

4 September 2018

Select Committee on Communications and Public Enterprises

National Council of Provinces

Parliament of the Republic of South Africa

Attention: Ms Phumelele Sibisi

Per email: psibisi@parliament.gov.za

Dear Ms Sibisi

FILMS AND PUBLICATIONS AMENDMENT BILL [B37B - 2015]

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the invitation to make submissions on the "B" version of the Films and Publications Amendment Bill [B37B-2015] ("**the Amendment Bill**") and sets out below its submissions.
2. ISPA extends its appreciation to the Committee for seizing itself of the opportunity to further engage with the Amendment Bill. The process of revising the Films and Publications Act 65 of 1996 ("**the Principal Act**") is of undeniable importance as more and more South Africans spend more and more time online.
3. ISPA has engaged with the Amendment Bill since its earliest origins, making numerous written and verbal submissions to the Department of Communications and the Portfolio Committee for Communications in the National Assembly on various versions of the Amendment Bill over the past three years.
4. ISPA refers to its prior submissions and requests that these be incorporated into this submission to the extent that they remain relevant. Given that the Amendment Bill has been subject to further amendment since its introduction into Parliament during October 2015, ISPA wishes to supplement its earlier submissions and seeks to bring the below to the attention of the Committee.

ABOUT ISPA

5. ISPA is a South African non-profit company, and recognised Internet industry representative body. Formed in 1996, ISPA actively facilitates exchange between the different independent Internet service providers, ICASA, the Department of Justice and Constitutional Development, the Department of Telecommunications and Postal Services and other government structures, operators and service providers in South Africa.
6. **ISPA as an Industry Representative Body:** On 20 May 2009, ISPA was formally recognised by the then Minister of Communications as an Industry Representative Body (IRB) in terms of section 71 of the Electronic Communications and Transactions Act 25 of 2002 (“**the ECT Act**”).
7. This recognition gives the members of ISPA special recognition and limited liability for Internet content.
8. **Take-down notices:** ISPA and its members also comply with the take-down notice requirements set out in section 77 of the ECT Act.
9. The take-down notice procedure allows a person who believes that their rights are being infringed by something published on a locally-hosted website to lodge a take-down notice with ISPA or an ISPA member as a means to getting the infringing content taken down or removed. This is an inexpensive and quick mechanism which does not require the assistance of a lawyer.
10. Internet Service Providers (ISPs) and other participants in the Internet content and distribution value chains have a direct interest in the Amendment Bill, which seeks to introduce greater regulation over the publishing and distribution of content over the Internet.
11. **Relationship with SAPS:** ISPA engages with different divisions of SAPS to facilitate the lawful exchange of information between law enforcement authorities and ISPA members and offers training to SAPS members in respect of the online environment and the manner in which ISPs and other role-players function.
12. **Relationship with the Film and Publications Board:** ISPA has a longstanding and constructive relationship with the Film and Publications Board (“**the Board**”) and is currently finalising a Memorandum of Understanding with the Board which will focus on assistance to the Board in the execution of its mandate.

13. **Understanding how things work online:** ISPA understands that the online environment which the Amendment Bill seeks to introduce regulation to is complex and that it can be difficult to recognise the differences between different kinds of service provider and technologies. As industry specialists ISPA offers its assistance to the Committee with regard to any challenges experienced by it in understanding the online content landscape and the roles played by ISPs, platforms, registries and others.

GENERAL SUBMISSIONS

14. **Fix the old or create something new:** ISPA remains of the view that it would be the best course of action to replace the Principal Act with new legislation which represents the outcome of a fresh debate about the protection of children and other vulnerable groups online and which is rooted in today's reality of almost ubiquitous use of electronic communications. The drafters of the Act could not possibly have foreseen the explosive growth of electronic communications and digital content when designing a framework for the regulation of the creation, possession, production and distribution of content in 1996.
15. ISPA notes that the South African Law Reform Commission (SALRC) is conducting an investigation into children and pornography online which will propose new legislation and law reform around issues such as child sexual abuse material, exposure of children to pornography and sexting. ISPA is engaging with this process and believes that this will in the future provide a more sound legislative platform for these issues.
16. Notwithstanding this reservation, ISPA acknowledges that the Amendment Bill has been significantly improved through its debate in the Portfolio Committee for Communications and the National Assembly. The introduction of greater clarity as to what constitutes "prohibited content" and a process for public participation in the finalisation of regulations to be promulgated under the Principal Act are particularly welcome.
17. **Scope of Application:** ISPA requests that the Committee in its deliberations consider the following facts relating to online content regulation:
- 17.1. There is a staggering amount of content available online in many different forms on many different platforms which is accessed in many different ways. The Committee is referred to the diagram in Annexure A which shows just how much content is created and exchanged in just sixty seconds online.
- 17.2. The Board has recognised that it cannot classify all online content: this is practically impossible. If not all content is required to be classified, then applicable legislation must make it clear which content is required to be classified and which content does not require classification. It must be clear who bears the obligation to register with the Board and to submit content for classification.

