

REPUBLIC OF SOUTH AFRICA

FILMS AND PUBLICATIONS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75), explanatory summary of
Bill published in Government Gazette No. 39331 of 28 October 2015)
(The English text is the official text of the Bill)*

(MINISTER OF COMMUNICATIONS)

[B 37—2015]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Films and Publications Act, 1996, so as to insert and amend certain definitions; to provide for the establishment of, the composition of, and appointment of, members of the Penalty Committee; to provide for the powers and duties of the Penalty Committee; to regulate online distribution of digital films and digital games; to extend the functions of the Film and Publication Board of monitoring compliance with the Films and Publications Act; to include online distributors in respect of the requirements to comply with the Films and Publications Act; to revise and further regulate the functions of compliance officers regarding the entering and inspection of premises and facilities in which the business of the sale, hire or exhibition of films or games is being conducted; to further regulate the classification of publications, films and games; to provide for independent industry classification bodies accreditation thereof by the Film and Publication Board; to provide for classification of publications, films and games by the independent industry classification bodies; to provide for foreign classification systems and approval thereof by the Film and Publication Board; to provide for the use of classification ratings issued by a foreign classification authority or body; to provide for the right of appeal against classifications issued by independent industry classification bodies; to provide for exemptions in respect of online distribution of films and games; to further provide for the obligations of internet service providers regarding curbing the use of their services in advocating racism and hate speech; to revise and strengthen penal provisions; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 65 of 1996, as amended by section 1 of Act 34 of 1999, section 1 of Act 18 of 2004 and section 1 of Act 3 of 2009

1. Section 1 of the Films and Publications Act, 1996 (Act No. 65 of 1996) (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of “**Appeal Tribunal**” of the following definition:

“ ‘**artistic**’ means predominantly aesthetic according to the reasonable person;”;

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- (b) by the substitution for the definition of “**certificate**” of the following definition:
 “**‘certificate’** means, in relation to a film, [means] the certificate referred to in section 18F, issued in respect of the classification of a film;”;
- (c) by the substitution in the definition of “**child pornography**” for the words preceding paragraph (a) of the following words:
 “**‘child pornography’** [includes any] means an explicit image, however created, or any explicit description of a person, real or simulated, [who is or] who is depicted, made to appear, look like, represented or described as being[,] under the age of 18 years—”;
- (d) by the substitution in the definition of “**child pornography**” for paragraph (c) of the following paragraph:
 “(c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation [, or in such a manner that it is capable of being used for the purposes of sexual exploitation];”;
- (e) by the insertion after the definition of “**Council**” of the following definitions:
 “**‘digital film’** means any sequence of visual images recorded in such a manner that by using such recording, such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition through the internet or any other electronic medium or device;
‘digital game’ means a computer game, video game, online apps or other interactive computer software for interactive game played, where the results achieved at various stages of the game are determined in response to the decisions, inputs and direct involvement of the game, accessed and played through the internet or any other electronic medium or device;”;
- (f) by the substitution for the definition of “**distribute**” of the following definition:
 “**‘distribute’**[,] in relation to a film, game or a publication, without derogating from the ordinary meaning of that word, includes—
 (a) to stream content through the internet, social media or other electronic mediums;
 (b) to sell, hire out or offer or keep for sale or hire; and[,]
 (c) for purposes of sections 24A and 24B, [includes] to hand or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereof by such a person;”;
- (g) by the substitution for the definition of “**distributor**” of the following definition:
 “**‘distributor’**[,] means, in relation to a film or game, [means] a person who conducts business in the selling, hiring out or exhibition of films including the streaming of content through the internet, social media and other electronic mediums;”;
- (h) by the substitution in the definition of “**domestic violence**” for the words preceding paragraph (a) of the following words:
 “**‘domestic violence’** means the explicit depictions or descriptions of—”;
- (i) by the insertion after the definition of “**game**” of the following definitions:
 “**‘hate speech’** includes any speech, gesture, conduct, writing, display or publication which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group;”;
- (j) by the insertion after the definition of “**identifiable group characteristic**” of the following definition:
 “**‘Independent Communications Authority of South Africa’** means the body established in terms of section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);”;
- (k) by the insertion after the definition of “**in public**” of the following definition:
 “**‘magazine’** includes an online publication of a magazine;”;

- (l) by the insertion after definition of “**newspaper**” of the following definitions:
 “**‘online distributor’** in relation to a digital film, digital game or publication, means a person who conducts business in the selling, hiring out or exhibition of films, games or publications online through the internet or any other electronic medium;
‘Penalty Committee’ means the body established in terms of section 3;”;
- (m) by the insertion after the definition of “**prescribed**” of the following definitions:
 “**‘Press Council of South Africa’** means a voluntary independent self-regulatory body established in terms of the Constitution of the Press Council of South Africa and which has adopted the Press Council Constitution, which includes the South African Press Code;
‘Press Ombudsman’ means the Ombudsman appointed in terms of the Constitution of the Press Council of South Africa;”;
- (n) by the substitution in the definition of “**publication**” for paragraph (i) of the following paragraph:
 “(i) any website, message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the **[Internet]** internet;”.
- (o) by the substitution for the definition of “**sexual conduct**” of the following definition:
 “**‘sexual conduct’** includes—
 [i](a) [male] genitals in a state of arousal or stimulation, real or simulated;”;
 [ii](b) undue display of genitals or of the anal region;
 (c) rape;
 [iii](d) masturbation;
 [iv](e) bestiality;
 [v](f) sexual intercourse[, **whether real or simulated**] with a person or a human corpse, including anal or oral sexual intercourse;
 [vi](g) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, anus, vagina, testicles or penis, with or without any object;
 [vii](h) the penetration of a vagina or anus with any object;
 [viii](i) oral genital contact; or
 [ix](j) oral anal contact;”;
- (p) by the insertion after the definition of “**sexual violence**” of the following definition:
 “**‘social media’** includes the various online technology tools and forms of electronic communication via the internet, such as websites for social networking and micro blogging through which users create online communities to share information, ideas, personal messages and other content;”.

Substitution of heading of Chapter 2 of Act 65 of 1996 45

2. The following heading is hereby substituted for the heading of Chapter 2 of the principal Act:

“Film and Publication Board [: Film and Publication Appeal Tribunal], Council, Appeal Tribunal and Penalty Committee”.

Amendment of section 2 of Act 65 of 1996, as substituted by section 2 of Act 34 of 1999 and section 2 of Act 3 of 2009 50

3. Section 2 of the principal Act is hereby amended—

- (a) by the deletion of the word “and” at the end of paragraph (b);
 (b) by the substitution for the full-stop at the end of paragraph (c) of a semi-colon;
 and
 (c) by the addition of the following paragraphs:
 “(d) criminalise the possession, production and distribution of child pornography; and
 (e) create offences for non-compliance with classification decisions of the Board.”.

