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The Film and Publications Board

Per email: policy.submissions@fpb.org.za

WAPA'S SUBMISSIONS ON THE DRAFT ONLINE CONTENT REGULATION POLICY

Please find set out below the submissions of the Wireless Access Providers' Association (WAPA) in response to the invitation to comment on the Film and Publications Board's Draft Online Content Regulation Policy.

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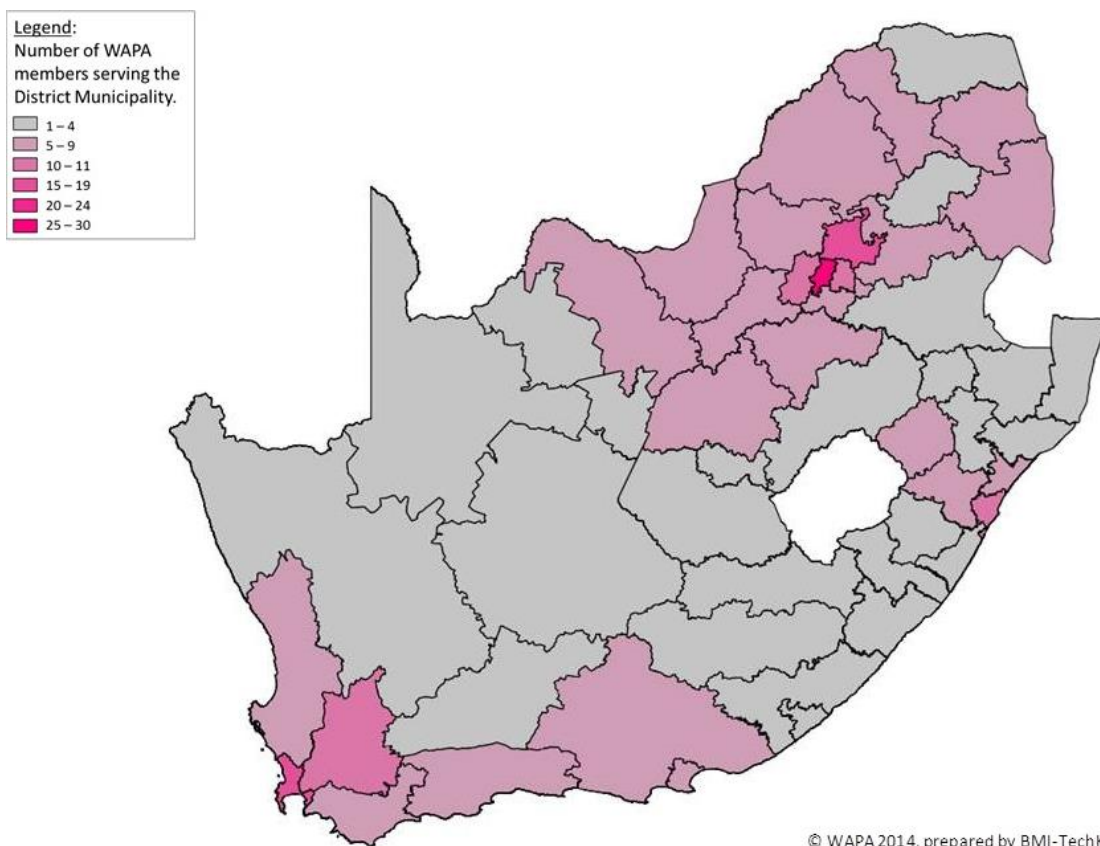
INTRODUCTION

1. WAPA has noted the invitation issued by the Film and Publications Board (“the Board”) to make submissions in response to the publication of the “Draft Online Regulation Policy to be adopted by Council in terms of Section 4A of the Films and Publications Act, 65 of 1996, as amended” (“the Draft Policy”).
2. WAPA’s comments on the Draft Policy and the “Explanatory Memorandum on the Draft Online Regulation Policy to be adopted by Council in terms of Section 4A of the Films and Publications Act, 65 of 1996, as amended” (“the Explanatory Memorandum”) are set out below and structured as follows:
 - 2.1. Information about WAPA is provided and the interest of its members established.
 - 2.2. Submissions relating to the legal nature of the Draft Policy.
 - 2.3. Submissions relating to the scope of application of the Draft Policy.
 - 2.4. Conclusions relating to future process.
3. WAPA is committed to further engagements with the Board and other institutional stakeholders regarding the Board’s mandate to “protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences”¹.

