



26 May 2016

**The Secretary**

**Portfolio Committee on Communications**

Parliament

**Attention: Mr Thembinkosi Ngoma**

Per email: [tngoma@parliament.gov.za](mailto:tngoma@parliament.gov.za)

Dear Thembinkosi

SUBMISSIONS ON THE FILMS AND PUBLICATIONS AMENDMENT BILL 2016

1. We refer to the Films and Publications Amendment Bill 2015 [B37-2015] (“the Bill”) as published for comment.
2. ISPA thanks the Portfolio Committee for the extension granted in respect of written submissions.
3. ISPA’s submissions on the Bill are attached, and are structured as follows:
  - 3.1. Part A: Executive Summary
  - 3.2. Part B: General Submissions
  - 3.3. Part C: ISP-specific Submissions
  - 3.4. Part D: Submissions on the text of the Bill.
4. ISPA thanks the Portfolio Committee for its consideration of its submissions and confirms its desire to participate in any oral hearings or other proceedings held in connection with the finalisation of the Bill.

Regards

ISPA CHAIRPERSON

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**ISPA Management Committee:**

Ant Brooks\*, Graham Beneke, Anthony Engelbrecht\*, Guy Halse, Jenny King, Mlindi Kgamedl\*,  
Duncan Martin, Mohammad Patel, Mike Silber, Warwick Ward-Cox, Elaine Zinn\* (\*ex officio)

**ISPA SUBMISSIONS ON THE FILM AND PUBLICATIONS AMENDMENT BILL 2015**

**26 May 2016**

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## PART A: EXECUTIVE SUMMARY

1. ISPA welcomes the commencement of a process to amend the Films and Publications Act 65 of 1996 (“**the Act**”). It is clear that the drafters of the Act and subsequent amendments thereto 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.
2. The challenges facing the Film and Publications Board (“**the Board**”) in respect of the sheer variety and volume of content available to and produced by South Africans through electronic communications are truly daunting. Furthermore, the difficulties of legislating for and regulating the online environment are making themselves felt across the world.
3. Within this context, the introduction of the Films and Publications Amendment Bill 2015 (“**the Bill**”) represents an opportunity to establish a legislative basis for future regulation of new forms of content. This is an opportunity which calls for broad and thorough engagement.
4. ISPA’s submissions can be summarised as follows:
  - 4.1. What should the Act regulate?
    - 4.1.1. The Board has recognised that it cannot classify all online content. If not all content is required to be classified, then the Act must make it clear which content is required to be classified.
    - 4.1.2. The Act must also make it clear who bears the obligation to register with the Board and to submit content for classification.
    - 4.1.3. The 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. Moreover, criminal offences currently in the Act and proposed in the Bill are already provided for or to be provided for in other legislation. The duplication of these offences in the Act is illogical and creates a danger to the efficient administration of justice.
    - 4.1.4. Criminal provisions currently in the Act and proposed in the Bill should be deleted.
  - 4.2. The Portfolio Committee in its deliberations should have reference to related processes currently being undertaken by the South African Law Reform Commission, the Department of Justice and the Department of Telecommunications and Postal Services.
  - 4.3. Clear definitions are required to ensure effective implementation of the finalised Act. These must be consistently applied.
  - 4.4. It is time for South Africa to remove the term “child pornography” from the statute books.
  - 4.5. The Portfolio Committee is requested to consider the insertion of a procedure for public participation in the finalisation of policies and regulations under the Act.

- 4.6. Internet service provider (ISP) is a broad term encompassing Internet access providers, hosting providers and others. These entities are already subject to an existing legal framework under the Electronic Communications and Transactions Act 25 of 2002 (“**the ECT Act**”). There is no reason for the Bill to propose a parallel mechanism to the existing framework.
  - 4.7. ISPs already 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.
  - 4.8. ISPs are not directly regulated by ICASA.
  5. ISPA acknowledges and makes submissions in respect of the role of it and its members in meeting the objectives set out in the Bill.
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## **PART B: GENERAL SUBMISSIONS**

### **The scope of regulation**

6. ISPA submits that the first and most important evaluation of the Bill relates to the scope of regulation which it enables.
7. The Board should not and does not operate in isolation in pursuing its mandate. As seen below there are a number of related processes taking place and there is clear recognition on the part of all players in the delivery chain that there is a shared responsibility in offering better protection to children and other vulnerable groups when they are online and in how they use online resources.
8. Children, parents, schools, communities, ISPs, distributors, content providers, law enforcement agencies, NGOs, Government and others all have a role to play and the various process being undertaken require a far greater degree of coordination to ensure that they are effective.

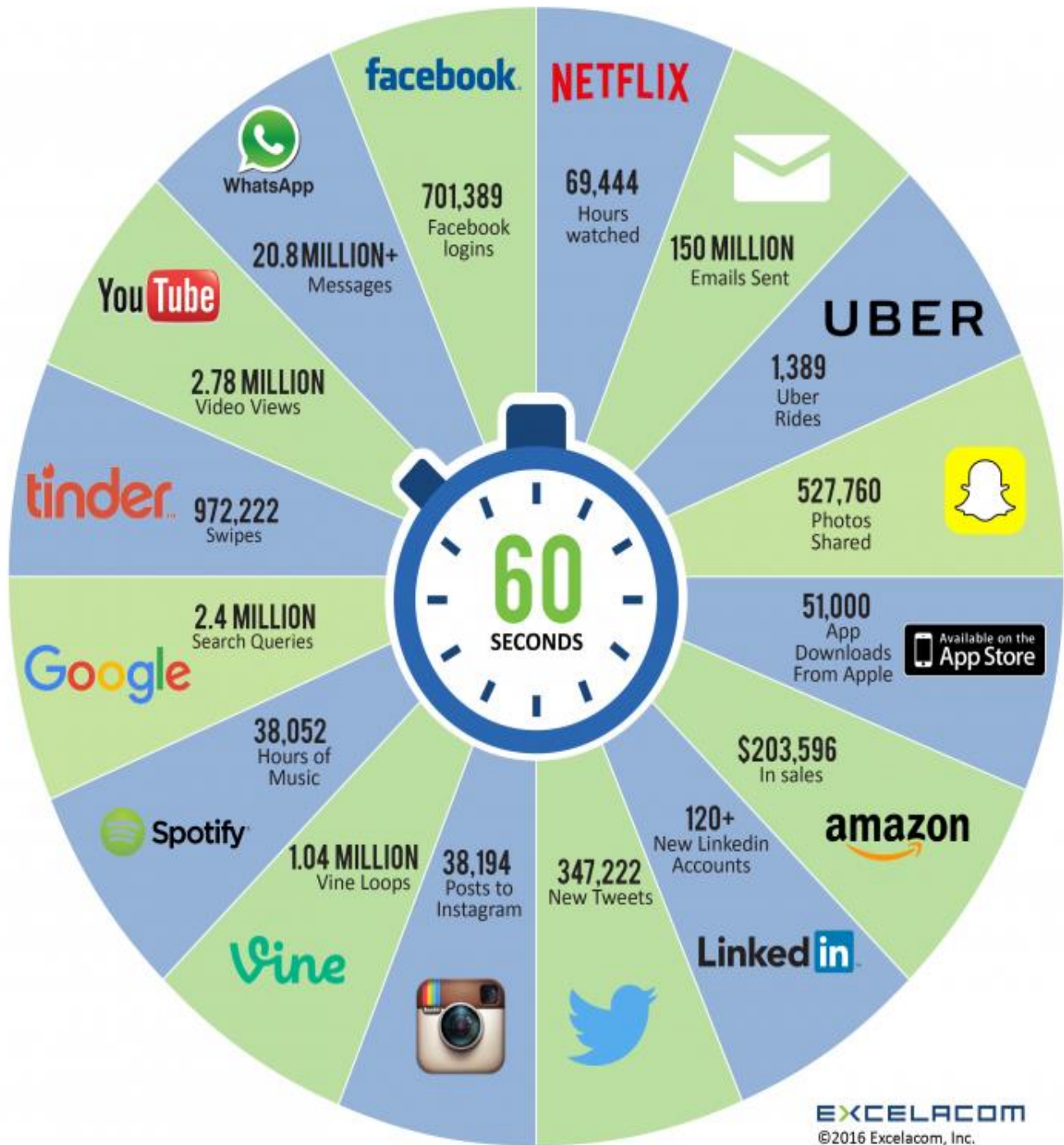
### **What content should be regulated?**

9. South Africa – as with the rest of the world – is experiencing massive growth in the ability of its people to conduct their business and social lives online. Convergence of devices and platforms and between telecommunications and broadcasting is driving an age of interconnectedness through mobile devices, social media and the Internet of Things (IoT).
10. The challenge faced by the Board in modernising its approach to the regulation of the creation, possession and distribution of online content is, bluntly, massive.
11. The graphic below illustrates just how much activity occurs online in a single minute across the globe<sup>1</sup>:

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<sup>1</sup> <http://www.excelacom.com/resources/blog/what-happens-in-an-internet-minute-how-to-capitalize-on-the-big-data-explosion>