Amendment of section 3 of Act 65 of 1996, as substituted by section 3 of Act 3 of 2009

4. Section 3 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading: 5
“Establishment of Film and Publication Board, Council [and], Appeal Tribunal and Penalty Committee”;
 - (b) by the deletion in subsection (1) of the word “and” at the end of paragraph (b);
 - (c) by the substitution in subsection (1) for the comma at the end of paragraph (c) of the expression “;and”;
 - (d) by the addition in subsection (1) of the following paragraph: 10
“(d) a Penalty Committee.”; and
 - (e) by the substitution for subsection (2) of the following subsection: 15
“(2) The Board [**and the**], Council, Appeal Tribunal and Penalty Committee shall be independent [**and function without any bias**] in the discharge of their functions and act in accordance with applicable law.”.

Amendment of section 6 of 65 of 1996, as substituted by section 3 Act 34 of 1999 and section 7 of Act 3 of 2009

5. Section 6 of the principal Act is amended—
- (a) by the substitution for the heading of the following heading: 20
“[Members] Appointment of members of Council [and], Appeal Tribunal and Penalty Committee [to be appointed] by Minister”;
 - (b) by the substitution for subsection (1) of the following subsection:
“(1) The members of the Council [**and**], Appeal Tribunal and Penalty Committee shall be appointed by the Minister by notice in the *Gazette* after consultation with Cabinet.”; 25
 - (c) by the substitution for subsection (2) of the following subsection:
“(2) The Minister may, whenever it is necessary to appoint members of the Council [**or**], Appeal Tribunal or Penalty Committee, appoint an advisory panel to advise him or her with regard to the persons who are to be appointed as such members, and shall appoint one of the members of the advisory panel as the chairperson thereof.”; and 30
 - (d) by the substitution in subsection (4)(a) for the words preceding subparagraph (i) of the following words:
“A member of the Council [**or**], Appeal Tribunal or Penalty Committee appointed in terms of subsection (1) shall—”. 35

Insertion of sections 6A and 6B in Act 65 of 1996

6. The following sections are hereby inserted in the principal Act after section 6:

“Composition of Penalty Committee

- 6A.** (1) The Penalty Committee shall consist of four members, including a chairperson, who must be— 40
- (a) a judge or retired judge of the High Court of South Africa;
 - (b) an advocate or attorney with at least 10 years of appropriate experience;
 - (c) a magistrate or retired magistrate with at least 10 years appropriate experience; or 45
 - (d) a lecturer of law or a retired lecturer of law of a South African University with at least ten years appropriate experience.
- (2) The four other members of the Penalty Committee shall have experience in or knowledge of any one or more of the following matters: 50
- (a) Law;
 - (b) law enforcement;
 - (c) regulatory matters;
 - (d) film, games, publications, arts, literature; or
 - (e) sentencing.

(3) A quorum for a session of the Penalty Committee shall be the chairperson plus two members and where the votes are equal, the chairperson shall have a deciding vote.

Powers and duties of Penalty Committee

- 6B.** (1) The Penalty Committee shall— 5
- (a) investigate all cases referred to it by the chief executive officer for adjudication in respect of non-compliance with any provision of the Act by a distributor, exhibitor or any other person to whom the Act applies, except persons to whom sections 24A, 24B, 24C and 27A(2), (3) and (4) apply; 10
 - (b) adjudicate all cases and make appropriate findings, after the chief executive officer or his or her representative and the respondent have been heard or granted a reasonable opportunity to be heard;
 - (c) hear evidence under oath or affirmation or evidence by affidavit and come to a finding when it is convinced on a consideration of all the facts before it that such a finding is justified; 15
 - (d) where appropriate—
 - (i) impose a fine of up to R150 000;
 - (ii) as prescribed, suspend a registration certificate; or
 - (iii) through the chief executive officer, refer a matter to the National Director of Public Prosecutions for prosecution and, in such a case, the Penalty Committee shall not make a finding; and 20
 - (e) where a fine is not paid, at the instance of the chief executive officer, apply to a competent court for the enforcement of such a fine as a civil debt to the Board. 25
- (2) The finding of a contravention by the Penalty Committee in terms of subsection (1) shall not be regarded as a conviction in respect of a criminal offence and no prosecution for that offence shall thereafter be competent.
- (3) An aggrieved person may appeal to the Appeal Tribunal against a finding of the Penalty Committee.”. 30

Amendment of section 7 of Act 65 of 1996, as amended by section 36 of Act 12 of 2004 and section 8 of Act 3 of 2009

7. Section 7 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading: 35
“Disqualifications with regard to membership of Council [or], Appeal Tribunal or Penalty Committee”;
 - (b) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 “A person shall not be qualified to be appointed as a member of the Council [or], Appeal Tribunal or Penalty Committee, or to be such a member, if he or she—”; and 40
 - (c) by the substitution for subsection (2) of the following subsection:
 “(2) Whenever circumstances in relation to a member of the Council [or], Appeal Tribunal or Penalty Committee so change that it would have disqualified him or her from being appointed as such a member, had they been in existence at the time of his or her appointment, the seat of the member shall become vacant, and the vacancy in such seat shall be filled in accordance with section 6.”. 45

Amendment of section 8 of Act 65 of 1996, as amended by section 9 of Act 3 of 2009 50

8. Section 8 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading:
“Period of office of members of Council [and], Appeal Tribunal and Penalty Committee”; and
 - (b) by the substitution for subsection (1) of the following subsection: 55
 “(1) Members of the Council [or], Appeal Tribunal and Penalty Committee shall be appointed for a period of five years.”.

Substitution of section 9 of Act 65 of 1996, as substituted by section 4 of Act 34 of 1999 and section 10 of Act 3 of 2009

9. The following section is hereby substituted for section 9 of the principal Act:

“Removal from office

9. (1) The Minister may remove a member of the Council [**or**], Appeal Tribunal or Penalty Committee from office on the grounds of incapacity, incompetence, misconduct or misrepresentation. 5

(2) A decision to remove a member of the Council [**or**], Appeal Tribunal or Penalty Committee from office shall be based on a finding of a tribunal appointed by the Minister: Provided that the member shall have a right to be heard. 10

(3) The Minister may suspend a member of the Council [**or**], Appeal Tribunal or Penalty Committee from office pending the finding of the tribunal referred to in subsection (2).

(4) A member of the Council [**or**], Appeal Tribunal or Penalty Committee shall vacate his or her office when any of the circumstances referred to in section 7 become applicable in respect of him or her, and the Minister issues him or her with a certificate to that effect.”. 15

Amendment of section 9A of Act 65 of 1996, as inserted by section 11 of Act 3 of 2009 20

10. Section 9A of the principal Act is hereby amended—

(a) by the deletion in subsection (2) of the word “and” at the end of paragraph (b);

(b) by the substitution in subsection (2) for paragraph (c) of the following paragraph:

“(c) determine an application made under section 18(1) for registration as a distributor or exhibitor of films[,] or games [**or publications.**]; and” 25

(c) by the addition in subsection (2) of the following paragraph:

“(d) take such step as may be necessary in regard to— 30

- (i) the accreditation of any foreign classification system in relation to the classification of digital films, digital games and publications; 35
- (ii) the conclusion of a compliance and online distribution agreement with an online distributor in relation to the online distribution in the Republic, of digital films, digital games and publications classified through the accredited foreign classification system; and
- (iii) the exemption of any online distributor from the classification of digital films, digital games and publications in terms of the Act.”. 40

Substitution of section 11 of Act 65 of 1996, as substituted by section 13 of Act 3 of 2009

11. The following section is hereby substituted for section 11 of the principal Act:

“Administrative support for Council [and**], Appeal Tribunal and Penalty Committee** 45

11. 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 and Penalty Committee shall be performed by the staff of the Board.”.

