centre for Constitutional Rights [1]

Comments

- Bill must be capable of implementation and enforceable
- Pre-classification is unconstitutional
- The penalty Committee lacks sufficient degree of independence
- Open public participation process in vetting, nominating and appointing of members of Council, Appeal Tribunal and Penalty Committee is required

Response by FPB & DOC

- We believe the Bill is implementable once it has been updated accordingly.
- Please refer to our response regarding the constitutionality of the Bill.
- The concern stem from reference to the powers of the Minister to appoint the Penalty Committee. In terms of the revised Bill it is no longer the Minister but Council which is responsible for appointment of the Committee. Accordingly, the Committee is now referred to as the Enforcement Committee. Further, the Bill requires the Committee to act with impartiality and discharge its duties without fear, favour or prejudice.
- This is now addressed in the new section 33 of the Bill.



Centre for Constitutional Rights [3]

Comments

- Classification of all online content is impractical
- Drop the pre-publication classification requirement
- Require that classifiers obtain a court order before entering premises to classify digital content

Response by FPB & DOC

- The co-regulation system introduced in the Bill will enable commercial online distributors to self classify their online content using the FPB guidelines.
- FPB will only have jurisdiction over non-commercial distributors (ugc) in respect of complaints and take down notices, they will not be required to pay a distribution fee or submit content for classification.
- The Bill does not require classifiers to go to premises of distributors to classify digital content.



The internet service providers' association [1]

Comments

- Proposed s27A places onerous obligations on ISPs to monitor hate speech and child pornography.
- Policy require ISPs to preserve evidence, whilst on the other hand the Bill requires them to take down upon being informed by FPB

Response by FPB & DOC

- There is no such duty to monitor. Duty arises to remove content pursuant to a take down notice issued in terms of section 77 of the ECT Act which is now incorporated in the Bill .
- The comment is noted.
- The Bill seeks to align itself to the relevant provisions in the ECT Act to address this concern.



The internet service providers' association [2]

Comments

- Terminology "Child Sexual Abuse Material is preferred instead of "Child pornography"
- Take down notices must be accompanied by a court order

Response by FPB & DOC

- It is suggested that the term be retained in line with the Criminal Law Amendment Act as the principal legislation in respect of sexual offences.
- The procedure outlined in the Electronic Communications and Transactions Act has been incorporated and cross referenced in the Bill.



Additional amendments

- In order to that the Bill passes constitutional muster, the grounds of hate speech have been confined to only those as outlined in the Constitution.
- The Penalty Committee has been renamed as the Enforcement Committee and will be appointed and removed by the Council of the FPB on the grounds outlined in the Bill.
- The Bill makes provision for public participation in respect of any regulations or directives as may be issued by the Minister from time to time.
- The definitions of “digital film” and “digital game” have been deleted as the provisions relating to online distribution adequately address the objectives of the Bill in this regard.



Additional amendments [2]

- The definition of internet service provider has been substituted with the definition as contained in the Electronic Communications Act, as the primary legislation regulating ISPs.
- The term “internet access provider” has been inserted to accommodate internet cafes as they do not fall within the definition of internet service providers as defined in the Electronic Communications Act.



Thank you.

