

ANNEXURE C

THE FILMS AND PUBLICATIONS AMENDMENT BILL, 2015

1. BACKGROUND

- 1.1** The Film and Publication Board (**FPB**) is a statutory body established in terms of the Films and Publications Act 65 of 1996 (**Act**), as amended, 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 to children in and the exposure of children to pornography punishable.
- 1.2** The Films and Publications Amendment Bill, 2015 (Bill) has been brought about as a result of need for a comprehensive and fundamental transformation for online content regulation in the country and for the first time, industry, civil society and the FPB will join hands and share the costs and responsibility for digital content classification and compliance monitoring to ensure that children are protected from exposure to disturbing and harmful content. For all intents and purposes, content includes films, games, publications and self generated content uploaded or posted on social media platforms.
- 1.3** Prior to the development of the Bill, the FPB consulted extensively with industry, civil society, Child Rights Organizations and key stakeholders. What came out of these engagements and consultations was that, in the context of ever greater

convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the need for a comprehensive review of classification laws and regulations became apparent.

- 1.4** In keeping with these findings the FPB in 2013 amended its regulations to the Act which became operational in February 2013. The review of the regulations to the Act was predicated on the realisation that although the Act provides for platform neutrality in its application, both the regulations to the Act were ambivalent in relation to the process for classification of digital content.
- 1.5** Since March 2012 there has been a dialogue/discussions between the FPB and major distributors who requested the FPB to suggest a remedy/solution which would enable them to distribute digital content in the country without risking contravening the Act. For example, one of the six major distributors currently distributing digital content in the country indicated to the FPB that as at the end of April 2012, it had sold 100 million ipads, in its apps stores in 155 countries worldwide, of these only three including South Africa did not have gaming apps. The distributor further indicated that as at the end of March 2012 it had developed in excess of 700 000 apps, of which more than 100 000 of them are gaming apps. Furthermore, 435 million store accounts have been opened, indicating the level of take – up by consumers of its services. On average, the distributor indicated that one consumer downloaded 100 apps and that 35 billion apps have been downloaded since launch of the service.

- 1.6** Industry trends in South Africa show an increase in the use of portable devices for gaming and social networking. It is predicted that over the next few years 78% of all internet traffic will be video traffic; this is further exasperated by the continuous increase of distribution of various kinds of digital media. The 2016 Nielsen survey on video-on-demand (VoD) included a sample of South African online respondents. The aggregate findings reveal that 63% of those who responded watch VoD. While there is no data on VoD reach across South Africa, the growth in the number of vendors testifies that the South African market is ripe for the pickings. Against this, it is further projected that South Africans will be spending more on digital in-home video entertainment and will continue to increase their spending on internet content and mobile internet.
- 1.7** While these are positive developments and will be economically beneficial for the country, the downside to this is that there is also a proliferation of illegal content in and the abuse of social media platforms which are at times used by sexual predators to lure their child victims and people who advocate racist ideologies and therefore use these platforms to undermine the government's agenda on social cohesion. This was further confirmed during the FPB public awareness and education campaigns wherein parents, learners and society at large raised concerns about the rise of self generated content, most of which involved school learners engaging in sexual activities and uploading images or video footages thereof on Facebook, Twitter, You-Tube or distributing same amongst their peers using mobile phones and similar devices.
- 1.8** The key concern for parents and learners was that whilst there is a need for adults to be free to make their own informed media choices and for children to

be protected from material which may cause harm, there continues to be a community expectation that certain media content, including digital content, be accompanied by classification information based on decisions which reflect the community's moral standards.

1.9 There have been several reports in the print media about the spate of hate speech and racist comments posted on public platforms such as Twitter and Facebook. Examples of such cases as reported in the media are the following:

(a) In February 2015 Sunday Times published an article about a case which came before the Human Rights Commission in which an individual posted racist comments on his Facebook page wherein he wrote "when I see a white man, I see someone who has robbed me of the privilege I was supposed to have." Thereafter he invited his friends on Facebook to join him at a "Big Black Braai" to celebrate the death of 42 people with white sounding names who died when the bus they travelled with plunged into the Westdene Dam. In the same article it was also reported that "in 2014 cases related to freedom of speech increased from 3% to 22% of more than the 10 000 cases dealt with by the Human Rights Commission. Furthermore, social media platforms such as Facebook and Twitter contributed to this increase and appear to have shifted the discourse of free speech. These cases are often complex, containing elements of racism, poverty, ignorance and misguided hatred."

(b) In October 2014, the Financial Mail published an article about one of the Pretoria's top school being in a state of panic after naked pictures of at least 20 teenage boys were posted on Twitter in the country's biggest sexting scandal. The posting which was from a fake Twitter account depicted the boys in compromising sexual positions. It was further reported that despite the account and a Gmail address which was used to receive the photos being shut down within hours of the pictures being uploaded, school principals, parents and pupils involved are now worried about where the pictures will end up. The postings also sparked outrage on social media. In January 2015 a video was uploaded on social media showing a popular pastor from KZN walking around naked in his home. The video also went viral and was accessible to persons of all ages.

(c) In September 2014 a pastor from one of the popular churches in Pretoria made headlines when a video clip was uploaded on You-Tube showing him ordering members of his congregation, some of whom were minors, to graze like cattle and drink petrol to prove that humans can eat anything provided by God. Upon classification, it was found by the classification committee of the FPB that although the themes of the video aforementioned are centered on religion, faith, scripture, miracles and beliefs, the video contained some instances of harmful imitative acts and techniques of a moderate nature. The footage of human consumption of petrol which is shown in the video clip may be harmful to young children under the age of 13 as their moral development is not complete. The video clip also appears to use religion to encourage or promote harmful behavior which is in contravention of Section 18(3) (b)(ii) of the Act.

(d) Recently, in November 2016 a revenge porn image, which violated the personal integrity and right to privacy of a person purportedly to be the Chairperson the MK Veterans Association, in a compromising position was published online and subsequently appeared on social media platforms.

1.10 Although the other cases mentioned were not referred for classification by the FPB, it goes without saying that some of these videos, Twitter and Facebook posts, especially the ones which have elements of racism, contain hate speech and exposing the genitals of young boys can cause irreparable harm to developing minds. Furthermore, hate speech, racism and propaganda for war are prohibited and not protected by freedom of expression as provided for in section 16 of the Constitution.

PROBLEMS WITH THE CURRENT FRAMEWORK

1.11 A strong underlying theme of many of the submissions to the FPB regarding the framework in its current form, particularly from industry players, was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content which is now available to South Africans. The Act lacks clarity in relation to the classification process for digital content and online media.

1.12 Most online distributors and members of civil society drew attention to aspects of the classification and content regulation framework in that it is failing to meet intended goals, and that it creates confusion for media content industries and the wider community. More specifically, the main problem identified was the

piecemeal regulatory responses to changes in technologies, markets and consumer behaviour which have the potential to create uncertainty for both consumers and industry. These may raise questions about where responsibilities lie for driving change.

1.13 In two separate judgments the Constitutional Court (Print Media SA, De Reuck cases) pronounced on provisions of the Act and held that they would have to be revised in order to be compatible with the constitution. This has necessitated a review of the specific provisions of the Act.

1.14 Against this background and in order to give effect to section 16 and 18 of the Act, it became imperative for the FPB to review the Act in its current form.

2 OBJECTS

The Bill seeks to amend the Act so as to:

- 2.1** align the definition of child pornography to the definition in terms of the Constitutional Court judgment in the case of *De Reuck v DPP* 2004 (1) SA 406 CC;
- 2.2** align the definition of sexual conduct to the definition in terms of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007;
- 2.3** give effect to the constitutional amendments of section 16(2)(a) as instructed by the Constitutional Court in *PMSA v Minister of Home Affairs and Another* (CCT 113/11);
- 2.4** decriminalize the online distribution of adult content on all platforms including digital platforms;

- 2.5 provide for the establishment of a co-regulation system that will allow for accreditation by the FPB of independent classification bodies to classify their own digital films, games and publications; and
- 2.6 provide for an effective penalty regime in support of amongst others the co-regulation approach.

3 PUBLIC COMMENTS ON BILL

- 3.1 In line with the principle of participatory democracy the Bill was published for public comments and hearings were held where various members of the industry made oral presentations on various provisions of the Bill.
- 3.2 The main issues pertained to the broadness of the definitions which rendered some provisions ambiguous. The constitutionality of the Bill was also raised as a point of concern particularly with respect to the practice of pre-distribution classification and the encroachment by the FPB on the jurisdiction of ICASA. The exemption currently afforded to broadcasters was raised with reference to incorporation of streaming in the Bill. To this end, broadcasters submitted that the exemption should extend to broadcast content which is streamed online.
- 3.3 It was further proposed that the Bill be aligned to existing legislation to the extent possible to ensure that there is legal certainty in the market. The Electronic Communications Act, and the Sexual Offences and Related Matters Act were specifically cited.

