

8 September 2017

Mr. V Ramaano

Portfolio Committee on Justice and Correctional Services

3rd Floor

90 Plein Street

Cape Town

By e-mail: vramaano@parliament.gov.za

Dear Mr Ramaano

RE: Cybercrimes and Cybersecurity Bill Hearings

- 1 I refer to our telephone discussion on Friday 8 September 2017, regarding the hearings on the Cybercrimes and Cybersecurity, Bill B06-2017 ("the Bill").
- 2 The National Association of Broadcasters ("NAB") is the leading representative of South Africa's Broadcasting industry, representing the interests of most South African broadcasters.
- 3 The NAB has a keen interest in the Bill. We participated in the previous round of consultation, including making written submissions on the draft Bill to the Department of Justice and Constitutional Development. A copy of our submission is attached for your ease of reference.
- 4 The NAB omitted to make timeous written submissions on this version of the Bill (although several NAB members did so). Nevertheless, we request your indulgence in allowing the NAB, as an interested stakeholder and

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participant in the public process on this Bill, to make a brief oral presentation at the forthcoming hearings on the Bill (preferably on Thursday 14 September 2017) as the broadcasting industry representative body.

- 5 Our intended submission relates to narrow aspects of the Bill, and primarily to a focussed, but critical, issue namely the need for legislative provisions in the Bill to address piracy in the online environment. In this regard, the NAB requests an opportunity to highlight our concerns about piracy in cyberspace and to make constructive proposals to the Committee in this regard.
- 6 We believe that our submissions will assist the Committee in its deliberations and will no doubt help to achieve the Committee's objectives in respect of this important legislation.
- 7 We look forward to receiving your favourable response.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Nadia Bulbulia', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Nadia Bulbulia
Executive Director



Attention: S J Robbertse
The Department of Justice and Constitutional Development
Private Bag X 81
Pretoria
0001

30 November 2015

E-mail address: cybercrimesbill@justice.gov.za

NAB Submission on the draft Cybercrimes and Cybersecurity Bill

Dear S J Robbertse

1. Introduction

1.1. On 28 August 2015, the Department of Justice and Constitutional Development ("DJCD") invited the public to comment on the draft Cybercrimes and Cybersecurity Bill ("the Bill") by 30 November 2015.

1.2. The National Association of Broadcasters ("NAB") is the leading representative of South Africa's Broadcasting industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes all three tiers of broadcasting as well as signal distributors and associate members, these include:

1.2.1. Three television public broadcasting services, and eighteen sound public broadcasting services of the South African Broadcasting Corporation of South Africa ("the SABC");

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- 1.2.2. The commercial television broadcasters (e.tv, DStv, M-Net and ODM) and sound broadcasting licensees (that include media groups Primedia, Tsiya, Kagiso, MSG Afrika, Times Media Ltd and AME);
 - 1.2.3. Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;
 - 1.2.4. Over thirty community sound broadcasting licensees and a community television broadcasting service, Faith Terrestrial;
 - 1.2.5. Associates, including industry professionals and training institutions.
- 1.3. The NAB welcomes the opportunity to make this written submission and commends the DJCD for this public consultation process on the draft Bill.
 - 1.4. We note that the purpose of the Bill is, amongst others, to create offences and impose penalties which have a bearing on cybercrime, to regulate aspects of international cooperation in respect of the investigation of cybercrime, to impose obligations on electronic communications service providers regarding aspects which may impact on cyber security, to delete and amend provisions of certain laws and to provide that the President may enter into agreements with foreign States to promote cybersecurity.
 - 1.5. Over the last two decades, the NAB has made a wide range of written and oral submissions on policy and regulation that impact on the broadcasting sector. More recently, the NAB made submissions to the Film and Publications Board as well as the South African Law Review Commission on policy, regulation and classification of online content. The NAB also made a submission to the Department of Trade and Industry ("DTI") on the Copyright Amendment Bill. There are a number of overlapping issues across these various processes. The NAB therefore respectfully submits that the DJCD engages the Department of



Communications ("DOC") as well as the DTI to ensure that a holistic and consistent approach is developed across government.

