
On 17 October 2019, ICASA published an Invitation to Nominate Members of the B-BBEE ICT Sector Council. Since the tenure of the current B-BBEE ICT Sector Council is soon coming to an end, it is time for ICASA to initiate the process of appointing the new Council to ensure that transformation in the sector is promoted, monitored and reported on.


The following information should be supplied in respect of the nominating organisation and the person being nominated:

- Curriculum vitae
- Full name(s)
- Identity number
- Physical and postal address
- Telephone number
- Email address
- Organisation being represented with the nomination
- Signature of the representative person making the nomination and the person being nominated

The nominating organisations should provide a motivation for the nomination of a representative.

The closing date for nominations is 7 November 2019. All nominations should be addressed to Mr Jabu Radebe (Acting Deputy-General: ICT Policy and Strategy Development, Department of Telecommunications & Postal Services) and sent to the following address:

Physical: First Floor, Block A3, 1166 Park Street, Iparioli Office Park, Hatfield Pretoria; or
Films and Publications Amendment Bill signed into law

On 2 October 2019, President Cyril Ramaphosa signed the Films and Publications Amendment Bill (the “Bill”) into law. The Bill has attracted controversy, being dubbed the “Internet Censorship Bill”. While the Bill has been signed into law, there is no indication as to when the law will be promulgated and properly put into effect.

The Films and Publication Board (the "Board"), a statutory body established by the Films and Publication Act, 1996, has as one of its main objectives, to regulate the creation, possession, production and distribution of films, games and certain publications with a view to protecting children from disturbing and harmful content. The Bill’s Memorandum indicates that while the Board has predominantly focussed its classification and monitoring attention and activities on physical platforms it has become apparent that more attention must be paid to digital platforms and social media. In particular, the Memorandum provides that "the increasing demands for online content and technological advances require the Board to extend its focus to the regulation of content on these diverse platforms. In this regard it is necessary for the applicable legislation, policies and procedures to reflect these demands and technological advances." The stated objectives of the Bill include the followin to

- provide for the establishment, composition and appointment of members of the Enforcement Committee;
- provide for the powers and duties of the Enforcement Committee;
- regulate the online distribution of films and games;
- extend the compliance obligations of the Films and Publications Act, and the compliance and monitoring functions of the Film and Publication Board, to online distributors;
- revise and further regulate the functions of compliance officers regarding entering and inspection of facilities in which the sale, hire or exhibition of films or games is being conducted;
- further regulate the classification of publications, films and games;
- provide for accreditation of independent commercial online distributors by the Film and Publication Board;
- provide for classification of publications, films and games by the independent industry classification bodies;
- provide for foreign and international classification systems and approval thereof by the Film and Publication Board;
- provide for the use of classification ratings issued by a foreign and international classification authority or body;
- provide for the right of appeal against classifications issued by independent industry classification bodies;
- provide for exemptions in respect of the online distribution of films and games; and
further provide for the obligations of internet access providers regarding curbing the use of their services in propagating prohibited content.

The major changes brought about by the Bill include provisions dealing with “revenge porn”, hate speech and certain Internet Service Provider (ISP) requirements.

**Revenge porn**

The Bill introduces a new section 18F to the Films and Publications Act which provides for the prohibition against the distribution of private sexual photographs and films. This section provides that no person may expose, through any medium (which explicitly includes social media), a private sexual photograph or film if the disclosure is not made with the consent of the person or persons who are depicted in the photograph or film, and with the intention of causing that individual harm. As such, in order to be found in contravention of this section, the disclosure must have been made without consent and with the intention of causing the individual(s) harm.

The “Bishops scandal”, involving a waterpolo coach and scholars that attended the school, is a good example of an event the Bill is looking to regulate. The films and photographs which were disclosed by the coach implicated, would in all likelihood be in contravention of this section, had the Bill already been promulgated and in force.

The Bill distinguishes between the disclosure of private sexual content in the offences and penalties section by referring to private sexual photographs and films where the individuals depicted therein can either be identified or not. Where the individual(s) are not capable of being identified, a person convicted of an offence in terms of section 18F read with section 24E could be liable for a fine not exceeding ZAR150 000 or up to two years in prison (or a combination of the two). While the penalty for disclosing private sexual photographs or films where the individual(s) is identifiable, could attract a fine of up to ZAR300 000 or up to four years in prison (or a combination of the two).