- 3.4** These comments and inputs were submitted to FPB's external legal counsel to review and advise thereon with the objective of revising the Bill accordingly. A further legal opinion was sought to advise specifically on the constitutionality of the Bill in its entirety. Once the revised Bill was finalized, the state law advisor was consulted together with parliament's legal advisor to ensure that all the objections and concerns raised were adequately addressed.
- 3.5** On 11 October, the revised Bill was presented to stakeholders and they were afforded a further opportunity to make inputs on the revised provisions. While the revised Bill was noted to be an improvement, concerns continued to be raised to which the DOC together with the FPB responded.
- 3.6** The Act currently provides that 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 subject to any classification or condition made by the FPB in relation to that film or game. The broadcasting sector therefore sought assurance that the exemption currently afforded to them will apply equally to broadcast content that it streamed online or made available through catch-up services.
- 3.7** The powers of the compliance monitors were still considered to be too broad and open to abuse. Furthermore, warrants must be conducted only after a court order has been obtained. In response, the FPB explained that due process would be followed by the FPB at all times when executing its duties.

3.8 The liability of online distributors in respect of distribution of prohibited content was raised, and whether there was any consideration for where such content is distributed for news reporting or educational purposes.

4 SUBMISSIONS TO BE CONCEDED BY DOC

4.1 ICASA

The initial version of the Bill was said to unduly encroach on the regulatory authority of ICASA and this rendered the Bill unconstitutional. The FPB and DOC have since revised the Bill to remedy the defect by providing exemption to broadcasters as indicated above.

4.2 Definition of streaming for broadcast content

The effect of the previous version of the Bill was that it removed the exemption afforded to broadcasters where they streamed broadcast content online. Upon revision, the Bill extended the current exemption to broadcast content which is streamed online. To this end, a definition of “streaming” was proposed, considered and accepted.

5 FUNDAMENTAL ASPECT TO BE RETAINED IN THE BILL

5.1 Deletion of sec 16 of the Act –

This section was redrafted by the Constitutional Court to ensure that the prohibition outlined in section 16(2) of the Constitution is duly weighed against the right outlined in section 16(1). The FPB through the application of the classification guidelines and regulation of content seeks to ensure that the creative industry thrives without the risk of prosecution for violation of the Constitution.

5.2 Pre-classification of online games

The mandate of the FPB is to protect children on harmful content. The only way in which the FPB can do so is to review the content prior to it being made available to the public and allocate the appropriate age rating.

5.3 Prohibition against prohibited content

In addition to the paragraph above, the FPB like any other entity is bound by the principles and values of the Constitution which include human dignity. There FPB therefore needs to ensure that these principles find expression in its legislation.

5.4 Prohibition against revenge porn

The mandate of the FPB includes making the exposure of children to pornography punishable, which this provision seeks to achieve. In addition thereto, the Bill seeks to uphold to right to dignity and privacy as entrenched in the Constitution.

5.5 Acceptance of multiple classification systems by online distributors

The classification guidelines reflect South Africa's norms and standards in order to protect children and adequately inform consumers. It is imperative that the classification guidelines be relevant to the society in which they are applied and reviewed continuously as values are not stagnant.

5.6 Payment of classification fees for online film, games and publications

Much as the FPB is rendering a public service, there is a cost associated thereto. The industry must bear some of the costs in protecting society at large.

5.7 Regulation of Video on Demand Services(Show Max) and payment of the prescribed fee

The industry requested that a distinction be made between commercial and non-commercial online distributors. Further to this distinction, it responsibility for submit content for classification and pay the prescribed fee should be applicable to online distributors.

5.8 The role of ISPs in combating hate speech and child pornography online

While it is recognize that ISPs cannot actively monitor the data traffic that passes through their network and services, there remains a duty for them to assist in removing such content where there is knowledge of such content or where they are notified of the presence thereof. This approach has also been adopted by other forums such as the European Commission where IT companies and intermediaries pledged their support combat the proliferation of online hate speech.

6. Analysis for proposed amendments

Old Section	New section	Mischief	Proposed remedy	Comments by industry	DOC/FPB response
<p>1.Definitions</p> <p>The Act currently does not have a definition for ‘artistic’</p>	Section 1 “artistic”	Absence of definition of “artistic” in sections 16(4)(b)(c) and 18(3)(b)(c) caused uncertainty when having to determine artistic merit of content.	Constitutional Court in <i>De Reuck v DPP</i> 2004(1) SA 406(CC) paragraph [34] proposed the definition of “artistic” to mean predominantly aesthetic according to the reasonable person.	There were no comments on this section.	This definition has subsequently been deleted, and the classification guidelines together with the Act will be used to determine whether content is permissible.
<p>1.Definitions</p> <p>Child pornography includes any image, however created, or any description of a person, real or simulated, who is, or</p>	<p>Same section</p> <p>Section 1</p> <p>“child pornography”</p>	In paragraph 19 of <i>De Reuck Case</i> the Constitutional Court in defining the term “child pornography” stated that “... in fact the legislative intention is suggested by contrast between the	<p>Repeal the words “includes”.</p> <p>The definition is comprehensive enough to ensure that no abuse will be left unpunished or lead to children being abused.</p>	The proposal from the public was to substitute the term child pornography with ‘child sexual abuse	It is suggested that the current term be retained as it is in line with the principal Act

<p>who is depicted, made to appear, look like, represented or described as being under the age of 18 years— (i) engaged in sexual conduct; (ii) participating in, or assisting another person to participate in, sexual conduct; or (iii) 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;</p>		<p>definition of ‘child pornography’ and some other definitions in section of the Act provides that a terms ‘includes’ certain things “without derogating from the ordinary meaning of that word”. The Constitutional Court also indicated that “although the legislature could have avoided ambiguity by stating that child pornography “means” only the images listed, the use of “includes” in the definition is consistent with an intention that the list should refine, and thus be coloured by, the primary meaning of child pornography (para 19 of the judgment)</p> <p>The Constitutional Court in <i>De Reuck</i> further added the word “explicit” and explained that “includes” does</p>		<p>material’ in line with international standards.</p>	<p>dealing with sexual offences (Criminal Law Amendment Act) and will be defined by cross reference with the definition contained in the Sexual Offences and Related Matters Act.</p>
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		<p>not include anything else than what is in definition.</p> <p>Definition of “child pornography” includes the following words: “or in such a manner that it is capable of being used for the purposes of sexual exploitation” which leads to speculative interpretation that could, e.g. place bona fide family photos in jeopardy.</p> <p>To ensure that there is certainty as there are other legislation defining child pornography, namely the Sexual Offences and Related Matters Act, the Films and Publications Act and a Constitutional Court decision pronouncing thereon.</p>			
Section 1	Section 1	While the previous Bill proposed to include	There must be a definition inserted of a commercial	As this was suggested by	The FPB and DOC had no

	<p>This is a new definition “commercial online distributor”</p>	<p>provisions in respect of online content, as this category is very broad, there should be a distinction based on whether it is distributed by a commercial or non-commercial distributor. Furthermore, there should be clarity on what the regulatory requirements are in respect of each.</p>	<p>online distributor which is defined as a distributor in relation to films, games and publications which are distributed for commercial purposes using the internet.</p>	<p>the industry itself they had no further to the new insertion.</p>	<p>further comments.</p>
<p>Section 1 Definitions</p>	<p>Section 1 “distribute”</p>	<p>The current definition does not adequately provide for online distribution of films and games.</p> <p>Therefore “distribute” should, for the sake of clarity, include streaming content through the internet and must include “game”</p>	<p>Amendments accordingly proposed by adding “game’ and “streaming”.</p>	<p>Broadcasters who stream content should be afforded an exemption in respect of content which is broadcast online.</p>	<p>The exemption outlined in section 18(6) was revised to include reference to online streaming.</p> <p>The definition of streaming was revised in line with inputs received.</p>

					To ensure consistency with the newly inserted definition of commercial online distributor the words "including using the internet" have been included to encompass the various modes of distribution.
Section 1 Definitions	Section 1 This is a new definition. "digital film" "digital game"	Definitions of "digital film" and "digital game" necessary in light of introduction of digital distribution in Act.	Include the definitions of digital film and digital game respectively.	These definitions are a duplication of the definitions of "film" and "game" respectively and do not	The definitions of "digital game" and "digital film" have been subsequently deleted as it is futile to distinguish between

				serve any real purpose.	content based on the mode of distribution thereof. The definitions of film and games were extended to include those distributed through the internet.
Section 1	Section 1 "distributor"	This definition necessitated revision as a consequence of the insertion of a 'commercial online distributor'	The definition to now read a person who conducts the business of distributing films, games or publications and includes a commercial online distributor.	The industry accepted this revision as it is consistent with the other inputs from industry and ensures consistent provisions in relation to both the content and	The DOC and FPB have no further responses.