# 2016 What happens in an INTERNET MINUTE?





12. There is no doubt that this growth will continue, and that it will continue to be unpredictable in how it impacts upon our daily lives in positive and negative ways. The implementation of South Africa Connect, our National Broadband Plan, will result in millions of South Africans coming online and joining into this growth, many of whom will be new users unaware of many of the dangers presented by being online.
13. Within this context, regulation of online content is a formidable challenge: one which no country has managed to address effectively through the balancing of regulatory measures with personal freedoms.
14. ISPA submits that it is critical to identify a scope of regulation which is practically attainable having regard to the spectrum of online content and the manner in which it is distributed and/or accessed:
  - 14.1. At one end of this spectrum are the VoD providers. A VoD platform is nothing more than an online DVD store. Instead of a consumer physically going into a store which displays films recorded on DVDs for rent, the consumer visits the website of the VoD provider in order to rent and download the film in data form. When we go into a DVD store the DVDs on display are required to display the Board's classification decision and the Board's logo so that the consumer has information to guide him or her in deciding whether a film may be appropriate or not. It makes perfect sense and is in line with the principle of platform neutrality for the films displayed in a VoD provider's website to also bear the classification decision and logo of the Board.
  - 14.2. Games provided through online platforms such as the Play Store, Steam or the App Store are in a similar position as they gradually replace offline stores selling digital games. There is no reason why the regime applicable in the offline world should not be applied to its online equivalent.
  - 14.3. Towards the other end of the spectrum, social media platforms such as Facebook, Twitter and many, many others do not find such a ready equivalent in the offline world. The Board has explicitly recognised in its Online Regulation Policy that it is not practical to regulate user-generated content (UGC) which is published on these platforms by users:

#### *6 User generated content*

*6.1 User created (or generated content (UGC) is content created by users of online services, which enable such content to be uploaded by the user. It applies to both professional and amateur productions and does not distinguish between whether consumers must pay to view the content or not.*

*6.2. The rise of UGC, supported by technological advancements in 'smart phones' and the availability of user distributor tools such as YouTube and other global digital media platforms, has shifted the nature of media users from being audiences to being participants. More and more South Africans, the majority of which are children, are using contact services such as Facebook and Twitter. The bulk of this media content is unclassified content on online platforms,*

6.3. The volume of UGC is enormous. It is estimated that 300 hours of video, much of it UGC, is uploaded to YouTube alone every minute.

6.4. UGC presents the following challenges:

6.4.1. The majority of it is produced, hosted in, and distributed from, foreign countries in which the Board has no jurisdiction;

6.4.2. **the sheer volume being produced makes traditional methods of review and classification impossible;**

6.4.3. the diffuse nature of the internet means that the Board cannot keep track of every website distributing UGC.

6.5. The effect of these challenges is that the Board cannot use its finite resources to attempt to classify and regulate UGC in general. **To attempt to do so would consume the resources of the Board that could be better spent classifying and regulating matters which it can.**<sup>2</sup>

(our emphasis)

14.4. Another class of UGC is that distributed through peer-to-peer distribution, including films shared between the handsets of consumers. The media frequently highlights peer-to-peer distribution between schoolchildren of videos featuring sexual conduct and bullying. The essence of peer-to-peer communications is that they are not published or available to others outside of the peer-to-peer network and therefore cannot be monitored. It is debatable whether this content can even be regarded as online content. In ISPA's view this class of content cannot be directly regulated: the behaviour underlying the distribution of inappropriate, objectionable or illegal content in this manner can only be addressed through education and digital literacy programmes.

15. As set out in clause 6.5 of the Online Regulation Policy – set out above – the Board has recognised that it cannot regulate all online content, and this is nothing more than a recognition of practical reality.

16. ISPA submits that the Bill should ensure that it employs definitions and provisions which reflect the position of the Board as set out in the Online Regulation Policy. Overly-wide definitions which have the effect of including UGC within the scope of application of the Bill will create unnecessary confusion amongst consumers and other players in the online content delivery chain and act as a disincentive to investment and the development of a local content creation and distribution industry.

#### Should the Act/Bill deal with Child Abuse Material and other criminal offences?

17. ISPA's understanding of the Act – based in its provisions as well as historical material relating to its drafting – is that the Act is intended to regulate a trade, occupation or regulation as contemplated by section 22 of the Constitution<sup>3</sup>.

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<sup>2</sup> Online Regulation Policy p8

<sup>3</sup> **Freedom of trade, occupation and profession**

18. This understanding is supported by, *inter alia*:

18.1. Section 2 of the Act, which explicitly recognises that the purpose of the Act is to regulate a trade, occupation or profession in the form of “the creation, production, possession and distribution of films, games and certain publications”.

**2 Objects of Act**

*The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to-*

*(a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;*

*(b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences;*

*(c) make use of children in and the exposure of children to pornography punishable.*

18.2. The definition of “distributor”, which references “a person who conducts business in the selling, hiring out or distribution of films [including the streaming of content through the internet, social media and other electronic mediums;]”.<sup>4</sup>

18.3. It is therefore central to the Act that it involves the administrative regulation of the trades / occupations / professions relating to the creation, production, possession and distribution of films and publications.

19. The terms “films”, “games” and “certain publications” define the scope of the content being published or distributed and which is therefore to be regulated.

20. Subsections (a) – (c) of section 2 of the Act set out the purposes for which this trade may be regulated. These subsections do not per se expand the scope of what is being regulated by the Act.

21. The Bill proposes the following amendments to section 2 of the Act:

**2 Objects of Act**

*The objects of this Act shall be to regulate the creation, production, possession and distribution of films, games and certain publications to-*

*(a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;*

*(b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences;*

*(c) make use of children in and the exposure of children to pornography punishable;*

*(d) Criminalise the possession, production and distribution of child pornography; and*

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22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

<sup>4</sup> FPA section 1; proposed addition from FPAB 2015 in square brackets

(e) Create offences for non-compliance with classification of the Board.

22. ISPA submits that the criminalisation of child abuse material, grooming and related criminal offences has nothing to do with classification of content and should not be provided for under the Act or dealt with by the Board. Rather, these are criminal offences more properly dealt with by SAPS under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“**the SOA**”).
23. The distinction between illegal content in the form of “child pornography” and the separate issue of protection of children from harmful content is unfortunately often conflated by commentators and the media.
24. Illegal content is not a matter for classification. The Act is clear that the Board must refuse to classify such material and refer it to SAPS for further investigation.
25. There is no reason or authority for the Board to concern itself with “child pornography” other than to refer it to SAPS. The investigation and prosecution of offenders is the task of SAPS and the National Prosecuting Authority (NPA). Where required they are assisted by ISPs and other communications providers in accordance with the applicable legal framework.
26. The Board does have a mandate in respect of protecting children from exposure to disturbing and harmful materials and from premature exposure to adult experiences. This is not a mandate which relates to criminal matters but rather to administrative law and classification under the Act.
27. “Child pornography” and other illegal conduct such as grooming and sexual predation should not be used to direct a discussion on the protection of children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.
28. There needs to be a clear distinction drawn between:
  - 28.1. CAM – criminalised under the current FPA and under the SOA.
  - 28.2. Grooming – criminalised under the SOA and proposed criminalisation under the Bill.
  - 28.3. “Revenge porn” – not criminalised but proposed amendment of the SOA through cybercrimes legislation and proposed criminalisation under the Bill.
  - 28.4. Exposure of children to pornography – not criminalised unless intentionally or negligently done and appropriate legal response still being developed, inter alia through the Bill and the work of the South African Law Reform Commission and other Government Departments.
29. In simple terms:

<b>Legislation</b>	<b>Scope of Application</b>	<b>Remedy</b>
Film and Publications Act	Content which may be disturbing or harmful to, or age-inappropriate for children	Classification and enforcement of classification guidelines (FPB)
SOA	Content involving children which is illegal	Criminal prosecution (SAPS)

30. The SALRC Issue Paper explicitly makes this distinction as part of the framework adopted for its investigations:

*“For the purpose of this paper, four areas of concern have been identified:*

- *Access to or exposure of a child to pornography and child pornography (child abuse material);*
- *Creation and distribution of child pornography (child abuse material);*
- *Explicit self-images created and distributed by a child; and*
- *Grooming of a child and other sexual contact crimes associated with or which are facilitated by pornography.”<sup>5</sup>*

31. Different conduct relating to “child pornography” as defined in the Act and the SOA has been criminalised.

31.1. Section 24B of the Act criminalises the possession, production and distribution of child pornography.

31.2. Section 18(1) of the SOA criminalises the supply, exposure or display of child pornography or pornography to a third person with the intention to encourage, enable, instruct or persuade such third person to perform a sexual act with a child as the offence of promoting the sexual grooming of a child.

31.3. Section 18(2) of the SOA criminalises the supply, exposure or display of child pornography or pornography to a child with the intention to encourage, enable, instruct or persuade the child to perform a sexual act. This includes a person who commits any act with or in the presence of a child or describes the commission of any act to or in the presence of a child with the intention to encourage or persuade the child or to diminish or reduce any resistance or unwillingness on the part of the child to be exposed to child pornography or pornography as the offence of sexual grooming of a child.

31.4. Section 20 of the SOA makes it a crime to use children for or benefit from child pornography.<sup>6</sup>

31.5. Furthermore, under the Act, the Criminal Procedure Act 51 of 1977 (“the CPA”) and the Regulation of Interception of Communications and Provision of Communication-related Information Acts 70 of 2002 (“RICA”) there are procedures available to law enforcement authorities for the investigation of child pornography and grooming offences.

32. The Board acts, primarily, as a classification agency: if in the course of its classification activities it comes across material which it has regards as falling within the definition of “child pornography”

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<sup>5</sup> SALRC Discussion Paper, paragraph 3, p6

<sup>6</sup> The relevant sections from the SOA are set out in Annexure A to this submission.

then it must refer the matter to SAPS. This is explicitly required by section 18(3) of the Act in respect of content submitted to the Board which it finds to constitute “child pornography”<sup>7</sup>.

33. The Bill furthermore proposes the insertion of a new section 18E(3):

*18E (3) In the case of content hosted outside of the Republic that is found to contain child pornography, the Board shall refer the matter to the South African Police Service or to the hotline in the country concerned, for the attention of law enforcement officials in that country.*

34. The Board has no further role to play other than being a reporting agency to SAPS: and this only in the highly unlikely event that CAM is actually submitted to it for classification (which in our understanding has never happened).

