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Dear Ms Jordan-Dyani

**PRESS COUNCIL AND SANEF: JOINT WRITTEN SUBMISSION ON THE DRAFT WHITE PAPER
ON AUDIO AND AUDIOVISUAL CONTENT SERVICES**

1. INTRODUCTION

1.1. The Press Council of South Africa (Press Council) is a self-regulatory body for print and online media. In terms of the Press Council's Constitution¹, "ethical journalism is essential to realising the promise of democracy". Besides constituent associations, the Press Council has subscriber publications and members involved in the production of editorial content and that subscribe to the Press Council's Constitution, Code of Ethics and Conduct for South African Print and Online Media² and to its Complaints Procedures. Press Council members include the overwhelming majority of news media outlets in South Africa (including broadcasters, print and online media (jointly referred to as "press" in this submission) with the notable exception, at this time, of Independent Media, which withdrew from the Press Council's self-regulatory mechanisms. The Press Council is at the forefront of campaigning for platform-neutral self-regulatory mechanisms and is developing a draft technology-neutral comprehensive code of conduct for print, broadcast and online media, intended for industry consultation.

1.2. The South African National Editors' Forum (Sanef) is a non-profit organisation whose members are editors, senior journalists and journalism trainers from South African media and educational institutions. Sanef campaigns for media freedom, access to information and

¹ <https://www.presscouncil.org.za/ContentPage?code=CONSTITUTION>

²² <https://presscouncil.org.za/ContentPage?code=PRESSCODE>

journalists' safety, and has recently released a report³ produced by its independent Inquiry into Media Ethics and Credibility. Sanef has also produced a research report on the devastating shrinking of jobs in the print media sector due, in part, to the global Covid-19 pandemic but also, longer term, to the flight of bedrock advertising Rands to global online giants such as Facebook and Google⁴.

1.3. For both the Press Council and Sanef, audio-visual media regulation is of vital importance to the South African media landscape as more and more media is consumed online, including traditional press products. Consequently, the Press Council and Sanef make this joint submission in response to the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 (the Draft White Paper) which is contained in Notice 1081 of Government Gazette No. 43797 dated 9 October 2020. The submission date for public comment was extended to 15 February 2021 by Notice 1267 in Government Gazette No. 43938, dated 26 November 2020.

1.4. The Press Council and Sanef note the wide-ranging nature of the Draft White Paper and are encouraged that so many submissions are being made, including by Non-Governmental Organisations (NGOs), industry bodies, directly affected operators, the local production sector and others. However, the Press Council and Sanef believe that the impact of the proposed policies on the role and interests of the media requires special attention – hence this joint submission deals, primarily, with provisions in the Draft White Paper that directly impact on the role, responsibilities, regulation and financial sustainability of the press. We submit that unless the final policy that emerges from the Draft White Paper takes cognizance of and promotes actions to address the existential threats facing the press, that is, the media that focus on providing quality and ethical news and information to the broad public, the public interest and our democracy will be threatened.

1.5. Consequently, the Press Council and Sanef wish to focus their written submissions on aspects of the Draft White Paper (and also aspects NOT contained in the Draft White Paper) that are crucial to news media as a whole:

1.5.1. the proposed licensing requirements for on-demand audio-visual content services (AVCS) and various definitional concerns relating thereto;

1.5.2. the overall online content regulation framework provided for (or insufficiently spelt out) in the Draft White Paper;

³ <https://sanef.org.za/wp-content/uploads/2021/01/SANEF-ethics-report-OK.pdf>

⁴ <https://sanef.org.za/wp-content/uploads/2020/06/SANEF-Covid-Impact-Research-Final-Report8.pdf>

1.5.3. the proposals to eliminate cross-media control provisions in the Electronic Communications Act, 2005 (the ECA); and

1.5.4. the failure of the Draft White Paper to consider the impact of dominant international technology companies, commonly referred to by the acronym FAANGs⁵, on the local press's abilities to secure sustainable funding and advertising and, consequently, its failure to safeguard the future sustainability of the South African news media.

