

31 January 2019

Portfolio Committee on Justice and Correctional Services

National Assembly

Parliament of the Republic of South Africa

Attention: Mr V Ramaano

Per email: vramaano@parliament.gov.za

ISPA SUBMISSIONS ON THE HATE CRIMES AND HATE SPEECH BILL [B9 - 2018]

1. The Internet Service Providers' Association of South Africa ("ISPA") refers to the Hate Crimes and Hate Speech Bill [B9-2018] ("the Bill") as gazetted for comment and sets out its submissions below.
2. The focus of ISPA's submissions is on hate speech where it occurs online.
3. ISPA and its members play a role in online content regulation through the operation of the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act"). In addition to making submissions on section 4 of the Bill, ISPA seeks to place information about the removal of locally-hosted content through take-down notices before the Portfolio Committee.
4. About ISPA
 - 4.1. ISPA is formally recognised by the Minister of Communications as an Industry Representative Body (IRB) in terms of section 71 of the ECT Act. ISPA is the only IRB recognised to date.
 - 4.2. This gives ISPA and its members limited liability in respect of content which is carried and stored over its networks. The ECT Act framework recognises the role played by ISPs and other Internet intermediaries and service providers in facilitating electronic communications and access to the Internet and affords them a qualified exemption from content liability when performing defined tasks, such as hosting of content.
 - 4.3. In order to obtain this recognition and limited liability for its members and to maintain it from year to year, ISPA is required to ensure that:
 - 4.3.1. its members are subject to a code of conduct;
 - 4.3.2. membership is subject to adequate criteria;
 - 4.3.3. the code of conduct requires continued adherence to adequate standards of conduct; and
 - 4.3.4. it is capable of monitoring and enforcing its code of conduct adequately.

4.4. The Minister has published Guidelines for the Recognition of Industry Representative Bodies under Chapter 12 of the Electronic Communications and Transactions Act¹ which set out the standards with which a code of conduct of a representative body must comply.

4.5. ISPA's Code of Conduct complies with such standards by, *inter alia*:

4.5.1. Requiring that members have the right in agreements with subscribers to remove illegal content which they become aware of or which is the subject of a take-down notice.

4.5.2. Requiring that members have an Acceptable Use Policy for the use of their services which prohibits illegal content such as hate speech and affords the member the right to terminate the services of any customer publishing such content.

4.5.3. Requiring that members uphold the right to freedom of expression as set out in the Bill of Rights.

4.6. ISPA works closely with SAPS in respect of the investigation of illegal content online and has a long constructive working relationship with the Film and Publications Board (FPB).

5. Take-down notices

5.1. The ECT Act creates a mechanism for the inexpensive and expeditious removal of content from the Internet where this content is under the control of a local ISP.

5.2. This process cannot be used in respect of content which is not under the control of a South African ISP, such as content on Facebook or Twitter. These platforms have their own mechanisms for the removal of content such as hate speech.

5.3. In accordance with its recognition as an IRB, ISPA operates a take-down notice process on behalf of its members. The take-down notice process allows for a person who believes that their rights have been infringed to lodge a simple notice setting out:

5.3.1. Their full name, address, telephone number, email address (if applicable);

5.3.2. The name of the ISP targeted;

5.3.3. A clear identification of the unlawful material or activity (for example, the URL of web page on which the material appears with an optional screenshot);

5.3.4. A description of the right believed to have been infringed by the material or activity concerned (for example, "my right to privacy is being infringed by the publication of my credit card number");

¹ <https://www.ellipsis.co.za/wp-content/uploads/2011/02/IRB-Regulations-Gazette-29474.pdf>

- 5.3.5. The remedial action required to be taken by the ISP (for example, “the credit card number should be removed”);
 - 5.3.6. A statement that the information in the complaint is true and correct and that the person lodging it is acting in good faith; and
 - 5.3.7. A signature (either written or electronic)
- 5.4. General information on take-down notices and online forms are available from <https://ispa.org.za/tdn/>.
- 5.5. ISPA publishes information on take-down statistics in South Africa at <https://ispa.org.za/tdn/statistics/>.
- 5.6. The Portfolio Committee may be interested in the following trends in the issuing and handling of take-down notices identified by ISPA:

Trends for 2017

- Increase in number of take-downs - 464 for 2017 (up 33%)
- Increase in the number of rejected TDNs - more than the number of accepted TDNs for the first time ever
- Of the 210 TDNs accepted by ISPA, 97% resulted in the removal of the content.