				distribution thereof.	
Section 1	Section 1 This is a new definition “harmful”	In the previous version of the Bill, the determining factor when assessing whether or not content is revenge porn (which has been introduced as a new offence in the Bill) is whether such disclosure was done with the intention to cause distress. During the engagement, the FPB and DOC were advised to rather use harm and not distress as harm has a legally accepted definition.	The definition of harm is derived as a corresponding meaning of harmful which means causing emotional, psychological or moral distress to a person, whether it be through a film, game or publication through any on-or offline medium, including through the internet.	As this change came about as a result of feedback from the industry, there were no further inputs.	The FPB and DOC have no further comments.
Section 1	Section 1 This is a new definition Hate speech	One of the objects of the Bill is to address the rise of hate speech particularly online.	The Bill proposed a comprehensive definition of hate speech. However, during the public consultations, various		

			submissions pointed out that the proposed definition does not accord with the grounds of hate speech as provided for in the constitution. To ensure that the provision is compatible with the constitution, the definition was revised to incorporate the grounds outlined in the Constitution by cross-reference.		
Section 1	Section 1 This is a new definition “internet”	The Bill identifies the internet as a mode of distribution in respect of content regulated by the FPB.	The updated Bill proposes to define the internet as it is defined in the Electronic Communications and Transactions Act 25 of 2002 which will ensure legal certainty and consistency.	The industry agrees with this new insertion	The DOC and FPB have no further responses in respect thereof.
Section 1 Definitions	Section 1 This is a new definition. Online magazine	Inclusion of “magazine” by Constitutional Court in section 16(1) necessitates inclusion of online publication of a magazine, as is the case with “newspaper”, where in 2009 “online newspaper” was already	“magazine” includes an online publication of a magazine	Not all publications published online constitute a ‘magazine’ or ‘newspaper’. Therefore, reference must be	Reference to ‘magazine’ and ‘newspaper’ have been deleted and replaced with publication.

		included by the Legislature.		made to 'publication' which must be comprehensively defined.	
Section 1 Definitions	Section 1 This is a new definition "online distributor"	Absence of application of Act in regard to "online distributors" of digital films, games and publications leads to inability of Board to regulate this field where circumvention of Act could readily take place.	Inclusion of definition of "online distributor" in section 1	A distinction must be made between commercial and non-commercial distributors.	The FPB has since incorporated the comments and outlined the regulatory approach in respect of each category. Consequently, this definition has since been deleted.
Section 1	Section 1 This is a new definition "non-commercial online distributor"	During the public engagement process, the industry suggested that there be a distinction between commercial and non-	The revised Bill proposes a new definition of non-commercial online distributors defined as any person who distributes content using the internet, or enable content to	The industry had no further comments on this revision.	The FPB and DOC have no further comments.

		commercial online distributors as this will clarify the requirements in respect of each category.	be distributed by a user of online services for personal and private services.		
Section 1.Definitions	Same section This is a new definition “Penalty Committee”	Currently non-compliance is dealt with in through the criminal justice process. This approach does not assist in addressing non-compliance timely. Therefore, the committee will address matters of non-compliance on behalf of the FPB and shall act independently thereof. To regulate the imposition of fines by a Penalty Committee appointed by the Minister and for that purpose include a reference in section 1 to Penalty Committee, constituted in section 3, for easy reference. The motivation for	Inclusion of reference to Penalty Committee in definition section 1.	The Minister will be vested with too much power if she also appoints the Enforcement Committee.	The Committee has now been renamed the Enforcement Committee in line with their objectives of dealing non-compliance. The Council of the FPB will now appoint and remove the committee. The committee is now referred to as the Enforcement Committee.

		establishment of the Committee will be dealt with when it is referred to in this document under section 3.			
Section 1 Definitions	Section 1 This is a new definition “Press Council”	The Act does not contain a definition of Press Council. The Act exempts newspapers and magazines which fall under its jurisdiction in Act in sections 16(1) and (2), a definition is needed for the sake of clarity.	Inclusion of definition of Press Council in section 1	There were no further comments	The FPB and DOC have no further responses.
Section 1 Definitions	Section 1 “Press Ombudsman”	Since section 16(1) refers to recognition by the Press Ombudsman, this position needs to be defined. Section 16(2) also refers to Press Ombudsman.	Inclusion of definition of Press Ombudsman in section 1	This reference must be replaced with “Press Council” as the Press Ombudsman has been replaced by the Press Council.	The inputs have been incorporated.

Section 1	Section 1 This is a new definition “prohibited content”	Hate speech is not the only content that does not enjoy constitutional protection under section 16 thereof. In recognition of this, the Bill proposes the inclusion of prohibited content, to ensure consistency with section 16(2) of the constitution which outlines content which is expressly excluded from the right to freedom of expression.	Subsequent to the public engagement, a new definition of prohibited content has been inserted.	There were sentiments that the grounds of prohibited content be further elaborated beyond what is currently provided for.	Whilst the DOC and FPB noted the concerns of the public, they further cautioned that the Bill must not be seen to go beyond the provisions of the Constitution.
Section 1	Section 1 This is a new section “self classification”	The FPB does not have the capacity to comprehensively and independently regulate all online content through classification.	It is proposed that provision be made to allow the industry to classify their content themselves using the FPB’s classification guidelines. To this end the definition of ‘self-classification’ is now inserted.	The industry did not have any further inputs as this new insertion provided the clarity sought.	The FPB and DOC have no further responses.
Section 1	Section 1 “sexual conduct”	1.Unjustified exclusion of female genitals from	“male” excluded	There were no comments	The FPB and DOC have no

	<p>which was defined as including (i) male genitals in a state of arousal or stimulation; (ii) the undue display of genitals or of the anal region; (iii) masturbation; (iv) bestiality; (v) sexual intercourse, whether real or simulated, including anal sexual intercourse; (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object; (vii) the penetration of a vagina or anus with any object; (viii) oral genital contact; or (ix) oral anal contact;⁷</p>	<p>definition of “sexual conduct”</p> <p>2. “sexual conduct” in 1(iv): “anus, vagina, testicles and penis” should be included in definition of sexual contact for the sake of clarity</p>	So added	on this section.	further comments.
Section 1	<p>Section 1</p> <p>“publication” which is currently defined as (i) any newspaper, book, periodical, pamphlet, poster or other printed matter; (ii) any writing or typescript which has in</p>	<p>“Website” needs to be added as for the FPB also regulates publications to the extent that they are not exempted</p>	So added	There were no comments.	This definition is inserted in the Bill

	<p>any manner been duplicated; (iii) any drawing, picture, illustration or painting; (iv) any print, photograph, engraving or lithograph; (v) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction; (vi) computer software which is not a film; (vii) the cover or packaging of a film; and (viii) any figure, carving, statue or model; (ix) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet;</p>				
Section 1	<p>This is a new section “prohibited content”</p>	<p>Hate speech and incitement for violence are prohibited in the Constitution. Therefore, legislation also needs to include such a provision.</p>	<p>Insert the definition of prohibited content which is confined to the provisions of section 16(2) of the Constitution.</p>	<p>The grounds for hate speech must be elaborated in line with the hate speech bill and</p>	<p>To create legal certainty the grounds have been confined to the grounds outlined in</p>

		The parameters of hate speech need to be clearly defined	<p>“Prohibited content” is defined as content which amounts to propaganda for war, incitement of imminent violence, advocacy of hatred that it based on an identifiable group characteristic, and that constitutes incitement to cause harm.</p> <p>DOC has also shared the Bill with Department of Justice & Constitutional Development who are currently developing Hate Crime and Hate Speech Bill to ensure the amendment are consistent with the proposals/amendment in the Bill</p>	international conventions	the constitution to ensure le legislation is compatible with the constitution.
Section 1	Section 1 “social media”	“Social media” should also be regulated and needs to be defined, in order to also be consistent with the definition of ‘website’.	Social media defined with reference to various online tools and forms of electronic communication	The regulatory approach of the FPB in respect of content distributed on social media needs to be clarified.	The distinction of commercial and non-commercial online distributors has been made.