We deal with each in turn.

2. CATCHING THE PRESS IN THE LICENSING NET – THE PROPOSED LICENSING REQUIREMENTS FOR AVCS IN THE DRAFT WHITE PAPER

2.1. None of the print or online press outlets that are members of the Press Council, or whose editors/journalists are members of SANEF, are licensed. This is in accordance with international best practice and global human rights standards for media freedom, freedom of expression and legitimate media regulation. For example:

2.1.1. Principle 12.2 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Any registration system for media shall be for administrative purposes only and shall not impose excessive fees or other restrictions on the media.'

2.1.2. Principle 19.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.'

2.1.3. The preamble to the AU Declaration on Internet Governance recognises that the right 'to freedom of expression and access to information (on and offline), and human and peoples' rights ... must be upheld online as well as offline.'

2.2. International best practice standards have, however, always recognised the need for stringent licensing requirements for media outlets that make use of scarce terrestrial frequencies. For example, Article 10(1) of the European Convention on Human Rights specifically provides that the article, which protects the right to freedom of expression, "shall not prevent States from requiring the licensing of broadcasting, television...".

2.3. AVCS provided on the internet are Over the Top (OTT) services that do not use scarce terrestrial frequencies and do not require radio frequency spectrum licences at all. Consequently, there is no need to treat them as being similar to broadcasting. This does not

⁵ Facebook, Apple, Amazon, Netflix, Google.

mean that we do not recognise the need for continual reviews of broadcasting regulatory frameworks to ensure increasing degrees of regulatory parity between light- and heavy-touch regulation to avoid platform shopping by content providers anxious to escape overly restrictive licensing and regulatory obligations currently imposed on broadcasters.

2.4. However, the proposals contained in section 3 of the White Paper, “Licence Framework and Thresholds for Audio and Audiovisual Content Services”, are of great concern to the Press Council and Sanef and need to be thoroughly reconsidered by the DCDT. In this regard:

2.4.1. First, there is no clarity on whether a licensed terrestrial/satellite broadcaster who has a website and/or App for its broadcasting service is required to have:

2.4.1.1. an additional broadcasting licence for the linear streaming of its licensed audio-visual programming; and/or

2.4.1.2. an additional on-demand licence for AVCS provided on its website/App or on third party platforms that is different to the streaming of its traditional broadcasting service.

In our view there is no justification for requiring a plethora of AVCS licences, but this is not clarified in the Draft White Paper.

2.4.2. Second, there is also no clarity on whether online-only media, or unlicensed print media that has a website and/or App, is required to have an on-demand AVCS licence for its website/App or for any third party-platform featuring its content. While DCDT representatives have assured us that the drafters of the Draft White Paper did not intend the licensing of the press, the actual provisions in the Draft White Paper contained no exclusions from licensing requirements for on-demand AVCS that meets the financial thresholds provided for in the Draft White Paper. In this regard:

2.4.2.1. currently, individual licenses are required to be applied for in response to an invitation to apply issued by the Independent Communications Authority of South Africa (Icasa). As no person may operate a service requiring a licence without one, this means that nobody who wishes to provide a service requiring an individual licence (such as an OTT AVCS meeting the financial threshold provided for in the Draft White Paper) would be able to commence or continue operations without such a licence. Further, they may also not apply for such a licence unless an invitation to apply has been issued by Icasa. This would fall foul of a number of international best practice standards, some of which have been set out above, and would almost certainly be an unconstitutional violation of section 16(1)(a) which provides that the guaranteed right to freedom of expression includes freedom of the press and other media; and

- 2.4.2.2. notwithstanding the problem of having to wait for an invitation to apply before being able to submit an application for an individual licence, the mere requirement of a licence (of any but the most administratively effortless kind and which cannot be refused by a regulatory body) to operate a news media service online, would fall foul of a number of international best practice standards, some of which have been set out above. This would almost certainly be an unconstitutional violation of section 16(1)(a) which provides that the guaranteed right to freedom of expression includes freedom of the press and other media.

