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29 April 2015

Attention: Tholoana Ncheke
The Film and Publication Board
ECO Glade 2, 420 Witch Hazel Avenue
Centurion, 1609

To whom it may concern:

RE: Right2Know Campaign's written submission to the Film & Publication Board on the Draft Online Regulation Policy

1. Introduction

1.1 The Film and Publication Board (FPB) has invited written submissions on the proposed Draft Online Regulation Policy (Notice No. 182, *Government Gazette* Vol. No. 38531 of 2015).

1.2 The Right2Know Campaign (R2K), launched in August 2010, is a coalition of organisations and activists across South Africa seeking a country and a world where we all have the right to know – that is to be free to access and to share information.

1.3 R2K believes that a free and open internet is crucial to the full realisation of our constitutionally enshrined right to freedom of expression, which includes, but is not limited to, the freedom to impart or receive information or ideas, freedom of the press, freedom of artistic creativity, academic freedom, and freedom of scientific research.

1.4 The internet revolution has the potential to democratise knowledge in unprecedented ways. In South Africa, where we are witnessing the blossoming of the internet on a variety of ever improving platforms, the rapid development of internet technology and increasing internet access offer great potential for fostering a more informed public, in tune with global conversations in an increasingly interconnected world.

1.5 R2K notes with alarm recent events and developments around the world, and at home in South Africa, which do not bode well for internet freedom. These include: the overreach of state security services and revelations of outrageous and unjustifiably widespread state and corporate surveillance; the harassment and jailing of online activists, journalists and others for publishing content that some, particularly those in positions of power, find uncomfortable; and, most relevant

in this case, censorship of content, often under the guise of security or 'moral' reasons. These deeply troubling signs are affront to our civil liberties and democracy, underscoring the need for the public to remain vigilant in defending internet rights and push back against reactionary legislation and policies that enable greater state and corporate control over the internet.

1.6 R2K is of the view that the Draft Online Regulation Policy is ill-defined in crucial areas and would confer powers on the FPB that are unacceptably broad and that would, in effect, give the FPB the ability to police the internet in a way that is at odds with the values upheld by the constitution. The FPB does not have the right to legislate and to give itself the sort of sweeping powers it envisages in its policy document. We further believe that the policy is out of touch with the internet age and would severely curtail one of the most important values of the internet – the immediacy with which information can be imparted and received. The policy is anti-democratic in nature and should be scrapped.

1.7 R2K welcomes the opportunity to engage with the FPB on the Draft Online Regulation Policy, although we also wish to express our disappointment at the lack of publicity so far around the FPB's public hearings concerning the draft policy.

2. Protecting children and freedom of expression

2.1 The FPB claims that the new Draft Online Regulation Policy – formulated in the context of increasing media convergence and the proliferation of internet-enabled devices – is motivated by the desire to protect children from 'harmful' online content, to criminalise and prevent sexual predation and child pornography, and to prevent the 'abuse' of social media by those advocating racist ideologies that 'undermine the government's agenda on social cohesion'.

2.2 There can be no justifiable, moral argument for the state to tolerate child pornography and R2K fully supports the right for society's most vulnerable, namely its children, to a safe environment with reasonable measures to safeguard against the exploitation of children. R2K concurs that there is a need for children to be protected from distressing material and from premature exposure to explicit adult content. Further, we recognise that the production, possession and dissemination of child pornography are very real threats to society, are explicitly illegal, and must be dealt with as serious crimes.

2.3 R2K maintains that there are sufficient legal measures in place to deal with the threat of child pornography which, it is worth reiterating, *is outlawed*. We believe that efforts to curb child pornography (or for that matter, racism, hate speech, incitement to violence etc.) must be reasonable and proportionate and must be weighed against individual rights and liberties. In particular, such efforts cannot unduly compromise the right to freedom of expression as the Draft Online Regulation Policy inevitably would if it were to ever be implemented.

2.4 It is clear that the Draft Online Regulation Policy, in its quest to combat child pornography and protect children from adult content, is heavy handed and offends the right to freedom of expression and the public's right to access information. The draft policy is both impracticable, in that it is an ineffective means of achieving the desired ends, and it is unconstitutional, because the blanket nature of the draft policy is at odds with the requirement that any limitation on the freedom of expression must be narrowly defined and used in a highly circumscribed manner.

3. Vagueness in terminology and misuse of legal categories

3.1 To begin with, R2K finds serious fault with the FPB's vague use of terminology and the excessively broad nature of the policy.