					The FPB will only regulate non-commercial distributors in instances that the content constitutes prohibited content as defined.
Section 1	Section 1 This is a new definition “streaming”	The Bill recognizes additional modes of distribution of content, all of which must be defined in order to determine the regulatory requirements if any, in respect of such content.	The revised Bill now includes the definition of streaming as proposed by member of the industry.	There was consensus on this definition.	The FPB and DOC have no further responses.
Section 2.Objects of Act	Section 2(d)	Protection of children against child pornography not stated widely enough in objects, as intended in Act.	Thus: “criminalise the possession, production and distribution of child pornography”	Only the Department of Justice has the authority to criminalise acts, the FPB is only an	All criminal matters will referred to Department of Justice & Constitutional Development

				administrative body.	for further investigation
Section 2.Objects of Act	Section 2(e)	Creation of offences for non-compliance with classifications not stated in Objects of Act	Thus: "create offences for non-compliance with classification decisions of the Board" included as one of objects of Act. This proposal has since been revised to offences for non-compliance with the Act as a whole and not only citing the classification decisions of the Board.	There were no comments on this section.	This provision is being retained as it makes provision for administrative offences.
Section 3.Legal persons created by Act	Section 3(1)(d) which proposes the establishment and inclusion of the Enforcement Committee	In order to deal administratively with non-compliance the Enforcement Committee now introduced and established in Act. The name has been changed from penalty committee to enforcement committee as it deals with non-compliance through issuing of fines.	To include reference to the penalty committee as one of the bodies established by the legislation.	The independence of the committee was raised as a concern.	A provision has been made outlining that it shall be independent, impartial and must perform its functions with fear, favour or prejudice.

Section 3. Legal persons created by Act	Section 3(2), to include reference to Enforcement Committee	The provisions in the Act were not sufficient to provide that these bodies shall be independent and act without bias.	Amended to provide that they must be independent, impartial and perform their functions without fear, favour or prejudice.	The public emphasized that as the committee will issue fines as one of its duties, it is vital that it is independent at all times.	These provisions outlining the independence of the committee have been enhanced in that they will act without fear, favour or prejudice..
Section 4A – powers and duties of the Council.	Section 4A – to further empower the Council to consider applications for accreditation.	As the Council may only exercise powers as conferred upon it by legislation, provision must be made wherein the Council is specifically empowered to make determinations in respect of applications for accreditation submitted to the Board.	This section must extend to powers of the Council accordingly.	There were no comments on this section	The DOC and FPB have no further comments or responses.
This is a new section	Section 6A, 6B and 6C	The composition, powers and duties as well as removal of the Penalty Committee must be provided for in the	The Penalty Committee will be appointed by the Council. The Bill provides for the requisite experience, powers	Further to vesting the appointment of the committee in the Council	The DOC and FPB have no further comments.

		legislation establishing such a body.	and duties as well as grounds for removal.	and no longer to Minister (as was the case in the initial version of the Bill) there were no further comments.	
Section 9A Composition, functions and management of Board	Section 9A	<p>As some of the content due to be distributed in South Africa is already classified by foreign and international classification bodies, there is an increasing need to recognize foreign and international ratings.</p> <p>Therefore one of the functions of Board must include: in so far as accreditation of foreign classification systems; conclusion of agreement with online films, games and publications distributors in the RSA -</p>	The Council 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 or international classification authority or body, approve the use of classification ratings issued by the foreign or international classification authority or body	The question pertained to the factors to be taken into consideration when determining whether to accredit a foreign classification system.	The proposed remedy to be retained and the factors will be outlined in the regulations.

		including exemption of online distributor's own system of classification and setting up own system.			
Section 12	Section 12 dealing with remuneration	To make provisions for the remuneration of members of the Enforcement Committee as created in Amendment Bill for purposes expenditure.	Add Enforcement Committee	There were no comments on this section.	The proposed remedy is retained.
15A.Functions of Compliance Officers	Same section	The challenge was that there was no sufficient clarity on the manner in which Compliance Officers must act when entering premises to conduct inspections. Assistance of Police where necessary included specifically provided for as this is currently lacking.	Section 15A(1)(b)(i),(ii),(iv) (2) and (3) amended. The latter making deployment of Police Officers with concurrence of Minister of Police possible for Minister of Home Affairs.	Their powers are too broad and subject to abuse. A warrant or court order must be obtained before inspections are carried out.	The suggested amendment to be retained as obtaining a warrant or court order first would defeat the purpose and is not practical. The compliance monitors will

					also seek assistance from the SAPS where necessary, this will ensure that due process is followed.
Section 16(1) Classification of Publications	Section 16(1)	<p>The Act exempts members of the Press Council from provisions of the Act, however, the Act only made specific reference to newspapers.</p> <p>The Constitutional Court in <i>Print Media South Africa</i> inserted <i>magazines</i> in addition to newspapers, which are also subject to the Press Council, as exempted from the Act as they all fall under the jurisdiction of the Press Council.</p> <p>Advertisements under Advertising Standards</p>	<p>Removing <i>bona fide</i> since jurisdiction of Press Council indicative of such bona fides through the application of the code which members of the Press Council are bound by.</p> <p>Now proposed that advertisements which fall under the ASASA should also be included in the exemption.</p>	Reference to 'newspaper' and 'magazine' should be substituted with 'publication' which is in line with the development and business practices of the press sector and members of the Press Council.	These inputs have been incorporated in the updated version of the Bill.

		Authority of SA (ASASA) should also be exempted, as is the practice in any case.			
Section 16(2)	Section 16(2)	<p>Newspapers and magazines under Press Council should be excluded from pre-distribution classification in line with the proposal above.</p> <p>The same applies to advertisements under ASASA .Within spirit of <i>PMSA</i> Constitutional Court case.</p> <p>Pre-distribution classification in other instances might possibly still create constitutional problems. However, exclusion mentioned above, is constitutionally positive.</p>	Pre-distribution classification is limited only to publications not under Press Council and ASASA.).	This revision was welcomed provided that reference to 'magazine' and 'newspaper' are deleted.	The proposed insertion is being retained.
Section 16(3)	Section 16(3)	Since pre-distribution classification may hamper the speed with which an important	"provided that the classification committee must render a decision as soon as is possible so as not to	The constitutionality of pre-distribution	Pre-distribution classification is practiced

		publication must reach the public (e.g. where it is in the public interest) the classification in terms of section 16(2) must be dealt with as a matter of urgency. This proviso is necessary to 16(3). It should be borne in mind that it amounts to a criminal act if such a publication is not submitted to pre-control.	unreasonably delay the publication that has been referred to it for classification in terms of subsection (2)."	classification continued to be challenged	across the globe in order to ensure that children are protected and consumers are well informed.
16(4)(b)	16(4)(b)	<p>Three Judges of the Constitutional Court in <i>PMSA</i> have held that three sub-paragraphs of 16(5)(b) are unconstitutional as a result of their vagueness.</p> <p>The other Judges did not express a view, since they regarded pre-distribution classification of publications pertaining to the XX sex category as sufficient to find such control unconstitutional.</p>	<p>16(4) (b) (i) : explicit <u>violent</u> sexual conduct; which violates or shows disrespect for the right to human dignity of any person." "</p> <p>16(4)(b)(ii) : bestiality, incest <u>or</u> rape; or conduct or an act which is degrading of human beings;</p> <p>16(4)(a)(iii) : conduct or an act which constitutes incitement of, encourages or promotes harmful behavior</p>	There were no comments on this particular section	The proposed section is to be retained.

		<p>However, advised were obtained indicating that to follow view of <u>three</u> Justices who pointed out the vagueness in three instances: proposed for repeal in proposed remedy. Explicit <i>violent</i> sexual conduct is added so as to distinguish the XX category from the X18 category, which is available in adult video shops and, if accepted by Parliament, also online distribution to adults as in section 18C." <i>Sexual conduct</i>" is defined in section 1 of the Act.</p>			
Section 16(4)(b)	Section 16(4)(b) continued as from "unless"	<p>Currently this section does not make any exemption where a publication is considered to contain child pornography. The effect of this is that there would be no consideration of whether there is any</p>	<p>Amend <i>unless</i> part of section 16(4)(b) to read as follows: "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</p>	There were no comments on this section	The proposed provision will be retained.