Substitution of section 12 of Act 65 of 1996, as substituted by section 14 of Act 3 of 2009

12. The following section is hereby substituted for section 12 of the principal Act:

“Remuneration

12. The members and staff of the Council, Appeal Tribunal, Penalty Committee, an advisory panel and any person appointed as an expert to assist or advise the Council, ~~[or] Appeal Tribunal or Penalty Committee~~, shall receive such remuneration, allowances and other benefits as may be determined by the Minister in consultation with the Minister of Finance.”. 5

Amendment of section 13 of Act 65 of 1996, as amended by section 15 of Act 3 of 2009 10

13. Section 13 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“ (1) The expenditure in connection with the performance of the functions, the exercise of the powers and the carrying out of the duties of the Board, Council, Appeal Tribunal, Penalty Committee and an advisory panel shall be defrayed from money appropriated by Parliament for ~~[the] that~~ purpose.”. 15

Substitution of section 14 of Act 65 of 1996, as amended by section 4 of Act 18 and substituted by section 16 of Act 3 of 2009

14. The following section is hereby substituted for section 14 of the principal Act: 20

“Annual report

14. (1) The Council shall, as soon as practicable after the end of each financial year, prepare a report on all the activities of the Board, Council ~~[and]~~, Appeal Tribunal and Penalty Committee during that financial year, and on the financial position of the Board, Council ~~[and]~~, Appeal Tribunal and Penalty Committee as at the end of that financial year. 25

(2) The report contemplated in subsection (1), together with the audited balance sheet and accounts pertaining to the funds of the Board, Council ~~[and]~~, Appeal Tribunal and Penalty Committee shall be submitted to the Minister for tabling in Parliament.”. 30

Substitution of section 15A of Act 65 of 1996, as inserted by section 18 of Act 3 of 2009

15. The following section is hereby substituted for section 15A of the principal Act:

“Functions and powers of compliance officers

15A. (1) A compliance officer may, for the purpose of achieving the objects of this Act ~~[and of]~~— 35

- (a) ~~[advising]~~ advise the distributors and exhibitors of films and games, of the requirements of this Act with regard to the distribution or exhibition of films and games; and
- (b) ~~[ensuring]~~ ensure that all films and games offered for sale or hire by a distributor ~~or an online distributor~~, have been classified and labelled in terms of this Act and that all such films and games display, in the prescribed manner, the classification reference number, the age restriction, consumer advice and such other conditions as may have been imposed on the distribution of such films and games by the Board, ~~enter any premises, with the consent of the person in charge of such premises, on or in which the business of the sale, hire or exhibition of films or games is being conducted]~~. 40 45

- (1A) For the purpose of subsection (1), the compliance officer may—
- (a) at all reasonable times, enter any premises, with the consent of the person in charge of such premises and with the assistance of a member of the South African Police Service, on or in which the business of the sale, hire or exhibition of films, publications or games is being conducted; 5
 - (b) at all reasonable times, with the consent of the person in charge of premises or facility, enter any premises or other facilities that are used to store films, games or publications being distributed or intended for distribution, in order to gain access, free of charge, to all the information, reports, documents and other material needed for the inspection of labelling and to access the premises of any internet service providers, to check compliance with the Act, subject to the limitation imposed by section 24(3)(g); 10
 - (c) in the prescribed form, issue a compliance notice and notice to remove from display unclassified films, games or publications; 15
 - (d) with the assistance of a member of the South African Police Services, seize any unclassified film, game or publication or any film, game or publication that does not comply with the requirements of the Act; 20
 - (e) direct that the film, game or publication contemplated in paragraph (d) be removed from display or offer for sale or hire until it complies with the requirements of this Act or until it complies with any decision of the Board with regard to its distribution; 25
 - (f) request the production of a certificate of registration as a distributor or exhibitor or film or games issued by the Board; 30
 - (g) where relevant, request the production of a licence to conduct the business of adult premises issued by a licensing authority contemplated in section 24; and
 - (h) examine or inspect any premises being used to conduct the business of adult premises for compliance with the conditions contemplated in section 24(2), with the consent of the person in charge of the premises. 35
- (2) Any entry and inspection of premises or facility made in terms of subsection (1A) must be conducted with strict regard for decency and order, and with regard to each person’s right to dignity, freedom, security and privacy. 35
- (3) A record shall be kept of any material seized in terms of subsection (1) indicating the purpose of seizure and the material seized: Provided that the person from whom the material is seized, if identifiable, is provided with a copy of such a record. 40
- (4) In order to give effect to the objects of the Act and fulfillment of the functions of the compliance officer provided for in this section, the Minister may in necessary circumstances and with the concurrence of the Minister of Police, deploy a member of the South African Police Service within the Board to carry out any compliance or monitoring duties.”. 40

Amendment of section 16 of Act 65 of 1996, as substituted by section 19 of Act 3 of 2009 45

16. Section 16 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) Any person may request, in the prescribed manner, that a publication, other than a *[bona fide]* newspaper or magazine that is published by a member of a body[,], that is recognized by the Press Ombudsman[,], and which subscribes[,], and adheres[,], to a code of conduct that must be enforced by that body, and, other than an advertisement that falls within the jurisdiction of the Advertising Standards Authority of South Africa, which **[is to be or]** is being distributed in the Republic, be classified in terms of this section.”; 50
- (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 - “Any person, except the publisher of a newspaper, magazine or advertisement contemplated in subsection (1), who, for distribution or 60

- exhibition in the Republic creates, produces, publishes or advertises any publication that—”;
- (c) by the deletion in subsection (2) of paragraph (a);
- (d) by the substitution in subsection (2) for paragraph (b) of the following paragraph: 5
- “(b) [**advocates**] amounts to propaganda for war;”;
- (e) by the substitution for subsection (3) of the following subsection:
- “(3) The Board shall refer any publication submitted to the Board in terms of subsection (1) or (2) to a classification committee for examination and classification of such publication: Provided that the classification committee must render a decision as soon as is possible so as not to unreasonably delay the publication that has been referred to it for classification.”;
- (f) by the substitution in subsection (4)(a) for subparagraph (ii) of the following subparagraph: 15
- “(ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is [**except with respect to child pornography,**] *a bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;”;
- (g) by the substitution in subsection (4) for paragraphs (b) and (c) of the following paragraphs, respectively: 25
- “(b) classify the publication as “XX” if it contains—
- (i) explicit violent sexual conduct [**which violates or shows disrespect for the right to human dignity of any person;**
- (ii) bestially, incest[,] or rape [**or 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, 35
- unless, judged within context, the publication is [**except with respect to child pornography,**] *a bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified [**“X18 or classified”**] with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials; 40
- (c) classify the publication as “X18” if it contains explicit sexual conduct, unless, judged within context, the publication is [**except with respect to child pornography,**] *a bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials; or” 50

Amendment of section 18 of Act 65 of 1996, as amended by section 7 of Act 18 of 2004 and substituted by section 21 of Act 3 of 2009

17. Section 18 of the principal Act is hereby amended—

- (a) by the substitution in subsection (3)(a) for the words following subparagraph (ii) of the following words: 55
- “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, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;”;
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- (b) by the substitution in subsection (3) for paragraphs (b) and (c) of the following paragraphs, respectively:
- “(b) classify the film or game as “XX” if it [depicts] contains—
- (i) explicit violent sexual conduct [**which violates or shows disrespect for the right to human dignity of any person**];
 - (ii) bestiality, incest[,] or 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;
 - (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 relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials; or”;
- (c) by the substitution for subsection (6) of the following subsection:
- “(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.”; and
- (d) by the addition of the following subsections:
- “(7) The exemption to the broadcasters contemplated in subsection (6) shall not apply to a broadcaster who streams content through the internet.
- (8) In order to give effect to the objects of the Act and fulfilment of the obligations provided for in this section, the Independent Communications Authority of South Africa may not issue or renew any broadcasting licence to a broadcaster who also streams content through the internet, unless such broadcaster is also registered with the Board as a distributor in terms of subsection (1).
- (9) For purposes of this section streaming content through the internet does not amount to broadcasting.”.

