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THE PRESIDENCY

No. 876

28 August 2009

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 3 of 2009: Films and Publications Amendment Act, 2009.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

*(English text signed by the President.)
(Assented to 26 August 2009.)*

ACT

To amend the Films and Publications Act, 1996, so as to insert, amend and delete certain definitions; to establish and provide for the powers and duties of a Council; to provide for the appointment and functions of compliance officers; to provide for the composition, functions and management of the Board; and to repeal the Schedules to the Act; and to provide for matters connected therewith.

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

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

1. Section 1 of the Films and Publications Act, 1996 (hereinafter referred to as “the principal Act”), is hereby amended— 5
- (a) by the insertion before the definition of “**Board**” of the following definition: 5
 “**Appeal Tribunal**’ means the Appeal Tribunal established by section 3;”;
- (b) by the substitution for the definition of “**chief executive officer**” of the 10
 following definition:
 “**chief executive officer**’ means the chief executive officer of the Board referred to in section 4(1)[(a)](c);”;
- (c) by the substitution for the definition of “**child pornography**” of the 15
 following definition:
 “**child pornography**’ includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years— 20
 [(i)(a) engaged in sexual conduct; 20
 [(ii)(b) participating in, or assisting another person to participate in, sexual conduct; or

- [(iii)](c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation;”;
- (d) by the insertion after the definition of “**consumer advice**” of the following definition: 5
 “**Council**” means the Council established by section 3;”;
- (e) by the substitution for the definition of “**distribute**” of the following definition: 10
 “**distribute**”, in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections [25(a), (b) and (c), 26(1)(a) and (b) and 28(1) and (2)] 24A and 24B, includes to hand or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;” 15
- (f) by the insertion after the definition of “**distributor**” of the following definition: 20
 “**domestic violence**” means depictions or descriptions of—
 (a) physical abuse;
 (b) sexual abuse; or
 (c) emotional, verbal and psychological abuse,
 and includes any other abusive behaviour involving persons who are or have been in an intimate relationship or who are family members, regardless of gender or sexual orientation;” 25
- (g) by the deletion of the definition of “**executive committee**”;
- (h) by the insertion after the definition of “**executive committee**” of the following definition: 30
 “**explicit sexual conduct**” means graphic and detailed visual presentations or descriptions of any conduct contemplated in the definition of “sexual conduct” in this Act;”;
- (i) by the substitution for the definition of “**film**” of the following definition: 35
 “**film**” means[—
 (a) any sequence of visual images recorded [on any substance, whether a film, magnetic tape, disc or any other material,] in such a manner that by using such [substance] recording such images will be capable of being seen as a moving picture[;
 (b) the sound track associated with and any exhibited illustration relating to a film as defined in paragraph (a); 40
 (c)], and includes any picture intended for exhibition through [the] any medium [of any mechanical, electronic] or [other] device;”;
- (j) by the insertion after the definition of “**film**” of the following definitions: 45
 “**game**” means a computer game, video game or other interactive computer software for interactive game playing, where the results achieved at various stages of the game are determined in response to the decisions, inputs and direct involvement of the game player or players;
 “**identifiable group characteristic**” means a characteristic that identifies an individual as a member of a group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality;” 50
- (k) by the substitution for the definition of “**in public**” of the following definition: 55
 “**in public**”, without derogating from the ordinary meaning of that word,] includes any place to which admission is obtained for any consideration, direct or indirect, or by virtue of membership of any association of persons or contribution towards any fund;”;
- (l) by the insertion after the definition of “**in public**” of the following definition: 60
 “**matters of public interest**” means discussions, debates or opinions on matters pertaining to the common well-being or general welfare of the public or serving the interests of the public and includes discussions,

- debates and opinions on matters pertaining to religion, belief or conscience;”;
- (m) by the insertion after the definition of “**Minister**” of the following definition: “**‘newspaper’** includes an on-line publication of a newspaper;”;
 - (n) by the insertion after the definition of “**possession**” of the following definition: “**‘prescribed’** means prescribed by regulation;”;
 - (o) by the substitution for paragraph (e) of the definition of “**publication**” of the following paragraph: “(e) any record, magnetic tape, soundtrack[, **except a soundtrack associated with a film,**] or any other object in or on which sound has been recorded for reproduction;”;
 - (p) by the deletion of the definition of “**Review Board**”; and
 - (q) by the insertion after the definition of “**sexual conduct**” of the following definition: “**‘sexual violence’** means conduct or acts contemplated in the definitions of “sexual conduct” and “explicit sexual conduct” that are accompanied either by force or coercion, actual or threatened, or that induces fear or psychological trauma in a victim;”.