		<p>scientific, literary or artistic merit.</p> <p>If content <i>indeed</i> contains child <i>pornography</i>, according to <i>De Reuck v DPP and Others</i> 2004(1) SA 406(CC), then it will not be exempted.</p> <p>However, if it, <i>indeed</i> falls in the exempted categories, including “artistic merit”, then it should, <i>constitutionally</i>, also be exempted. Once so saved, it should <i>not</i> only be allowed to be distributed in what is known as licensed sex shops. That would amount to unconstitutional limitation on the right to scientific research and right to access information. Age restriction on sales in bookshops will be appropriate. In <i>DeReuck</i> art is defined as “predominantly aesthetic</p>	<p>in which event the publication shall be classified X18 or with reference with reference to the guidelines relating to the protection of children...”</p> <p>“artistic” is defined in section 1 as “predominantly aesthetic according to the reasonable person.”</p> <p>Remove classification as X18 of works of scientific (etc) merit and apply ordinary classification guidelines protecting children.</p>		
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		<p>according to the reasonable person.” And this definition is now added in section 1. NB: Core of De Reuck is that material is not “pornography” if it is predominantly aesthetic.</p>			
Section 18(3)(b)	Same subsection	<p>Three Justices of the Constitutional Court have held that three sub-paragraphs of 16(5)(b) [also to be found in section 18(3)] are unconstitutional as a result of their vagueness. The other Justices did not express a view, since they regarded pre-control of publications pertaining to the XX sex category as sufficient to find such control unconstitutional. However, wise to follow view of <u>three</u> Justices as to vagueness in three instances, proposed for</p>	<p>(i)Explicit <u>violent</u> sexual conduct; which violates or shows disrespect for the right to human dignity of any person.</p> <p>18(3)(b)(ii) : bestiality, incest <u>or</u> rape; or conduct or an act which is degrading of human beings;</p> <p>18(3)(b)(iii) : conduct or an act which constitutes incitement of, encourages or promotes harmful behavior</p>	There were no comments on this section	The proposed section will be retained

		<p>repeal in proposed remedy. The undersigned agrees that the criteria are too vague.</p> <p>“Explicit <u>violent</u> sexual conduct” ; <i>violent</i> is added so as to distinguish the XX category from the X18, <i>voluntary</i>, sex category, which is available in adult video shops and, if now accepted by Parliament, also by way of <i>online</i> distribution to adults as in section 18C.</p> <p>“Sexual conduct” is defined in section 1.</p> <p>No reason to exclude child pornography from exemption. If it is indeed child <i>pornography</i>,</p>	<p>Amend <i>unless</i> part of section 18(3)(b) to read as follows: “unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary ...in which event the film or game shall be classified X18 or with reference to the guidelines....</p> <p>“artistic” is <u>now</u> defined as “predominantly aesthetic according to the reasonable person” In section 1.</p>		
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		<p>according to <i>De Reuck v DPP and Others</i> 2004(1) SA 406(CC), then it will not be exempted. However, if it, indeed falls in the exempted categories, then it should also be exempted. Once so saved, it should not only be allowed to be distributed in what is known as licensed sex shops. That would amount to unconstitutional limitation on the right to scientific research and right to access information. Age restriction on distribution in ordinary video shops will be appropriate.</p> <p>The definition of “artistic” is based on the criterion applied by the Concourt in <i>De Reuck</i>.</p>	<p>Remove classification as X18 of works of scientific (etc) merit and apply ordinary classification guidelines protecting children.</p>		
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Section 18(6)	Section 18(6)	<p>The constitution provides for an independent authority to regulate broadcasting in the public interest.</p> <p>In recognition of this independence, broadcasters who are subject to ICASA are exempt from the Act.</p>	<p>(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.</p>	<p>Streaming must also be included in the exemption as broadcast content is now streamed online and the exemption must be extended thereto.</p>	<p>This provision has been revised accordingly with the insertion of “online streaming”.</p>
Section 18	One subsection added =18(7)	<p>The definition of the Electronic Communications Act does not seem to extend to broadcasting and ICASA has stated that it does not regard “streaming” as broadcasting. The effect is that the Films and Publications Act, probably for the sake of clarity, needs to state explicitly that it applies to <i>streaming</i>. In section 1</p>	<p>Thus, read with section one, <i>streaming</i> is included in section 18(7):</p> <p>“(7)for purposes of this section streaming content through the internet does not amount to broadcasting”</p>	<p>The FPB does not have the authority to determine what constitutes broadcasting; broadcasting is regulated solely by ICASA.</p>	<p>This provision was aimed at addressing online distribution of content. However, upon consideration of the point raised this section was deleted.</p>

		<p>the definition of “distribution” has, accordingly, been proposed for amendment:”</p> <p>“distributor”, in relation to a film or game, means a person who conducts business in the selling, hiring out or exhibition of films <u>including the streaming of content through the internet, social media and other electronic mediums.</u></p> <p>The implication is that “streamers” fall under the Films and Publications Act and would have to apply for an exemption from the FPB insofar as <i>live visual</i> content (= film) is streamed and, in so far as <i>films</i> are streamed, in any case register as a distributor in terms of section 18(1)(a) and ensure that a film which is to be streamed is classified and that the</p>			
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		classification and age restriction are added to the content streamed. Alternatively be part of “online distributors” in terms of section 18C (as now proposed for inclusion in Act)			
Sections 18A and 18B	Section 18E and 18I	<p>Currently the provisions relating to the display of classification decisions is not sufficient for content which is distributed online.</p> <p>These sections 18A and 18B deal with the manner in which classifications must be published. The aim is to make the applicable to digital classifications and should, from a systematic perspective, be placed in a new section 18F with all the relevant rules combined. Digital distribution is addressed in section 18C and 18 D (two new</p>	Sections 18A and B will be combined in one section 18E read together with section 18I which will include digital distribution. Since digital distribution is addressed in new sections 18C and 18D, the publication of classifications will more appropriately be dealt with in section 18I after section 18E, which deals with complaints against classifications.	There were no comments on this specific provision.	The proposed provision will be retained.

		sections). Section 18E will deal with complaints against classification decisions.			
There was no previous section	Section 18C	<p>Currently the Act requires all films and games to be submitted to the FPB for classification before they can be distributed.</p> <p>The creation of an online film or game distribution <i>industry</i> classification body is suggested as it would streamline regulation within this area.</p> <p>Distributors of games may set up a similar body.</p> <p>Setting up of independent industry classification for films in ordinary cinemas and DVD's distributed in so called "Video Shops" is</p>	<p>To ensure consistency the accredited industry body: (1) will apply classification guidelines of the Board; (2) classifiers will have to fit the qualifications of Board classifiers;(3) may not change classifications by the Board; (4) will report XX and X18 classifications to the Board;(5) will be subject to an audit by the Board and may be suspended where the above conditions are not met. Distributors of <i>games</i> may set up a similar body. The accreditation may, after due inquiry, be suspended for 12 months or indefinitely where the above conditions have not been met.</p>	<p>The FPB was advised against outsourcing its mandate to an external entity.</p> <p>It is unclear whether distributors will still have to pay an additional fee where they apply a classification system that has been accredited by the FPB.</p>	<p>The aspect pertaining to the establishment of an independent classification body has been deleted.</p> <p>The section will only make provision for classification by the distributors using the classification guidelines of the FPB</p> <p>The FPB tariff structure is currently under review, the</p>

		<p>not regarded as practical or wise. The Board should set the basic precedent by classifying these films, which are, in the normal commercial course, issued earlier than online versions.</p> <p>It should be mentioned that in 1994 the Film and Video distributors, in a meeting with the Task Group which drafted the 1996 Act, stated that they preferred the State to classify films and videos before distribution for practical reasons as to withdraw a film <i>after</i> distribution would be disruptive. The distributors also indicated that they would have practical difficulties in combining foreign (local) distributors with local distributors into one industry classification body. See <i>Report of the Task Group: Film and</i></p>			<p>conclusion of which will inform the fee structure which will indicate the fees payable where the FPB has accredited a foreign or international classification system.</p>
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		<p><i>Publication Control</i>(1 Dec 1994) published on 3 March 1995 by the Government Printer page 26. These practical difficulties do not apply to online distributors, which are able to control distribution from a central point.</p> <p>In Canada, for example, the provinces have pre-classification systems for films. The Supreme Court of Ontario has held that pre-classification is constitutionally justifiable in <i>Re: Ontario Film and Video Appreciation Society and Ontario Board of Censors</i> 41 O.R. 2nd confirmed 147 DLR (3^d) 58. This is also the practice in most countries.</p>			
The was no previous section	Section 18D	Currently all content regulated by the FPB	Section 18D will ensure that the matter is dealt with	The factors to be taken	The provisions will

		<p>must be classified using the classification guidelines of the FPB even if it has previously been classified using a foreign or international classification system.</p> <p>Non-acceptance of foreign classification for online distribution could be disruptive of the trade, which would, preferably, wish to attach one classification to distribution. In any case, most foreign classifications would broadly accord with what the FPB would have imposed. The Board's contact with Classifiers from other countries, has demonstrated that the accent is placed on the protection of children as well as advisories. Where an online distributor can show that it applies such classifications, it should</p>	<p>responsibly and under the guidance of the FPB. For this purpose an agreement will be concluded between the FPB and the distributor(s). Alignment of foreign ratings to local ratings will also be undertaken. In any case no XX material will be permitted. And X18 material will only be permitted subject to reasonable measures taken to exclude access by children.</p>	<p>into consideration when assessing an application for accreditation must be clearly articulated in the legislation</p>	<p>be outlined in the regulations.</p>
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		<p>be free to apply for the recognition of that foreign system. An online distributor might wish to distribute internationally and it would be in the interest of consistency if it were to apply the system of one foreign country's classifiers. It is noted that child <i>pornography</i> is, widely, not permitted by classification systems and that violent sex pornography is also prohibited.</p> <p>The opportunity for recognition of foreign systems is now made possible in the proposed section 18D.</p>			
There was no previous section	Section 18E	In order to ensure that unclassified or prohibited content is not placed <i>online</i> , the Board should be placed in a position where it may approach a	Section 18E will provide for such a complaint system. The Board may apply <i>ex parte</i> to a Court to obtain a take-down notice, a cessation notice or a link-deletion. In the case of child pornography	There are other legislative processes outlined that will be more appropriate	In order to harmonize with existing legislation and processes section 77 of

