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RESPONSE TO THE OPINION OF ADV ISMAIL JAMIE, SC

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Para. 7 : *"The classification of publications is, however, not mandatory under the current Act, but applies only if a complaint is received concerning a particular, hitherto unclassified, publication."*	**The current Act provides for two categories of publications: publications only classified upon receipt of a public complaint (section 16(1) and a category of "submittible" publications subject to mandatory classification in terms of section 17(4) of the Act.**
Para. 9 : *"The Bill seeks to amend the objects of the Act in clause 2. In so doing, it broadens the objects....."*	**The proposed amendment is, in effect, a re-draft of the existing provision to define the objects of the Act with reference to the purpose and significance of classification. Far from broadening the objects, it, in fact, limits the objects to what is the specific purpose of classification.**
Para. 10 : *".....the Amendment Bill now refers to.....together with two new entities, viz, a Council and an Appeal Tribunal."*	**The Appeal Tribunal is not a new entity but merely a re-naming of the existing Film and Publication Review Board.**
Para. 12 : *".....there are three key rights/constitutional principles against which the constitutionality of the Amendment Bill falls to be considered....."*	**The amendments were drafted against a wider range of constitutional principles than the three "key rights" mentioned in the opinion. In addition to the three, the amendments also took into consideration-** • **the Children's Bill of Rights, especially sections 28(1)(d) and (2)** • **the right to equality in section 9** • **the right to human dignity in section 10** • **the right to access to information in section 32, and** • **the founding values set out in sections 1(a) and (b)** **of the *Constitution.***

Paras. 14-19 : *The right to freedom of expression*	The amendments do not, in any way, suggest that the right to freedom of expression is an issue of little or no concern with respect to what a democracy means in practice. However, freedom of expression is not absolute, and the cases cited in the opinion all make the same point : that limitations on freedom of expression is constitutional if justified in terms of section 36 of the *Constitution.* It should be noted that the absence of any reference to the right to freedom of expression in the Table of Non-Derogable Rights in the *Constitution* is evidence of the fact that the right to freedom of expression is not absolute and may be limited under section 36 of the *Constitution.* The point was aptly expressed in the Canadian Supreme Court decision in *R v Sharpe [2001] 1 S.C.R.: "Under our society's democratic principles, individual freedoms such as expressions are not absolute, but may be limited in consideration of a broader spectrum of rights, including equality and security of the person."* This principle is echoed in the *Islamic Unity* case, referred to in paragraph 15 of the opinion, where the Constitutional Court acknowledged that certain expressions do not deserve constitutional protection because, among other things, they have the potential to impinge adversely on the dignity of others and cause harm. And see, also, *Case and another v Minister of Safety and Security and others, CCT 20/95*, where the Constitutional Court noted that an invasion of privacy may be permissible in terms of the limitation clause *where the material concerned was so pernicious that a ban on its possession could be said to serve a useful purpose in the campaign against the production of such material.*
Paras. 20-23 : *On the requirement of clear and accessible legislation that provides certainty*	In common with almost all classification and rating authorities, decisions of the Board must mirror community standards of tolerance. Community standards are not static. The Act requires the establishment of guidelines to be used to determine what is disturbing and harmful to children *in consultation with the public on an annual basis.* A classification system must be sufficiently flexible to accommodate not only changing social norms and values but also the

	convergence of technology as it impacts on the distribution of films, games and publications. The observation of the court in the *Affordable Medicines Trust v Minister of Health* case, quoted in paragraph 21 of the opinion, is appropriate:*"Indeed.....laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions.....One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself."* The proper place to expect a "degree of precision" is the guidelines.
Paras. 24-25 : *On implementation*	The proposed amendments do not alter the classification system, which requires the appointment of a panel of examiners, from which classification committees are appointed to examine and classify materials referred to them, using guidelines established by the Board.
Para. 29 : *"The Amendment Bill however, introduces a two-fold mechanism for classification..."*	The proposed amendment in clause 19 combines both sections 16 and 17 of the existing Act – the "two-fold mechanism" is, in fact, already part of the current Act.
Para. 30 : *On the limitation of the newspaper exclusion to only NASA newspapers*	The exclusion of only members of NASA was not an arbitrary decision. The options were to exempt *all* newspapers or only those within a particular category. An important consideration was the issue of self-regulation. NASA is part of self-regulation and self-regulation schemes bind only members. NASA-members may be said to be bound by codes of conduct and good practice. Newspapers which do not belong to NASA are not bound by any codes of conduct and good practice but should be "regulated" in some way. Excluding such "newspapers" from the exemption provisions of section 16(2) will ensure that such papers are subject to a regulatory regime – in this case, the Board.