Substitution of section 2 of Act 65 of 1996, as substituted by section 2 of Act 34 of 1999

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

“Objects of Act

2. The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to—
- (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;
 - (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and
 - (c) make use of children in and the exposure of children to pornography punishable.”.

Substitution of section 3 of Act 65 of 1996

3. The following section is hereby substituted for section 3 of the principal Act:

“Establishment of Film and Publication Board, Council and [Film and Publication Review Board] Appeal Tribunal

3. (1) There is hereby established—
- (a) a juristic person which shall be known as the Film and Publication Board; **[and]**
 - (b) **[a juristic person which shall be known as the Film and Publication Review Board,]** the Council; and
 - (c) an Appeal Tribunal, which shall perform the functions, exercise the powers and carry out the duties[,] assigned to, conferred on or imposed upon them in terms of this Act or any other law.
- (2) The Board and **[Review Board]** the Appeal Tribunal shall **[function without any bias and shall]** be independent and function without any bias.
- (3) The seat of the Board **[and Review Board]** shall be determined by the Council in consultation with the Minister.”.

Substitution of section 4 of Act 65 of 1996, as amended by section 2 of Act 18 of 2004

4. The following section is hereby substituted for section 4 of the principal Act:

“Composition of Council

- 4.** (1) The Council shall consist of—
- (a) a chairperson and a deputy chairperson appointed by the Minister; 5
 - (b) such number of members, not exceeding seven, as the Minister may appoint having regard to the need to ensure that the membership of the Council is broadly representative of the South African community and relevant stakeholders; and
 - (c) the chief executive officer appointed by the Council in consultation with the Minister. 10
- (2) (a) In the absence of the chairperson the deputy chairperson shall act as chairperson.
- (b) In the absence of the chairperson and the deputy chairperson at a meeting, the Council shall elect one of the members present to act as the chairperson of that meeting. 15
- (3) Decisions of the Council shall be taken by a majority of votes, and in the case of an equality of votes, the chairperson of the meeting shall have the casting vote.
- (4) A quorum of the Council is constituted by fifty per cent plus one of its total number of members.” 20

Insertion of section 4A in Act 65 of 1996

5. The following section is hereby inserted in the principal Act after section 4:

“Powers and duties of Council

- 4A.** (1) The Council shall— 25
- (a) in consultation with the Minister, issue directives of general application, including classification guidelines, in accordance with matters of national policy consistent with the purpose of this Act
 - (b) determine and issue a Code of Conduct for members of the Council;
 - (c) in consultation with the Minister, appoint the chief executive officer; 30
 - (d) in consultation with the Minister, determine the qualifications, experience and terms and conditions of employment of classifiers;
 - (e) appoint such number of classifiers that comply with the determinations contemplated in paragraph (d), as may be required, having regard to the likely volume of applications and submissions that will be made in terms of this Act; 35
 - (f) at least four times a year, review and report to the Minister on the functioning of the Board to ensure that the objects of this Act are implemented efficiently and that the Board discharges its obligations and responsibilities in accordance with this Act or any other law; and 40
 - (g) exercise and perform such other functions, powers and duties as are conferred or imposed on the Council by or under this Act or any other law.
- (2) When making an appointment in terms of subsection (1)(e), the Council shall— 45
- (a) have regard to the person’s personal attributes, integrity, qualifications, knowledge and experience in the different aspects of matters likely to come before the Board; and
 - (b) ensure broad representation of the South African community in terms of race, ethnicity, gender and religion and may invite the public to nominate candidates suitable for appointment as classifiers. 50

(3) Meetings of the Council shall be convened by the chairperson and shall be held at the premises of the Board, unless, for *bona fide* reasons, the chairperson directs that a meeting be held at another venue.”

Amendment of section 5 of Act 65 of 1996, as amended by section 3 of Act 18 of 2004

6. The following heading is hereby substituted for the heading to section 5 of the principal Act: 5

“**Composition of Appeal Tribunal**”.

Substitution of section 6 of Act 65 of 1996, as substituted by section 3 of Act 34 of 1999

7. The following section is hereby substituted for section 6 of the principal Act: 10

Members of [Board] Council and [Review Board] Appeal Tribunal to be appointed by Minister

6. (1) The members of the **[Board] Council** and **[Review Board] Appeal Tribunal** shall be appointed by the Minister by notice in the *Gazette* after consultation with **[the]** Cabinet. 15

(2) The Minister may, whenever it is necessary to appoint members of the **[Board] Council** or **[Review Board] Appeal Tribunal**, appoint an advisory panel to advise him or her with regard to the persons who are to be appointed as such members, and shall appoint one of the members of the advisory panel as the chairperson thereof. 20

(3) The Minister[,], or the advisory panel may invite members of the public to **[propose]** nominate persons **[who may be considered]** for appointment.

