

14 February 2023

Film and Publication Board

Attention: Mr Pandelis Gregoriou

Per email: clientsupport@fpb.org.za

Dear Pandelis

SUBMISSIONS ON DRAFT REGULATORY INSTRUMENTS

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the:
 - 1.1. Draft Enforcement Committee Rules
 - 1.2. Draft Complaints Handling Procedures
 - 1.3. Draft Films and Publications Amendment Tariff's Regulations ("**the Draft Tariff Regulations**")
 - 1.4. Draft Regulations on the Processes and Procedures for Applying or Registering, Amending, Transferring and Renewing Licences and Terms and Conditions to be Applied to such Licences ("**the Draft Processes and Procedures Regulations**" or "**Draft Regulations**")published in the Government Gazette on 6 and 13 January 2023 (collectively "**the Draft Regulatory Instruments**") and sets out its submissions below.
2. ISPA also refers to:
 - 2.1. The engagement between the Film and Publication Board ("**the Board**") and ISPA on Friday 3 February 2023 and the discussions undertaken, with particular reference to requests from the Board for ISPA to cover additional matters in its submission on the Draft Regulatory Instruments.
 - 2.2. The invitation received from the Board to attend consultative hearings to be held on 15 and 16 February 2023 in relation to its expanded mandate under the Films and Publications Act 103 of 1996 as amended by the Films and Publications Amendment Act 11 of 2019 ("**the FPA**").
3. ISPA's comments are limited to aspects of the FPA and the Draft Regulatory Instruments which regulate or impact on Internet service providers (ISPs).
4. ISPA has not made submissions on the Draft Complaints Handling Procedures or Draft Enforcement Committee Rules.

Structure of this document

5. Part 1 is the introduction set out above.
6. **Annexure A contains information about ISPA**, its members as well its history of engagement with the Board.
7. **Part 2 sets out general submissions on the position of ISPs** under South African law.
 - 7.1. This includes **Annexure B – South African Internet Industry Overview: A Guide for Law Enforcement Agencies**, which sets out information about the ISP industry in South Africa. This guide was recently prepared for the Office for Interception Centres (OIC) and ISPA believes this will be a valuable resource for the Board in understanding the Internet industry in South Africa.
 - 7.2. Annexure B includes guidance on the different types of entities in the industry (e.g. Internet service providers, hosting providers, social media and messaging service providers, and resellers) as well as information which they typically have access to regarding subscriber electronic communications.
 - 7.3. ISPA requests that the Board study this document as a clear understanding of the industry will enable effective regulation. ISPA is willing to present training specifically on this document to the Board if this is requested.
 - 7.4. Also relevant to Part 2 is **Annexure C**, a copy of correspondence entered into between ISPA and the Department of Justice and Constitutional Development **regarding overlaps between the FPA and other legislation, particularly the Cybercrimes Act, 2019**.
8. **Part 3 sets out submissions on the Draft Processes and Procedures Regulations**. ISPA's submissions focus on Part VII of the Draft Regulations relating to Internet service providers.
9. **Part 4 sets out submissions on the Draft Tariff Regulations**.
10. **Annexure D** is a copy of ISPA's submissions in respect of the consultative process initiated by the Board in July 2022. This document contains a broader set of submissions relating to the implementation of the Films and Publications Amendment Act.

PART 2 – THE FPA AND ISPS

Overlaps between the FPA and other legislation

11. As noted during the July 2022 consultative process – see Annexure D – ISPA is concerned about overlaps between substantive and procedural provisions in the FPA and provisions in other legislation, particularly the Cybercrimes Act.
12. ISPA has formally raised its concerns with both the Board and the Department of Justice and Constitutional Development in correspondence which contains a comprehensive discussion of identified overlaps and resultant challenges for ISPs (and others).
13. A copy of this correspondence is provided as Annexure C.
14. ISPA is willing to work with the Board and the Department in addressing these concerns.