Consequently, we are of the respectful view that there can be no licensing requirements of the press outside of the need to impose conditions for the use of scarce finite physical resources (such as the radio frequency spectrum for broadcasters), and in any event, not in respect of the online or print media.

- 2.4.3. Third, the Press Council and Sanef are puzzled by all the new terms and definitions of different services in the Draft White Paper, particularly, as we try to match these to new terms and definitions for similar services in the enacted (but not yet in force) Films and Publications Amendment Act, 2019 (FPAA). For example:

- 2.4.3.1. what is the difference between “on-demand AVCS” as defined in the Draft White Paper and a “commercial online distributor” as defined in the FPAA? If there is no difference then we are of the respectful view that the same terms and definitions should be used across all legislation emanating from government, and particularly from the DCDT, to avoid confusion;

- 2.4.3.2. what is the difference between a “video sharing platform service” as defined in the Draft White Paper and a “commercial online distributor” as defined in the FPAA? Again, if there is no difference then we are of the respectful view that the same terms and definitions should be used across all legislation to avoid confusion. However, as is clear from the preceding paragraph, there will be a definitional conflict between the Draft White Paper and the FPAA if a video sharing platform service, an on-demand AVCS and a commercial online distributor are in fact similes of each other, given the very different proposed licensing and regulatory treatment between on demand AVCS and video sharing platform services that is proposed in the Draft White Paper and is already contained in the FPAA;

- 2.4.3.3. why would an on-demand AVCS that meets the licensing thresholds in the Draft White Paper have to be subjected to the registration and classification processes

in the FPAA (see section 5.3.6 of the Draft White Paper) in respect of commercial online distributors while broadcasters regulated by Icasa and members of the Press Council are exempt from such requirements in the Film and Publications Act, 1996 (FPA), as amended by the FPAA, and as negotiated in the draft regulations to be promulgated to implement the FPAA.

Consequently, it appears that the DCDT's drafting team responsible for the development of the Draft White Paper have had no interaction with the DCDT's drafting team responsible for the development of the FPAA, given the levels of overlap and arbitrary distinctions identified above. As the Draft White Paper recognises, the media environment and particularly the electronic media environment, is increasingly converged, and it is essential that all laws and regulatory mechanisms use uniform terms and definitions to guard against chaos and secure compliance.

- 2.5. As we have argued before the Films and Publications Board and before the Information Regulator, the state should avoid licensing requirements for non-broadcasting members of the press that belong to a recognised and effective self-regulatory body which operates in accordance with a constitution and a code of conduct to protect the public interest in promoting and enforcing high standards of journalistic integrity and ethics. Failure to provide for a carve-out/exemption for the press (in particular, for members of the Press Council) in respect of licensing requirements for on-demand AVCS is a significant oversight in the Draft White Paper and must be addressed, failing which, legislation developed as a result of adopting these kinds of policies could be open to constitutional and other legal challenges.

3. CONTENT REGULATION FOR ON-DEMAND AVCS

- 3.1. The Press Council and Sanef also note the provisions of section 5.3.5 of the Draft White Paper which propose to require a code of conduct for on-demand AVCS in addition to the existing code of conduct for broadcasting services. We note that such services will be subject to a code of conduct administered by Icasa, unless the provider thereof is a member of a body which has proved to the satisfaction of Icasa that it subscribes and adheres to a code of conduct enforced by that body using its own disciplinary mechanisms, provided that such a code and disciplinary mechanisms are acceptable to Icasa.
- 3.2. The Press Council and Sanef also note the reference to the Broadcasting Complaints Commission of South Africa (BCCSA) in section 5.3.2 of the Draft White Paper but is disappointed that no reference is made to the Press Code of Ethics and Conduct for the South African Print and Online Media, which is a self-regulatory code enforced by the Press Council. The DCDT is well aware of this code because of exemptions given to members of the Press Council as provided for in the FPA.