(4) (a) A member of the **[Board] Council** or **[Review Board] Appeal Tribunal** appointed in terms of subsection (1) shall— 25

- (i) be a fit and proper person;
- (ii) be of good and sound character; and
- (iii) not be disqualified in terms of section 7.

(b) A member of the **[Board] Council** or **[Review Board] Appeal Tribunal** shall have experience in, or knowledge of, any one or more of the following matters: 30

- (i) Community development;
- (ii) education;
- (iii) psychology;
- (iv) religion; 35
- (v) law;
- (vi) drama;
- (vii) literature;
- (viii) communications science;
- (ix) photography; 40
- (x) cinematography;
- (xi) gender matters;
- (xii) children’s rights; or
- (xiii) any other relevant field of experience as may be prescribed.”

Amendment of section 7 of Act 65 of 1996, as amended by section 36 of Act 12 of 2004 45

8. Section 7 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“**Disqualifications with regard to membership of [Board] Council or [Review Board] Appeal Tribunal**”; 50

- (b) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 - “(1) A person shall not be qualified to be appointed as a member of the **[Board] Council** or **[Review Board] Appeal Tribunal**, or to be such a member, if he or she—”;
- (c) by the substitution in subsection (1)(h) for subparagraph (i) of the following subparagraph:
 - “(i) in the Republic, of theft, fraud, forgery and uttering a forged document, perjury, or any offence under the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), or Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);”;
- (d) by the substitution for subsection (2) of the following subsection:
 - “(2) Whenever circumstances in relation to a member of the **[Board] Council** or **[Review Board] Appeal Tribunal** so change that it would have disqualified him or her from being appointed as such a member, had they have been in existence at the time of his or her appointment, the seat of that member shall become vacant, and the vacancy in such seat shall be filled in accordance with section 6.”.

Amendment of section 8 of Act 65 of 1996

- 9. Section 8 of the principal Act is hereby amended—
 - (a) by the substitution for the heading of the following heading:
 - “**Period of office of members of [Board] Council and [Review Board] Appeal Tribunal**”;
 - (b) by the substitution for subsection (1) of the following subsection:
 - “(1) **[An examiner shall be appointed for a period of three years, and any other member of the Board or Review Board] Members of the Council and Appeal Tribunal** shall be appointed for a period of five years.”.

Substitution of section 9 of Act 65 of 1996, as substituted by section 4 of Act 34 of 1999

- 10. The following section is hereby substituted for section 9 of the principal Act:
 - “**Removal from office**
 - 9. (1) The Minister may remove a member of the **[Board] Council** or **[Review Board] Appeal Tribunal** from office on the grounds of incapacity, incompetence, misconduct or misrepresentation.
 - (2) A decision to remove a member of the **[Board] Council** or **[Review Board] Appeal Tribunal** from office shall be based on a finding of a tribunal appointed by the Minister: Provided that the member shall have the right to be heard.
 - (3) The Minister may suspend a member of the **[Board] Council** or **[Review Board] Appeal Tribunal** from office pending the finding of the tribunal referred to in subsection (2).
 - (4) A member of the **[Board] Council** or **[Review Board] Appeal Tribunal** shall vacate his or her office when any of the circumstances referred to in section 7 become applicable in respect of him or her, and the Minister[, **upon information given to him or her by the Chief executive officer or the chairperson of the Review Board,**] issues him or her with a certificate to that effect.”.

Insertion of section 9A in Act 65 of 1996

11. The following section is hereby inserted in the principal Act after section 9:

“Composition, functions and management of Board

- 9A.** (1) The Board shall consist of the chief executive officer and such number of officers as determined by the Council. 5
- (2) The functions of the Board shall be to—
- (a) appoint classification committees to examine and determine, in accordance with any classification guidelines issued by the Council, the classification of any film, game or publication submitted to the Board under this Act 10
 - (b) determine an application made in terms of section 22 or 23 for an exemption in respect of any film, game or publication; and
 - (c) determine an application made under section 18(1) for registration as a distributor or exhibitor of films, games or publications. 15
- (3) The chief executive officer shall be responsible for all matters relating to the administration and management of the Board, including—
- (a) the appointment of administrative staff;
 - (b) the appointment of compliance officers;
 - (c) the submission to the Council of the quarterly reports contemplated in section 4A(1)(f); and 20
 - (d) the submission of the annual report and financial statements contemplated in section 55 of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (4) The chief executive officer may delegate any power conferred on him or her.”. 25

Amendment of section 10 of Act 65 of 1996

12. Section 10 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

- “(1) The Board shall appoint classification committees as may be prescribed. 30
- (2) Decisions of a classification committee shall be taken by a majority of votes: Provided that where there is an equality of votes the Board shall appoint an additional member to such committee so as to enable the committee to come to a majority decision.”.