ISPs are not distributors under the FPA

15. ISPs are not distributors as that term is defined in the FPA. They were not part of the original scheme of the FPA when enacted in 1996 but added as a distinct category requiring registration for the purposes of combating the hosting and distribution of child pornography through a 2004 amendment.
16. ISPs are not providers of content but rather provide the routing and related services which allow their subscribers to choose and consume content. ISPs do not select the content viewed by their customers and have no knowledge of what content their subscribers consume (this information may be obtainable in response to a court order).
17. This is an important issue for ISPA:
 - 17.1. It is ISPA's view that the Board has persistently conflated ISPs with distributors or viewed ISPs as a form of distributor.
 - 17.2. This is reflected historically in the changing of the registration requirements for ISPs to include requirements previously only requested from distributors.
 - 17.3. It is also reflected in the structure of the Draft Regulations: the same considerations and headings used for distributors are used for ISPs.
18. ISPA requests that the Board in its consideration of a regulatory framework for ISPs under the FPA:
 - 18.1. Accept that ISPs are not distributors and that the purposes of the section 27A registration requirement and related obligations is to assist in combatting child sexual abuse material and prohibited content. This is narrower than the broader purpose of the FPA to regulate the trade of commercial distribution of content in South Africa.

- 18.2. Accept that ISPs – unlike distributors – do not distribute content: they provide access to it. ISPs do not produce or distribute content which must be submitted for classification by the Board: they should not be regulated in the same manner as distributors.

ISPs and interception and monitoring

19. It is apparent from the Board's October 2022 notice that the Board is of the view that ISPs can and should monitor electronic communications carried over or stored using their services. This monitoring would then allow the ISP to identify the use of its services for the distribution or hosting of child sexual abuse material or other prohibited content.
20. This is a misconception.
- 20.1. Section 78 of the ECT Act sets out an important legislative principle:
- 78.(1) When providing the services contemplated in this Chapter there is no general obligation on a service provider to—*
- (a) monitor the data which it transmits or stores; or*
- (b) actively seek facts or circumstances indicating an unlawful activity.*
- 20.2. This language is also found in section 54 of the Cybercrimes Act. ISPA is currently working with SAPS to develop regulations under section 54 governing the instances in which electronic communications service providers will be required to report knowledge of specified cybercrimes.
- 20.3. Further, the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2022 ("RICA"), prohibits interception and monitoring of electronic communications other than in accordance with lawful exceptions set out in that Act.
- 20.4. Finally, it is not technically possible for ISPs to monitor all communications. The Board is referred to Annexure B for further information.
21. The role of ISPs in assisting law enforcement agencies under South African law is therefore reactive rather than proactive.
22. Stated differently: an ISP typically only has knowledge that its services are being used for a criminal or unlawful purpose when it receives a request for assistance from a law enforcement agency under applicable legislation such as the Criminal Procedure Act, 1977 or the Cybercrimes Act.
23. ISPA works closely with SAPS and the Department of Justice and Constitutional Development to ensure that its members are able to respond to such requests timeously and effectively.

ISPs are not legal firms or courts

24. A related point is that ISPs employ technical, support and sales people, not lawyers who are experts in determining when speech constitutes prohibited speech or content constitutes prohibited content.
25. There are extremely complex legal issues involved in making such determinations and considerable legal risk for an ISP that makes them.
26. In ISPA's view it would be an extremely bad idea to place ISPs in this position.

What are "all reasonable steps to prevent the use of [ISP] services for the hosting or distribution of child pornography"?

27. Historically there has never been clarity on this issue.
28. For ISPs, the position is complicated by the legislative framework set out above, particularly the criminalisation of unlawful monitoring and interception set out in RICA.
29. ISPA members will cooperate in full with any lawful request for assistance from a law enforcement agency investigating the use of its services for the hosting or distribution of child pornography.
30. ISPA commits to working with the Board as well as third parties such as the Department of Justice and Constitutional Development in bringing clarity to what reasonable steps can lawfully be taken within the applicable legal framework.

Section 24C: Obligations of internet access and service providers

31. Notwithstanding the title of this section, **it does not impose any obligations on Internet service providers.**
32. ISPs are not providers of "content services" or "child-oriented services" as defined in this section.
33. ISPA has consistently pointed out to the Board and Parliament that the drafting of this section is problematic.