3.3. The next version of the Draft White Paper should make specific reference to the Press Council and its self-regulatory code for print and online media, including online video, given that it already applies to members of the press operating online as evidenced by the numerous decisions of the Press Ombudsman available here:

<https://www.presscouncil.org.za/Ruling?page=1>

3.4. The Press Council's self-regulatory code deals extensively with the areas of concern (children and consumers) identified by the DCDT in section 3.5 of the Draft White Paper.

4. ABOLITION OF CROSS-MEDIA CONTROL PROPOSALS

The Press Council and Sanef welcome the provisions of section 7.1.8.2 of the Draft White Paper which recommends the removal of the cross-media (print and broadcast) control restrictions in the ECA. The Press Council and Sanef endorse the DCDT's view that "given the developments of the past 25 years... print media companies are no longer by default the largest media companies, there has been a proliferation of on-demand content services and access to online news has multiplied tenfold". This is undoubtedly true, and it is important that print media companies be able to cross-subsidise operations via online and broadcast outlets.

5. FUTURE-PROOFING THE PRESS: WHAT THE DRAFT WHITE PAPER IS MISSING

5.1. The Draft White Paper sadly ignores the existential crisis facing the news media, as a result of rapidly shrinking available advertising due to the targeted advertising algorithms of multinational behemoths such as Facebook and Google.

5.2. This is a crisis in the making not just for the public's ability to be properly informed about news, events and happenings, but also for the state of democracy, which cannot be healthy in an environment where citizens make less-than informed or uninformed choices and decisions at the ballot box.

5.3. We note the various suggestions to harness economic contributions for South Africa from the likes of on-demand AVCS such as Netflix and Amazon Prime. However, the Draft White Paper adopts an entirely hands-off approach to video sharing platform services, user-generated content, social media platforms such as Facebook and the indexing/search engine functions of a company such as Google.

5.4. We are not in a position at this stage to provide the DCDT with detailed submissions on how to harness such economic contributions from operators such as Facebook and Google, but several institutions, including international bodies such as UNESCO⁶, have sounded the alarm

⁶ <https://unesdoc.unesco.org/ark:/48223/pf0000261065>

on the impact of the flight of advertising to these online operators which has decimated local media globally. As highlighted above, Sanef has commissioned research⁷ showing that the global pattern is also happening in South Africa. Further, Sanef is working on important research on ways to support “public interest journalism”. This is forthcoming. One of the chapters in the research will be looking at strategies to achieve private sector support for public interest journalism, including support from Facebook and Google. We will share this research with the Department.

- 5.5. We recognise that operators such as Facebook and Google are unwilling to shoulder regulatory or financial burdens in the various jurisdictions in which they operate and that they have resisted such attempts. We also recognise that, globally speaking, South Africa is a relatively small market with little ability to enforce what larger and more powerful jurisdictions elsewhere are struggling to achieve.
 - 5.6. Nevertheless, it is imperative that the DCDT investigate attempts by countries such as Japan, Australia and France to ring-fence taxes and other economic contributions on the vast revenues that these platforms earn, in many cases profiting from news stories generated by local media, to secure the future existence of the press. In this regard, we urge the DCDT to avoid developing an excessive amount of toothless initiatives and to work with the proposed Presidential Task Team on the Sustainability of the Media, an initiative Sanef has initiated and has an in principle agreement on, to ensure workable outcomes.
6. The Press Council and Sanef thanks the DCDT for the opportunity to make this submission. Please do not hesitate to contact the writer should you have any queries.

Your sincerely



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⁷ <https://sanef.org.za/wp-content/uploads/2020/06/SANEF-Covid-Impact-Research-Final-Report8.pdf>