

10 August 2017

Parliamentary Portfolio Committee for Justice and Correctional Services

For attention of The Secretary: Mr V Ramaano

Per email: vramaano@parliament.gov.za

Dear Sir

Submissions: Cybercrimes and Cybersecurity Bill 2017

1. ISPA refers to the call for comments on the Cybercrimes and Cybersecurity Bill [B6 – 2017] (“**the Bill**”) issued by the Chairperson of the Portfolio Committee for Justice and Correctional Services (“**the Committee**”) on 3 July 2017.

ISPA’s interest in the Bill

2. ISPA is a South African Internet industry body incorporated as a Non-Profit Company (NPC). Established on 6 June 1996, ISPA currently represents more than 180 members offering a range of services and targeting diverse markets in the electronic communications industry value chain. ISPA’s membership comprises a blend of providers of network and communications services, as well as resellers of network and communication services.
3. The then Minister of Communications formally recognised ISPA as an Industry Representative Body in terms of section 71 of the Electronic Communications and Transactions Act, 2002 on 20 May 2009.
4. The majority of ISPA’s members fall squarely under the definition of ‘electronic communication service provider’ as that term is defined in the Bill.
5. ISPA has also proactively engaged with law enforcement authorities and other stakeholders to:
 - 5.1. Develop a shared understanding of the legal framework applicable to the interaction between law enforcement and ISPA members.
 - 5.2. Facilitate co-operation between ISPA members and law enforcement authorities within such framework.
 - 5.3. Train law enforcement agencies in Internet-related issues.
 - 5.4. Provide information to and assist consumers with cybercrime issues.

- 5.5. Develop the icode1 project, which is an industry-driven initiative to identify infected machines, inform affected consumers that they may be at risk, provide support to enable those consumers to disinfect their machines, and reduce their risk of re-infection.
- 5.6. Develop shared resources such as posters to assist with consumer awareness around cybersecurity issues.
- 5.7. As such ISPA has - and its members have - a direct interest in the Bill.

Scope of submissions

6. ISPA has restricted its consideration and comments to those provisions of the Bill affecting “electronic communications service providers” or “ECSPs”.

Prior engagement

7. The Department of Justice and Constitutional Development (“**the Department**”) stands to be lauded for the effort which it has made in preparing the Bill for presentation to Parliament.
8. While ISPA understands that certain provisions of the Bill will be highly contentious, this should not detract from the wide-ranging public consultation and comparative research undertaken by the Department. It should also be borne in mind that the Bill deals with highly complex social and technical issues which are being grappled with around the world.
9. ISPA has had numerous constructive interactions with the Department regarding the Bill over the past two years: the direct result of this is reflected in the minimal comments which ISPA has on the Bill as it has been presented.

Chapter 9 of the Bill – Obligations of electronic communications service providers and financial institutions

10. ISPA supports the inclusion in the Bill of subsection 52(4) of the Bill, which affirms the position under the Electronic Communications and Transactions Act 25 of 2002 that ECSPs are not required to monitor all data passing over their networks or to actively seek out facts or circumstances indicating any unlawful activity. This reflects the reality of communications service provision as well as the fundamental right of South Africans not to have the privacy of their communications infringed upon².
11. ISPA requests that subsection 52(3) be amended to allow for a discretion in the quantum of any fine imposed upon an ECSP for a contravention of subsection 52(1). Suggested wording for such an amendment is as follows:

¹ www.icode.org.za, see further below.

² Section 14 of the South African Constitution

(3) An electronic communications service provider or financial institution that fails to comply with subsection (1), is guilty of an offence and is liable on conviction to a fine of not exceeding R50 000.

Amendments to be effected to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (“SORMAA”)

Definition of “electronic communications service provider”

12. ISPA requests that the definition of “electronic communications service provider” to be inserted into SORMAA be aligned with the definition proposed in the body of the Bill. Currently the following definitions are proposed:

Definition in the Bill	Definition to be inserted into SORMAA
“electronic communications service provider” means any person who provides an electronic communications service under and in accordance with an electronic communications service licence issued to such person under Chapter 3 of the Electronic Communications Act, 2005 (Act No. 36 of 2005), or who is deemed to be licensed or exempted from being licensed as such in terms of the Electronic Communications Act, 2005;	““electronic communications service provider” means an entity or a person who is licensed or exempted from being licensed in terms of Chapter 3 of the Electronic Communications Act, 2005 (Act No. 36 of 2005), to provide an electronic communications service;”.

13. While there may – in practical terms – be no difference between these two provisions, ISPA submits that it is in the interests of consistency in the administration of justice that the two definitions be identical. ISPA cannot think of any rationale for using different definitions in this manner.