Repeal of sections 18A and 18B

18. Sections 18A and 18B of the principal Act are hereby repealed.

Insertion of sections 18C, 18D, 18E, 18F, 18G, 18H, 18I and 18J in Act 65 of 1996

19. The following sections are hereby inserted in the principal Act after section 18:

“Independent classification of digital films, digital games and certain publications

18C. (1) The Council may, on application by an independent industry classification body which has been established by some or all of the distributors registered in terms of section 18(1)(a), approve and accredit such classification body to conduct classifications of digital films, digital games and publications.

(2) An online distributor of digital films, digital games or publications that is a member of the classification body contemplated in subsection (1) shall not be subject to section 18(1)(b) provided that—

- (a) the classification body referred to in subsection (1) has been accredited by the Council to classify its own digital films and digital games; 5
- (b) the classification body applies the classification guidelines as determined by the Council in consultation with the Minister; 10
- (c) the decisions of the classification body comply with the requirements set out in section 10 and any other requirements as may be set by the Council from time to time and by the founding body of the classification body; 15
- (d) the registered distributors remain subject to classifications which were issued before such classification body was approved and may apply for re-classification by the Board only after two years of a classification decision of the Board; 20
- (e) the classification body informs the Board of all its “XX” and “X18” classifications of digital films, digital games and publications and any other classification of digital films, digital games and publications so that the Board may publish these classifications in the *Gazette*, after which such classifications are deemed to have been made by the Board; 25
- (f) if a digital film, digital game or publication is already classified by the Board, the classification body will not have jurisdiction to classify or re-classify the said digital film, digital game or publication; and 30
- (g) if some or all distributors of digital films, digital games and publications wish to set up a classification body, that body shall be subject to this section. 35

(3) The classification body shall upon demand by the Board make available all its classification decisions in relation to digital films and digital games, for auditing purposes. 40

(4) The accreditation of a classification body may, after due inquiry, be suspended by the Council for a maximum period of 12 months or indefinitely, if the classification body acts contrary to the provisions of this section, and in addition, an online distributor may also be subject to prosecution for an offence in terms of this Act. 45

(5) No digital film or digital game may be distributed in the Republic unless it has been classified in terms of section 18 or this section, and a clearly visible label indicating the age limit and the nature of content is displayed on or in connection with the film or game and appearing next to the logo of the Board. 50

Approval of foreign classification systems by Board

18D. (1) The Board may, on application by an online distributor wishing to distribute digital films, digital games or publications in the Republic using classification ratings issued by a foreign classification authority or body, approve the use of classification ratings issued by the foreign classification authority or body. 55

(2) The Board may approve the application contemplated in subsection (1), subject to such conditions as the Board may consider necessary in relation to the online distribution of digital films or digital games. 60

(3) The Board shall, in considering the application contemplated in subsection (1), take into account—

- (a) the accessibility by the Board of the distributor’s online service for compliance, monitoring and auditing purposes; 65
- (b) the alignment of the foreign ratings to the applicable ratings in terms of the Act and the Council’s classification guidelines; and 70
- (c) the payment of the prescribed fee.” 75

Complaints against digital content services distributed online

18E. (1) Any person may complain to the Board about unclassified, prohibited content, or potential prohibited content, in relation to services being offered online by any person, including online distributors.

(2) If, upon investigation, the Board establishes that there is merit in the complaint or that the prohibited content or content being hosted online has not been submitted for examination and classification, the Board may—

- (a) in the case of a hosting service, issue a take-down notice;
- (b) in the case of a live content service, issue a service cessation notice; and
- (c) in the case of a link service, issue a link-deletion notice.

(3) In the case of content hosted outside of the Republic that is found to contain child pornography, the Board shall refer the matter to the South African Police Service or to the hotline in the country concerned, for the attention of law enforcement officials in that country.

Prohibition against distribution of private sexual photographs and films

18F. (1) No person may expose, through any electronic medium including the internet and social networking sites, a private sexual photograph or film if the disclosure is made—

- (a) without the consent of an individual who appears in the photograph or film; and
- (b) with the intention of causing that individual distress.

(2) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(3) For the purposes of this section a photograph or film is “private” if it shows something that is not of a kind ordinarily seen in public.

(4) For the purposes of this section a photograph or film is “sexual” if such photograph or film—

- (a) shows all or part of an individual’s exposed genitals or pubic area;
- (b) shows something that a reasonable person would consider to be sexual because of its nature; or
- (c) regarding its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

Prohibition against filming and distribution of films and photographs depicting sexual assault and violence against children

18G. (1) No person may create, produce or distribute in any electronic medium including the internet and social networking sites any films or photographs depicting sexual assault and violence against children.

(2) For the purposes of this section “photograph or film” means a still or moving image in any form that—

- (a) consists of, or includes, one or more photographed or filmed images; and
- (b) appears to consist of, or includes, one or more photographed or filmed images.

(3) The reference in subsection (2)(b) to photographed or filmed images includes photographed or filmed images that have been altered in any way.

(4) For the purposes of this section “photographed or filmed image” means a still or moving image that—

- (a) was originally captured by photography or filming; or
- (b) is part of an image originally captured by photography or filming.

(5) For the purposes of this section “filming” means making a recording, on any medium, from which a moving image may be produced by any means.

(6) References to a photograph or film include—

- (a) a negative version of an image described in subsection (2), and

- (b) data stored by any means which is capable of conversion into an image described in subsection (2).

Prohibition against propaganda for war, incitement of violence and hate speech

18H. No person may distribute through any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech.

Display of classification decisions

18I. (1) Where a digital film, digital game or publication has been classified or exempted from classification in terms of this Act, or such digital film, digital game or publication has been classified by an industry classification body referred to in section 18C, the said digital film, digital game or publication must—

- (a) if it is a film or game approved for sale or hire, display a label in the prescribed form; and
 (b) if it is a digital film, digital game or publication approved for sale or hire online, must conspicuously display the Board’s classification decision and logo on the landing page of the website, the website catalogue and at the point of sale of the online distributor services.

(2) The format, including the size and design, as well as the manner of the display of certificates of classification on films, games and publications approved for distribution or exhibition, must be prescribed.