The extent to which section 27A was amended by the Films and Publications Amendment Act (FPAA)

34. It is worth noting that amendments effected to section 27A by the FPAA were narrow:
 - 34.1. Additional wording was inserted into subsection 27A(2):

"(2) If an [~~Internet~~] internet [service] access provider has knowledge that its services are being used for the hosting or distribution of child pornography, propaganda for war, incitement of imminent violence or advocating hatred based on an identifiable group characteristic and that constitutes incitement to cause harm, such [~~Internet~~] internet service provider shall—";
 - 34.2. Subsection 27(4) relating to sanctions for non-compliance was revised:

(a) fails to comply with [subsection 1] subsections (1) and (2) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding 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 not exceeding R750 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

35. The introduction of the term “internet access provider” is problematic.

35.1. This term is not defined in the FPA.

35.2. As explained in Annexure B: Structure of the ISP industry in South Africa, the terms “internet access provider” and “internet service provider” **are not synonymous or equivalent**.

35.3. “Internet access providers” are a subset of “internet service providers”.

PART 3 – SUBMISSIONS ON THE DRAFT PROCESSES AND PROCEDURES REGULATIONS

36. In order to withstand successful judicial review, draft regulations must be aligned with and not *ultra vires* the FPA.

Title of the Draft Regulations

Draft Regulations on the Processes and Procedures for Applying or Registering, Amending, Transferring and Renewing Licences and Terms and Conditions to be Applied to such Licences in terms of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended

37. It is surely ironic that this is proposed as the “short title” for the Draft Regulations.

38. ISPA suggests that the Board retain the historical practice of naming regulations of this nature as “Films and Publications Regulations”. This is appropriate given that the Draft Regulations touch on all aspects of the FPA.

39. The current title is incorrect in that it conflates licences and registrations. ISPs are not licensed by the Board: they are required under section 27A to register with the Board.

Part 7 of the Draft Regulations: Internet service providers

40. Proposed sub-regulation 37(1)

37(1) An application for registration as an internet service provider in terms of section 27A of the Act must be made on the application and registration forms to be used when submitting applications or when registering, together with instructions and information as to the submission of such forms, whether in paper format or electronically, may be accessed from the FPB’s offices on Monday to Friday, excluding public holidays, from 9h00 to 16h00 or obtained electronically from the FPB’s website.

40.1. Section 27A clearly contemplates **registration**: the references to “applications” should be deleted.

40.2. This sub-regulation could – in the interests of clear drafting – be substantially shortened.

40.3. Finalised regulations should include the registration form to be used. The form currently being used forms part of a set of regulations which have been repealed.

40.4. Taking into account the above, ISPA proposes the following redraft:

37(1) A registration as an internet service provider in terms of section 27A of the Act must be made on the prescribed registration form set out in Schedule XX, which is available from the FPB’s offices during business hours and from its website.

41. Proposed sub-regulation 37(2)

37(2) The application referred to in sub-regulation 37 (1) of these Regulations must include –

(a) proof of registration of the business of the applicant in terms of the applicable legislation;

(b) a document confirming that the applicant's tax affairs are in order; and

(c) a declaration that the applicant warrants to the best of its knowledge and insofar as it is reasonably aware, that it complies with the laws and regulations applicable to it, with its legal obligations pertaining to its business in general and undertakes to continue to take all reasonable and necessary steps to ensure that such compliance is maintained.

41.1. References should be to “registration” and “registrant” rather than “application” and “applicant”.

41.2. Taking into account the above, ISPA proposes the following redraft:

37(2) The registration referred to in sub-regulation 37 (1) of these Regulations must include –

(a) proof of registration of the business of the registrant in terms of the applicable legislation;

(b) a document confirming that the registrant's tax affairs are in order; and

(c) a declaration that the registrant warrants to the best of its knowledge and insofar as it is reasonably aware, that it complies with the laws and regulations applicable to it, with its legal obligations pertaining to its business in general and undertakes to continue to take all reasonable and necessary steps to ensure that such compliance is maintained.