Substitution of section 11 of Act 65 of 1996

13. The following section is hereby substituted for section 11 of the principal Act: 35

“Administrative [staff of Board and Review Board] support for Council and Appeal Tribunal

11. The administrative work connected with the performance of the functions, the exercise of the powers and the carrying out of the duties of the [Board] Council and [the Review Board] Appeal Tribunal shall be performed by the staff [appointed, in the case of the Board, by the chief executive officer, and in the case of the Review Board, by the chairperson thereof, under the management, supervision and control of the chief executive officer or the chairperson, as the case may be] of the Board.”. 40 45

Substitution of section 12 of Act 65 of 1996

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

“Remuneration

12. The Members and staff of the **[Board] Council, [Review Board] Appeal Tribunal, [and] an advisory panel** and any person appointed as an expert to assist or **[advice] advise** the **[Board] Council, or [Review Board] Appeal Tribunal [or a classification committee]**, shall receive such remuneration, allowances and other benefits as may be determined by the Minister in consultation with the Minister of Finance.” 5

Amendment of section 13 of Act 65 of 1996 10

15. Section 13 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

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

(2) The chief executive officer shall be the accounting officer **[in respect of all money referred to in subsection (1)] of the Board.**”.

Substitution of section 14 of Act 65 of 1996, as amended by section 4 of Act 18 of 2004 20

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

“Annual Report

14. (1) **The Council shall, as soon as practicable after the end of each financial year [the chairperson of the Board shall, from information supplied to the Board by the chief executive officer and the chairperson of the Review Board, compile] prepare** a report on all the activities of the **[Board,] Council and [Review Board] Appeal Tribunal** during that financial year, and on the financial position of the **[Board,] Council and [Review Board] Appeal Tribunal** as at the end of that financial year. 25

(2) **[That] The report contemplated in subsection (1), together with the audited balance sheet and accounts pertaining to the funds of the [Board] Council and [Review Board] Appeal Tribunal shall be submitted to the Minister[, and the Minister shall lay it upon the Table] for tabling in Parliament [within 14 days after receipt thereof if Parliament is then in session, or if Parliament is not then in session, within 14 days of the commencement of the next session].”.** 30 35

Repeal of section 15 of Act 65 of 1996

17. Section 15 of the principal Act is hereby repealed.

Insertion of section 15A in Act 65 of 1996

18. The following section is hereby inserted in the principal Act after section 15: 40

“Functions of compliance officers

15A. (1) A compliance officer may, for the purpose of achieving the objects of this Act and of— 45

(a) advising distributors and exhibitors of films and games of the requirements of this Act with regard to the distribution or exhibition of films and games; and

- (b) ensuring that all films and games offered for sale or hire by a distributor have been classified in terms of this Act and that all such films and games display, in the prescribed manner, the classification reference number, the age restriction, consumer advice and such other conditions as may have been imposed on the distribution of such films and games by the Board, 5
 enter any premises, with the consent of the person in charge of such premises, on or in which the business of the sale, hire or exhibition of films or games is being conducted.
- (2) Upon entry of any premises contemplated in subsection (1), the compliance officer may— 10
 - (a) request the production of a certificate of registration as a distributor or exhibitor of films or games issued by the Board and, where relevant, a licence to conduct the business of adult premises issued by a licensing authority contemplated in section 24 of this Act; 15
 - (b) examine or inspect any premises being used to conduct the business of adult premises for compliance with the conditions contemplated in section 24(2) of this Act;
 - (c) examine or inspect any film or games being offered for sale or hire for compliance with the requirements of this Act with regard to the distribution of that film or game; and 20
 - (d) instruct that films, games and publications being offered for sale or hire that do not comply with the requirements of this Act or any decision of the Board with regard to the distribution of that film, game or publication be removed from any display or offer for sale or hire until such products comply with the requirements of this Act or any decision of the Board with regard to their distribution. 25
- (3) When performing any function in terms of this section, a compliance officer may request the assistance of a police official of the South African Police Service.”. 30

Substitution of section 16 of Act 65 of 1996

19. The following section is hereby substituted for section 16 of the principal Act:

“Classification of publications

- 16.** (1) Any person may request, in the prescribed manner, that a publication, other than a *bona fide* newspaper that is published by a member of a body, recognised by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section. 35
- (2) Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that— 40
- (a) contains sexual conduct which—
 - (i) violates or shows disrespect for the right to human dignity of any person; 45
 - (ii) degrades a person; or
 - (iii) constitutes incitement to cause harm;
 - (b) advocates propaganda for war;
 - (c) incites violence; or
 - (d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, 50
- shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.