The Bill, SORMAA, the Films and Publications Act 65 of 1996 and the Films and Publications Amendment Bill

14. ISPA notes that the Bill proposes the deletion of section 24B of the Films and Publications Act on the basis that said section 24B criminalises conduct relating to the possession, creation and distribution of child pornography. Under the Bill this conduct will be criminalised through the insertion of provisions into SORMAA, and it is therefore correct that the Bill seeks the deletion of section 24B of the Film and Publications Act once a finalised Cybercrimes and Cybersecurity Act comes into force.

15. It is our submission, however, that the Bill does not go far enough in this regard, and that it should – on the same logic - also seek to delete section 27A of the Films and Publications Act as well as other provisions in that Act which deal with child pornography.
16. ISPA does not understand the continued involvement of the Films and Publications Board – an administrative body - in the investigation and prosecution of criminal conduct involving child pornography. The Films and Publications Act should not provide for criminal offences and these criminal offences should be clearly distinguished from aspects of the Board’s mandate relating to the protection of children from exposure to inappropriate content. Criminal offences are the province of SAPS, the NPA and the Courts, not the Films and Publications Board.
17. In this regard, ISPA refers to the presentation made to the Portfolio Committee for Communications (PCC) by the Department of Communications on 20 September 2016, title– “DOC response to submissions by stakeholders to the Films and Publications Amendment Bill: 20 September 2016”³ – in connection with the consideration by that Committee of the Films and Publications Amendment Bill 2015. This presentation reflects the recommendations of a series of meeting held between the Department of Justice and the Department of Justice and Constitutional Development to resolve identified overlaps between the Cybercrimes and Cybersecurity Bill 2016 and the Films and Publications Amendment Bill 2015.
18. The recommendations flowing from these engagements were as follows⁴:
- 1. The regulation and criminalisation of “child pornography” should not be dealt with in terms of the FPA. The objects of the FPA is set out in the long title of the Act which provides that the aims of the FPA are to “provide for the classification of certain films and publications; to that end to provide for the establishment of a Film and Publication Board and a Film and Publication Appeal Tribunal; to repeal certain laws; and to provide for matters connected therewith”. It is submitted that the criminalisation of child pornography should be dealt with in the SOA. The current tendency to deal with child pornography in a law which does not specifically relates to the criminalisation of sexual offences hampers the further development of this important aspect and give rise to fragmentary approach.*

³ Available from <http://www.ellipsis.co.za/wp-content/uploads/2016/08/DoC-Responses-to-Submissions-20-September-2016.pdf>

⁴ As set out in slides 15-18 of the presentation

2. The regional court magistrates, the National Prosecuting Authority and the South African Police Service have requested the Department of Justice and Constitutional Development to deal with child pornography coherently in a single law, namely the SOA.

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4. South Africa is probably the only country in the world that deals with child pornography in a law that primarily deals with the classification of media. In almost all other countries this category of offences forms part of their substantive criminal law.

5. In order to rectify the fragmentation of criminal law and to ensure that this aspect can in context of other sexual offences be further developed it is proposed that section 24B of the FPA be incorporated in the SOA. The Cybercrimes and Cybersecurity Bill can be used as the medium to effect such an amendment. The proposed amendment may also be utilised to address child pornography that is cyber related which is probably not fully addressed in the current section 24B of the FPA.

(ISPA's emphasis)

19. ISPA agrees unreservedly with this position and the proposed remedial action and submits that the principles set out and underlined in the above excerpt need to be taken through to their logical conclusion by effecting further amendments to the Films and Publications Act through the agency of the Bill.
20. Amendments to be effected to the Film and Publications Act by the Bill should include the deletion of the definition of "child pornography" in section 1 of the Films and Publications Act, which is significantly different from the definition which the Bill proposes to insert into SORMAA, as shown in the table below.

Definition of "child pornography" in the Films and Publications Act	Definition of "child pornography" proposed by the Bill
<p>"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-</p> <p>(a) engaged in sexual conduct;</p> <p>(b) participating in, or assisting another person to participate in, sexual conduct; or</p>	<p>"child pornography" means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is realistically depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such</p>