42. Proposed sub-regulation 37(3)

37(3) Every internet service provider must, when making an application for registration as an internet service provider, indicate in the application form:

(a) all measures, or steps taken or put in place to ensure that children are not exposed to child pornography and pornography; and

(b) that their services are being used for the hosting and distribution child pornography, propaganda for war, incitement of imminent violence or advocacy of hatred based on an identifiable group characteristic and that constitutes incitement to cause harm.

42.1. This sub-regulation must reflect the wording of the FPA and the requirements of subsections 27A(1)(b) viz: ISPs must take all reasonable steps to prevent the use of their services for the

hosting or distribution of child pornography. The current wording referring to “exposure” and to “pornography” has no basis in law.

- 42.2. Sub-regulation 37(3)(a) is *ultra vires* the FPA in that it imposes requirements not contemplated in the FPA.
- 42.3. Sub-regulation 37(3)(b) read in context does not make sense.

37(3) Every internet service provider must, when making an application for registration as an internet service provider, indicate in the application form:

....

(b) that their services are being used for the hosting and distribution child pornography, propaganda for war, incitement of imminent violence or advocacy of hatred based on an identifiable group characteristic and that constitutes incitement to cause harm.

42.3.1. It cannot be the intention of the drafters that ISPs must indicate that their services are being used for the conduct described.

- 42.4. Taking into account the above, and in particular the wording of subsections 27A(1)(b) and 27A(2), ISPA proposes the following redraft:

37(3) Every internet service provider must, when registering as an internet service provider, indicate in the registration form:

(a) that it takes all reasonable steps to prevent the use of its services for the hosting or distribution of child pornography, and

(b) that, if it has knowledge that its services are being used for the hosting and distribution of child pornography, propaganda for war, incitement of imminent violence or advocating hatred based on an identifiable group characteristic and that constitutes incitement to cause harm, it will:

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

(ii) 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;

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

(iv) will, 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.

43. Proposed regulation 38: Renewal of registration

38. Renewal of the registration as an internet service provider

(1) An application for the renewal of the registration as an internet service provider in terms of section 27A of the Act must be filed using the forms, whether in paper format or electronically, accessed from the FPB's offices on Monday to Friday, excluding public holidays, from 9h00 to 16h00 or obtained electronically from the FPB's website.

(2) The application referred to in sub-regulation 38 (1) of these Regulations must be accompanied with the proof of payment of the prescribed fee and either a confirmation that the supporting documents are still valid and accurate, or where there have been any changes to provide copies of the said supporting documentation.

(3) The application for the renewal of the registration in terms of sub-regulation 39 (1) of these Regulations must be made within 90 (ninety) days from the date of expiry of the registration issued by the FPB.

(4) If an application for the renewal of the registration is not made within 90 (ninety) days from the date of expiry of that registration, such registration shall cease to be valid.

43.1. Submissions above regarding distinguishing between applications and registrations apply.

43.2. This regulation could – in the interests of clear drafting – be substantially shortened.

43.3. Presumably the prescribed registration form is utilised for renewals of registrations. If this is not the intention of the Board then a registration renewal form must be included as a schedule to the regulations.

43.4. There is an incorrect reference to sub-regulation 39(1).

43.5. ISPA notes that draft regulation 5 deals with the renewal of licences and permits in general but that it is recognised that renewal of registration as an ISP is separate from this and subject to its own requirements (as set out in draft regulation 39).

43.6. Taking into account the above, ISPA proposes the following redraft:

38. Renewal of the registration as an internet service provider

(1) Renewal of the registration as an internet service provider in terms of section 27A of the Act must be made on the prescribed registration form set out in Schedule XX, which is available from the FPB's offices during business hours and from its website.

(2) The renewal of registration referred to in sub-regulation 38 (1) of these Regulations must be accompanied with the proof of payment of the prescribed fee and either a confirmation that the

supporting documents are still valid and accurate, or where there have been any changes to provide copies of the said supporting documentation.