35. The Board is an administrative organ of the Republic and not a law enforcement agency. It is not the role of the Board to in any manner investigate or prosecute criminal offences such as those relating to the manufacturing, possession or distribution of child sexual abuse material.

36. Furthermore, the Board is not in a position to exercise investigatory and prosecutorial powers relating to criminal offences: providing them with such powers simply leads to an enforcement lacuna.

37. To the extent that the Board requires a definition of child sexual abuse material or “child pornography” as a reference in making a determination on whether content submitted for classification can be regarded as such, the definition in the SOA should be utilized.

38. It also appears to be highly undesirable to have two statutes seeking to criminalise the same conduct but in different ways, using different definitions and carrying different sanctions. This issue is being reviewed by the SALRC.

38.1. A clear example of the difficulties caused by such an approach is found in the requirement under section 27A(2)(a) of the Act:

(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.

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<sup>7</sup> 18(3) Where a film or game submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that film or game to a police official of the South African Police Service for investigation and prosecution.

- 38.2. The obligation to take all reasonable steps to prevent access to CAM which an ISP has knowledge of by any person conflict directly with instructions received from SAPS which generally requests ISPs to continue to allow access to the CAM for the purpose of allowing further investigation of those persons accessing it and others that they may communicate with.
- 38.3. This conflict places an ISP in an invidious position and is potentially detrimental to the effective administration of justice.
39. ISPA therefore requests the Portfolio Committee to consider whether the deletion of subsections 2(c) of the Act and 2(d) of the Bill would constitute a more appropriate amendment to the Act.
40. It is further ISPA's considered view that the refinement of the scope of the Act and therefore the scope of activity of the Board would enhance rather than detract from the role of the Board and its ability to discharge its mandate.
41. The challenges of classifying digital content and protecting children from exposure to inappropriate content in a digital world are truly massive and the Board has recognised that it will take significant expertise and capacity to meet these challenges. We do not see how it serves to meet these challenges where the Board is required to deal with matters properly beyond its remit and which are already dealt with under other legislation and by other agencies.

#### **Related processes**

42. ISPA wishes to highlight various resolutions and processes which we submit the Portfolio Committee should have reference to in its deliberations regarding the Bill.
43. These processes complement the mandate of the Board to classify content for the purposes, inter alia, of protecting minors from exposure to inappropriate content.

#### **South African Law Reform Commission Project 107C**

44. The South African Law Reform Commission (SALRC) is undertaking a review of the law regarding children and online pornography under its Project 107C. The SALRC published its Issue Paper No 30, Project 107 relating to Sexual Offences: Pornography and Children on 5 August 2015 ("the SALRC Issue Paper").<sup>8</sup>
45. The SALRC Issue Paper is a comprehensive analysis of the current legal position as well as international developments relating to the criminal and civil law treatment of children and pornography available online.

#### **Department of Telecommunications and Postal Services**

46. The Department of Telecommunications and Postal Services (DTPS) launched its Children's Empowerment & Information Communication Technology (ICT) Strategy in October 2015. In her Department's Budget Vote Speech on 10 May 2016, the Deputy Minister of Telecommunications and Postal Services noted the following:

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<sup>8</sup> Available from [http://www.justice.gov.za/salrc/ipapers/ip30\\_prj107\\_SexualOffences-PC-2015.pdf](http://www.justice.gov.za/salrc/ipapers/ip30_prj107_SexualOffences-PC-2015.pdf)

*“As part of the implementation of the Children Empowerment and ICT Strategy and in our quest to lead and contribute towards ensuring the safety of our young people online, we will engage the Department of Social Development (DSD), National Youth Development Agency (NYDA) and other relevant stakeholders to develop an ICT National Mainstreaming Programme which is envisaged to culminate into an ICT Summit aimed to achieve amongst others:*

- 1. Development of the comprehensive Child Online Protection Programme.*
- 2. Research programmes on cyber bullying, social cohesion, online behaviour and parents support.”<sup>9</sup>*

47. The DTSP has also concluded a review of ICT policy, including issues directly relevant to the protection of children when online, and a White Paper on ICT Policy is expected to be published in the next few months.

#### Cybercrimes and Cybersecurity Bill and the Sexual Offences Act

48. The Department of Justice and Constitutional Development (DoJCD) is at an advanced stage of the development of the Cybercrimes and Cybersecurity Bill, which is expected to be introduced into the Parliamentary process during 2016.
49. The current draft of this Bill has a number of provisions intended to amend the Sexual Offences Act which overlap with those in the Film and Publications Amendment Bill with particular reference to criminal offences relating to child abuse material, grooming and “revenge porn”.
50. ISPA has made submissions below as to why it would be preferable for these provisions to be set out in the Cybercrimes and Cybersecurity Bill read with the Sexual Offences Act, and not in an amended Films and Publications Act.

#### Hate Speech Bill and the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016 – 2021

51. The Minister of Justice and Correctional Services Minister has announced in the media briefing prior to his Budget Vote Speech that his Department will shortly introduce into Parliament legislation aimed at combating racism and hate speech<sup>10</sup>.
52. The DOJCD has published for public comment a draft “National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016 – 2021”<sup>11</sup>, which includes a section on Racism and Prejudice in Traditional and Social Media:

*141. Racism continues to play out in the traditional media in South Africa, which is itself under the pressure of the increase of social media outlets. Social media has, in some cases, become an outlet for untrammelled racism. In addition, racial conflicts erupt in wars of words among media practitioners themselves. The media and other means of public communication, such as the Internet and social media, play a crucial role in enabling free expression and the realization of equality. But*

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<sup>9</sup> <http://www.gov.za/speeches/budget-vote-debate-deputy-minister-department-telecommunications-and-postal-services-hon>

<sup>10</sup> <http://www.sanews.gov.za/south-africa/departments-moots-racism-hate-speech-legislation>

<sup>11</sup> <http://www.justice.gov.za/docs/other-docs/NAP/NAP-A4-PublicConsultationBook.pdf>



*while freedom of expression and freedom of religion or belief are mutually dependent and reinforcing, freedom of expression must not impinge on the right to dignity.*

*142. Conversely, the unprecedented, rapid development of new communication and information technologies, such as the Internet and social media, has enabled wider dissemination of racist and xenophobic content that has the potential to incite racial hatred and violence.*

*143. In 2014, the South African Human Rights Commission confirmed that it had received more than 500 reports of racism – of which a large part were on social media. In February 2015 the SAHRC said that hate speech cases on social media increased to 22% of matters investigated, compared to 3% in the same period the previous year.*

*144. The Durban Declaration and other international human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights provide a comprehensive framework for possible actions in combating the phenomenon of racial, ethnic and xenophobic hatred. The Durban Declaration encouraged States, civil society and individuals to use the opportunities provided by the Internet to counter the dissemination of ideas based on racial superiority or hatred and to promote equality, non-discrimination and respect for diversity.*

*145. South Africa has also enacted the Protection from Harassment Act, 2011 (Act No. 17 of 2011) thereby enabling all South Africans to approach the courts for protection from harassment or sexual harassment per electronic communication - including harassment via SMS or e-mail.*

*146. In response to the increasing vulnerability of victims to cybercrime, South Africa has implemented a number of strategic and tactical interventions including the approval of a National Cyber Security Policy Framework (NCPF) in 2012. The issues of racism and racial hatred on the worldwide web and social media platforms are further addressed through legislation to combat cybercrime. The country is in the process of finalising legislation on cybercrime and related matters. This is in accordance with the African Union Draft Convention on the establishment of a credible legal framework for cyber security in Africa. It requires States who ratified the Convention to adopt legislation to criminalise the dissemination of racist and xenophobic material. The legislation includes the prohibition and dissemination of racist and xenophobic material through a computer or electronic communications network as well as the incitement of violence against a person or groups of persons through the same.<sup>12</sup>*

53. Given the planned introduction of this Bill and the steps taken by the DOJCD to address hate speech manifesting on social media, as well as the provisions of the Cybercrime and Cybersecurity Bill, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the role of the South African Human Rights Commission, it is difficult to understand why provisions relating to hate speech should be included in the Films and Publications Act. It is furthermore not clear what role the Board would play in the classification of hate speech:

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<sup>12</sup> Draft “National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016 – 2021, p36

- 53.1. By its nature such speech is a criminal act which the Board would be obliged to refuse classification and refer to SAPS.
- 53.2. The Board is not, with respect, qualified to make determinations on what does and what does not constitute hate speech. ISPs are most certainly not in a position to make such determinations.

### Terminology

54. As South Africa considers appropriate legislative responses to negative aspects of convergence and the widespread adoption of electronic communications and digital content, it is critical to be clear in the terminology used so as to ensure the appropriate scope of application.
55. Many of the concepts raised are confusing and difficult to articulate and there is a tendency to use terms interchangeably when they mean very different things. It is also the case that different pieces of legislation carry different definitions of the same terms.
56. ISPA has made specific submissions regarding definitions proposed in the Bill, but wishes to include some general notes to the Portfolio Committee regarding terminology used in this submission as well as that to be used in the Bill.