(3) No film or game may be distributed in the Republic, unless it has been classified in terms of section 18 or 18C and a clearly visible label indicating the age limit and the nature of content is displayed on or in connection with the film or game.

Re-classification

18J. (1) Any person may, after a period of two years from the date when a film, game or publication was first classified in terms of this Act, apply to the Board in the prescribed manner, for a less restrictive classification of that film, game or publication.

(2) Any member of the public who is aggrieved or offended by a classification decision in respect of a film, game or publication, may in a prescribed manner and upon payment of a prescribed fee, apply to the Board for re-classification of such film, game or publication.

(3) The Board shall, upon receipt of the application contemplated in subsections (2) and (3), inform the distributor in writing of the application for re-classification and request the applicant to make representations before a decision is made as to whether or not to reclassify the film, game or publication.”.

Substitution for the heading of Chapter 5 of Act 65 of 1996

20. The following heading is hereby substituted for the heading of Chapter 5 of the principal Act:

“**Right to [Appear,] appear and to [Appeal] appeal to Appeal Tribunal [and Supreme Court]**”.

Amendment of section 19 of Act 65 of 1996, as amended by section 5 of Act 34 of 1999 and substituted by section 23 of Act 3 of 2009

21. Section 19 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of the following words:

“**[The Minister or any] Any** person who has **[lodged a complaint with] made a request to the Board [that any] for a publication to be referred to a classification committee for classification in terms of section 16(1) or submitted a publication for**

classification in terms of section 16(2), or the person who has applied for the classification or the reclassification of a film, game or publication, or for a permit, exemption or licence, or who is the publisher of a publication which is the subject of an application for classification, or whose financial interest could be detrimentally affected by a decision of the Board on such application, or with regard to an exemption or permit, the withdrawal of which is being considered, or who appeals to the Appeal Tribunal against a decision with regard to such an application, shall have the right—”.

Amendment of section 20 of Act 65 of 1996, as amended by section 6 of Act 34 of 1999, section 8 of Act 18 of 2004 and section 24 of Act 3 of 2009

22. Section 20 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) [The Minister or any] Any person who has lodged a complaint with the Board that any publication be referred to a classification committee for a decision and classification in terms of section 16, and any person who applied for the classification of a film or game, or the publisher or distributor of a publication which formed the subject of any complaint or [application] a submission in terms of section 16, may, within a period of 30 days from the date on which he or she was notified of the decision of the Board, in the prescribed manner, appeal to the Appeal Tribunal.”; and

(b) by the addition of the following subsection:

“(6) Where a distributor of a film or game is a member of an industry classification body referred to in section 18C, such distributor shall not have the right to appeal to the Appeal Tribunal against a classification by that industry classification body unless the Board, based on a complaint in terms of section 18G, imposes a more onerous classification, in which case that distributor may appeal to the Appeal Tribunal against such a classification.”.

Amendment of section 24 of Act 65 of 1996, as amended by section 28 of Act 3 of 2009

23. Section 24 of the principal Act is hereby amended by the addition of the following subsection:

“(3) Any person who is registered as a film or game distributor in terms of section 18(1)(a) may, subject to an exemption being granted by the Board, distribute a film or game classified as “X18” online, subject to the following conditions:

- (a) The distributor shall ensure to the satisfaction of the Board that children under the age of 18 would not be able to access such a film or game on-line;
- (b) the distributor shall ensure that the classification and age restriction are clearly displayed on the screen of the user throughout the screening;
- (c) the user must confirm that he or she is 18 years or older prior to commencing viewing of the film or playing the game;
- (d) the distributor shall not distribute any promotion of the film or game to be accessed without it being paid for by way of a credit card or another child secure method agreed to by the Board and, for the purposes of this subsection, the promotion of the film shall be subject to the same conditions regarding distribution as the main feature of the film or game;
- (e) the distributor shall keep, solely for his or her private records, a register of all instances where access was granted to a user, whose name, address and verifiable age must be noted in the register kept for that purpose;
- (f) the register referred to in paragraph (e) must be kept for one year from the date when distribution took place;
- (g) the chief executive officer may approach a court *ex parte* for the production of the register referred to in paragraph (e) if he or she has reasonable cause to believe that the online distributor is supplying material to children under the age of 18;
- (h) if the film or game is exhibited online in a public place, that place must be a licensed premises in terms of subsection (1);

- (i) the Board may, after due inquiry, suspend an exemption for a maximum period of 12 months if any of the conditions specified in this subsection have not been met by the distributor;
- (j) a distributor who knowingly or negligently grants access to a film or game classified as “X18” to a child under the age of 18 shall be guilty of an offence as contemplated in section 24A(4); and
- (k) the inquiry instituted by the Board in terms of paragraph (i) must continue even if criminal proceedings have been instituted against the distributor.”

Substitution of section 24A of Act 65 of 1996, as inserted by section 29 of Act 3 of 2009

24. The following section is hereby substituted for section 24A of the principal Act:

“Prohibitions, offences and penalties on [distribution and exhibition] possession of films, games and publications

24A. (1) Any person who knowingly distributes or exhibits in public a film or game without first having been registered with the Board as a distributor or exhibitor of films or games shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding [six] eight months or to both a fine and such imprisonment.

(2) Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication referred to in section 16[(1)](2) **[of this Act]** which has, except with respect to broadcasters that are subject to regulation by the Independent Communication Authority of South Africa and except with regard to a newspaper, magazine or advertisement contemplated in section 16(1)—

(a) **[except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper contemplated in section 16(1),]** not been classified by the Board;

(b) been classified as a “refused classification”; or

(c) been classified as “XX” or would have been so classified had it been submitted for classification,

shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R500 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(3) Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the Board as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or a publication which has been classified “X18”, or would have been so classified had it been submitted for classification, shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R750 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(4) Any person who knowingly distributes or exhibits any film, game or publication—

(a) classified as “X18”; or

(b) which contains depictions, descriptions or scenes of explicit sexual conduct, **[unless such film, game or publication is a bona fide documentary or is of scientific, literary or artistic merit or is on a matter of public interest]** which would have justified an “X18” classification,

to a person under the age of 18 years, shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R750 000 or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(5) Any person who knowingly distributes a film, game or publication which has been classified by the Board without displaying, clearly and conspicuously and in the prescribed manner, the classification reference

number, the age restriction, consumer advice and any other condition imposed on the distribution of that film, game or publication, shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R50 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment. 5

(6) Any person who knowingly advertises a film or game in any medium without indicating, clearly and conspicuously so as to be plainly visible to the public, the age restriction, consumer advice and any other condition imposed on the film or game being advertised, shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R50 000 or to imprisonment for a period not exceeding [six] eight months or to both a fine and such imprisonment. 10

(7) Any person who knowingly and without the prior written approval of the Board exhibits in public during the same screening session, or distributes on the same cassette or disc of a film or game, a trailer advertising a film or a game with a more restrictive classification than the featured film or game, shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R100 000 or to imprisonment for a period not exceeding [six] eight months or to both a fine and such imprisonment.”. 15 20

Amendment of section 24B of Act 65 of 1996, as inserted by section 29 of Act 3 of 2009

25. Section 24B of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words following paragraph (d) of the following words: 25

“shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”;

(b) by the substitution in subsection (2) for the words following paragraph (b) of the following words: 30

“shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R50 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.”; and

(c) by the substitution for subsection (3) of the following subsection: 35

“(3) Any person who processes, facilitates or attempts to process or facilitate a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of, child pornography, shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R400 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”. 40

Amendment of section 24C of Act 65 of 1996, as inserted by section 29 of Act 3 of 2009

26. Section 24C of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“Any person who fails to comply with subsection (2) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R50 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.”. 45

Insertion of sections 24D, 24E, 24F and 24G in Act 65 of 1996

27. The following sections are hereby inserted in the principal Act after section 24C:

“Prohibition, offences and penalties for submission of false and misleading information to online submission system of Board 50

24D. Any person who furnishes the Board with false or misleading information on the Board’s online submission system with respect to registration online to—

- (a) classify a film or game; 55
(b) renew registration; or

(c) apply for the submission of a game for classification, shall be guilty of an offence and liable, upon conviction to a fine not exceeding R15 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.