		<p>Court <i>ex parte</i> to issue a relevant order.</p> <p>It would amount to taking the law into one's own hands if the Board would be permitted to act without a court order.</p> <p>See section 34 of the Constitution of the RSA.</p> <p>The public will, in accordance with this section, also be in a position to complain about content, which had not been approved. The Board's compliance officers will, of course, also keep an eye on the matter.</p>	<p>the Board will refer the matter for local prosecution or, in the case of foreign origins, approach the law enforcement authority in the relevant country or a hotline in that country. Of course, if the distributor is a local distributor, it will be prosecuted in SA Courts.</p> <p>See attached Act for proposed section 18E.</p>	<p>such as the takedown notice in terms of the Electronic Communications Act (ECA).</p> <p>Will an indexing entity such a Google be liable?</p>	<p>the ECA has been incorporated and the internet service provider will be granted an opportunity to respond.</p> <p>Liability will only ensure should the service provider fail to act upon the take down notice.</p>
There was no previous section	Section 18F	<p>There is no provision prohibiting revenge pornographic films and photographs.</p> <p>There has been a recent increase in the distribution of such content with violates the</p>	<p>It is proposed that there be a provision in terms of which no person may expose, through any electronic medium, including the internet and social media networking sites, a private sexual photograph or film if the disclosure is made without</p>	<p>The Bill does not adequately provide for instances when the victim becomes</p>	<p>The Bill further provides for the fine to be imposed where the person depicted in the film or</p>

		right to dignity and privacy of the person depict therein.	the consent of the individual or individuals who appear/s in the photograph or film. with the intention of causing that individual distress harm	identified or identifiable.	photograph is identified or identifiable.
There was no previous section	Section 18G	There has been a proliferation particularly on social media networking sites in the distribution of content depicting violence against children, which violates the right to dignity.	It is proposed that there be a provision in terms of which no person may create, produce or distribute in any electronic medium, including the internet, and social media networking sites any films or photographs depicting sexual assault and violence against children	What purpose will this section achieve in light of the definition of child pornography ?	This section deals specifically with violence and sexual assault children as child pornography is different from violence and therefore cannot be provided for under the section dealing with child pornography.
No previous section	Section 18H	In keeping with the provision of prohibited content and to ensure legal certainty, a provision is necessary	A provision is proposed in terms of which no person may distribute through any electronic medium including the internet and social media	There were no comments on this	The proposed provision will be retained.

		which specifically prohibits propaganda for war, incitement of imminent violence and advocacy of hatred that is based on an identifiable group characteristic.	networking sites, any film, game or publication which amounts to propaganda for war, incites imminent violence or advocates hate speech.	specific section.	
Section 18A	Section 18I	Section 18A, which followed directly on section 18 (which deals with classification), dealt with the manner in which classifications must be published by distributors. With the introduction of industry self-classification for online distribution and accreditation of foreign systems of classification for online distribution, it is systematically more appropriate to deal with this aspect <i>after</i> the three systems have been dealt with. It is submitted that the proposed notification of classification is	The publicity given to classification is dealt with comprehensively in 18I and includes online distribution, where a website will indicate classification. The section includes publications which have been classified. Section 18I(3) also makes it clear that no film or game may be distributed in SA without having been classified and without the classification being attached thereto or displayed. See attached Act for section 18I	There were no comments on this section.	The proposed provision will be retained.

		comprehensively dealt with in the new section 18F.			
Section 18B	Section 18J	<p>18J(1) repeats the general rule of the past under a new section number. In so far as re-classification is concerned the traditional rule is applicable: two years after classification a distributor may apply for a less restrictive classification of the film, game or publication.</p> <p>It is now proposed that the public should also be permitted to file for re-classification of a film or game. So as to ensure that the application is <i>bona fide</i> a prescribed fee will be required and the CEO will, after the distributor has had the opportunity to file representations, decide whether to consider reclassification.</p>	<p>The amendment will provide for the opportunity for a member of the public to apply for re-classification at any time. To ensure that the re-classification is limited to the nature of the classification and not lead to a limitation to adult video shops(X18) or that a film is effectively banned by reclassifying to XX, these categories are excluded.</p> <p>The distributor may appeal to the Appeal Tribunal where a reclassification is ordered by the Board.</p>	There were no comments on this section.	The proposed provision will be retained.

		<p>Reclassification may, however, not lead to a classification as X18 or XX. That would be unfair in the light of the fact that distributors should, at least, be placed in a position where they may rely on the basic classification that the film is not XX or X18. Where re-classification has taken place, the distributor may appeal to the Appeal Tribunal.</p>			
Section 19	Section 19	<p>The Minister is included here as a person who may appear before the Board, the Classification Committee or the Appeal Tribunal.</p> <p>Since the Minister appoints the Appeal Tribunal and the Council and the Council appoints the Chief Executive Officer in consultation with the Minister, to provide that the Minister</p>	Reference to the Minister has been deleted as one of the persons who may lodge a complaint with the Board.	There were no comments on this section.	The proposed provision will be retained.

		may lodge a complaint or an appeal to the very people whom he or she appointed, would create a reasonable basis for concluding that there is a conflict of interest.			
Section 20	Section 20	<p>For the same reasons as in section 19, the Minister should not be an appellant.</p> <p>Also amend “application” to “submission”. Section 16(2) does not provide for an application but imposes a duty to submit certain publications.</p> <p>An appeal to the Appeal Tribunal by a distributor, who is a member of an industry classification body, should not be permitted against a decision of an industry body. If the rules of that industry body provide for an appeal, an industry</p>	<p>Accordingly, remove and delete “The Minister or” and commence with “Any person...”</p> <p>Amend “application” to “submission” in section 20(1)</p> <p>Section 20(6) takes care of the rights of a member of an industry body: no appeal to the Appeal Tribunal; however, if the industry body has an appeal body, obviously that member may appeal to that body.</p> <p>Provision of right to complain to the Board against a</p>	There were no comments on this section	The proposed provision will be retained save for the revised specific reference to commercial online distributors.

		<p>appeal will, of course, be permissible. Any person who is aggrieved by the classification of an industry body may lodge a complaint with the Board against a classification of an industry body in terms of section 18G(2). In such a case, if the classification is made more onerous, the said distributor will be permitted to appeal to the Appeal Tribunal.</p>	<p>classification of the industry body – section 18G(2).</p> <p>No right of appeal by Online Industry member, except where the classification was increased in terms of section 18G(2).</p>		
Section 24	Same section but with additions	<p>This section provides for an exemption for so-called licensed adult premises where X18 material may be distributed subject to strict conditions. This possibility was created in the 1996 Act. The new sub-section, in the light of the investigation conducted by the Legal Review Team appointed</p>	<p>(3) <u>Any person who is registered as a film or game distributor in terms of section 18(1)(a) may, on an exemption being granted by the Board, distribute a film or game classified as X18 online subject to the following conditions (a)that the distributor ensures to the satisfaction of the Board that children under the age</u></p>	<p>This section is contrary to the limitation of liability outlined in the ECA as far as the duty to monitor is concerned.</p>	<p>The Bill does not place not place an obligation to monitor content but to rather report it when there is knowledge thereof.</p>