### Child Pornography / Child Abuse Material

57. In its submissions below ISPA will make use of the term “child abuse material” or “CAM” as opposed to “child pornography” or “CP” which are the terms defined and used in the Bill.
58. This is in line with the approach taken by the SALRC in its Discussion Paper issued earlier this year, which addresses this issue directly:

*“1.9 From the outset the Commission takes the stance that - child pornography - is not pornography but rather the memorialisation of child abuse increasingly in digital form. Interpol reports that most law enforcement agencies working with child sexual abuse material believe that the term - child pornography - is misleading when describing images of the sexual abuse of children.*

*Interpol is of the view that - a sexual image of a child is ‘abuse’ or ‘exploitation’ and should never be described as pornography. It is further of the view that child abuse materials are documented evidence of a crime in progress, namely a child being sexually abused.*

*Interpol views the terms - child pornography - or - kiddy porn - as trivialising the seriousness of the abuse perpetrated on children. Interpol suggests that such terms legitimise this form of abuse by including it with other types of pornography which are used for and by adults for their sexual pleasure.*

*1.10 To ensure an adequate description of the sexual abuse, degradation and exploitation of children, the Commission has considered replacing the term - child pornography - with the term - child abuse material. The latter term, in the words of Professors Max Taylor and Ethel Quayle - unambiguously expresses the nature of child pornography, and places it firmly outside the range of acceptable innuendo and smutty jokes. The term - child abuse material - also describes such materials from within a victim-centred perspective, confirming that these are materials which will*

*abuse, degrade and exploit children portrayed as sexual objects and are not simply images of children who have been abused.*

*1.11 Interpol suggests several alternative definitions which could be used in place of - child pornography. These include:*

- *Documented child sexual abuse;*
- *Child sexual abuse material;*
- *Child abuse material (CAM);*
- *Depicted child sexual abuse;*
- *Child abuse images (CAI); and*
- *Child Exploitation Material (CEM).*

*1.12 The Commission is alive to the fact that the terminology used in the debate on children and pornography is integral to the larger debate on harm, rights and the legality of pornography. For this reason the Commission elects to use the term - child abuse material - instead of - child pornography - unless a direct quote, legislation or case law uses the term - child pornography. This aligns with the stance taken by Interpol on this matter.”<sup>13</sup>*

(our emphasis)

59. It is also useful to note that the SALRC adopted the term “explicit self-image” to describe inappropriate images taken by children.

*“1.13 However, having made this decision, the Commission also flags the anomaly where a child seemingly of his or her own volition, or as a result of grooming, produces such images. Such images would also constitute - child abuse material - and once published could be used for illegal purposes by child exploiters even though ostensibly no abuse is present. In uncontested instances of voluntary peer-to-peer sharing of material it may be apposite to refer to the material as - images of inappropriate behaviour or - explicit self-images instead of - child abuse material.”*

60. ISPA submits that it is important to standardise the applicable terminology and to have a single definition as to what constitutes child abuse material.

61. Submissions on the definition of “child pornography” proposed in the Bill are set out in Part D below.

#### Online content

62. In its submissions below ISPA will make use of the term “online content” to describe all content in data form accessed via electronic communications. The definition of “data” contained in section 1 of the ECT Act<sup>14</sup> is used to ascribe meaning to this term.

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<sup>13</sup> SALRC Discussion Paper pp15-16 and sources cited therein

<sup>14</sup> “**data**” means electronic representations of information in any form

## **Platform Neutrality**

63. ISPA supports the overarching principle of platform neutrality and understands this principle to require that the Board regulate offline and online content in the same manner.
64. While this principle should recognise practical realities and not be applied inflexibly, deviations must be justified.

## **Tariffs**

65. ISPA understands that the Board is undertaking a review of its tariffs as set out in the Films and Publications Tariffs published in 6 November 2015<sup>15</sup>, and welcomes this.
66. There current tariff regime is objectionable for the following reasons:
  - 66.1. The requirement to register for “on-line distribution” of content is ultra vires the Act.
  - 66.2. It appears to arbitrary in setting tariffs for a licence fee for “on-line distribution” at R795 000 per annum;
  - 66.3. It acts as a clear disincentive to development of the local content development and distribution industries;
  - 66.4. The requirement to register as a “Distributor or exhibitor of films or interactive computer games, and mobile cellular and internet content”, is ultra vires the Act insofar as it references “mobile cellular and internet content” as well as being vague to the extent that nobody knows who is required to register under this category; and
  - 66.5. It violates the principle of platform neutrality without justification.
67. The Board has attempted to explain the discrepancy between the tariff for “on-line distribution” – currently R795 000 per annum – and the tariff for “distribution” – currently R1 121 per annum – on the basis that “online distributors” will submit greater volumes of content to the Board for classification.
68. This argument does not, however, stand up to scrutiny.
  - 68.1. The main category of distributors of online content distributors affected by the move to classification of online content will be Video-On-Demand (VoD) providers such as Showmax and Netflix. Such providers typically do not offer more content than offline DVD rental distributors: the decline in offline content being distributed through DVD stores is being offset by the increase in online content through VoD providers.
  - 68.2. The Board has clarified in its Online Regulation Policy that it does not intend to try and regulate user-generated content (UGC). It is ISPA’s belief that the current tariff was set at a time when the Board remained of the view that it would regulate UGC such as YouTube, and therefore that the tariff enacted was justified.

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<sup>15</sup> Government Notice 1072, GG 39379, available from <http://www.ellipsis.co.za/wp-content/uploads/2015/11/Film-and-Publications-Board-Tariffs-November-2015.pdf>

68.3. The Bill and the Online Regulation Policy propose that the Board will be empowered to delegate its classification duties to “online distributors” who will, subject to the terms and conditions imposed, be entitled to self-classify or to have classification undertaken by an industry representative body recognised by the Board for this purpose. This implies that actual classification of online content will not be undertaken at the expense of the Board.

#### **The need for a public participation in regulation- and policy-making processes**

69. The Act currently does not provide for the participation of the public in the development of regulations and directives undertaken by the Board in terms of the Act.
- 69.1. Section 4A of the Act allows Council – in consultation with the Minister – to issue directive of general application, including classification guidelines, in accordance with matters of national policy and which are consistent with the purpose of the Act. No provision is made for the public to participate in the formulation and finalisation of such directives.
- 69.2. Section 31 provides for wide-ranging powers to be exercised by the Minister acting alone or in consultation with the Minister of Finance when regulations pertain to fees payable under the Act or in consultation with the Board’s Council. No provision is made for the public to participate in the formulation and finalisation of such regulations.
70. ISPA wishes to acknowledge expressly the efforts of the Board to inform its regulations and directives through the undertaking of research and engagement with the public on a number of its processes, with particular reference to its efforts to formulate an online content regulation policy for South Africa.
71. Notwithstanding such consultation, however, ISPA submits that it would be appropriate, Constitutionally-sound and in line with the requirements of the Promotion of Administrative Justice Act (“PAJA”) for provision to be made in the Bill to allow for public participation in the drafting of policies, directives, regulations and other regulatory instruments to be promulgated under the Act.
72. As the Board expands its legal authority and capacity to regulate the creation, production, possession and distribution of digital content it is likely that its activities will have a broader impact on all South Africans. This is evident from the more than 600 submissions received by the Board in response to its invitation to comment on its Draft Online Content Regulation Policy in March 2015.
73. It is also fair to say that challenges being experienced by the Board as a result of convergence and the growth in digital content and electronic communications are extremely complex ones which are being grappled with – mostly unsuccessfully – by many jurisdictions in the world.
74. ISPA submits that these and other factors substantiate the public interest in the activities of the Board and in the regulations and directives which it or the Minister are empowered to issue.
75. We therefore urge the Portfolio Committee to insert the appropriate wording into the Bill so as to create a mandatory public participation process.
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## **PART C: ISP-SPECIFIC SUBMISSIONS**

### **Definition of Internet Service Provider**

76. Section 1 of the Act defines an “Internet service provider” as meaning “any person who carries on the business of providing access to the internet by any means”. No substantive amendments to this definition are set out in the Bill.
77. In the event that there remains – taking into account submissions made above and below - a requirement to define the term “Internet service provider” in the Bill, ISPA submits that the current definition is problematic in that it is overly-broad while simultaneously not inclusive enough.
78. The Board has adopted an interpretation of this definition which includes any location at which Internet access is available. This includes coffee shops, airports, hotels and restaurants.
79. In ISPA’s view this interpretation is overly broad.
  - 79.1. The Board does not attach sufficient weight to the words “carries on the business of providing access”.
  - 79.2. While it is correct that Internet access is available in these places, it is absurd to argue that any of the companies involved carry on the business of providing access to the Internet. Neither ACSA nor McDonalds would ever be logically considered to be an ISP.
  - 79.3. When a traveller uses a Wi-Fi service in an airport that service could be provided by a number of different ISPs using for example the AlwaysOn platform. A coffee shop does not itself install equipment and build links to the Internet but rather contracts with an ISP to provide these services.
  - 79.4. The fact that the coffee shop may share in revenue derived from the sale of access to the Internet by the ISP does not change this understanding: the coffee shop remains in the business of selling coffee and not in the business of providing access to the Internet.
  - 79.5. All of these examples can be contrasted with an Internet Café or an ISP generally recognised as such which are both clearly in the business of providing access to the Internet.
80. Of far greater concern for the execution of the Board’s mandate is its failure to recognise that entities such as the mobile networks – Vodacom, MTN, Cell C and Telkom Mobile – as well as Government entities such as SITA and municipalities offering free Wi-Fi services also fall within the definition of “Internet service provider”.
81. ISPA requests that the Portfolio Committee bear in mind the distinction between companies which sell access to the Internet – Internet Access Providers (IAPs) – and companies that provide hosting services (“hosting providers”) and which do not automatically also sell Internet access. While both of these companies could be regarded as Internet service providers – i.e. they are companies that provide services over or related to the internet – the functions of hosting and Internet access are very different.

82. ISPA has engaged with the Board regarding the deficiencies in the current definition in the Act for more than five years, and is genuinely surprised that the opportunity has not been taken to propose improvements to this definition during the review of the Act.