¹ Film and Publications Act, section 2(b)

ABOUT WAPA

4. WAPA was formed in 2006 as a non-profit organisation representing the Interest of wireless Internet service providers (WISPs) in both urban and rural locations in South Africa. WAPA promotes technical and business best practices for wireless connectivity providers and engages in policy work to promote spectrum allocation and assignment, wholesale service provision and SMME enablement.
5. WAPA currently represents more than 220 organisations, including large and small players as well as support industries such as equipment vendors and software providers.
6. Members are found throughout South Africa.



7. WAPA further has a focus on Wi-Fi service provision and many of its members are providers of hotspots and wireless local area networks.
 8. As suggested by the acronym WISP, many WAPA members fall within the definition of “Internet service provider” as set out in the Films and Publications Act 65 of 1996, as amended (“the Act”). WAPA’s members accordingly have a direct interest in the Draft Policy.
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SUBMISSIONS

9. There is no doubt that a strategy needs to be adopted and implemented to ensure that children are better empowered and able to utilise broadband communications and are able to protect themselves and be protected from harmful content and experiences when online or using electronic communications.
10. The Board is to be congratulated for placing the debate around the strategy to be adopted in the public domain.
11. WAPA has material reservations, however, about the ability and suitability of the Draft Policy to meet this challenge.
12. The Draft Policy does not constitute a valid or constructive starting point for the development of such a strategy and accompanying legislative and regulatory framework. WAPA's reservations stem from the Draft Policy being:
 - 12.1. Ultra vires the Film and Publications Act ("the Act"): On a fundamental level this is manifested in the Board – by its own admission - basing the Draft Policy on the Act as if it has already been amended by a set of amendments proposed by it to the Minister of Communications. This is a profound misunderstanding of the legislative process: as the Act stands – and bearing in mind that the Board is a creature of statute – many of the processes and obligations proposed in the Draft Policy are not authorised and beyond the scope of the Board's governing legislation.
 - 12.2. Unconstitutional: aspects of the Draft Policy relating to pre-publication classification, take-down notices, "restricted access" notices and classification notices appear to constitute unjustifiable limitations on the rights of freedom of expression and access to administrative justice. Furthermore the proposed scope of application of the Draft Policy covers "broadcasting services" as defined in the Electronic Communications Act 36 of 2005 ("the ECA"), which are required by section 192 of the South African Constitution to be regulated independently.
 - 12.3. In conflict with primary legislation: requirements relating to filtering of content and interception and monitoring of content appear to be in conflict with primary legislation such as the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act") and the Regulation of Interception of Communications and Provision of Communication-related Information Acts 70 of 2002 ("RICA"). It is trite that subordinate legislation such as proposed by the Board cannot conflict with primary legislation.
 - 12.4. Fatally unclear in its scope of application: The Draft Policy is too vague in its scope of application and key definitions to pass the threshold set by the principle of legality. WAPA's understanding is that it is the intention to the Board to try and regulate the

broadest possible range of content in digital form, an approach which is demonstrably unworkable given the quantity of content, the international nature of electronic communications networks and the private nature of person-to-person communications. The meaning attributed by the Board to the term “distributor” is also excessively broad such that it includes Internet service providers and a variety of other Internet intermediaries.

The broadness of the scope of application of the Draft Policy makes it unenforceable and practically impossible to implement.

- 12.5. Conflates illegal content in the form of “child pornography” with other content, including pornography: illegal conduct and content is already catered for in the Act as well as the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and should not be used as a justification for measures to be adopted to protect children from harmful content accessed online and through electronic communications. This is evident from the following excerpt from the Draft Policy:

*Although at the time the FPB was not specifically provided with statistics relating to the South African situation, industry trends in South Africa show an increase in the use of portable devices for gaming and social networking, and the expected boom in online gaming over the next few years. While these are positive developments and will be economically beneficial for the country, the downside to this is that there is also a proliferation of illegal content in and the abuse of social media platforms which are at times used by sexual predators to lure their child victims and people who advocate racist ideologies and therefore use these platforms to undermine the government's agenda on social cohesion.*²

- 12.6. Fails to take into account related processes involving a number of Government Departments which are seeking to address the issues raised in the Draft Policy. These include:

12.6.1. The South African Law Reform Commission (SALRC) Project 107 which will later this year issue an Issue Paper relating to its investigation into the need for reform of the law regarding “children and pornography”. WAPA sees this process as the ideal vehicle for developing a strategy around the challenges presented by harmful content and experiences available online or through electronic communications.