- 1.6. As a highly regulated industry, the focus of this submission will be on the applicable legislative framework that governs broadcasting in South Africa. To that end, we note that the draft Bill refers to the Electronic Communications Act 36 of 2005, ("the ECA"). The DJCD also proposes amendments to the Criminal Law (Sexual Offences and Related Matters Amendment Act of 2007 ("SORMA") stating that the meaning of 'electronic communications service provider' is to be as defined as per the ECA.

2. Limitation on the Freedom of Speech

- 2.1. The NAB is concerned that the drafting of sections 17 and 18 in the Bill which define impermissible speech and prohibition against dissemination of racist and xenophobic material are broader than the constitutional exclusion for hate speech set out in section 16 of the Constitution.
- 2.2. In the view of NAB this extension of the limitation of freedom of speech will not withstand constitutional scrutiny, and in this regard we refer the DJCD to the decision of the Constitutional Court in *Islamic Unity Convention v The Independent Broadcasting Authority and Others* 2002 (4) (SA) 294 (CC).
- 2.3. The NAB, accordingly, proposes that if the DJCD wishes to continue with a prohibition in the draft Bill, it does so in a manner that is completely aligned with the wording of section 16 (2) of the Constitution.

3. Alignment of Definitions

With regard to the definition of 'electronic communications service provider' ("ECSP"), the NAB is encouraged to note that the DJCD has had regard to the provisions of the ECA, and is accordingly seeking to adopt the ECA wording in defining ECSP. The DJCD must however note that the ECA does not recognise



the term ECSP, but rather refers to "the electronic communications service licensee" The NAB therefore recommends that the term electronic communications service licensee be adopted in the draft Bill.

- 3.1. Similarly, the definition of 'electronic communications network' ("ECN") is defined in the Bill as: '*electronic communications infrastructure and facilities used for the conveyance of data*'. The NAB recommends that the definition of ECN also be aligned with that of the ECA, as follows:

"electronic communications network" means any system of electronic communications facilities (excluding subscriber equipment), including without limitation -

- (a) *satellite systems;*
- (b) *fixed systems (circuit- and packet-switched);*
- (c) *mobile systems;*
- (d) *fibre optic cables (undersea and land-based);*
- (e) *electricity cable systems (to the extent used for electronic communications services); and*
- (f) *other transmission systems, used for conveyance of electronic communications;*

4. Infringement of Copyright

- 4.1. The NAB holds the view that section 20 of the draft Bill which deals with infringement of copyright should rather be dealt with by the Copyright Amendment Bill which has been published by the Minister of Trade and Industry. The NAB and other interested parties have already made proposals and representations on this matter in the consultative process around the Copyright Amendment Bill. We therefore propose the deletion of section 20 from the draft Bill.

5. Cybercrime involving child pornography

- 5.1. The NAB supports the efforts and legislative processes undertaken by government departments to protect children and to curb the access, production



and consumption of content that is harmful to children and that exploits them. With respect to issues of content, child pornography is evidently a global challenge and one that government aims to address by effective law enforcement and robust international collaboration.

- 5.2. As mentioned above, the NAB has participated in the Film and Publications Board ("FPB") public initiatives toward developing a regulation process for online content. The NAB cautioned that the FPB await national policy to inform its proposed regulation making process.
- 5.3. It must be noted that at the time of drafting this submission, the Film and Publications ("FPA") Amendment Bill 37 of 2015 was tabled before Parliament. It is therefore imperative for the DJCD to consider the FPA Amendment Bill and its implications on this Bill. Once again, the underpinning concern and challenge for regulated sectors is the alignment of government policies and legislation.
- 5.4. The NAB notes that the DJCD is silent on Section 24B of the FPA that also criminalises child pornography. It is unclear if it is the express intention to have two sets of legislation dealing with the same/similar offences.

6. Conclusion

- 6.1. The NAB looks forward to a closer collaboration and harmonisation of the various government policies and legislative processes aimed at safeguarding citizens in their engagement in and with, electronic communications services and applications.
- 6.2 We trust that this submission will assist the DJCD in its deliberations and process.

The NAB