3.2 As an important example, the term 'publisher' defines all those who fall within the ambit of the new policy. This applies to any individual who distributes or exhibits online any film, game or certain publication in the Republic of South Africa. Save for a throwaway line where the draft policy states that the obligation to classify content would *generally* not apply to persons uploading online content on a non-commercial basis, there are no adequate guarantees that this would be the case. Indeed, the statement is contradicted by a section in the policy where it is stated that: "This Online Regulation Policy applies to any person who distributes or exhibits online any film, game, or certain publication in the Republic of South Africa." The FPB, in terms of the draft policy, would thus apply to every online publisher in the country, from major news and information websites to bloggers and users of social media platforms.

3.3 While the intent of combating child pornography is noble, the means must justify the ends and must not lead to the criminalisation of legitimate and legal depictions of sex and forms of sexual expression, for the purposes of, inter alia, education, art and science, and including legal pornography. The broad definition of child pornography has in the past been interpreted by the FPB in excessively broad terms, such that legitimate depictions of sex have been restricted and even banned. We refer to the well known case of the film *Of Good Report*, which was made illegal because of a scene played by two fully clothed adult actors, where one was portrayed as being under 18 years of age. The film dealt in a serious manner with a pressing social issue – that of school teachers having relationships with their pupils. In censoring the film, the FPB ignored an important constitutional court ruling that in determining a film as pornographic due consideration must be made to context and artistic merit, and that for a film or publication to be deemed pornographic the primary intent must be to cause arousal (in other words, the predominant element of the film or publication must be erotic as opposed to aesthetic). It should be kept in mind that sexual expression is implicitly protected by the Constitution.

3.4 The effect of the vague definitions contained in the policy – and here it is worth recalling the FPB's previous misuse of legal definitions – would be to give the FPB sweeping powers that extend well beyond its mandate, affording the FPB an unacceptably high level of control over individuals' daily lives, much of which, in this day and age, are spent online. The definitions used by the draft policy are so vague in their nature that the policy could effectively apply to anyone publishing any content online, whether or not that content includes the representation of sex. The far-reaching and all-encompassing nature of the draft regulations is therefore not acceptable.

4. Censorship, prior restraint and infringement of press freedom, freedom of speech and free expression

4.1 R2K opposes the restrictions that the Draft Online Regulation Policy would impose on freedom of expression, including the freedom of the press, as well as the freedom of ordinary persons to publish information, opinions and ideas online. We are of the view that the classificatory regime, relying as it

does on pre-publication classification and given its broad nature, is tantamount to pre-publication censorship.

4.2 We refer to a landmark constitutional court ruling presided over by Justice Skweyiya in 2012 and concerning the Film and Publications Act of 1996 and its subsequent amendments. The court struck down large sections of the Act as unconstitutional. Of particular concern was the issue of prior restraint of publication. The court endorsed a statement by Lord Scarman which read as follows: "[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice." Following on from that assertion the court ruled that to restrain content prior to publication in any sort of systematic way would contradict the spirit of the constitution, especially with regards to freedom of expression: "The free flow of constitutionally protected expression is the rule and administrative prior classification should be the exception." This is in line with the highest democratic standards in international jurisprudence, in accordance with which any limitations on freedom of speech are treated with great circumspection.

4.3 We would urge the FPB to revisit the constitutional court's landmark decision concerning the Film and Publications Act. It appears that the FPB, in its Draft Online Regulation Policy, has not heeded the message of the court as the policy makes prior classification the rule, and not the exception. Where the publication of certain content carries the risk of grave injustice, a court interdict may be sought, but only granted in exceptional circumstances. Otherwise, publishers should be allowed to "publish and be damned." In other words, publishers should face the consequences of their decisions and face potential punishment if what they choose to publish is illegal. The answer to the risk of harmful content being published cannot be a blanket restriction on free action that will affect all legitimate and legal publication.

4.4 R2K cannot accept the limitations on press freedom that the Draft Online Regulation Policy would entail. Time is of the essence in the news industry and the internet has been a boon for media outlets in terms of the circulation of content – more news reaches more people more quickly, offering publics around the world an unprecedented range of angles and opinions. It may be illustrative in this case to highlight a hypothetical scenario of the challenges that the policy would impose for online news distributors. Assume a news website has a breaking content of considerable public interest where prompt digital distribution is important. As the draft regulations currently stand, the said content would first need to be classified by the publisher on behalf of the FPB, proceeding through various checks determined by the strict set of guidelines issued solely by the board, or the content would first have to be scrutinised by classifiers sent to the distributor's premises should the FPB determine it expedient to do so, or the content would need to be sent to the board for classification. Each of these possibilities would take time, thus reducing the news value of the content. Moreover, in the second and third cases, the board may decide that the content is not fit for publication. This entire process sidelines editorial discretion and the ability to make quick expert decisions in the public interest, in favour of a cumbersome administrative process that that would drastically impede the free flow of information.