- (3) The Board shall refer any publication submitted to the Board in terms of subsection (1) or (2) to a classification committee for examination and classification of such publication.
- (4) The classification committee shall, in the prescribed manner, examine a publication referred to it and shall—
- (a) classify that publication as a “refused classification” if the publication contains—
 - (i) child pornography, propaganda for war or incitement of imminent violence; or
 - (ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;
 - (b) classify the publication as “XX” if it contains—
 - (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
 - (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;
 - (iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
 - (iv) explicit infliction of sexual or domestic violence; or
 - (v) explicit visual presentations of extreme violence, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified “X18” or classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials;
 - (c) classify the publication as X18 if it contains explicit sexual conduct, unless, judged within context, the publication is, except with respect to child pornography, a *bona fide* documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest, in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful and age-inappropriate materials; or
 - (d) if the publication contains material which may be disturbing or harmful to or age-inappropriate for children, classify that publication, with reference to the relevant guidelines, by the imposition of appropriate age-restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials.
- (5) Where a publication has been classified as a “refused classification” or has been classified “XX” or “X18”, the chief executive officer shall cause that classification decision to be published by notice in the *Gazette*, together with the reasons for the decision.
- (6) Where a publication submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that publication to a police official of the South African Police Service for investigation and prosecution.”

Repeal of section 17 of Act 65 of 1996

20. Section 17 of the principal Act is hereby repealed.

Substitution of section 18 of Act 65 of 1996

21. The following section is hereby substituted for section 18 of the principal Act:

“Classification of films and games

18. (1) Any person who distributes, broadcasts or exhibits any film or game in the Republic shall in the prescribed manner on payment of the prescribed fee— 5

(a) register with the Board as a distributor or exhibitor of films or games; and

(b) submit for examination and classification any film or game that has not been classified, exempted or approved in terms of this Act or the Publications Act, 1974 (Act No. 42 of 1974). 10

(2) The Board shall refer any film or game submitted under subsection (1)(b) to a classification committee for examination and classification.

(3) The classification committee shall in the prescribed manner, examine the film or game referred to it and shall— 15

(a) classify the film or game as a “refused classification” if the film or game—

(i) contains child pornography, propaganda for war or incites imminent violence; or

(ii) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the film or game is, except with respect to child pornography, a *bona fide* documentary, is of scientific, dramatic or artistic merit or is on a matter of public interest; 20

(b) classify the film or game as “XX” if it depicts— 25

(i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;

(ii) bestiality, incest, rape, conduct or an act which is degrading of human beings;

(iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour; 30

(iv) explicit infliction of sexual or domestic violence; or

(v) explicit visual presentations of extreme violence, unless, in respect of the film or game, judged within context, the film or game is, except with respect to child pornography, a *bona fide* documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified “X18” or classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials 35

(c) classify the film or game as “X18” if it contains explicit sexual conduct, unless, judged within context, the film or game is, except with respect to child pornography, a *bona fide* documentary or is of scientific, dramatic or artistic merit, in which event the film or game shall be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials; or 40

(d) if the film or game contains a scene which may be disturbing or harmful to, or age-inappropriate for children, classify that film or game with reference to the relevant guidelines issued by the Board by the imposition of appropriate age restrictions and such other conditions as may be necessary to protect children in the relevant age categories from exposure to such materials. 50

(4) Where a film or game has been classified as a “refused classification” or has been classified as “XX” or “X18”, the chief executive officer shall cause that classification decision to be published by notice in the *Gazette*, together with the reasons for the decision.

(5) Where a film or game submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that film or game to a police official of the South African Police Service for investigation and prosecution.

(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.”.

Insertion of sections 18A and 18B in Act 65 of 1996

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

“Display of classification decisions

18A. (1) Where a film, game or publication has been classified or exempted from classification in terms of this Act it must—

(a) if it is a film or game approved for sale or hire, display the following certificate conspicuously and clearly visible on or through the cover or packaging of the cassette or holder of the film or game:

CERTIFICATE OF CLASSIFICATION

Certificate of Classification No.:

Classification and Consumer Advice:

Any other condition imposed;

(b) if it is a publication, display either on the front of the cover or on the wrapper of the publication, where applicable display the following information—

(i) classification and consumer advice; or

(ii) any other condition aimed at the protection of children; or

(c) if it is a film approved for exhibition in public, display on all advertisements and illustrated exhibitions associated with that film the classification, consumer advice and any other condition imposed by the Board with respect to the exhibition of that film in public.