### **Registration of ISPs under the FPA**

83. ISPs as defined are required to register with the FPB under section 27A of the Act.

#### **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.*

84. Section 27A deals exclusively with the obligations of ISPs in respect of child pornography and the intention of the legislature in introducing this section through the 2004 Amendment Act is explicit.
85. The Memorandum on the Objects of the Film and Publications Amendment Bill B61 of 2003<sup>16</sup> states that one of those objects is “to address the problems of child pornography on the Internet by bringing Internet service providers within the jurisdiction of the Act”.
86. The practical benefits flowing from registration of ISPs under section 27A are not clear. ISPA and its members have and will continue to cooperate directly with SAPS as required under section 27A without reference to the Board.

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<sup>16</sup> <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/040812b61-03.pdf>

87. ISPA notes that the Department of Justice and Correctional Services already holds at least two databases of ISPs / electronic communications service providers and ISPs will in any event be required to cooperate with SAPS.

### **Section 24C of the Act**

88. Section 24C of the Act purports to set out obligations imposed on “Internet access and service providers” (amendments proposed in the Bill are underlined):

#### **24C Obligations of internet access and service providers**

- (1) *For the purposes of this section, unless the context otherwise indicates-*
- (a) *“**child-oriented service**” means a contact service and includes a content service which is specifically targeted at children;*
  - (b) *“**contact service**” means any service intended to enable people previously unacquainted with each other to make initial contact and to communicate with each other;*
  - (c) *“**content**” means any sound, text, still picture, moving picture, other audio visual representation or sensory representation and includes any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated but excludes content contained in private communications between consumers;*
  - (d) *“**content service**” means-*
    - (i) *the provision of content; or*
    - (ii) *the exercise of editorial control over the content conveyed via a communications network, as defined in the Electronic Communications Act, 2005 (Act No. 35 of 2005), to the public or sections of the public; and*
  - (e) *“**operator**” means any person who provides a child-oriented contact service or content service, including internet chat-rooms.*
- (2) *Any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet, shall-*
- (a) *moderate such services and take such reasonable steps as are necessary to ensure that such services are not being used by any person for the purpose of the commission of any offence against children;*
  - (b) *prominently display reasonable safety messages in a language that will be clearly understood by children, on all advertisements for a child-oriented service, as well as in the medium used to access such child-oriented service including, where appropriate, chat-room safety messages for chat-rooms or similar contact services;*
  - (c) *provide a mechanism to enable children to report suspicious behaviour by any person in a chat-room to the service or access provider;*
  - (d) *report details of any information regarding behaviour which is indicative of the commission of any offence by any person against any child to a police official of the South African Police Service; and*
  - (e) *where technically feasible, provide children and their parents or primary care-givers*



*with information concerning software or other tools which can be used to filter or block access to content services and contact services, where allowing a child to access such content service or contact service would constitute an offence under this Act or which may be considered unsuitable for children, as well as information concerning the use of such software or other tools.*

*(3) Any person who fails to comply with subsection (2) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R50 000 or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.*

89. ISPA offers the following observations in respect of this section:

89.1. The section is unworkable and cannot be implemented.

89.2. The section does not impose any obligations on internet service providers or internet access providers. As per subsection (2) the obligations are in fact imposed on persons who provide child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet.

89.3. The term “internet access provider” is not defined and this is the only instance in which it is used in the Act.<sup>17</sup>

90. ISPA accordingly urges the Portfolio Committee to review this section and to query with the Board the implementation of the section to date.

#### **The legal framework regarding ISPs in South Africa**

91. ISPA submits that – in considering the provisions of the Bill – it is important to have a clear understanding of the current legislative framework applicable to information system service providers, including ISPs, in South Africa.

92. We have set out below an analysis of the framework established under the ECT Act regulating the liability of information system service providers such as ISPs.

93. One of the motivations for doing so is to demonstrate to the Portfolio Committee that there are already existing mechanisms in place for dealing with unlawful content online. In particular, we would ask the Portfolio Committee to consider the different obligations attached under the ECT Act to Internet access providers, hosting providers and other intermediaries.

94. The ECT Act includes the following definitions which make it clear that an information system service provider is an intermediary and that an intermediary is neither a content provider nor a content consumer:

**"intermediary"** means a person who, on behalf of another person, whether as agent or not, sends, receives or stores a particular data message or provides other services with respect to that data message;

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<sup>17</sup> Please see further ISPA’s submissions regarding the use of the term “Internet service provider” and the definition thereof in the Act.

"addressee", in respect of a data message, means a person who is intended by the originator to receive the data message, but not a person acting as an intermediary in respect of that data message;

"originator" means a person by whom, or on whose behalf, a data message purports to have been sent or generated prior to storage, if any, but does not include a person acting as an intermediary with respect to that data message;

95. ISPA wishes to emphasise that the ECT Act clearly distinguishes between the different roles played by content providers, content platforms and Internet Access Providers.

#### ISPs under the Electronic Communications and Transactions Act 25 of 2002

96. The Minister of Communications (now the Minister of Telecommunications and Postal Services) formally recognised ISPA as an Industry Representative Body ("IRB") in terms of section 71 of the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act") on 20 May 2009.

97. The effect of formal recognition as an IRB is that ISPA's members are entitled to claim the limitations on liability in respect of content carried over their networks which are created by Chapter XI of the ECT Act.

98. Under section 71(2) of the ECT Act the Minister of Telecommunications and Postal Services may only grant such recognition to a representative body if he or she is satisfied that its members are subject to a code of conduct which requires continued adherence to prescribed standards of conduct and that the representative body is itself capable of monitoring and enforcing its code of conduct.

99. Entities falling within the definition of "service provider" set out in section 70 of the ECT Act will only be entitled to the limitations of liability set out in Chapter XI where:

99.1. They are members of a recognised IRB; and

99.2. They have adopted and implemented the official code of conduct of the IRB.

100. The Minister of Communications has prescribed standards of conduct to be incorporated into representative body codes of conduct through the publication of Guidelines for the Recognition of Industry Representative Bodies ("the IRB Guidelines").

101. ISPA undertook a lengthy process of amendments to its Code of Conduct and interaction with the then Department of Communications to ensure that the Code complies with the criteria set out in the IRB Guidelines. ISPA was recognised as an IRB on 20 May 2009.

102. The current version of the ISPA Code of Conduct is available at [www.ispa.org.za/code-of-conduct](http://www.ispa.org.za/code-of-conduct).

#### *ISPA's members act as "mere conduits"*

103. Section 73 of the ECT Act stipulates that a service provider "is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control".

104. This immunity holds only where the service provider:

104.1. is a member of an IRB and has adopted and implemented the code of conduct of that IRB;

- 104.2. does not initiate the transmission;
  - 104.3. does not select the addressee;
  - 104.4. performs the functions in an automatic, technical manner without selection of the data;  
and
  - 104.5. does not modify the data contained in the transmission.
105. The section 73 “mere conduit” immunity does not interfere with the right of the courts to order a service provider to terminate or prevent unlawful activity in terms of any other law which may apply.
106. In simple terms: ISPA’s members, when acting in the capacity of service providers, are provided with legislative immunity from liability in respect of the content which flows over their networks subject to the provisions of the ECT Act.
107. Even where ISP's are not members of ISPA, there is other legislation – as well as the common law relating to defamation - that reinforces the “mere conduit” principle, albeit by exclusion rather than inclusion. The Consumer Protection Act imposes liability of defective goods and services on the entire value chain involved in the production, distribution, sale and installation of goods and services. To this extent, all parties involved in such value chains (save for those specifically excluded) must register with the Consumer Goods and Services Ombud and are subject to the Industry Code of Conduct. In terms of regulation 4.4, electronic service providers are excluded from the application of the code. ISPA submits that this is a clear indication and recognition that (a) ISP's are adequately regulated, and (b) are mere conduits in the distribution chain.
108. Electronic networks are nothing more than the offline equivalents of roads and railways, whilst ISP's are nothing more than the electronic version of post offices and courier companies. In other words, they are the electronic version of common carriers. In this regard, ISPA notes that there is no legal precedent that imposes liability on common carriers for the goods that are conveyed over or by them in the lawful execution of its functions and duties.

*Hosting, caching and information local tools*

109. This legislative immunity also covers hosting of content, caching of content and the provision of tools such as hyperlinks which are designed to assist users to find information. In all of these instances there are further requirements set out in the relevant section and which in essence stipulate that the provision of the service or performance of the activity must take place at arm’s length, in accordance with industry standards and that the service provider should not have knowledge of unlawful activity.
110. Section 76(d) of the ECT Act holds that the immunity for providers of information location tools only applies where the provider “removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person”.

### *Take-Down Notice Procedure*

111. Section 77 of the ECT Act creates a procedure which allows a complainant to notify a service provider or its designated agent (such as ISPA) of unlawful activity in a written notice which sets out the right which has been infringed and the location or nature of the infringing material or activity under the control of the service provider.
112. A service provider is obliged to act expeditiously to remove or disable access to infringing content, failing which it may lose the immunity it has in respect of hosted content under section 75 of the ECT Act.
113. ISPA has established a Take-Down Procedure and Take-Down Guide as well as an online facility that allows for the lodging of take-down notices in respect of infringing content or activities hosted or under the control of ISPA members in their capacity as service providers<sup>18</sup>.
114. It should be noted that concerns have been expressed regarding the constitutionality of the current take-down notice procedure, in particular because it does not provide the party affected with an opportunity to be heard prior to the take-down being effected<sup>19</sup>.
115. The Explanatory Memorandum to the Electronic Communications and Transactions Amendment Bill, 2012<sup>20</sup> states that:

*“12.5 After further consideration, the Minister considers that any notice or take-down procedure should allow for the right of reply in accordance with the principle of administrative justice and the audi alteram partem rule. Changes have been proposed in this regard to section 77 and a new section 77A is proposed.”*

### *No general obligation to monitor*

116. Section 78 of the ECT Act explicitly states that services providers are not under any general obligation to monitor the data which it transmits or stores or to actively seek facts or circumstances indicating an unlawful activity.
117. This is recognition of practical reality: even a small Internet access provider would find it impossible to monitor all the content flowing over its systems due to the volume of content and the speed at which it travels.
118. Internet access providers are further under a Constitutional imperative to respect the privacy of their subscribers and, as previously mentioned, are prohibited under RICA from any unauthorised interception and/or monitoring of electronic communications.