12.6.2. The Final Recommendations Report of the ICT Policy Review Process (“the ICT Policy Recommendations”) which made specific recommendations to be included in an ICT Policy White Paper regarding the protection of children and the institutional framework required around content regulation

² Explanatory Memorandum, page 2

measures. The ICT Policy Recommendations also suggest a greater role for self-regulatory and co-regulatory models.

- 12.6.3. The Broadcasting Policy Review process;
- 12.6.4. The development of the Cybercrimes and Related Matters Bill by the Department of Justice and Correctional Services; and
- 12.6.5. The South Africa Connect: National Broadband Policy with particular reference to the demand-side strategy to be deployed around education and digital literacy. This represents a perfect opportunity to ensure that broadband roll-out goes hand-in-hand with education designed to empower vulnerable groups and new users of the Internet to use it in a constructive manner.

- 13. WAPA submits that the Board should also carefully consider the scope of application of its intended intervention, which is currently extremely broad. The Explanatory Memorandum identifies “Clear scope of the type of content to be classified” as a key concept underlying the model adopted in the Draft Policy.

Clear scope of the type of content to be classified

This includes self-generated content uploaded on platforms such as You-Tube, Facebook and Twitter, feature films, television programs and certain computer games which are distributed online by streaming through the internet.

- 14. The Draft Policy also identifies eight principles proposed to guide online content regulation. These have been taken directly from those developed by the Australian Law Reform Commission (ALRC) in its Report on Classification –Content Regulation and Convergent Media, published in February 2012³.
- 15. The seventh guiding principle states that:
(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and
- 16. While the principles identified by the ALRC call for less classification, the Draft Policy has close to the maximum possible scope of application in respect of online content.
- 17. The ACLR Report⁴ in fact suggests a far more practical approach with a far more limited scope:

As it is impractical to expect all media content to be classified in Australia, the scope of what

³ Australian Law Reform Commission, *Classification - Content Regulation and Convergent Media* (ALRC Report 118), February 2012 (available at <http://www.alrc.gov.au/publications/classification-content-regulation-and-convergent-media-alrc-report-118>).

⁴ ACLR Report p26

must be classified should be confined to feature films, television programs and higher-level computer games.

A classification obligation that applies to content must be focused on material for which Australians most need and demand classification information. Therefore, importantly, feature films, television programs and computer games should only be required to be classified if they are both made and distributed on a commercial basis and likely to have a significant Australian audience.

Obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis. Internet intermediaries, including application service providers, host providers and internet access providers, would also generally be excluded from classification-related obligations other than those concerning Prohibited content.

18. WAPA submits that the Board should – in line with the above suggestion – accept that content regulation in the form of classification should be limited to what is practically achievable and proportionate. Ideally this would be guided by a form of regulatory impact assessment.

CONCLUSIONS

19. WAPA submits that the Draft Policy should be withdrawn as a result of its dubious legal providence and the fundamental vagueness in its scope of application which makes the formulation of constructive comment very difficult.
20. Following withdrawal of the Draft Policy the Board could seek finalisation of the proposed amendments to the Act and thereafter reintroduce an amended version of the Draft policy.
21. Notwithstanding the above, WAPA submits that it would be preferable for relevant policy to first be finalised and thereafter for the Act to be reviewed in its entirety, given that it remains pre-Internet legislation which should not form the basis for classification of content in a world where communication by electronic means is pervasive. The Act may require platform-neutrality but the drafters – even in respect of the 2009 Amendment – had no conception of the realities of modern communications.
22. This would also enable the drafters to take into account the outputs of the processes mentioned in paragraph 12.6 above.
23. WAPA wishes to express its willingness to engage with the Board regarding the position of its members and the development of a stronger relationship between the two bodies. This is in line with the ICT Policy Recommendations⁵ and the recommendations of the “Market research on the prevalence of online and informal Film and video game content distribution channels in South Africa” undertaken by Deloitte on behalf of the Film and Publications Board.
24. In the event that the Board elects to hold further public hearings relating to the Draft Policy WAPA hereby records its intention to participate.

⁵ See recommendations 169 (Provisions for self-regulation and co-regulation) and 172 (Co-operation between regulatory authorities to ensure protection)