4.5 Furthermore, the bureaucratic and administrative costs incurred for distributors, especially smaller outlets, will prove prohibitive. Firstly, distributors would need to pay the unspecified costs for registration with the board. Secondly, as the policy envisions an ostensibly co-regulatory system, each distributor would have to rely on full-time classifiers or classifiers employed on a task-basis, the labour costs of which would be considerable.

4.6 R2K is of the view that the idea of a co-regulatory regime in the case of the FPB's draft policy is a misnomer because far too much regulatory power would be vested in the FPB, which would hold the power to determine classification guidelines with which distributors would simply have to comply. In addition, the FPB is attempting to give itself sweeping powers of enforcement, perhaps most alarmingly highlighted by a clause stating that: "Where it is convenient and practical to do so, the Board may dispatch classifiers to the distributors' premises for the purposes of classifying digital content. In such an event the classification shall be deemed to be the classification process of the Board, and the distributors shall ensure that the work of classifiers takes place unhindered and without interference." The FPB would be indemnified from any loss or damage caused by its classifiers. In addition, the FPB would reserve the right to revoke a distributor's licence to classify, thereby "[directing] that all media belonging to the distributor be submitted to the Board or classification by the Board." The political implications of this are worrying and such provisions are reminiscent of authoritarian, apartheid era practices. The FPB does not have the authority to conduct such interventions and, in attempting to implement them, is overstepping its mandate.

4.7 R2K is also concerned that the FPB's draft policy would allow the FPB to censor material after publication. The FPB, in terms of the draft policy, could order that content be taken down from an online platform if that content is deemed to have contravened classification guidelines. Anyone who publishes content that the FPB considers harmful or inappropriately classified could be subjected to arbitrary punitive measures and closer monitoring by the FPB. These measures are excessive and contradict basic rights including freedom of expression.

5. Moralising tone of the FPB

5.1 R2K notes with alarm the moralistic tone of the Draft Online Regulation Policy, which evokes the language used by apartheid era censors. As noted in an opinion by Justice Van Der Westhuizen in the Skweyiya ruling referred to above, apartheid era censorship laws relied on ambiguous criteria such as 'harmful to public morals' and 'obscene'. Similarly, the draft policy is written in vague moralistic language, referring to 'social cohesion' and the 'community's moral standards'. We believe that the excessive nature of the draft policy feeds into moral panic, in particular concerning sexually explicit content online, and it is a fundamentally irrational, crusading response to the issues at hand.

5.2 R2K is also concerned by the influence of a right-wing Christian group, the Family Planning Institute, which has in the past enjoyed close ties with the FPB. In 2010, the FPB and FPI jointly organised a seminar on child pornography. The FPI is an openly homophobic organisation that espouses reactionary views regarding to sexual expression. It has no place in any sort of working relationship with a public body such as the FPB.

5.3 Apartheid's censors were informed by a conservative Nationalist-Calvanist ideology that had an obsession with sex and its regulation. The FPB risks taking the South African public down that road again, compromising our constitutionally enshrined rights in the process. Tellingly, a recent General Household Survey found that less than one-half per cent of households were primarily concerned about possible exposure to harmful content on the Web. It is not for the FPB to be policing legitimate and legal sexual conduct.

6. Concluding remarks

6.1 While combating child pornography is a worthy cause, we must always keep in mind whether the means justify the ends. In the case of the Draft Online Regulation Policy, the answer is an unequivocal *NO!* The intrusions into our daily lives and infringement on freedom of expression and press freedom that the policy would allow are totally unjustifiable and will not stand in court. The FPB has overstepped its mandate and it attempting to play judge, jury and executioner, and should the policy ever see light of day, it would have a suffocating effect on internet freedom.

6.2 In its current form the policy is totally unworkable and betrays a complete lack of understanding of how the internet works. It is unclear just how the FPB thinks it could even begin to enforce its policy, with millions of users ('publishers') in South Africa uploading and posting an incalculable volume of content every day. In order to sufficiently implement the policy, the FPB would require an army of classifiers at its disposal and an impossibly sophisticated means of oversight. The effect of the policy would be to restrict the legitimate use of the internet while having little effect on child pornography, because paedophiles use sophisticated software to access what is referred to as the "deep web," which contains content that is not indexed by ordinary search engines.

6.3 The policy offers us insight into the minds of our administrators, bureaucrats and politicians, and worryingly, the signs to not bode well for freedom of online expression. We are concerned about political and corporate interference in state institutions, clampdowns on freedom of expression, the overreach of the security sector. The policy would be yet another tool in the hands of an increasingly unaccountable and paranoid state to police the public. We believe that the FPB needs to take a step back and reappraise its role in post-apartheid South Africa. The FPB remains stuck in the past and its draft policy is totally backwards looking.

6.3 There is little, if anything, that can be salvaged from the policy as its rests on a fundamentally flawed approach to the regulation of publishable content. We therefore call for the policy to be withdrawn immediately.

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