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<sup>18</sup> <http://ispa.org.za/code-of-conduct/take-down-guide/>

<sup>19</sup> See Rens, A: South Africa Censorship on Demand: Failure of Due Process in ISP Liability and Takedown Procedures in *Global Censorship and Access to Knowledge*, International Case Studies, Nagla Rizk, Carlos Affonso de Souza and Pranesh Parakesh (eds) Information Society Project, Yale Law School (available on request)

<sup>20</sup> General Notice 888 of 2012, GG 35821, 26 October 2012

119. It is important to note that as soon as a service provider becomes aware of conduct or content which it knows to be illegal or unlawful it can no longer rely on the Chapter 11 limitations of liability.
120. While a service provider is under no obligation to monitor the data which it transmits or stores or to seek out facts or circumstances which indicate an unlawful activity, once it becomes aware of such facts or circumstances it is obligated to respond thereto with reasonable expediency.
121. This obligation to act may take a number of forms but will generally involve reporting a matter to the SAPS or Film & Publications Board, retention of evidence and/or the disabling of access or taking down of content.

*Guidelines for the recognition of Industry Representative Bodies*

122. As a recognised IRB ISPA's Code of Conduct is compliant with the requirements of the Guidelines for Recognition of the Industry Representative Bodies of Information System Service Providers contemplated in Chapter XI of the ECT Act ("the IRB Regulations") as promulgated by the Minister of Communications.
123. The IRB Regulations underpin the approach of placing the emphasis for control on self-regulation by the industry rather than directly applicable legislation or government regulation and intervention.

*The only monitoring or control done by the state in the above process is to ensure that the IRB and its ISPs meet certain minimum requirements laid down in the ECT Act.*

*The ECT Act is also quite emphatic that there is no general requirement on ISPs to monitor whether the recipients of the service are transgressing the law or to monitor data that it transmits or stores.*

*This is simply a realistic approach, taking cognisance of economic and practical realities in the internet environment.*

*This set of guidelines provides assistance to Industry Representative Bodies and ISPs on the minimum requirements regarded as adequate by the Minister and against which any application for recognition will be measured. It also contains guidelines on what is viewed as international best practice and the standards that should ultimately be striven for.<sup>21</sup>*

124. The IRB regulations set out minimum criteria to be included in an IRB's Code of Conduct, including criteria relating to the protection of children, which are observed by all ISPA members.

**5.9. Protection of Minors**

*5.9.1. Members will take reasonable steps to ensure that they do not offer paid content subscription services to minors without written permission from a parent or guardian.*

*5.9.2. Members undertake to provide their recipients of Internet access with information about procedures, content labelling systems, filtering and other software applications that can be used to assist in the control and monitoring of minors' access.*

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<sup>21</sup> IRB Regulations paragraph 1

5.9.3 Paragraphs 5.9.1 and 5.9.2 do not apply when Members offer services to corporate recipients of their services, where no minors have Internet access.

Are ISPs regulated by ICASA?

- 125. ISPA wishes to make submissions intended to clarify the regulation of Internet service providers by the Independent Communications Authority of South Africa.
- 126. ISPA has noted the reference in the Online Regulation Policy recently published by the Board that the Board will seek to approach “media platforms, including internet service providers”<sup>22</sup> to take down offending content.
- 127. The Submission to the FPB’s Council published together with the Online Regulation Policy, further sets out the following under section 7 relating to risk analysis:

Risk	Impact	Controls
Lack of buy-in by industry	Reputational damage due to inability to enforce the policy	MOU with ICASA to block non-compliant online distributors at ISP level.

- 128. ISPA notes the following:
  - 128.1. The provision of retail Internet access services requires the holding of an electronic communications service (ECS) licence or an ECS licence exemption issued by ICASA under Chapter 3 of the Electronic Communications Act.
  - 128.2. ICASA does not, however, directly regulate “Internet service providers”. This term is not defined in the ECA and ICASA has previously confirmed to ISPA that the provision of hosting services is not regarded as requiring licensing issued by ICASA under Chapter 3 of the ECA.
  - 128.3. This is not to say that there is a significant overlap between the body of ISPs and the body of entities holding electronic communications services licences issued by ICASA under Chapter 3 of the ECA.
  - 128.4. It does not appear that a planned MOU to be entered into between the Board and ICASA has been finalised. This is notwithstanding an ICASA media release dated 11 March 2016<sup>23</sup> which indicated that the MOU had been signed and that the two entities would in future address issues of co-jurisdiction “in a seamless and collaborative manner”. The media release notes that:

*The signing of this MOU is aimed at establishing a formal relationship between the FPB and ICASA to deal with amongst others; the uniform classification and labelling of content*

<sup>22</sup> It must be noted that this is incorrect, an ISP is not a media platform or any subset thereof.

<sup>23</sup> [https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/MOU\\_Film\\_Publication\\_Board/Default.aspx](https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/MOU_Film_Publication_Board/Default.aspx)

*by the industry including the wireless application service providers, electronic communications service providers and broadcasters, and creation of awareness on compliance with applicable laws. The MOU will further promote information sharing and research between the two entities on matters of mutual interest in the realm of content regulation; and also promote awareness of the role of ICASA and FPB in the protection of children against undesirable content.*

- 128.5. ISPA requests that the Portfolio Committee investigate the reason for the MOU not being signed and that it consider further the manner in which these two regulators are able to work together.

### **ISPs are not “distributors” or “online distributors” of content for the purposes of the Act**

129. ISPs have not under the Act to date been required to register with Board as “distributors” under the Act and have therefore not been regarded as falling within the definition of “distributor” such as to require registration under section 18 of the Act. Nor have their activities in providing Internet access services been regarded as “distribution” (and it follows that such activities can also not be regarded as “online distribution”).
130. The Board has previously conflated “Internet service providers” and “distributors” but has now recognised in its Online Regulation Policy and public statements that these are two different categories of entity.
131. ISPA requests that the Portfolio Committee bear this distinction in mind in its deliberations regarding the Bill.

### **Internet Service Providers, hate speech and advocacy of racism**

132. Set out below are amendments to section 27A of the Act proposed by the Bill:

#### **27A. Registration and other obligations of ~~Internet~~ internet service providers**

- (1) Every ~~Internet~~ 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~~ internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography or advocating racism and hate speech, such ~~Internet~~ internet 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~~ 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~~ 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~~ 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 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.

133. ISPA notes that the proposed amendments seek to extend the obligations on ISPs currently in place regarding actions to be taken where they have knowledge of CAM to situations where an ISP has knowledge that its services are being used for advocating racism and hate speech.

134. ISPA reiterates its earlier submissions regarding the scope of application of the Act and criminal offences as well as the framework for intermediary liability set out in Chapter 11 of the ECT Act.

135. In particular:

135.1. It must be absolutely clear to all parties that South African ISPs are unable to “take-down” or otherwise deal with content which is placed on social media platforms based outside of South Africa. Media reports indicate that the majority of illegal speech is posted on platforms such as Facebook and Twitter, but there are also smaller platforms based in jurisdictions such as Russia which have previously demonstrated to the Board the difficulties of dealing with posts on these platforms.

135.2. There is nothing local access or hosting providers can do about this material, even if they are provided with a court order notifying them that it is in fact illegal speech.

135.3. As regards locally-hosted content, the question must be asked as to at what stage there is knowledge that a service is being used for the dissemination of illegal speech? Defining what is and what is not hate speech is a notoriously difficult exercise properly in the domain of the courts: ISPs are not in any position to make such a determination.

135.4. Where an ISP is presented with a court order or similar document notifying it of the hosting or distribution of illegal speech it will comply with such order immediately.

135.5. The proposed amendments to section 27A(2) are not consistently carried through the section as the Bill proposes to amend it.

#### **The role of ISPs in furthering the mandate of the Board**

136. As noted above, ISPA’s member are already subject to the standards of behaviour set out in the IRB Guidelines.



137. ISPA refers to the Children’s Empowerment & Information Communication Technology (ICT) Strategy published by the Department of Telecommunications and Postal Services (DTPS) and launched in October 2015<sup>24</sup>. This Strategy notes, inter alia, that:
- 137.1. Proper education is the only means to address the exploitation of children by usage of social media, as there is no legal means available to do it.
- 137.2. Filtering software such as the Web nanny software is available to block access to harmful sites and content and usage monitoring.
- 137.3. Operators don’t have control over or the right to view personal content of users, i.e. sending of pictures through MMS.
- 137.4. Manufacturers should improve education to parents of children who purchase handsets on the features of equipment.<sup>25</sup>

138. The Strategy sets out the current position of ISPs and the obligations imposed on them in respect of the protection of children when online:

*“The Department of Telecommunications and Postal Services published in the Government notice on 14 December 2006 the Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers contemplated in Chapter XI of the Electronic Communications and Transactions Act, 2002.*

*Clause 2.3 of the Guidelines principle which is dealing with constitutional values provides that “the guidelines are based on and consistent with constitutional values contained in the Constitution of South Africa, Act 108, Chapter 2 of the Bill of Rights and more specifically the provisions on human dignity (section 10), privacy (section 14), freedom of belief, religion and opinion (section 15) and freedom of expression (section 16). The basic values underlying a democratic society such as freedom of speech, protection of privacy and informational integrity, legality and the protection of minors should be respected”.*