Para. 31 : *".....legislation must be rationally connected to a legitimate government purpose and must not be arbitrary."*	**In providing for the regulation of the distribution of certain kinds of materials, Parliament was pursuing the pressing and substantial objective of criminalizing the possession materials that pose a reasoned risk of harm to children. There is a substantial body of evidence which suggests a very high correlation between exposure to certain kinds of materials and harm to children. The means chosen – *classification, age restrictions and consumer advice* – are, in my opinion, rationally connected to this objective.** **The overriding objective of the proposed sections 16 and 18 is, therefore, not moral disapprobation but the avoidance of harm to children, in particular, and society in general, and this is not only a sufficiently pressing and substantial concern, but also a constitutional obligation towards the protection of children (section 28 of the Constitution) to warrant a restriction on freedom of expression. In the matter of *R V Sharpe 2001 SCC 2* the Court remarked that "*[T]here is a sufficiently rational link between the criminal sanction, which demonstrates community's disapproval of the dissemination of materials which potentially victimize children and women and restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective. While a direct link between obscenity and harm to society may be difficult to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.*"**
Para. 33 : *On prior restraint*	**The proposed amendment in section 16(2) is not a prior restraint on freedom of expression in general but only on the publication and distribution of specific and defined expressions which are either illegal and outside constitutional protection or are potentially disturbing and harmful to children and to society.** **Section 16(2) only minimally impairs freedom of expression that is said to enjoy constitutional protection i.e. sexual conduct. It does not affect material that is not degrading or dehumanizing, but is designed to catch material that creates a risk of harm to society, and especially to**

	children. Given the gravity of the harm, and the threat to the values at stake, it is doubtful that there is an alternative equal to the proposed measures for respecting the underlying fundamental values and principles of the *Constitution.* Serious social problems, such as violence against children and women and racism, require multi-pronged approaches by government; education and legislation are not alternatives but complements in addressing such problems.
Para. 34.1 : Section 16(2)...."*impermissibly intrudes upon and restricts constitutionally protected speech.*"	In fact, the proposed section 16(2) refers only one category of expressions not described in the category of unprotected speech in section 16(2) of the *Constitution* – sexual conduct. Perhaps "sexual conduct" should be qualified by "explicit", which will narrow the scope of the application of the proposed section 16(2) to materials which do pose a reasonable risk of harm.
Para. 34.2 : *"In any event it fails to provide clear and certain indications as to what speech is permissible and what is not."*	Subsections (b) and (c) of the proposed section 16(2) is exactly as will be found in section 16(2) of the *Constitution.* Subsection (a) refers to "sexual conduct", which is clearly defined in the Act but which may be narrowed by the qualifier "explicit". Subsection (d) refers to the advocacy of hatred on grounds which are also defined in the Act. In any event, details are matters for guidelines. I would also refer to the comments made with respect to paragraphs 20-23.
Paras. 35-39 : *Regarding the phrase "or amounting to" in section 16(2)*	The remedy suggested in paragraph 38 – the deletion of the phrase "*or amounting to*" – is supported.
Para. 40.5 : *On subsection (a) of section 16(2) of the Bill regarding "sexual conduct"*	Although "sexual conduct" is not excluded "from the ambit of freedom of expression under the Constitution" (i.e. section 16(2) of the Constitution), it could just as well be argued that child pornography is also not excluded. In order to align the Amendment Bill more effectively with its objects and with the Constitution, we propose that the word "explicit" could be inserted before "sexual conduct" in the proposed new section 16(2)*(a)* of the Amendment Bill. Alternatively, the

	reference to "sexual conduct" in the proposed section 16(2) could be amended to reflect the current Act: "*explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm.*"
the composition of the Board	The opinion does state how the "given" composition of the Board is "problematic". The classification system, guidelines and procedures have been in operation for a number of years, including for publications subject to mandatory classification in terms of section 17(4) of the current Act. The Bill does not propose changes to the classification system itself.
On "conduct or an act which is degrading of human beings".	The opinion itself seems to provide the answer. In the matter of *S V Chapman 1997 (3) SA 341 (SCA) 344 J to 345 E* the Court held that sexual violence in general rape in particular, constituted "*a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim*". Also, in the matter of *R v Butler 1992 (1) SCR 452,* the Court remarks that material which may be said to exploit sex in a "*degrading or dehumanizing*" manner "*will necessarily fail the community standards test, not because it offends against morals but because it is perceived by public opinion to be harmful to society.*". It would thus seem that the Courts do recognize conduct which may be said to be "*degrading of human beings*".
	Adv Jamie's proposal to include reference to "*public interest*" in the exception of *bona fide* documentary or a publication of scientific, literary or artistic merit as provided in the new proposed section 16(4)*(b) and (c)* is supported.
the definition of "film"	The proposed definition, in fact, deletes the part quoted in paragraph 46.2.

Para. 53 : *On the display of classification decisions*	An "exemption" is a classification decision, the only difference being that the age-restriction and consumer advice is imposed by the Board and not by a classification committee. Products may be exempted from the classification ***process*** but not from the classification ***system***
Para. 56 : *Regarding the "would have been so classified" provision in the proposed section 24A(2)(c)*	**These are materials which are prohibited from distribution or public exhibition, though not from possession for personal and private use. Society should be expected to know what materials are prohibited from distribution and public exhibition, just as the public is expected to know what conduct will constitute criminal acts or omissions. The purpose of preventing the distribution or public exhibition of such materials would be frustrated if the provision related only to materials already classified "XX" but allows the distribution and public exhibition of similar materials only because they have not been classified.**
Para. 57 : *Regarding offences in the "X18" category in the proposed section 24A(4)*	**This offence should, in fact, be consistent with the "X18" category, and "sexual" should be qualified by "explicit".**
Para. 58 : *Regarding the anti-grooming provision in the proposed section 24B(3)*	**This is an "anti-grooming" provision and it should, necessarily, be much broader than the "XX" or "X18" categories. Any depiction of sexual conduct, whether explicit or even implied, may be used for the purpose of grooming children into accepting intergenerational sex as normal and acceptable.**