

AFRICA'S WORST NEW INTERNET CENSORSHIP LAW

everything you don't want to know – but need to

The Film and Publication Board's new Draft Online Regulation Policy has been touted as a measure to protect the children. But if the children of our future get to take a look at its deeply censorial and draconian measures, they ought to be extremely offended.

By Julie Reid

The Film and Publications Board's (FPB) Draft Online Regulation Policy has been called "Africa's worst new internet censorship law". Condemnation for the policy has been swift, damning, and widespread, and an online petition against the policy has quickly gathered thousands of signatures. Many decry the policy as an attempt to censor the internet in South Africa. To its credit, the FPB has shown a remarkable level of willingness to openly engage the public and its critics with regard to the policy, hosting a series of public consultation sessions around the country. I took part in those engagements, and below is an account both of what happened, what is wrong with what happened, and some additional analysis of the FPB's fundamentally flawed arguments.

Vague and imprecise

The aspect of the FPB policy which has caused the most alarm is the vague nature of the imprecise language and definitions. The fact that so many concerned parties are all left unsure of who this policy actually applies to, indicates that there is something very wrong with the drafting of the policy. Faced with a badly written policy, all one can do is believe the policy applies to absolutely everyone who uses the internet.

And it is not only about to whom the policy applies, but to what type of content it applies. Here again, definitions are over-broad and resultantly includes everything that is published online. The policy claims to apply to films, games and "certain publications" but it is patently unclear on what "certain publications" means.



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Soweto by Jodi Bieber

The FPB's current policy, if realised, would have an undoubtedly negative impact on the encouragement of media diversity within South Africa, and be at odds with the variety of efforts to do the opposite.

The problem here is that the policy demands pre-classification of published content. This means that anyone wishing to post anything in a digital space, first needs to apply to the FPB for a digital online distributor's licence (and pay a fee) and thereafter submit each piece of content to the FPB for pre-classification before it can be posted online (and pay another fee).

At the Johannesburg hearing the FPB PowerPoint presentation included a slide depicting a photograph of a young girl to the left, and a photograph of a middle-aged and over-weight man to the right. Below these images were some text, depicting an extract of an online chat-room type conversation between the two characters. The young girl interacts with her online co-chatter while mistakenly believing that he is one of her age-peers. The much older man delivers a misrepresentation of himself in his interaction with the female child, leading her to believe that he is young and attractive. This was shown to the audience to demonstrate how adult predators may use the online space to 'groom' younger people and lure them into situations which may endanger them.

Protecting the Children

The FPB is doing all of this under the moralistic guise of protecting children from harm, and preventing the distribution of child abuse content (which it calls "child pornography"). It's a clever tactic because it holds a great deal of moral weight: who can legitimately argue that the protection of children is a not a good thing?

But if we are serious about protecting our children from the evils of this world, then measures to do so must be effective. Due to the impracticality of these regulations, as 'good intentioned' as they claim to be, they are not going to be a solution to the problem of children experiencing content that is harmful. There are many other more appropriate things that the FPB should be doing to protect children from harm online. The FPB could work with

the Department of Education to introduce digital literacy tuition in school curricula: the best way to protect children in the digital information age is to empower children to protect themselves. The FPB could roll out wide-scale national digital literacy public awareness campaigns to warn parents of the dangers to their children online, and explain how parents can educate and protect their children.

The FPB's resources would be better spent on researching all the various different kinds of safe-search software available, and make this freely available, and free-to-download for parents to provide an additional safety-net to protect children. The FPB should commission audience and ethnographic research studies in consultation with children, in order to determine what the South African child's real and lived experience of the internet really is.

And yes, this means actually talking to real children – not just referring to statistics. These are effective measures and more appropriate to the FPB's purported goals. For its part, the FPB states that it has conducted research into the matter, which Palesa Kadi from the FPB told the Johannesburg audience, will be released shortly. One wonders however, what was the methodology of that research, what were its aims/goals/hypothesis/research questions, and what were its findings, that it could have informed a policy which is written this badly and which through implementation will do nothing to meet the professed aim of protecting children? We will see.