Clear definitions are required to ensure effective implementation of the finalised Act. These must be consistently applied.

- 17.3. In our view the Amendment Bill still falls short in this regard, particularly insofar as it remains unclear whether content created by users – “non-commercial online distributors” in the language of the Amendment Bill – is subject to classification. The core mandate of the Principal Act is to regulate the trade of distribution of films and publications (both online and offline): where content is distributed outside of the trade of distribution it should not be subject to any requirement for the user to register with the Board or obtain prior classification.

18. Criminalising provisions in the Principal Act: ISPA retains its position that it is incorrect to place criminal offences in the Principal Act:

- 18.1. Sexual offences currently contemplated in the Principal Act and the Amendment Bill should be situated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“**SORMAA**”).
- 18.2. The investigation of criminal offences should not be part of the mandate of the Board. Criminal offences are the province of SAPS, the NPA and the Courts. Moreover, criminal offences currently in the Act and proposed in the Bill are already provided for or to be provided for in other legislation.
- 18.3. ISPs cooperate directly with the Department of Justice and Constitutional Development (“**the DOJCD**”) in respect of a range of legislation. The DOJCD already administers databases of ISPs. ISPs also work directly with SAPS in assisting with the investigation and prosecution of cybercrime and the prevention of online harassment.
- 18.4. ISPA submits that the duplication of these offences in the Act is illogical and creates a danger to the efficient administration of justice.

DETAILED SUBMISSIONS

19. Amendment of definition of “child pornography”:

- 19.1. ISPA submits that there is an error in subsections 1(b) and 1(c) of the Amendment Bill, both of which purport to deal with the definition of “child pornography” but which are mutually exclusive in effect. The Portfolio Committee’s list of proposed amendments reflects an intention to substitute the existing definition with a reference to the definition set out in section 1 of SORMAA.
- 19.2. ISPA submits that subsection 1(c) of the Amendment Bill should therefore be deleted.

19.3. ISPA welcomes the explicit alignment of the definition of “child pornography” with that in SORMAA.

20. Definitions of “Internet service providers”, “Internet access providers” and “service providers”: ISPA requests that the Committee consider the use of these terms in the Amendment Bill and the Principal Act.

20.1. The Principal Act defines an “internet service provider” as meaning “any person who carries on the business of providing access to the Internet by any means”.

20.2. This term is used in the proposed sections 18E, 18F, 18G to be inserted into the Act as well as the existing section 27A of the Act.

20.3. ISPA requests that the Committee consider the use of this term in the Amendment Bill taking into account the following:

20.3.1. It is proposed in section 27A to amend “internet service provider” to “internet access provider”, although this has not been consistently applied:

‘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—’;

20.3.2. The term “internet access provider” is not defined in the Amendment Bill or the Principal Act. It is used in the proposed section 15A(1A) to be inserted by the Amendment Bill which would empower a compliance officer, assisted by a SAPS member, to enter the premises of “any internet access providers” to check compliance with the Act (as amended).

20.3.3. Section 18E as contained in the Amendment Bill creates a mechanism for complaints to be lodged to the Board regarding “unclassified, prohibited content, or potential prohibited content, in relation to services being offered online by any person, including commercial online distributors and non-commercial online distributors”. If the Board after investigation decides there is merit in the complaint it may - subject to due process of law:

20.3.4. in the case of a non-commercial online distributor, issue a take-down notice in accordance with the procedure in section 77 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); or

20.3.5. in the case of internet service providers, issue a take-down notice in terms of section 77 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

20.4. Section 18E(3) further provides that an “internet service provider” is compelled to furnish the Board or a SAPS member with information on the identity of the publisher of prohibited content for the purpose of the prosecution of such person for offences specified in the proposed sections 24E, 24F and 24G.

20.5. Section 18E(5) provides as follows (our emphasis):

(5) For the purposes of this section an “internet service provider” means the service provider contemplated in section 70 and section 77 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

20.6. This imports an entirely different definition of the term “internet service provider”, which is only applicable in respect of the proposed section 18E (no similar provision is found in the proposed sections 18F, 18G and 18H).

20.7. Under the ECT Act the definition to be applied is as follows:

“70 Definition

In this Chapter, ‘service provider’ means any person providing information system services.”