*Section 78 of Electronic Communications and Transactions Act of 2002 states that there is no general obligation on ISPs to monitor the conduct or content of the recipients of their services except as provided in South African law as the requirements in the Films and Publications Act No.65 of 1996 on the prevention of child pornography, but clause 2.9 of the Guidelines stipulates that ISPs should not be allowed to turn a blind eye where they become aware of illegal content or conduct within their sphere of operation and control.*

*Bearing in mind that clause 5.9 of the Guidelines is focusing on the protection of minors (minors mean children) and provides the followings:*

- *members will take reasonable steps to ensure that they do not offer paid content subscription services to minors without written permission from a parent or guardian;*

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<sup>24</sup> Available from <http://www.ellipsis.co.za/wp-content/uploads/2015/08/Final-Draft-Children-Strategy-July-2014-002.pdf>

<sup>25</sup> Children’s Empowerment & Information Communication Technology (ICT) Strategy pp19-20

- *members undertake to provide their recipients of Internet access with information about procedures, content labelling systems, filtering and other software applications that can be used to assist in the control and monitoring of minor's access;*
- *therefore, these two mentioned bulletins do not apply when Members offer services to corporate recipients of their services, where no minors have Internet access.*

*As a result, Internet Service Providers of Association was recognised as Industry Representative Body by the Minister of Communications and it reporting on annual basis to the Department of Telecommunications and Postal Services.*<sup>26</sup>

- 139.** ISPA will continue to engage with all stakeholders regarding the measures which can be taken by Internet service providers to ensure responsible and constructive use of electronic communications in South Africa.
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<sup>26</sup> Children's Empowerment & Information Communication Technology (ICT) Strategy p20

## PART D: SPECIFIC SUBMISSIONS

### Definitions

140. ISPA accepts that it is often not possible or even desirable to be precise in defining terms used in legislation. Nevertheless, it is important to ensure that definitions:

140.1. Clearly identify those upon whom obligations are imposed;

140.2. Provide clear guidance as to the nature of such obligations.

### Definition of “child pornography”

141. The Bill proposes substantive amendments to the current definition of the term “child pornography”, including the:

141.1. Introduction of a requirement that image or description of child must be “explicit”; and

141.2. Deletion of the element of the current definition holding that an image / description is child pornography if it is capable of being used for the purposes of sexual exploitation.

142. The new definition showing amendments is set out below:

**“child pornography”** ~~includes any~~ means an explicit image, however created, or any explicit 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-

(a) engaged in sexual conduct;

(b) participating in, or assisting another person to participate in, sexual conduct; or

(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;~~

143. The Memorandum to the Bill explains that the amendment to this definition is intended to align the definition with that judgement of the Constitutional Court in the matter of De Reuck v Director of Public Prosecutions 2004 (1) SA 406 CC<sup>27</sup> (“the De Reuck Case).

144. This may be so, but it also the case that the proposed definitions are directly in conflict with the definition adopted by Parliament in the SOA, which definition was the subject of considerable debate before the interpretation set out in the De Reuck case was rejected. That such amendments should be proposed is unfortunate.

145. ISPA submits that this is yet another example of the dangers of having different legislation dealing with the same criminal acts.

146. ISPA submits further that this definition – together with section 24B and other provisions of the Act dealing with CAM – be deleted from the Act.

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<sup>27</sup> <http://www.saflii.org/za/cases/ZACC/2003/19.html>

**“Distribution” and “online distribution”**

147. The concept of the distribution of films, games and publications is central to the Act. The Bill proposes the following amended definition of “distribute”, covering both traditional and digital distribution:

“**distribute**”, in relation to a film, game or a publication, without derogating from the ordinary meaning of that word, includes –

- (a) to stream content through the internet, social media or other electronic mediums;
- (b) to sell, hire out or offer or keep for sale or hire and,
- (c) for purposes of sections 24A and 24B, includes to hand or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;

148. The Bill seeks to amend the definition of “distributor”, as well as introducing a definition for “online distributor”:

“**distributor**”, means, in relation to a film or game, means a person who conducts business in the selling, hiring out or exhibition of films including the streaming of content through the internet, social media and other electronic mediums;

‘online distributor’ in relation to a digital film, digital game or publication, means a person who conducts business in the selling, hiring out or exhibition of films, games or publications online through the internet or any other electronic medium;

(underlined text represents additions to the Bill)

149. These definitions are important in understanding how the Bill is intended to operate. In particular, a distributor needs to be understood in the context of someone who conducts the business of distributing content.

Distributor	Online Distributor
conducts business	conducts business
selling, hiring or exhibiting	selling, hiring or exhibiting
films (and presumably games)	digital films, digital games and publications
Including the streaming of content through the internet, social media and other electronic media	online through the internet or other electronic media
Examples: Ster-Kinekor, DVD chains, company selling games (digital)	Examples: Video on Demand players such as Showmax, Netflix; Steam, Apple and Google online stores where games may be purchased, Youtube and numerous other online content platforms

150. Any person who knowingly distributes or exhibits in public a film or game without being registered with the Board as a distributor or exhibitor of films or games 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 eight months or to both a fine and such imprisonment.
151. ISPA has the following concerns regarding these definitions:
- 151.1. Consideration should be given as to whether the current definition in the Act is not, in any event, sufficient for the scope of online regulation to be undertaken by the Board.
- 151.2. The proposed definition of “online distributor” is, in our view, too broad and it covers almost all imaginable online content, including UGC. As noted above, the Board has accepted in its Online Regulation Policy that this is not the intended scope of regulation and the Bill should reflect this.
- 151.3. The extension of the ambit of “distribution” to include publications confuses the separate regimes for the classification of publications under section 16 and the classification of films and games under section 18 of the Act.
- 151.4. A shared understanding of who is a “distributor” or “online distributor” is critical for the effective implementation of the Act.
- 151.5. A shared understanding of which party bears the onus of registering as a “distributor” or “online distributor” and submitting films and games for classification is critical for the effective implementation of the Act. One ISPA member, in response to this consultation noted that:
- We have a site where one can view trailers of games and can also link to other sites to purchase games. The game may be advertised for sale on our site, however the purchase takes place on the third parties site. Does this make us an online distributor? Are we required to submit these trailers for classification?*
- 151.6. The proposed definition of “online distributor” itself refers to both “digital games” and “digital films” and “games” and “films”.

**“Digital games” and “digital films”**

152. The Bill proposes to introduce new definitions for “digital films” and “digital games”: this creates a distinction between offline distribution – “games” and “films” – and “online distribution” – “digital games” and “digital films”.

<p>“<b>film</b>” means any sequence of visual images recorded in such a manner that by using such recording such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition through any medium or device;</p>	<p>‘<b>digital film</b>’ means any sequence of visual images recorded in such a manner that by using such recording, such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition <u>through the</u></p>
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	<u>internet or any other electronic medium or device;</u>
“ <b>game</b> ” means a computer game, video game or other interactive computer software for interactive game playing, where the results achieved at various stages of the game are determined in response to the decisions, inputs and direct involvement of the game player or players;	‘ <b>digital game</b> ’ means a computer game, video game, <u>online apps</u> or other interactive computer software for interactive game played <sup>28</sup> , where the results achieved at various stages of the game are determined in response to the decisions, inputs and direct involvement of the game <sup>29</sup> , <u>accessed and played through the internet or any other electronic medium or device;</u>

153. The Bill then sets out – in a proposed section 18C(5) - a clear prohibition on the distribution of “digital films” and “digital games” unless these have been classified under the Act and display the labelling required by the Act<sup>30</sup>.

154. ISPA has the following submissions in respect of these definitions:

154.1. There appears to be little distinction between the definition of “film” and the proposed definition of “digital film” and the Portfolio Committee is requested to consider whether the proposed new definition is necessary.

154.2. The term “online apps” should be defined.

#### **Complaints against digital content services distributed online**

155. The Bill proposes the insertion of a new section 18E which would allow anyone to complain to the Board about “unclassified, prohibited content, or potential prohibited content, in relation to services being offered online by any person, including online distributors”.

156. The proposed section gives the Board – where it establishes there is merit in the complaint or that “the prohibited content or content or content being hosted online” has not been submitted for examination and classification – powers to:

156.1. Issue a take-down notice in respect of a “hosting service”;

156.2. Issue a service cessation notice in respect of a “live content service”; or

156.3. Issue a link-deletion notice in respect of a “link service”.

157. ISPA submits that this provision is highly problematic.

157.1. As set out at length above, the Board should not concern itself with prohibited content or potentially prohibited content which is a matter for SAPS. Rather, the Board should be

<sup>28</sup> Presumably “playing”

<sup>29</sup> This does not make sense and “game” should read “game player or players”

<sup>30</sup> 18C (5) No digital film or digital game may be distributed in the Republic unless it has been classified in terms of section 18 or this section, and a clearly visible label indicating the age limit and the nature of content is displayed on or in connection with the film or game and appearing next to the logo of the Board.

concerned about unclassified content which is subject to an obligation to classify under the Act.

157.2. There is no provision made for observance of *audi alteram partem* prior to the Board exercising a power which is administrative and subject to PAJA and which also directly impacts on the Constitutional right to freedom of expression. ISPA is uncertain as to whether it is Constitutional to allow the Board the powers proposed by this section.

157.3. The terms “hosting service”, “live content service” and “link service” are not defined which makes the scope of application of this section vague.

157.4. Most importantly, the mechanisms created in this section already exist in Chapter 11 of the ECT Act, as set out above in the discussion regarding the position of ISPs and other information system service providers under that Act. ISPA cannot identify any reason why the Board should not use the existing mechanisms, which have been in place since 2002, to achieve the ends it seeks.