Prohibitions, offences and penalties on distribution of private sexual photographs and films 5

24E. Any person who knowingly distributes private sexual photographs and films in any electronic medium including the internet and social networking sites, without prior consent of the individual in the said sexual photographs and films with the intention to cause the said individual distress, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment. 10

Prohibitions, offences and penalties on filming and distribution of films and photographs depicting sexual assault and violence against children 15

24F. Any person who knowingly creates, produces or in any way contributes to or assists in any film or photograph which contains depictions, descriptions or scenes of sexual assault and violence against children, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment. 20

Prohibitions, offences and penalties on propaganda for war, incitement of violence and hate speech

24G. Any person who knowingly distributes, in any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.”. 25

Amendment of section 27A of Act 65 of 1996, as amended by section 31 of Act 3 of 2009 30

28. Section 27A of the principal Act is hereby amended—

(a) by the substitution for subsection 2 of the following subsection:

“(2) If an **[Internet]** internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography or advocating racism and hate speech, such **[Internet]** internet service provider shall—”; and 35

(b) by the substitution in subsection (4) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) fails to comply with subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; or 40

(b) fails to comply with subsection (2) or (3) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R750 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”. 45

Repeal of section 30 of Act 65 of 1996

29. Section 30 of the principal Act is hereby repealed.

Amendment of section 31 of Act 65 of 1996, as amended by section 35 of Act 3 of 2009

30. Section 31 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 5
 “(b) make regulations relating to the procedure with regard to the nomination of persons as candidates for the Council **[or]**, Appeal Tribunal and Penalty Committee, further relevant experience in terms of section 6 (4)(a) **[of this Act]** and the experience of persons who may be appointed as members of the advisory panel referred to in section 6**[(1)](2)**”; and 10
- (b) by the substitution in subsection (3) for paragraph (b) of the following paragraph:
 “(b) As soon as possible after the lapse of every consecutive period of 12 months after the publication of the guidelines referred to in paragraph (a), the **[Board]** Council, in consultation with the Minister, shall publish the **[said]** guidelines in the *Gazette* and, where necessary, amend them.”. 15

Substitution of expression in Act 65 of 1996

31. The principal Act is hereby amended by the substitution for the expression “Internet” of the expression “internet” wherever it occurs. 20

Amendment of arrangement of sections in Act 65 of 1996

32. The arrangement of sections of the principal Act is hereby amended—

- (a) by the substitution for the heading of Chapter 2 of the following heading: 25
“Film and Publication Board [: Film and Publication Appeal Tribunal], Council, Appeal Tribunal and Penalty Committee”;
- (b) by the substitution for item 3 of the following item:
“3. Establishment of Film and Publication Board, Council **[and], Appeal Tribunal and Penalty Committee”**;
- (c) by the substitution for item 6 of the following item: 30
“6. **[Members] Appointment of members of Council **[and]**, Appeal Tribunal and Penalty Committee **[to be appointed]** by Minister”**;
- (d) by the insertion after item 6 of the following items: 35
“6A. Composition of Penalty Committee
6B. Powers and duties of Penalty Committee”;
- (e) by the substitution for items 7 and 8 of the following items:
“7. Disqualifications with regard to membership of Council **[or], Appeal Tribunal or Penalty Committee**
8. Period of office of members of Council **[and], Appeal Tribunal and Penalty Committee”**; 40
- (f) by the substitution for item 11 of the following item:
“11. Administrative support for Council **[and], Appeal Tribunal and Penalty Committee”**;
- (g) by the substitution for item 15A of the following item: 45
“15A. Functions and powers of compliance officers ”;
- (h) by the deletion of items 18A and 18B;
- (i) by the insertion after item 18 of the following items:
“18C. Independent classification of digital films, digital games and certain publications 50
18D. Approval of foreign classification systems by Board
18E. Complaints against content services distributed online
18F. Prohibition against distribution of private sexual photographs and films
18G. Prohibition against filming and distribution of films and photographs depicting sexual assault and violence against children 55

- | | | |
|-----|--|----------|
| | 18H. Prohibition against propaganda for war, incitement of violence and hate speech | |
| | 18I. Display of classification decisions | |
| | 18J. <u>Re-classification</u> ”; | |
| (j) | by the substitution for the heading of Chapter 5 of the following heading: “Right to [Appear,] <u>appear</u> and to [Appeal] <u>appeal</u> to Appeal Tribunal [and Supreme Court]”; | 5 |
| (k) | by the substitution for item 24A of the following items:
“ 24A. Prohibitions, offences and penalties on [distribution and exhibition] <u>possession</u> of films, games and publications”; and | 10 |
| (l) | by the insertion after item 24C of the following items:
“ 24D. Prohibition, offences and penalties for submission of false and misleading information to online submission system of Board
24E. Prohibitions, offences and penalties on distribution of private sexual photographs and films
24F. Prohibitions, offences and penalties on filming and distribution of films and photographs depicting sexual assault and violence against children
24G. Prohibitions, offences and penalties on propaganda for war, <u>incitement of violence and hate speech</u> ”. | 15
20 |

Short title and commencement

33. This Act is called the Films and Publications Amendment Act, 2015, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE FILMS AND PUBLICATIONS AMENDMENT BILL, 2015

1. BACKGROUND

- 1.1 The Film and Publication Board (“Board”) is a statutory body established in terms of the Films and Publications Act, 1996 (Act No. 65 of 1996) (“Act”), whose main objective is to regulate the creation, possession, production and distribution of films, games and certain publications with a view to protect children from disturbing and harmful content and to provide information on content to adults to enable them to make informed viewing, gaming and reading choices for both themselves and for children in their care. The Act further makes the use of children in, and the exposure of children to, pornography, punishable.
- 1.2 Until recently, the Board has predominantly focused its classification and monitoring attention and activities on physical platforms and less on digital platforms and social media. The increasing demands for online content and technological advances require the Board to extend its focus to the regulation of content on these diverse platforms. In this regard, it is necessary for the applicable legislation, policies and procedures to reflect these demands and technological advances.
- 1.3 In view of the aforementioned, it has thus become necessary to evaluate whether the Act and other pieces of legislation are still aligned with the constitutional values of the Republic of South Africa, aimed at protecting children against disturbing and harmful content, and whether the Act makes adequate provisions for technological advances, especially on online, social and media platforms. Research commissioned by the Board (conducted by PYGMA Consulting and Bridge IT) highlights gaps in the current Act and further recommends urgent amendments thereto.