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

Re-classification

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

Substitution of section 19 of Act 65 of 1996, as amended by section 5 of Act 34 of 1999

23. The following section is hereby substituted for section 19 of the principal Act:

“Right to appear, to be represented, to adduce evidence, to address, to have case and arguments properly considered, and to be informed of grounds of decision 5

19. The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for **[a decision and]** classification in terms of **[section 17]** section 16, **[and any person who applies for a classification of a film,]** or the reclassification of a film, game or publication, or for a permit, exemption or licence, or who is the publisher of a publication which is the subject of an application for classification, or whose financial interest could be detrimentally affected by a decision of the Board on such application, or with regard to an exemption or permit, the withdrawal of which is being considered, or who appeals to the **[Review Board]** Appeal Tribunal against a decision with regard to such an application, shall have the right—

- (a) to appear in person before the **[executive committee]** Board, classification committee or **[Review Board]** Appeal Tribunal, or to be represented or assisted by a legal practitioner or by any other person of his or her choice, to adduce oral or written evidence and, subject to a reasonable time-limit imposed by the chairperson concerned, to address that committee, **[or board]** the Board or Appeal Tribunal, in the language of his or her choice; and
- (b) to have his or her case and arguments duly considered and to be informed, in writing, of the decision of the **[Review]** Board **[or committee]** or Appeal Tribunal, of the reasons for and grounds upon which such decision is based, which shall include, in the case of a “refused classification” or a “XX” classification of a publication, **[or]** film[,] or game a reference to the particular **[clause of Schedule 1 or 6]** section of the Act which **[forms]** formed the basis of the decision[, **and of the names of the members of that board or committee who took part in rendering the decision of that board or committee.**”.

Amendment of section 20 of Act 65 of 1996

24. Section 20 of the principal Act is hereby amended— 35

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

“(1) The Minister or any person who has lodged a complaint with the Board that any publication be referred to a classification committee for a decision and classification in terms of **[section 17]** section 16, and any person who applied for the classification of a film or game, or the publisher or distributor of a publication which formed the subject of any complaint or application in terms of section 16, may within a period of 30 days from the date on which he or she was notified of the decision, **[which in the case of the classification of a publication shall be the date of publication of the decision in the Gazette,]** in the prescribed manner appeal to the **[Review Board]** Appeal Tribunal.”; and

(b) by the substitution for subsections (3) and (4) of the following subsections:

“(3) The **[Review Board]** Appeal Tribunal may refuse the appeal and confirm the decision in question, or allow the appeal, either wholly or in part, and give such decision as the Board **[or executive committee]** should, in its view, have given, and amend the classification of the **[publication or]** film, game or publication, specifying the **[clause]** section of **[Schedule 1 or 6]** this Act upon which the classification is in terms of its decision based, and may impose other conditions in respect of the distribution or exhibition of the **[publication or]** film, game or publication. 55

(4) The chief executive officer shall, in the case of a successful appeal against a decision whereby an application for [a] registration, exemption, permit or licence is refused, issue the requisite certificate of registration, exemption, permit or licence, subject to the conditions, if any, imposed by the [Review] Appeal Tribunal.”. 5

Repeal of section 21 of Act 65 of 1996

25. Section 21 of the principal Act is hereby repealed.

Amendment of section 22 of Act 65 of 1996

26. Section 22 of the principal Act is hereby amended—
 (a) by the substitution for subsections (1) and (2) of the following subsections: 10
 “(1) The [executive committee] Board may on receipt of an application in the prescribed form, subject to such conditions as it may deem fit, exempt in writing any person or institution from [sections 25, 27 and 28] section 24A, 24B or 24C if it has good reason to believe that *bona fide* purposes will be served by such an exemption. 15
 (2) Where the [executive committee] Board after due inquiry has good reason to believe that the conditions of an exemption are not complied with or that the *bona fide* purposes are no longer present, it may withdraw the exemption.”; and
 (c) by the deletion of subsection (3). 20

Substitution of section 23 of Act 65 of 1996, as amended by section 6 of Act 34 of 1999, section 8 of Act 18 of 2004

27. Section 23 of the principal Act is hereby substituted for the following section:

“Exhibition of films to distributor of films not prohibited by this Act

23. (1) The provisions of [section 26(1)(a) and (b)] section 24A(1), 25 (2)(a) and (3) shall not prohibit the exhibition of any film or game to any person in the course of his or her business as a distributor of films or games or to the representative of such distributor acting for the purposes of such business.
 (2) The [executive committee] Board may, in its discretion and subject to such conditions as it may deem fit to impose, either by means of a permit, issued in the prescribed form, or by notice in the *Gazette*, exempt from [section 26] classification any particular film or game, any particular class of films or games, or any film or game intended for exhibition to a particular group of persons or under any particular circumstances, and may at any time, after due inquiry, withdraw any such permit or exemption: Provided that if such exemption was granted by notice in the *Gazette*, the chief executive officer shall by notice withdraw the exemption.”. 30 35