		<p>by Council in 2012, introduces the possibility to also distribute X18 films and games online, after an exemption has been granted by the Board to a registered film distributor. The Council has supported this innovation in the light of the urgent necessity to regulate these operations which have, in any case, developed irregularly outside the Act. The Legal Review Team (2012) conducted an investigation as to how children could be protected. After expert advice was sought, the Committee advised Council that the use of credit cards and other approved secure methods of ordering online films and games would make such distribution safe. A register must be kept by</p>	<p><u>of 18 would not be able to access such a film or game on-line;</u>(b)<u>that the distributor ensures that the classification and age restriction be clearly displayed on the screen of the user throughout the screening;</u>(c)<u>that the user must confirm that he or she is 18 years or older prior to commencing viewing of the film or playing the game;</u> (d)<u>that the distributor does 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 secure method agreed to by the Board and that, for 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;</u> (e) <u>that the distributor keeps, solely for</u></p>		
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		<p>the distributor of persons who ordered such films. Such register must be kept <i>private</i> and would only be available to the CEO of the Board after he or she has obtained an ex parte order to do so from a Court. In this manner the privacy of adult users is protected. Such application would have to make out a case that the CEO has reasonable cause to believe that the distributor is supplying such material to children under 18. Such film or game may, in so far as <i>public places</i> are concerned, only be screened in registered, licensed premises to which only adults have access. The exemption may, after due inquiry, be suspended up to 12 months by the Board.</p>	<p><u>its 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;</u>(f)<u>that such register must be kept for one year from when distribution took place;</u> (g) <u>that the Chief Executive Officer of the Board may approach a Court <i>ex parte</i> for the production of the record referred to in clause(d) if he or she has reasonable cause to believe that the online distributor is supplying material to children under the age of 18;</u>(h)<u>that where such film or game is exhibited online in a public place that place must be a licensed premises in terms of subsection (1);</u>(i)<u>that such exemption may, after due inquiry, be suspended by the Board for a</u></p>		
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			<p><u>maximum period of 12 months where any of these conditions have not been met by the distributor and that, in addition, the distributor would also be guilty of an offence in terms of section 24A(4) if access was knowingly or negligently granted to a child under 18</u></p>		
Sections 24A and 24B	<p>24A(1),(2),(3),(4),(5), (6) and(7)</p> <p>24B (1)(d), (2) and (3)</p>	<p>These sub-sections contained a mere reference to a fine without detailing the amount of the fine and in some cases, the prison sentence was not added. Earlier, reliance was placed on section 30, which set out what the punishment would be. However, section 30 (1),(1A), (2) and (3) were repealed in 2009. Fines and, in some cases, prison sentences must now be added to fill the lacunae in the Act.</p>	<p>In all these instances maximum fines have been added and in some instances the maximum prison sentences had to be included.</p> <p>See the relevant sections in the attached Act.</p>	<p>The fines and terms of imprisonment for child pornography are not in line with the Cyber crimes and cyber security Bill and with the Criminal Procedure Act read together with the Sexual Offences and</p>	<p>The cited legislation has been incorporated into the revised Bill.</p> <p>The Cyber Bill cannot be incorporated as it is still undergoing to parliamentary processes and it would be premature to incorporate</p>

				Related Matters Act. .	it at this stage.
Section 24A(2)	Section 24A(2)	This sub-section raises Constitutional issues and has to be amended. It should firstly be amended so as to bring it in conformity with the order in PMSA v Minister of the Interior and Another 2012(6) SA 443 (CC). Secondly it includes jurisdiction over broadcasters under the jurisdiction of ICASA in terms of section 192 of the Constitution of the RSA. It rightly exempts newspapers, and magazines in the light of PMSA v Minister of the Interior & Another 2012 (6) SA 443 (CC). It should however, as proposed earlier in regard to section 16(1) and (2), also exclude advertisements which fall under the ASA.	24 (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 publication referred to in section 16(2) of this Act which has, <u>except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and except with regard to a newspaper, magazine or advertisement contemplated in section 16(1),</u> ____(a) except with respect to broadcasters that are subject to regulation by the Independent	In keeping with the other amendments 'newspaper' and 'magazine' must be deleted and replaced with 'publication'.	This has been incorporated.

		<p>There is a Constitutional problem with section 24A(3). As it presently provides, the subsection firstly exempts broadcasters under ICASA from having their films classified. However, it then provides that where an XX and X18 is imposed by the Board or where it should have been classified as such, the broadcasters are not exempt from such classifications. There is, however, a Constitutional reason why Parliament may not extend the reach of the Films and Publications Act to jurisdiction over licensed broadcasters: section 192 of the Constitution provides that an independent regulator must be established to regulate broadcasting. This has</p>	<p>Communications Authority of South Africa, not been classified by the Board;</p> <p>(b) been classified as a “refused classification”;</p> <p>(c) been classified as “XX”, <u>or would have been so classified had it been submitted for classification-</u></p> <p>shall be guilty of an offence and liable, upon conviction, to a fine <u>not exceeding R350 000</u> or to</p>		
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		<p>turned out to be ICASA. Thus, the section must, with respect, be amended. Broadcasters under ICASA may not be regulated by another regulator such as the Films and Publications Board or, for that matter, by the Human Rights Commission. There is also an element of unfairness in the situation: the Press Ombudsman, which is not a Constitutional body such as ICASA, is exempted by the Publications Act. Similarly, the ASA is also now proposed to be exempted. It is also of interest to note that online distributors, as proposed in this document will be permitted to distribute X18 material. Toptv has been permitted by ICASA to broadcast to</p>	<p>imprisonment for a period not exceeding five years or to both a fine and such imprisonment.</p>		
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		<p>paying adults such material. Access is protected by a Pin, which must be activated for each broadcast. The activation only lasts for the film so activated. The Broadcasting Code for subscription broadcasters prohibits the broadcast of child pornography and XX material. The Broadcasting Regulations for Free to Air Broadcasters prohibits XX and X18 material from being broadcast.</p>			
Section 24A(3)	Section 24A(3)	<p>Secondly section 24(3) must be addressed. An addition is needed in cases where a film has not been classified but, if classified, would have been classified as X18. See the underlined additions.</p>	<p>(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</p>	<p>How will the FPB deal with online distribution of pornographic material?</p>	<p>The co-regulatory model proposed seeks to curb the distribution of such content online. The take down notice</p>

			hire or advertises for sale or hire any film, game or a publication which has been classified "X18", <u>or would have been so classified had it been submitted for classification</u> , shall be guilty of an offence and liable, upon conviction, to a fine <u>not exceeding R750 000</u> or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.		process is an additional mechanism to bolster the efforts of the FPB.
Section 24A(4)	<u>Section 24A(4)</u>	It is unnecessary to include the exemptions for science etc. In terms of section 18; these factors would already have been considered in coming to a conclusion. The addition of the <u>underlined</u> words would, already in section 18, take care of that.	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	What about instances where such images are being reported for news purposes and the liability of the distributor in respect thereof.	The takedown notice process will apply and the liability of the distributor will be as a consequence of failure to comply with the notice.

			<p>matter of public interest which would have justified a X18 classification to a person under the age of 18 years, shall be guilty of an offence and be liable on 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.</p>		
No old section	Section 24D	It is necessary to add a section where persons who provide false information to the Board on its online system are subjected to a criminal offense.	<p><u>24D Prohibition, offences and penalties for submission of misleading and wrongful information to the Board online submission system.</u></p> <p><u>Any person who furnishes the Board with false or misleading information on the Board's online submission system with</u></p>	There were no comments on this section	The proposed provisions will be retained.

			<p><u>respect to registration online to:</u></p> <p><u>(a) classify a film or game</u></p> <p><u>(b) renew registration</u></p> <p><u>(c) apply for the submission of a game for classification</u></p> <p><u>shall be guilty of an offence and liable upon conviction fine not exceeding R15 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.</u></p>		
Now old sections	Sections 24E and 24F	It is important to add the offences and penalties in respect of the newly established offences in respect of the distribution of private sexual photographs and films as well as in respect of films and photographs depicting sexual assault and violence against children.	<p><u>"24E.(1) Any person who knowingly distributes private sexual photographs and films in any medium including the internet and social media sites, without prior consent of the individual or individuals in the said sexual photographs and films with the intention to cause the said individual harm shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150,000</u></p>	Provisions criminalizing sexual offences and providing for the penalty in respect thereof are much better suited in legislation administered by the Department	The FPB and DOC noted this input and will consider further to amend these two provisions accordingly.