### **IPTV and Video on Demand**

158. The emergence of IPTV and Video on Demand (VoD) services in South Africa is a form of convergence between broadcasting and IP networks: the Bill makes it explicit that the exemption in favour of broadcasters does not apply to “a broadcaster who streams content through the internet”. Such a person is required to register with the Board as a distributor and submit content for classification where required.

159. ISPA submits that this position is at odds with the position taken by ICASA in its “Final Report in ICASA’s Review of the Broadcasting Regulatory Framework towards a Digitally Converged Environment”<sup>31</sup> which sets out the following position:

159.1. South Africa works with the ITU definitions of IPTV services:

*“a system where a digital television service is delivered by using [IP] over network infrastructure, which may include delivery by broadband connection”*

*“IPTV is defined as multimedia services such as television/video/audio/text/graphics/data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability.”*

159.2. In South Africa IPTV services – services which provide scheduled television programming over a managed network and may provide additional features such as data, text and audio which are ancillary to the scheduled television programming – are regarded as broadcasting services because they are primarily unidirectional.

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<sup>31</sup> Available from <http://www.ellipsis.co.za/wp-content/uploads/2012/01/Final-Report-on-Review-of-Broadcasting-Regulatory-Framework-June-2013.pdf>

159.3. ICASA has decided that an individual broadcasting service (IBS) licence is required where IPTV services are provided on a for-profit basis and that such service will be subject to the various requirements of Chapter 9 of the ECA regarding content.

159.4. VOD services are regarded as electronic communication services (ECS). This includes both "push VOD", i.e. on-demand content that is downloaded onto a user's device allowing the user to select from a limited and defined list of programming, and "pull VOD" or TVOD, i.e. on-demand content which is accessed from an external server. According to ICASA, the element of viewer choice distinguishes VOD services from IPTV services by giving the former a sufficiently bi-directional character.

160. As such IPTV providers are subject to ICASA’s jurisdiction as is the case with all holders of broadcasting services licences. Noting the Constitutional considerations surrounding broadcasting, ISPA submits that such providers should also be exempt from the provision to register with the Board under section 18 and to submit content for classification under that section.

**Independent classification of digital films, digital games and certain publications**

161. The Bill proposes the insertion of a new section 18C which would introduce a system whereby the Board can delegate classification of “digital films, digital games and publications” to an approved and accredited “independent industry classification body” established by all or some distributors registered under section 18(1)(a) of the Act.

162. ISPA notes the position adopted by the Board in its Online Regulation Policy, allowing for classification to take place in three distinct ways:

162.1. Through submission of content to the Board;

162.2. Classification according to a foreign classification system which has been accredited by the Board; and

162.3. Self-classification after receiving the required training from the Board.

163. The Policy further sets out ongoing auditing, retention and compliance requirements for those classifying other than through submission of content to the Board.

164. ISPA understands that there is support within industry for the self-classification model, which is not currently provided for in Bill, and requests that the Portfolio Committee consult with the Board regarding including a basis for self-classification in the Bill.

**Display of classification decisions**

165. The Bill proposes the insertion of a new section 18I regarding the display of classification decisions regarding a “digital film, digital game or publication”.

films and games	digital films and games
display label in the prescribed form	conspicuously display the Board’s classification decision and logo on <ul style="list-style-type: none"> <li>• the landing page of the website,</li> </ul>



	<ul style="list-style-type: none"> <li>• the website catalogue and</li> <li>• at the point of sale of the online distributor services.</li> </ul>
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166. ISPA suggests that the display of a classification decision should be clearly connected with the content in respect of which the classification applies. The landing page of a website may accordingly not be the correct place for such a display.
167. It may be preferable to use language which refers to the display of the classification decision to be associated with instances of the content being displayed.

### **Prohibition against distribution of private sexual photographs and films**

168. The Bill proposes the insertion of a new section 18F into the Act to criminalise what is generally referred to as “revenge porn”. In essence this creates an offence where one person exposes a private sexual photograph or film through electronic media if this is done without the consent of a person appearing in the film or photograph and with the intention of causing distress to that person.
169. Any person found guilty of an offence under this section will be liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.
170. ISPA acknowledges the need for criminalisation of this conduct.
171. As noted above, provision for such an offence is included in the Cybercrimes and Cybersecurity Bill through proposed amendments to the SOA:

#### **“Harmful disclosure of pornography**

10A. (1) A person (“A”) who unlawfully and intentionally discloses or causes the disclosure of pornography in which a person 18 years or older (“B”) appears or is described and such disclosure—

- (a) takes place without the consent of B; and
- (b) causes any harm, including mental, psychological, physical, social or economic harm, to B or any member of the family of B or any other person in a close relationship to B,

is guilty of the offence of harmful disclosure of pornography.

(2) A person (“A”) who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1) and such threat causes, or such disclosure could reasonably be expected to cause, any harm referred to in subsection (1)(b), is guilty of the offence of threatening to disclose pornography that will cause harm.

(3) A person (“A”) who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1), for the purposes of obtaining any advantage from B or any member of the family of B or any other person in a close relationship to B, is guilty of the offence of harmful disclosure of pornography related extortion.

(4) A person (“A”) who unlawfully and intentionally accesses or possesses pornography referred to in subsection (1) and A knows or is reasonably expected to know that the disclosure of

such pornography took place as referred to in subsection (1), is guilty of accessing or possessing pornography resulting in harm.

(5) (a) A person who contravenes the provisions of subsection (1) or (2) is liable, on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

(b) A person who contravenes the provisions of subsection (3) is liable, on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

(c) A person who contravenes the provisions of subsection (4) is liable, on conviction to a fine or to imprisonment for a period not exceeding 3 years or to both such fine and imprisonment.”

172. This is, in ISPA’s view, the correct place for such a provision. This is a criminal offence which the Board cannot enforce. In line with its submissions above, ISPA submits that this provision should be deleted from the Bill.

#### **Prohibition against filming and distribution of films and photographs depicting sexual assault and violence against children**

173. The Bill proposes the insertion of a new Section 18G which sets out a prohibition against the creation, production or distribution – “in any electronic medium including the internet and social networking sites” - of films and photographs depicting sexual assault and violence against children.

174. Any person who is found guilty of an offence under this section is liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

175. This insertion is confusing as it appears to repeat the prohibition on the creation, production or distribution of child pornography / child sexual abuse material.

176. In line with its submissions above regarding the Board and criminal offences, ISPA submits that this provision should be deleted from the Bill.

#### **Prohibition against propaganda for war, incitement of violence and hate speech**

177. The Bill proposes the insertion of a new section 18H prohibiting the distribution of any film, game or publication which advocates propaganda for war, incites violence or advocates hate speech through any medium “including the internet and social networking sites”.

178. Any person found guilty of an offence under this section will be liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

179. In line with its submissions above regarding the Board and criminal offences as also relating to proposed hate crimes legislation and the Draft National Action Plan under development by the DOJCD, ISPA submits that this provision should be deleted from the Bill.

## **CONCLUSION**

180. ISPA thanks the Portfolio Committee for its consideration of these submissions and will make itself available at the Committee's convenience in the event that further consultation is required.
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## **ANNEXURE A – RELEVANT PROVISIONS FROM THE SOA**

*We have set below, for convenience, relevant provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which deal comprehensively with CAM-related offences. This is for the purpose of illustrating that there is no need – and it would be highly undesirable - to include provisions relating to the same criminal acts in the Film and Publications Act.*

*The following provisions are included:*

- *Section 10: Exposure or display of or causing exposure or display of child pornography to persons 18 years or older*
- *Section 18: Sexual grooming of children*
- *Section 19: Exposure or display of or causing exposure or display of child pornography or pornography to children*
- *Section 20: Using children for or benefiting from child pornography*
- *Section 56: Defences*

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### **10 Exposure or display of or causing exposure or display of child pornography to persons 18 years or older**

A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C') or not, exposes or displays or causes the exposure or display of child pornography to a complainant 18 years or older ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography to a person 18 years or older.

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### **18 Sexual grooming of children**

(1) A person ('A') who-

(a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child ('B');

(b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by 'B';

(c) supplies, exposes or displays to a third person ('C')-

(i) an article which is intended to be used in the performance of a sexual act;

(ii) child pornography or pornography; or

(iii) a publication or film, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or

(d) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B, is guilty of the offence of promoting the sexual grooming of a child.

(2) A person ('A') who-

(a) supplies, exposes or displays to a child complainant ('B')-

(i) an article which is intended to be used in the performance of a sexual act;

(ii) child pornography or pornography; or

(iii) a publication or film, with the intention to encourage, enable, instruct or persuade B to perform a sexual act;

(b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to-

(i) perform a sexual act with A or a third person ('C');

(ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;

(iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;

(iv) be exposed to child pornography or pornography;

(v) be used for pornographic purposes as contemplated in section 20 (1); or

(vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;

(c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;

(d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B-

(i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B;  
or

(ii) during such meeting or communication or any subsequent meeting or communication to-

(aa) commit a sexual act with A;

(bb) discuss, explain or describe the commission of a sexual act; or

(cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person; or

(e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B, is guilty of the offence of sexual grooming of a child.

—

### **19 Exposure or display of or causing exposure or display of child pornography or pornography to children**

A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of-

(a) any image, publication, depiction, description or sequence of child pornography or pornography;

(b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act 65 of 1996), or in terms of any other legislation; or

(c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law, to a child ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

—

### **20 Using children for or benefiting from child pornography**

(1) A person ('A') who unlawfully and intentionally uses a child complainant ('B'), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person ('C') or not-

(a) for purposes of creating, making or producing;

(b) by creating, making or producing; or

(c) in any manner assisting to create, make or produce, any image, publication, depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of using a child for child pornography.

(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child pornography.

—

## **56. Defences**

(6) It is not a valid defense to a charge under section 20 (1), in respect of a visual representation that-

(a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and

b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.