(3) The renewal of the registration in terms of sub-regulation 38 (1) of these Regulations must be lodged within 90 (ninety) days from the date of expiry of the registration issued by the FPB.

(4) If the renewal of registration is not lodged within 90 (ninety) days from the date of expiry of that registration, such registration shall cease to be valid.

44. Proposed regulation 39

44.1. The Draft Regulations skip from regulation 38 to regulation 40.

45. Proposed regulation 40: Suspension of registration as an ISP

40. Suspension of the registration as an internet service provider

(1) Should the holder of the registration issued by the FPB fails to meet all the requirements of section 24C (2) and 27A (2) of the Act, the registration shall be suspended pending the rectification or remedying of such noncompliance.

45.1. The reference to section 24C(2) is incorrect. This section imposes obligations on “Any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet”: it does not impose obligations on Internet service providers and ISPs do not typically provide child-oriented services.

45.2. The suspension of a registration may have material consequences for an ISP and constitutes an administrative action by the Board as contemplated in the Promotion of Administrative Justice Act, 2000 (“**PAJA**”). There must therefore be a procedure governing:

45.2.1. The Board issuing a written notice to the ISP setting out the details of the alleged non-compliance and the steps which must be taken to remedy such non-compliance within a reasonable period of time¹.

45.2.2. An opportunity for the affected ISP to make representations.

45.2.3. Taking into account the above, ISPA suggests the following redraft:

40. Suspension of the registration as an internet service provider

(1) Should the holder of the registration issued by the FPB fails to meet all the requirements of section 27A of the Act, the FPB shall:

¹ ISPA notes the definition of “reasonable period of time” in the Draft Regulations, meaning “the amount of time that is fairly required to do whatever is required to be done, conveniently under the permitted circumstances”.

(a) issue a written notice to such registrant setting out details of the non-compliance and identifying the steps required to be taken by the registrant to remedy such non-compliance within a reasonable period of time;

(b) provide such registrant with an opportunity to make written representations in response to such notice;

(c) suspend the registration of such registrant where the non-compliance persists beyond the reasonable period of time afforded for compliance.

46. Proposed regulation 41: Standard terms and conditions

41. Standard terms and conditions.

(1) [Classification and Licencing Sub-programme to provide the standard terms and conditions]

(2) These standard terms and conditions may be amended from time to time by the FPB in accordance with section 18 of the Act.

(3) Upon the coming into force of any such amendment, the standard terms and conditions, as amended, shall be binding on all current and future holders of any registration certificate.

(3) Nothing in these standard terms and conditions shall absolve a distributor or exempt a distributor from any requirement in law or otherwise to obtain any additional licences or permits as may be necessary for the distribution of content and for the exercise of its rights or discharge of its obligations under the registration certificate issued by the FPB.

46.1. This regulation shall be deleted. There are no standard terms and conditions applicable to ISPs contemplated in the FPA.

46.2. As set out above, the Board has adopted a specific drafting framework but not all items relevant to distributors are relevant to ISPs.

46.3. ISPA is in any event unable to provide a full response given the absence of the actual proposed terms and conditions.

47. Proposed regulation 42: Additional terms and conditions

42. Additional terms and conditions

(1) The FPB may impose additional terms and conditions in terms of section 18 of the Act that are consistent with the objects of the Act.

(2) Additional terms and conditions that apply to individual licences may be specified by the FPB.

(3) Where the FPB intends to apply additional terms and conditions to a registration certificate, such additional terms and conditions will be published in the Gazette.

- 47.1. This regulation shall be deleted. There are no standard terms and conditions applicable to ISPs contemplated in the FPA.
 - 47.2. As set out above, the Board has adopted a specific drafting framework but not all items relevant to distributors are relevant to ISPs.
 - 47.3. ISPA is in any event unable to provide a full response given the absence of the actual proposed additional terms and conditions.
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PART 4 – SUBMISSIONS ON THE DRAFT TARIFFS REGULATIONS

48. ISPA requests that the Draft Tariff Regulations treat Internet service providers as a separate category and not conflate tariffs for ISPs with tariffs for distributors.
49. The Draft Tariff Regulations do not specify a tariff for renewal of registration as an Internet service provider under section 27A of the FPA.
50. As a general comment, ISPA strongly supports steps taken in the formulation of tariffs to protect the local content creation industry, including distinctions between small, medium and large content distributors.