Trends for 2018

- Total for first ten months - 577, predicting 692 for the year, which would be 50% increase in total volume.
- Only 37% of TDNs received are accepted by ISPA.
- Of the 216 accepted TDNs, 95% (205) resulted in content removal.

- 5.6.1. A very high percentage of content which forms the subject of a valid take-down notice is expeditiously removed and no longer available on the Internet.
- 5.6.2. Approximately 5% of take-down notices in 2017 related to defamation, hate speech, harassment or invasion of privacy.
- 5.6.3. By far the largest percentage of take-down notices accepted by ISPA relate to copyright or trademark infringements.
- 5.6.4. ISPA rejects take-down notices where:
 - 5.6.4.1. The ISP targeted is not a member of ISPA;

- 5.6.4.2. The content targeted in the take-down notice is no longer available (presumably because the publisher has already removed it);
- 5.6.4.3. No ISP is identified; and
- 5.6.4.4. The request is technically not feasible. This could be where, for example, the take down notice requests the take-down of the entire website of a bank.

5.7. Under section 78(1) of the ECT Act a service provider is not under a general obligation to monitor the data which it transmits or stores or to actively seek facts or circumstances indicating an unlawful activity. The take-down notice process is a mechanism for bringing alleged unlawful activity to the attention of a service provider.

6. Submission on subsection 4(2) of the Bill

6.1. ISPA requests that the Portfolio Committee give due consideration to making explicit reference to the limited liability framework created under the ECT Act as discussed above.

6.2. This would create a clear exception from the application of subsection 4(1) in respect of “information system service providers” as defined in the ECT Act which are members of an Industry Representative Body and which are providing the services set out in section 73-76 of the ECT Act.

6.3. ISPA proposes:

6.3.1. the insertion of a definition for “information system service provider” to be defined with reference to the ECT Act;

6.3.2. the insertion of a new clause 4(3):

“The provisions of subsection (1) do not apply to any distribution, display or making available of an electronic communication by an information system service provider which meets the conditions for eligibility set out in section 72 of the Electronic Communications and Transactions Act 25 of 2002 and which is providing a service contemplated in Chapter 11 of that Act.”

7. Subsections 4(1)(b) & 4(1)(c)

7.1. ISPA requests that the Portfolio Committee consider whether the distinction between “distributing an electronic communication” and “making available an electronic communication” serves any useful purpose and should be retained. The same consideration is requested in respect of “displaying an electronic communication” and “making available an electronic communication”.

7.2. ISPA requests that the Portfolio Committee consider whether the current drafting makes it clear that the element of intention is required both in respect of distributing/displaying of hate speech and in respect of the making available of hate speech.

8. Other relevant processes

8.1. ISPA requests that the Portfolio Committee have reference to the Cybercrimes Bill [B6B - 2017] and the Film and Publications Amendment Bill [B37 - 2015], both of which impact on hate speech online.

8.2. The latter Bill in particular is relevant in that it creates a mechanism for reporting hate speech and harmful speech to the Film and Publications Board, which, after investigation, may itself lodge a take-down notice in respect of the content complained about.

9. Conclusion

9.1. We trust that the above is of assistance to the Portfolio Committee in its further deliberations and would welcome the opportunity to participate in any public hearings should the Portfolio Committee wish to hear us.

Regards

INTERNET SERVICE PROVIDERS' ASSOCIATION