For the purposes of this prohibition, ISPs will be compelled to furnish the Board or the South African Police Services with the information of the identity of the person who published the private sexual photograph or film.

Despite the controversies around the Bill, if one considers the harm (if not absolute social ruin) that has been caused to individuals in the past as a direct result of this type of content being shared, one can certainly argue that this new section of the Bill is not entirely without merit. The more problematic section of the Bill is that dealing with hate speech.

**Hate speech**

The Bill also introduces a new section 18H which provides that “no person may distribute, through any medium including the Internet and social media, any film, game or publication which amounts to propaganda for war, incites imminent violence or advocates hate speech.” Any person who knowingly makes a statement of hate speech through any
medium, which includes social media, will also be subject to a fine of up to ZAR150 000 or up to two years imprisonment (or a combination of the two).

"Hate speech" is defined in the Bill as including “any speech, gesture, conduct, writing, display or publication, made using the Internet, which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group.” Clearly, both the prohibition and the definitions are broadly defined, which can be seen as giving credence to the Bill being dubbed the “Censorship Bill” as the inroads on the right to freedom of expression enshrined in our Bill of Rights are manifestly implicated here. It is difficult to perceive how this will be policed by the enforcement committee established by the Bill. Regardless, our courts will need to be wary when interpreting these sections (as they will likely be tasked to do) of the delicate balance that needs to be struck between protecting individuals from harmful content and inroads that may be made on the right to freedom of speech.

**ISPs**

An ISP may be found guilty of an offence if it knowingly hosts or distributes child pornography, propaganda for war, the incitement of violence, or the advocating of hatred based on an identifiable group of characteristics. In these instances, the content may be removed or censored. This does raise some concerns considering the widely drafted provisions, particularly those relating to hate speech, which are discussed above, and what obligations an ISP has to monitor the content it hosts or distributes, or to investigate complaints relating to the content it hosts or distributes. Chapter XI of the Electronic Communications and Transactions Act provides that an ISP has no general obligation to monitor data which it transmits or stores, or to actively seek facts or circumstances indicating unlawful activity. This is in line with the so called “safe harbour” provisions, acknowledged internationally, that provide that ISPs are mere conduits and are not liable for content they host or distribute. If found guilty, the ISP may be subject to a fine and/or imprisonment.

**Minister comments on WOAN licensing**

The Policy on High Demand Spectrum and Policy Direction on Licensing of a Wireless Open Access Network (“Policy”) gazetted by the Department of Communications is intended to address South Africa’s longstanding spectrum scarcity challenges.

In the Policy, the Minister of Communications has directed that a portion of the unallocated high demand spectrum must first be assigned to a network category of licensees, known as wireless open access networks (“WOAN”) and the remainder must then be assigned to other eligible licensees. Licensees will, as a consequence, be able to either apply for radio frequency spectrum from the Independent Communications Authority of South Africa (“ICASA”) – in relation to unallocated radio frequency spectrum made available by ICASA for
this purpose – or licensees may seek to enter into a commercial relationship with a WOAN provider to utilise radio frequency spectrum licensed to a WOAN provider by ICASA.

The idea of a WOAN was proposed as part of the National Integrated ICT Policy White Paper, published in 2016. It calls for a shake-up of the previous policy framework for spectrum allocation in favour of an "open access regime" with the WOAN outlined as a "public-private sector owned and managed consortium".

Since the publication of the Policy there has been much speculation about what the licensing process will entail and how same will be allocated. At a recent “fibre-to-the-x” (FTTX) conference in Johannesburg, Communications & Digital Technologies Minister Stella Ndabeni-Abrahams, spoke out and indicated that high-demand radio frequency spectrum licensing is likely to “involve an auction” – although ICASA will require “business, financial and technical plans” from prospective wireless open access network licensees. The Minister further likened the WOAN licensing process to a “beauty contest”. Pam Saxby for Legalbrief Policy Watch has opined that the Minister’s remarks “tended to point to a preference for ‘new’ market entrants and ‘potential new investors’ when identifying suitable wireless open access network operators”.

ICASA has undertaken to publish an information memorandum before the end of the year on the approach envisaged for licensing and releasing unassigned spectrum. It is hoped that this will finally provide some certainty on the topic.

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