			<p><u>or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.</u></p> <p><u>(2) Any person who knowingly distributes private sexual photographs and films in any medium including through the internet, without prior consent of the individual or individuals and where the individual or individuals in the photographs or films is identified or identifiable in the said photographs and films, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R300 000 or to imprisonment for a period not exceeding four years or to both a fine and such imprisonment.”.</u></p> <p><u>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</u></p>	<p>of Justice and Constitutional Development</p>	
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			<u>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.</u>		
There is no old section	Section 24F	As the Bill prohibits speech which is not protected under the Constitution, there must be a corresponding penalty provisions.	<u>24G. Any person who knowingly distributes in any medium, including the internet and social media any film, game or publication which amounts to propaganda for war, incites imminent 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."</u>	There was no further input on this provision.	The FPB and DOC have no further responses.
Heading above section 25	Heading above section 25	The content of this Chapter has changed and the heading is, accordingly, adapted.	<u>INTERNET, EXTRA-TERRITORIAL JURISDICTION AND</u>		

			<u>PRESUMPTIONS OF PROOF</u>		
			PROHIBITION OF CONDUCT CONTRARY TO CLASSIFICATIONS		
Section 27A	Section 27A	There must be consistency in respect of prohibited content, irrespective of the medium of distribution as well as specifying the penalty for non-compliance with the section. Therefore, internet service providers must bear responsibility in respect of prohibited content as a whole and not only child pornography.	Subsection has now been expanded to include propaganda for war, incitement of imminent violence or advocating hatred based on an identifiable group characteristic and that constitutes incitement to cause harm. Subsection 4 provides for fines up to the amount of R150,000 and R750,000 respectively.		
Section 30(4)	Subsection to be repealed	In the light of the introduction of the Penalty Committee	30(4) (a) If any person who	There were no comments	Reference is now made to Enforcement

		<p>which is now renamed Enforcement Committee in section 15B, this provision for a fine by agreement is no longer necessary. A respondent before the Penalty Committee may plead guilty and the same effect would be reached. But then it would not be a matter of its agreement to jurisdiction, as is the case with section 30(4)(a).</p>	<p>has contravened or failed to comply with section 24(A)(1), 2(a), (5), (6), (7), 24C(2) or 27A(1)(a) agrees to abide by a decision of the Board and deposits with the Board such sum as the Board may determine on each such contravention, but not exceeding the greater of two thousand rand or two</p>	<p>on this section</p>	<p>committee as opposed to penalty committee.</p>
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				times the prescribed classification costs, where applicable, on each such contravention or failure to comply, the Board may, after conducting an enquiry, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount		
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			<p>so deposited.</p> <p>(b) There shall be a right of appeal to the Minister from any determination on or order of the Board under paragraph (a), as long as that right is exercised within a period of three months from the date of such determination on or order.</p> <p>(c) The imposition of a penalty</p>		
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			<p>under paragraph (a) shall not be regarded as a conviction in respect of a criminal offence and no prosecution for that offence shall thereafter be competent.</p>		
Section 31(3)(b)	Section 31(3)(b)	<p>There is a reference to Schedules 3 and 8 in section 31(3)(a). The Schedules were repealed in 2004. However, the wording accords with the terminology at the time (1996). It would, accordingly, be incorrect to amend it now.</p>	<p>31(3)(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 BoardCouncil in consultation with the Minister shall publish the said guidelines in the</p>	<p>There is no provision for public participation in relation to regulation and other legislative instruments published by the Minister</p>	<p>A provision has been inserted in terms of which the Minister shall publish the regulation for public</p>

		<p>Therefore the wording remains the same.</p> <p>In 31(3)(b) repeal Board and replace with Council, which, after amendment has had the function to publish guidelines for classification in consultation with the Minister</p>	<p><i>Gazette</i> and, where necessary, amend them <u>at any time</u>.</p>	<p>in terms of the Act.</p>	<p>comments and inputs.</p>
<p>There is no old section</p>	<p>Section 31A</p>	<p>It was requested that it must be explicitly provided that any publications by the Minister in the government gazette pursuant to this Act be subject to a public participatory process.</p>	<p>A new section has been added to ensure that due process is followed which provides as follows:</p> <p>31A(1) The Minister or Council, as the case may be, before making or amending any regulations referred to in section 31, must publish a notice in the Gazette—</p> <p>(a) setting out that draft regulations have been developed;</p>		

			<p>(b) specifying where a copy of the draft regulations may be obtained; and</p> <p>(c) inviting written comments to be submitted on the proposed regulations within a specified period.</p> <p>(2) After complying with subsection (1), the Minister may—</p> <p>(a) amend the draft regulations; and</p> <p>(b) subject to subsection (3), publish the regulations or directives in final form in the Gazette.</p> <p>(3)</p> <p>(a) The Minister must, within 30 days before publication of the regulations in the Gazette, as referred to in subsection (2)(b), table them in Parliament.</p>		
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			(b) Subsection (1) does not apply in respect of any amendment of the regulations as a result of the process referred to in paragraph (a)."		
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The Department of Justice and Constitutional Development has recently submitted the comments on Bill. More pertinently they changed penal provision (fine/sentence) to be in line with CyberCrimes and CiberSecurity Bill, 2016. The also some incidental comments was raised in which DOC responded to.

**NOTE: PROPOSED NEW SECTION 24E: FILMS AND PUBLICATIONS
AMENDMENT BILL, 2015**

1. Ad: proposed new section 18F read with proposed new section 24E

The proposed two new provisions aim to criminalise the distribution of private sexual photographs and films. In having regard to the proposed new section 18F, read with the proposed new section 24E, the following should be noted:

(i) The proposed new section 24E(1) creates an offence in which the “intention to cause the said individual (*appearing in the private sexual photograph or film*) harm”. The proposed new section 24E(2) creates a similar offence, but without the requirement of “harm”. The offence in the proposed new subsection (2) appears to be less serious than the offence that is reflected in the proposed new subsection (1). However, the penalty for the offence in the proposed new subsection (2) is higher than the penalty that is envisaged for the more serious offence that is reflected in the proposed new subsection (1). It is recommended that the penalty in the proposed new subsection (2) should be inserted in the proposed new subsection (1) and *vice versa*.

Response: the offence outlined in (2) is where the individual depicted is identified or identifiable subsequent to the dissemination of the said film or photograph.

(ii) It is confusing that two separate provisions should be enacted to create one single offence to the extent that the proposed section 18F reflects a prohibition while the proposed new section 24E actually creates the offence.

(iii) The ambit of the section 18F prohibition is not expressly restricted to adult persons as victims which may give rise to interpretation concerns if section 18F is read with section 18G (which provision is aimed at regulating the position of children).

Response: the wording of the section may be revised to specifically refer to persons who are 18 years and older.

(iv) The ambit of the section 18 prohibition is restricted to photographs and films and therefore excludes explicit electronic text messages, which per definition also constitute pornography.

Response: the primarily regulatory ambit of the FPB extends only to films, games and certain publications as provided for in the Act. Therefore, text messages do not primarily fall within regulatory ambit of the FPB.

2. Ad: proposed new section 18G read with proposed new section 24F

The proposed two new provisions aim to criminalise the distribution of films and photographs depicting sexual assault against children. In this regard the following should be noted:

(i) The same technical concerns that have been pointed out in paragraph 1(ii) to (iv) apply with regard to the provisions of the proposed new section 18G, read with the proposed new section 24F.

(ii) There is already an absolute prohibition with regard to the production, possession and distribution of child pornography. It is therefore not clear what useful purpose a provision of this nature will serve.

Response: Upon perusal of the definition child pornography in SORMA which we have since incorporated into our Bill by cross reference, the term includes showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons,

(iii) The penalty that is prescribed may have to be reconsidered because it is viewed as a light sentence.

(iv) The implementation of the provision may lead to unintended consequences insofar as the prosecution and especially the sentencing of offenders is concerned.

(v) The provision should be kept in abeyance pending the outcome of the investigation of the South African Law Reform Commission insofar as child pornography is concerned.

Response: DOC does not support this proposal as this would be an impediment to the FPB in the execution of its mandate.

The Department of Justice and Constitutional Development suggest the following penal provision which are in line with CyberSecurity Bill. DOC support all the proposal on penal provisions.

Proposed amendment to clause 27 of the Bill

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

“24B. (1) Any person who—

- (a) unlawfully possesses child pornography ;
- (b) creates, produces or in any way contributes to, or assists in the creation or production of child pornography;
- (c) imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of child pornography; or
- (d) knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children,

[shall be] is guilty of an offence.

(2) Any person who, having knowledge of the commission of any offence under subsection (1) or having reason to suspect that such an offence has been or is being committed and fails to—

(a) report such knowledge or suspicion as soon as possible to a police official of the South African Police Service; and

(b) furnish, at the request of the South African Police Service, all particulars of such knowledge or suspicion,

[shall be]is guilty of an offence.

(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]**is guilty of an offence.

(4) A court which convicts a person of an offence in terms of subsection (1)(b), may, where a penalty is not prescribed in respect of that offence by any other Act, impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction.

(5) Any person who contravenes subsection (1)(d), is liable —

(a) in the case of a first conviction, to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment; or

(b) in the case of a second and subsequent conviction, to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and imprisonment.

(6) Any person who contravenes subsection (1)(a) or (c), is liable —

(a) in the case of a first conviction, to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment;

(b) in the case of a second conviction, to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment; or

(c) in the case of a third or subsequent conviction, to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and imprisonment.

(7) Any person who contravenes the provisions of subsection (2), is liable, on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

(8) Any person who contravenes the provisions of subsection (3), is liable—

(a) in the case of a first conviction, to a fine of R1 000 000 or to imprisonment for a period not exceeding 5 years, or to both such fine and imprisonment;

(b) in the case of a second or subsequent conviction, to a fine of R2000 000 or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