The term “information system services” is further defined in in section 1 of the ECT Act as:

‘information system services’ includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service;

The term “information system” is also further defined in section 1 of the ECT Act:

‘information system’ means a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet;

21. There are accordingly three different types of service provider or access provider contemplated in the Amendment Bill.

22. In ISPA’s understanding:

22.1. “Internet service provider” is a general term for any entity that provides services relating to the Internet. These could include providing access to the Internet, hosting of websites, design of websites, provision of online security services and the marketing of websites.

- 22.2. “Internet access provider” more specifically refers to entities which sell or provide Internet access to their subscribers. The biggest Internet access providers in South Africa are Vodacom, MTN and Telkom.
- 22.3. “Service provider” as defined in the ECT Act is an extremely broad term covering almost every provider of information systems. This would include network operators, Internet access providers, some Internet service providers, universities, schools and business which provide these services to employees.
- 22.4. The term “electronic communications service provider” or ECSP is another descriptor used in legislation such as the Regulation of Interception of Communications and Provisions of Communication-related Information Act 70 of 2002 and the Protection from Harassment Act 17 of 2011. This term is also used in the Cybercrimes and Cybersecurity Bill currently being processed by the Portfolio Committee for Justice and Correctional Services.
23. ISPA submits that it is important to have clarity as to what is intended in the Amendment Bill and to ensure that the correct definition is correctly and consistently applied.
24. ISPA’s view is that it would be practical to utilise the term “electronic communications service provider” across all legislation to promote consistency and certainty.
25. **Take-down notices:** It is important to note the following:
- 25.1. Take-down notices are only effective in respect of content which is hosted locally. The party which is required to effect the take-down must practically be able to do so due to the content being found on their network.
- 25.2. In particular take-down notices cannot be used to remove posts from social media platforms hosted outside of South Africa (i.e. most if not all of them). For example, posts on Facebook and Twitter cannot be removed using the take-down notice procedure.
- 25.3. Often even after the infringing content has been taken down, it will still appear in searches done on Google and other search engines. This can also not be removed using the take-down notice procedure.
26. Even though it may have limited application, ISPA’s statistics show that the use of take-down notices is growing, with a total of 8 lodged in 2006 and 464 in 2017. This trend shows no indication of slowing.
27. The Committee can view statistics for take-down notices processed by ISPA since 2006 at <https://ispa.org.za/tdn/statistics/>.

28. **Complaints against digital content services (s18E):** ISPA refers to its earlier submissions regarding the scope of application of the Bill and notes that section 18E to be inserted into the Principal Act is problematic in this regard.
29. ISPA submits that:
- 29.1. This section deals with “prohibited content” created and/or published and/or distributed by “non-commercial online distributors”. It does not deal with content distributed by “commercial online distributors”.
 - 29.2. A “non-commercial online distributor” could be any person in South Africa posting a message on Facebook or Twitter or writing a blog or providing website content. The Board itself falls within this definition, as does every member of the Committee when they post content online.
 - 29.3. There is no obligation on “non-commercial online distributors” to register with the board as a “commercial online distributor” or to submit any film, game or publication to the Board for classification before posting or distributing it. This is obvious: users cannot be expected to submit their WhatsApp posts or emails to the Board for classification before these are posted or sent.
 - 29.4. It follows that references to the obligation to obtain classification in section 18E are incorrect and should be deleted.
 - 29.5. What this section contemplates is a reactive rather than a proactive mechanism for dealing with “prohibited content”. There is no obligation to submit this content for prior classification but there will be a framework which allows remedial action to be taken after publication when such content falls within the definition of “prohibited content”.
 - 29.6. It is illegal to published such content in South Africa and such matters should properly be referred to SAPS.
30. Section 18E(3) requires further that an “internet service provider shall be compelled to furnish the Board or a member of the South African Police Services with information of the identity of the person who published the prohibited content”. ISPA submits that a better balance is created between the rights of users and the State by stipulating that identifying information can only be released to SAPS in accordance with existing lawful processes.
31. ISPA is confused by the specific reference to issuing take-down notices to both non-commercial online distributors [s18E(2)(a)] and “internet service providers” [18E(2)(b)]. Take-down notices are not issued to non-commercial online distributors or users of a service but to the “internet service provider” which is hosting or distributing the content which is the subject of the complaint.

CONCLUSION

32. ISPA once again extends its appreciation to the Committee for the opportunity to further engage on the Amendment Bill and confirms that, if required and invited, it is available for any oral hearings scheduled by the Committee.

Regards

ISPA REGULATORY ADVISORS

ANNEXURE A – SIXTY SECONDS ON THE INTERNET

2018 *This Is What Happens In An Internet Minute*



(source: <https://www.weforum.org/agenda/2018/05/what-happens-in-an-internet-minute-in-2018>)