Amendment of section 24 of Act 65 of 1996

28. Section 24 of the principal Act is hereby amended— 40
 (a) by the substitution for subsections (1) and (2) of the following subsections:
 “(1) Any person may [notwithstanding the provisions of section 25(b), 26(1)(b) or 28(2),] exhibit in public or distribute any film, game or publication [or film] classified as “X18” in terms of [a decision of the Board which has been published in the Gazette as X18 or a publication which falls within Schedule 2 read with Schedule 5,] this 45
 Act if such person is the holder of a licence to conduct the business of adult premises, issued by a licensing authority in terms of [section 2, read with item 2 of Schedule 1, of the Business Act, 1991 (Act No. 71

of 1991), and if] relevant national, provincial or local government laws: Provided that such exhibition or distribution takes place on or from within premises forming part of a building.

(2) Any exemption granted in terms of subsection (1) may be suspended by the **[executive committee]** Board for a period not exceeding one year, if the **[executive committee]** Board, after the holding of an inquiry, is satisfied that—

- (a) notices stating that no person under the age of 18 years may enter or be within such premises were not displayed, in the manner prescribed by the Board, at all entrances to the premises concerned; 10
- (b) a film, game or publication was displayed or **[a film was]** exhibited within such premises, or in a display window or door forming part thereof, in such a manner or in such a position that the film, game or publication **[or film]** could be seen from any point outside the premises concerned; 15
- (c) any person under the age of 18 years was allowed to enter or be within the premises concerned; or
- (d) any film, game or publication **[or film]** classified as “X18” in terms of a decision of the Board, published in the *Gazette*, was delivered by the person licensed in terms of subsection (1) to conduct such premises— 20
 - (i) to a person who is not the holder of a similar licence; or
 - (ii) in a manner which was not in accordance with regulations made **[by the Board,]** under this Act with the aim of preventing the delivery of such films, games or publications **[and films]** to persons under the age of 18 years.”. 25

Insertion of sections 24A, 24B and 24C in Act 65 of 1996

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

“Prohibitions, offences and penalties on distribution and exhibition of films, games and publications 30

24A. (1) Any person who knowingly distributes or exhibits in public a film or game without first having been registered with the Board as a distributor or exhibitor of films or games shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment. 35

(2) Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication referred to in section 16(1) of this Act which has—

- (a) except with respect to broadcasters that are subject to regulation by the Independent Communications Authority of South Africa and a newspaper contemplated in section 16(1), not been classified by the Board; 40
- (b) been classified as a “refused classification”; or
- (c) been classified as “XX”,

shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. 45

(3) Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the Board as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or a publication which has been classified “X18”, shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. 50 55

- (4) Any person who knowingly distributes or exhibits any film, game or publication—
- (a) classified as “X18”; or
 - (b) which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film, game or publication is a *bona fide* documentary or is of scientific, literary or artistic merit or is on a matter of public interest,
- to a person under the age of 18 years, shall be guilty of an offence and liable, upon conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment .”
- (5) Any person who knowingly distributes a film, game or publication which has been classified by the Board without displaying, clearly and conspicuously and in the prescribed manner, the classification reference number, the age restriction, consumer advice and any other condition imposed on the distribution of that film, game or publication shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.
- (6) Any person who knowingly advertises a film or game in any medium without indicating, clearly and conspicuously so as to be plainly visible to the public, the age restriction, consumer advice and any other condition imposed on the film or game being advertised, shall be guilty of an offence and liable, upon conviction, to be a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.
- (7) Any person who knowingly and without the prior written approval of the Board exhibits in public during the same screening session, or distributes on the same cassette or disc of a film or game, a trailer advertising a film or a game with a more restrictive classification than the featured film or game, shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.

Prohibition, offences and penalties on possession of films, games and publications

- 24B.** (1) Any person who—
- (a) unlawfully possesses;
 - (b) creates, produces or in any way contributes to, or assists in the creation or production of;
 - (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; 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 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 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 guilty of an offence.

Obligations of internet access and service providers

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24C. (1) For the purposes of this section, unless the context otherwise indicates—

- (a) **‘child-oriented service’** means a contact service and includes a content service which is specifically targeted at children;
- (b) **‘contact service’** means any service intended to enable people previously unacquainted with each other to make initial contact and to communicate with each other;
- (c) **‘content’** means any sound, text, still picture, moving picture, other audio visual representation or sensory representation and includes any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated but excludes content contained in private communications between consumers;
- (d) **‘content service’** means—
 - (i) the provision of content; or
 - (ii) the exercise of editorial control over the content conveyed via a communications network, as defined in the Electronic Communications Act, 2005 (Act No. 35 of 2005), to the public or sections of the public; and
- (e) **‘operator’** means any person who provides a child-oriented contact service or content service, including Internet chat-rooms.