2. OBJECTS

The Films and Publications Amendment Bill, 2015 (“Bill”) seeks to amend the Act so as to—

- align the definition of child pornography to the definition in terms of the Constitutional Court judgment in the case of *De Reuck v Director of Public Prosecutions 2004 (1) SA 406 CC*;
- give effect to the constitutional amendments of section 16(2)(a) as instructed by the Constitutional Court in *Prime Media v Minister of Home Affairs and another (CCT 113/11)*;
- decriminalise the online distribution of adult content on all platforms including digital platforms;
- provide for the establishment of a co-regulation system that will allow for accreditation by the Board of independent classification bodies to classify their own digital films, games and publications; and
- provide for an effective penalty regime in support of, amongst others, the co-regulation approach.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1

Section 1 of the Bill inserts and amends certain definitions as outlined below.

- the definition of “artistic” has been revised to mean predominantly aesthetic accordingly to the reasonable person;

- the definition of “child pornography” has been revised by the deletion of the words “includes” and “or in such a manner that it is capable of being used for the purposes of sexual exploitation”;
- the definition of “distribute” has been revised with the addition of the words “game” and provision for streaming content;
- the definitions of “digital film” and “digital game” have been added;
- the definition of “hate speech” has been added;
- the definition of “magazine” has been added to include an online magazine;
- the definition of “online distributor” has been added to include distributors of films, games or publications online through the internet or other electronic medium;
- the definition of “penalty committee” has been added;
- the definition of “press council” has been added;
- the definition of “press ombudsman” has been added;
- the definition of “publication” has been revised to include “website”;
- the definition of “sexual conduct” has been revised by the deletion of “male” with reference to genitals, and the addition of “anus, vagina, testicles and penis”; and
- the definition of “social media” has been added.

3.2 **Clause 2**

Clause 2 amends the heading of Chapter 2 to align it with the contents of the Chapter.

3.3 **Clause 3**

The objects of the Act have been revised by amending section 2 of the Act by—

- the addition of section 2(*d*) which criminalises the possession, production and distribution of child pornography in order to extensively provide for the protection of children against child pornography; and
- the insertion of paragraph (*e*) in order to create offences for non-compliance with classification decisions of the Board.

3.4 **Clause 4**

3.4.1 The legal entities created and established in terms of the Act have been amended to include a Penalty Committee.

3.4.2 The provisions relating to these legal entities have been amended to provide that they must act in accordance with the applicable law to ensure that they shall act independently and without bias.

3.5 **Clause 5**

Clause 5 of the Bill amends section 6 of the Act and has been revised with the inclusion of the Penalty Committee regarding its membership requirements and appointment thereof by the Minister.

3.6 **Clause 6**

Clause 6 of the Bill inserts section 6A in the Act to provide for the composition of the Penalty Committee and also inserts section 6B to provide for the powers and duties of the Penalty Committee.

3.7 **Clauses 7, 8 & 9**

Clauses 7, 8 & 9 of the Bill amend sections 7, 8 & 9 of the principal Act and has been revised with the inclusion of reference to the Penalty Committee.

3.8 **Clause 10**

Clause 10 of the Bill amends section 9A of the Act by making provision for accreditation of foreign classification systems, the conclusion of foreign distribution agreements and the exemption of online distributors from the pre-distribution classification requirements in relation to films, games and publications.

3.9 **Clauses 11, 12, 13 and 14**

Clauses 11, 12, 13 and 14 amend sections 11, 12, 13 and 14 of the Act, which deal with administrative support, remuneration, expenditure and the annual report respectively, have been amended with the inclusion of reference to the Penalty Committee.

3.10 **Clause 15**

Clause 15 of the Bill amends section 15A of the Act in order to clarify the manner in which compliance officers must act upon entering premises and further makes provision for the deployment of police officers.

3.11 **Clause 16**

3.11.1 Clause 16 amends section 16 of the Act. Magazines and any other advertisement falling within the jurisdiction of the Advertising Standards Authority of South Africa are exempted from the classification. Section 16(2)(b) is being amended to include magazines and advertisements, in accordance with the judgement in *Prime Media South Africa and another v Minister of Home Affairs*.

3.11.2 Section 16(4)(b) has been revised to refer only to “explicit violent sexual conduct, bestiality, incest, or rape, explicit infliction of domestic violence, explicit visual presentations of extreme violence”. This section no longer includes child pornography or material classified as “X18”.

3.12 **Clause 17**

3.12.1 Clause 17 amends section 18 of the Act. Section 18(3)(b) has been revised to remedy the vagueness thereof which resulted in the provision being deemed to be unconstitutional, as a result it only makes reference to “explicit violent sexual conduct” in order to distinguish the “XX” category from the “X18” voluntary sex category. This subsection further omits child pornography from the exemption.

3.12.2 Section 18(b) is being amended to exclude broadcasters which are subject to regulatory authority of the Independent Communications Authority of South Africa (“ICASA”). Streaming content through the internet is not regarded as broadcasting and to this end subsection (7) has been inserted.

3.13 **Clause 18**

Sections 18A and 18B of the Act which deal with the display of classification decisions and re-classification are being deleted.

3.14 **Clause 19**

- 3.14.1 Clause 19 of the Bill inserts sections 18C, 18D, 18E, 18F, 18G, 18H, 18I and 18J in the Bill.
- 3.14.2 Section 18C makes provision for independent classification of digital films, games and publications by online distributors who are registered with the Board.
- 3.14.3 In terms of the new section 18D, the Board may recognise a foreign classification system upon application by an online distributor, subject to alignment of the foreign ratings to the Board classification guidelines and payment of the prescribed fee.
- 3.14.4 In terms of the new section 18E members of the public may lodge complaints to the Board regarding unclassified, prohibited content, or potential prohibited content distributed online. The Board may issue a take-down notice, a service-cessation notice or a link deletion notice. In the event that such content contains child pornography the Board must refer the matter to the South African Police Service or hotline in the country concerned, where the content is hosted outside the geographical borders of South Africa.
- 3.14.5 In terms of the new section 18F it is prohibited for a person to distribute private sexual photographs and films in any electronic medium including the internet and social networking sites without the consent of an individual who appears in the photograph or film with the intention of causing that individual distress. The only circumstance under which such disclosure may be made is where it is necessary for the purposes of preventing, detecting or investigating crime.
- 3.14.6 In terms of the new section 18G it is prohibited for a person to film and distribute in any electronic medium including the internet and social networking sites any films or photographs depicting sexual assault and violence against children.
- 3.14.7 In terms of the new section 18H it is prohibited for a person to distribute in any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech.
- 3.14.8 In terms of the new section 18I only content which has been classified may be distributed in South Africa and such content must clearly display the classification decision.
- 3.14.9 In terms of the new section 18J members of the public may apply for a less restrictive classification for content after a period of 2 years from when the content was initially classified. Furthermore, any aggrieved member of the public may apply for the reclassification of content and the distributor will be afforded the opportunity to make representations in response thereof.