<p>(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;</p>	<p>image, presentation or description of such person—</p> <p>(a) engaged in an act that constitutes a sexual offence;</p> <p>(b) engaged in an act of sexual penetration;</p> <p>(c) engaged in an act of sexual violation;</p> <p>(d) engaged in an act of self-masturbation;</p> <p>(e) displaying the genital organs of such person in a state of arousal or stimulation;</p> <p>(f) unduly displaying the genital organs or anus of such person;</p> <p>(g) displaying any form of stimulation of a sexual nature of such person's breasts;</p> <p>(h) engaged in sexually suggestive or lewd acts;</p> <p>(i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;</p> <p>(j) engaged in any conduct or activity characteristically associated with sexual intercourse;</p> <p>(k) showing or describing such person—</p> <p>(i) participating in, or assisting or facilitating another person to participate in; or</p> <p>(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j);</p> <p>or</p> <p>(l) 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 a 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;</p>
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21. Should the Film and Publications Board need to have reference to a definition of child pornography when deciding to refer content submitted to it to SAPS for prosecution, it should refer to the definition contained in SORMAA.
22. ISPA further submits that section 27A of the Films and Publications Act - which we have set out in full below for ease of reference – should also be deleted through the provisions of the Bill.

27A. Registration and other obligations of Internet service providers

(1) Every Internet service provider shall

(a) register with the Board in the manner prescribed by regulations made under this Act; and

(b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.

(2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall -

(a) take all reasonable steps to prevent access to the child pornography by any person;

(b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and

(c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.

(3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.

(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

(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.

23. Section 27A of the Films and Publications Act is intended to regulate the conduct of electronic communications service providers as regards child pornography. As is the case with section 24B of the

Films and Publications Act, the provisions of section 27A will be overtaken by the insertions to SORMAA proposed by the Bill.

24. This can be illustrated by comparing the proposed insertion of section 19A into SORMAA, with specific reference to the proposed subsection 19A(9), against section 27A(2) of the Films and Publications Act:

Proposed subsection 19A(9) of SORMAA	Subsection 27A(2) of the Films and Publications Act
<p>(9) An electronic communications service provider that is aware or becomes aware that its electronic communications system is used or involved in the commission of any offence provided for in subsections (1) to (7), must—</p> <ul style="list-style-type: none"> (a) immediately report the offence to the South African Police Service; (b) preserve any information which may be of assistance to the law enforcement agencies in investigating the offence; and (c) take all reasonable steps to prevent access to the child pornography by any person.' 	<p>(2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall -</p> <ul style="list-style-type: none"> (a) take all reasonable steps to prevent access to the child pornography by any person; (b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and (c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.

24.1. ISPA submits that the location of similar – but not identical - provisions regulating the behaviour of ECSPs with regard to crimes relating to child pornography in different pieces of legislation is confusing and directly contrary to the objective of the Bill to consolidate the law relating to such crimes in SORMAA.

24.2. This confusion is exacerbated by the fact that the Films and Publications Act imposes obligations on “Internet Service Providers”, defined as “any person who carries on the business of providing access to the Internet by any means”, whereas the Bill – through the proposed amendments to SORMAA – will impose obligations on “electronic communications service providers”. These two definitions are not the same and there is likely to be confusion about which entities fall under which definition and are accordingly subject to which set of obligations.

25. Finally, in this regard, ISPA requests that the Committee reconsider the requirement set out in the proposed subsection 19A(9)(c) which requires an electronic communications service provider to “take all reasonable steps to prevent access to the child pornography by any person” where it is aware or becomes aware that its “electronic communications system”⁵ is being used or is involved in a criminal offence involving child pornography.

25.1. It is ISPA’s experience in dealing with the similar requirements set out in section 27A of the Films and Publications Act that this obligation creates practical difficulties for SAPS personnel investigating child pornography.

25.2. This flows from SAPS’ interest in tracking down national and international child pornography rings by observing the traffic to identified child pornography sites. This interest is not able to be pursued due to the requirement on electronic communications service providers to take all reasonable steps to prevent access to such sites once they have been identified.

25.3. ISPA requests that the Committee engage with SAPS in order to obtain their views on this matter.

25.4. ISPA suggests the following possible amendment to subsection 19A to meet this difficulty:

(9) An electronic communications service provider that is aware or becomes aware that its electronic communications system is used or involved in the commission of any offence provided for in subsections (1) to (7), must—

(a) immediately report the offence to the South African Police Service;

(b) preserve any information which may be of assistance to the law enforcement agencies in investigating the offence; and

(c) take all reasonable steps to prevent access to the child pornography by any person, unless lawfully instructed to do otherwise by a police official.

Conclusion

26. We trust that the above will assist the Portfolio Committee in its further deliberations.

27. ISPA requests the opportunity to participate in any public hearings scheduled by the Committee.

Regards

ISPA Chair

⁵ ISPA queries whether this reference should be to the defined term “computer system” which is used in this context elsewhere in the Bill.