CONCLUSION

51. ISPA trusts the matters discussed and submissions raised above are of assistance to the Board in finalising the Draft Regulatory Instruments and looks forward to further engagements.
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ANNEXURE A – INFORMATION ABOUT ISPA AND ITS RELATIONSHIP WITH THE FPB

ISPA is a registered non-profit company (NPC) which represents the majority of Internet service providers (ISPs) in South Africa.

ISPA is recognised by the Minister of Communications and Digital Technologies as an Industry Representative Body (IRB) under Chapter 11 of the Electronic Communications and Transactions Act 51 of 2002 (“**the ECT Act**”). This means that ISPA members provide their services within an existing legislative framework.

ISPA’s core activities relevant to this process include:

- **Mediation and complaints handling:** ISPA handles many requests from consumers to mediate in disputes with ISPs. [ISPA’s mediation process](#) ensures relevant information is collected about the matter and that it is escalated to the appropriate point of contact, to maximise the chances of a swift resolution. In cases where the mediation process does not resolve the problem, [the formal complaints process](#) supports an independent adjudicator review process.
- **Code of Conduct enforcement:** All ISPA members are bound by [the ISPA Code of Conduct](#). This Code requires all members to meet certain standards in terms of privacy, consumer protection, and protection of vulnerable persons. Members of the public buying services from ISPA members know that they are being presented with honest and accurate information about those services and have recourse if they are not.

The ISPA Code of Conduct is required to comply with the standards of conduct set out in the [Guidelines for the Recognition of Industry Representative Bodies of Information System Service Providers](#) promulgated by the Minister of Communications and Digital Technologies. Standards of conduct include commitments to the protection of minors and obligations in respect of illegal use of services.

- **Take-down notice process:** In accordance with its recognition as an IRB, ISPA operates [a take-down notice process](#) on behalf of its members. This process allows for unlawful content hosted by ISPA’s members to be reported, and, where necessary, acted upon. This process facilitates the removal of phishing and fraud sites from the South African Internet.

ISPA maintains [detailed statistics](#) in respect of take-down notices lodged with it and the manner in which these are handled by ISPA and its members.

As an IRB, ISPA is required to file an annual report with the Minister of Communications and Digital Technologies setting out detailed information on the steps it has taken to ensure compliance with Chapter XI of the ECT Act, including steps taken to enforce its Code of Conduct and the manner in which take-down notices have been dealt with.

ISPA and the Board

ISPA has a long history of constructive engagement with the Board, dating back to 2004, and has participated in all processes leading to the finalisation of the FPAA as well as the development of the regulatory framework under the FPA.

In March 2020, ISPA and the Board entered into a Memorandum of Understanding (MOU) which set out the framework for future engagements. Paragraph 2.7 of the MOU specifically recognises the impact of the Films and Publications Amendment Act 2019 (“**the FPAA**”) and the need for the relationship between the parties to be aligned with the FPAA.

Under the MOU ISPA has also committed to publishing media releases relating to online safety and the prevention of online harms. A list of such releases is provided to the Board on an annual basis.

More recently ISPA has assisted its members to register with the Board as required under section 27A of the Act. ISPA is committed to continuing to work with the Board to ensure member compliance with the requirements of the FPA.

Further information about ISPA is available from www.ispa.org.za.

ANNEXURE B – SOUTH AFRICAN INTERNET INDUSTRY OVERVIEW: A GUIDE FOR LAW ENFORCEMENT AGENCIES

Provided as a separate document.

ANNEXURE C – CORRESPONDENCE FROM ISPA TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Provided as a separate document.

ANNEXURE D – ISPA SUBMISSION ON JULY 2022 CONSULTATIVE PROCESS

Provided as a separate document.