3.15 **Clause 20**

Clause 20 of the Bill amends the heading of Chapter 5.

3.16 Clause 21

Clause 21 of the Bill amends section 19 of the Act. The Minister is being removed as a potential complainant and appellant in light of the fact that it is the same Minister who appoints the Appeal Tribunal and the Council, which in turn appoints the chief executive officer (“CEO”) in consultation with the Minister. Consequently, any person may lodge a complaint with the Board regarding a classification decision.

3.17 Clause 22

3.17.1 Clause 22 of the Bill amends section 20 of the Act. The Minister is being removed as a potential complainant for the same reasons as outlined in clause 21, consequently, any person may lodge a complaint with the Board regarding a classification decision.

3.17.2 A distributor who is a member of an industry classification body cannot appeal decisions of that body to the Appeal Tribunal.

3.17.3 In the event that the Board imposes a more onerous classification upon application for reclassification, as envisaged in the new section 18G, then the distributor may appeal to the Appeal Tribunal.

3.18 Clause 23

Clause 23 of the Bill amends section 24 of the Act by adding a new subsection (3). In terms of clause 23 “X18” material may be distributed online by a registered distributor provided that the Board is satisfied that the distributor has mechanisms in place to ensure that the material will not be distributed to children under the age of 18 and the classification details are clearly displayed throughout the screening thereof. Furthermore, the distributor must keep a register of all users and the register must be made available to the CEO where he has reason to believe that the distributor is in contravention of the conditions set out above. The exemption afforded to the distributor may be suspended for a maximum period of 12 months where the distributor is found in contravention of this section.

3.19 Clause 24

3.19.1 Clause 19 amends section 24A of the Act. In terms of the proposed amendment to section 24A(1) of the Act the maximum fines have been specified and the maximum period of imprisonment has been extended to eight months. Section 24A(2) exempts broadcasters which are subject to the regulatory authority of ICASA and newspapers, magazines or advertisements which are subject to the regulatory authority of the Press Ombudsman.

3.19.2 Subsection (3) now makes provision for material which would have been classified “X18” had it been submitted for classification and further provides for the monetary amount of the fine.

3.19.3 Subsection (4) omits the exemptions for science, literary or artistic merit and aligns it with the provisions of section 18 with the addition of the words “which would have justified an “X18” classification”.

3.20 Clause 25

Clause 25 amends section 24B of the Act and the maximum fines and the maximum period of imprisonment in respect of offences relating to possession of films, games and publications have been specified.

3.21 **Clause 26**

Clause 26 amends section 24C of the Act and the maximum amount for the fine in respect of the offence relating to child-oriented services.

3.22 **Clause 27**

3.22.1 Clause 27 of the Bill inserts new sections 24D, 24E, 24F and 24G in the Act. The new section 24D provides that any person who provides the Board with false information on its online system will be guilty of an offence and liable upon conviction to a maximum fine of R15 000 or imprisonment for a maximum period of six months, or both.

3.22.2 The new section 24E provides that any person who knowingly distributes private sexual photographs and films without the prior consent of the individual appearing in the said films and photographs with the intention to cause such individual distress shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or both.

3.22.3 The new section 24F provides that any person who knowingly creates, produces or distributes in any electronic medium, including the internet and social networking sites, any film or photograph which contains depictions or scenes of sexual assault and violence against children, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or both.

3.22.4 The new section 24G provides that any person who knowingly distributes any film or game which advocates propaganda for war, incites violence, or advocates hate speech shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both.

3.23 **Clause 28**

Clause 28 of the Bill amends section 27A of the Act and provides that an internet service provider must reveal the details of a person using such service to advocate racism and hate speech.

3.24 **Clause 29**

Clause 29 repeals section 30, which provides for punishment.

3.25 **Clause 30**

Clause 30 of the Bill amends section 31 of the Act. The proposed amendment to section 31(3)(b) removes the reference to the Board and replaces it with reference to the Council which shall be responsible to publish the classification guidelines in consultation with the Minister.

3.26 **Clauses 31, 32 and 33**

3.26.1 **Clause 31** substitutes the expression “Internet” for “internet”.

3.26.2 **Clause 32** provides for the amendment of the arrangement of section to the Act.

3.26.3 **Clause 33** provides for the short title and commencement.

4. DEPARTMENTS/ BODIES/ PERSONS CONSULTED

The following departments/bodies were consulted:

- Department of Trade and Industry;
- Department of Basic Education;
- ICASA;
- Film and Publication Board;
- South African Broadcasting Corporation;
- Department of Home Affairs;
- Distributors of films, games and certain publications;
- Doctors for Life;
- Nu Metro;
- Ster-Kinekor;
- Internet service providers' association;
- Wireless application service providers' association; and
- SAPS.

5. FINANCIAL IMPLICATIONS FOR STATE

The budgeted amount in support of the legislative process is R2 million during the 2014/2015 financial year.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes procedure for the classification of Bills, therefore a Bill must be correctly classified so that it does not become inconsistent with the Constitution.
- 6.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.
- 6.4 Therefore the issue to be determined is whether the proposed amendments to the Act, as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The Bill seeks to amend the Act to address shortcomings identified in the implementation of the Act by regulating further, all matters relating to the

classification of publications, films and games in the Republic. The Bill seeks to establish a new Penalty Committee and also provides for the composition of, and appointment of, the members of the Penalty Committee and the powers and duties of the Penalty Committee. The main duty of the Penalty Committee will be to investigate all cases referred to it by the chief executive officer of the Board in respect of non-compliance with any provision of the Act by a distributor, exhibitor and any other person to whom the Act applies. The Penalty Committee will adjudicate all the cases referred to it and make appropriate findings.

- 6.6 The Bill seeks to regulate online distribution of digital films and digital games. The functions of the Board are being extended to ensure compliance by online distributors in respect of requirements for online distribution of publications, digital films and digital games. The Bill revises and regulates further, the functions of compliance officers regarding the entering and inspection of premises and facilities in which the business of the sale, hire or exhibition of films or games is being conducted, in order to ensure that all films and games offered for sale or hire by a distributor, including through online distribution, have been classified and labelled in terms of the Act.
- 6.7 The Bill provides for independent industry classification bodies which must be accredited by the Board regarding the classification of publications, digital films and digital games by these bodies. The Bill allows foreign classification systems and approval thereof by the Board. A foreign classification authority or body may issue classification ratings which may be used by online distributors wishing to distribute digital films and digital games online in the Republic, subject to approval by the Board. The Bill extends the right to appeal to include decisions relating to classifications issued by independent industry classification bodies. It further provides for exemptions in respect of online distribution of films and games classified as “X18” in terms of the Act, if such person is the holder of a licence to conduct the business of adult premises.
- 6.8 The Bill also seeks to curb the use of internet services in advocating racism and hate speech and also seeks to revise and strengthen the existing penal provisions that relate to the prohibitions, offences and penalties in respect of the distribution, exhibition and possession of films, games and publications. The Bill seeks to make the applicable fines and periods of imprisonment for violations of the Act, more severe.
- 6.9 The proposed amendments reflected have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.10 In our view the subject matter of the proposed amendments does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
- 6.11 We are therefore of the opinion that since this Bill does not deal with any of the matters listed in Schedule 4 of the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.12 We are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.