(2) Any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet, shall—

- (a) moderate such services and take such reasonable steps as are necessary to ensure that such services are not being used by any person for the purpose of the commission of any offence against children;
- (b) prominently display reasonable safety messages in a language that will be clearly understood by children, on all advertisements for a child-oriented service, as well as in the medium used to access such child-oriented service including, where appropriate, chat-room safety messages for chat-rooms or similar contact services;
- (c) provide a mechanism to enable children to report suspicious behaviour by any person in a chat-room to the service or access provider;
- (d) report details of any information regarding behaviour which is indicative of the commission of any offence by any person against any child to a police official of the South African Police Service; and
- (e) where technically feasible, provide children and their parents or primary care-givers with information concerning software or other tools which can be used to filter or block access to content services and contact services, where allowing a child to access such content service or contact service would constitute an offence under this Act or which may be considered unsuitable for children, as well as information concerning the use of such software or other tools.

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

Repeal of sections 25, 26 and 27 of Act 65 of 1996

30. Sections 25, 26 and 27 of the principal Act are hereby repealed.

Amendment of section 27A of Act 65 of 1996, as inserted by section 12 of Act 18 of 2004

31. Section 27A of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection: 5

“(4) Any person who—

- (a) fails to comply with subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; or 10
- (b) fails to comply with subsection (2) or (3) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”.

Repeal of sections 28 and 29 of Act 65 of 1996 15

32. Sections 28 and 29 of the principal Act are hereby repealed.

Amendment of section 30 of Act 65 of 1996, as amended by section 15 of Act 18 of 2004

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

- (a) by the deletion of subsections (1), (1A), (2) and (3); and 20
- (b) by the substitution for paragraphs (a) and (b) of subsection (4) of the following paragraphs:

“(4) (a) If any person who has contravened or failed to comply with **[section 26(1)(a), (aA), (b), (c), (d), (2) or (3) or 27A(1)]** section 24(A)(1), 2(a), (5), (6), (7), 24C(2) or 27A(1)(a) agrees to abide by a decision **[of the executive committee]** of the Board and deposits with the Board such sum as **[the executive committee of]** the Board may determine but not exceeding the greater of two thousand rand or two times the prescribed classification costs, where applicable, on each such contravention or failure to comply, **[the executive committee of]** 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 so deposited. 25 30

(b) There shall be a right of appeal to the Minister from any determination or order of the **[executive committee 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 or order.”. 35

Amendment of section 30B of Act 65 of 1996, as inserted by section 16 of Act 18 of 2004

34. Section 30B of the principal Act is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph: 40

“(b) any film, game or publication **[or film]** has or has not been submitted to the Board in terms of this Act.”.

Amendment of section 31 of Act 65 of 1996

35. Section 31 of the principal Act is hereby amended— 45

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

“(1) The Minister **[shall] may—**

- (a) in consultation with the Minister of Finance, make regulations, **[prescribing the]** regarding fees **[which shall be]** payable in respect of any application, exemption, permit or appeal under this Act; 50

- (b) make regulations relating to the [establishment of,] procedure with regard to the nomination of persons as candidates for the [Board] Council or [Review Board] Appeal Tribunal, further relevant experience in terms of section 6(4)(a) of this Act and the experience of persons who may be appointed as members of the advisory panel referred to in section 6(1); 5
- (c) after consultation with the Council, make regulations relating to—
 - (i) the procedures and forms for making any application or submission under this Act; 10
 - (ii) the form of any certificate to be issued in terms of this Act; and
 - (iii) the format and details of the display or exhibition of decisions of the Board with respect to films, games and publications classified in terms of this Act; 15
- (d) after consultation with the Appeal Tribunal, make regulations regarding the procedures and forms for the submission of appeals to the Appeal Tribunal;
- (e) make regulations on any matter that may be prescribed under this Act; and 20
- (f) make regulations generally on any matter required for the better achievement of the objects and purposes of this Act.”; and

(b) by the deletion of subsection (2).

Repeal of section 32 of Act 65 of 1996 25

36. Section 32 of the principal Act is hereby repealed.

Repeal of Schedules to Act 65 of 1996

37. Schedules 1 to 10 to the principal Act are hereby repealed.

Substitution of words in Act 65 of 1996

38. The principal Act is hereby amended by the substitution for the words “**Review Board**”, wherever it occurs, of the words “**Appeal Tribunal**”. 30

Transitional provisions

39. The provisions of this Act shall not affect—
- (a) anything done or omitted in terms of the principal Act before the date of commencement of this Act; and 35
 - (b) anything done under the provisions of the principal Act prior to the commencement of this Act, which can be done under the principal Act as amended by this Act.

Short title and commencement

40. This Act is called the Films and Publications Amendment Act, 2008, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 40