During the public consultation hearing in Johannesburg, Sekoetlane Phamodi from the SOS – Support Public Broadcasting Coalition, questioned whether the FPB is over-stepping its mandate. There is no such thing as 'child pornography', he claimed. The term 'pornography' is used to describe the representation of a consensual sex act between adult persons, and watching pornography is not illegal in South Africa. Sex acts depicting children do not involve consent (a child is too young to consent

to sex) and therefore cannot be described as, or associated with, pornography. Instead, Phamodi pointed out that the representation of sex acts involving children can be considered as nothing other than the depiction of child abuse.

The law already provides for and criminalises those who abuse children or who distribute material showing the abuse of children. These are criminal acts and as such ought to be investigated by the authorities responsible for reacting to criminal activity – that is, the South African Police Services. Phamodi made the point that the FPB does not have the authority to do the SAPS' work for them.

Mark Weinberg, national co-ordinator for the Right2Know Campaign, raises the point that parents may not be delighted with the FPB's determining (on behalf of parents) what children may be exposed to, saying: "The footage of the Marikana Massacre was shocking and horrific. As a parent, I had to decide if I wanted my son watch the murder. I chose to show him the footage so that he could better understand the forces driving the inequity he sees around him every day. It was not an easy decision, but I'm glad I got to make it, and not some conservative FPB censor sympathetic to the state. The President is now refusing to release the Marikana Commission Report. As a parent, I'm relieved that the massacre footage is on YouTube and Al Jazeera websites, well beyond the reach of government censors."

It's worth noting that the FPB's slogan is "We inform. You choose". In itself, and with parenting in mind, the slogan contains a good principle. It encompasses the practical notion that content has been reviewed and rated before-hand so that viewers, and especially parents, can determine for themselves whether they want to expose either themselves or their children to certain content prior to watching it. If the new online regulation policy comes into effect in its current form however, the slogan would require rephrasing in order to more accurately describe the practical functioning of the FPB: "We censor. You deal with it".

Payment

There is also the matter of the money. The policy, in sections 5.1.2 and 5.1.3, demands that anyone who wishes to post content on the internet need first apply to the FPB for an "online distribution agreement" and thereafter either self-classify content or if that is not feasible, submit "each title" to the FPB for classification. Of course, content distributors would need to pay a fee to the FPB for all of this. The policy does not state what these tariffs will be, but says only that the fee will be "prescribed from time to time by the Minister of DOC as the

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Executive Authority". This raises a constitutional question, since freedom of expression is listed as a basic fundamental human right in the Bill of Rights. But under this type of regulatory regime, freedom of expression belongs then to only those who are able to pay for it.

I questioned Risiba on this at the public consultation hearing. He answered that the FPB is planning to release a tariff structure in the near future, which will take smaller online distributors into account, and adjust the fee structure accordingly. That all sounds good and well, except that it is missing the point. No one, whether you are extremely wealthy or economically disadvantaged, should have to first, ask permission of anyone else to publically say something (pre-classification) or second, pay a fee (even a small fee) before you can do so. This fundamentally undermines the principle of freedom of expression and is unacceptable in a democracy.

The FPB has claimed that it is really seeking is a co-regulation agreement, and that if material is posted online that is understood to be harmful to children or the like, then they will contact the big distributors like YouTube or Google and ask them to

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take such content down. But this is actually at odds with what is in the draft policy because that type of thing would only amount to post-publication take-down. However, the policy asks for pre-publication classification. So, what the FPB claims to be thinking with regard to a co-regulatory environment is certainly not accurately reflected in the policy.

Classification

And then we come to what the policy demands regarding the actual process of pre-classifying content. The policy itself is damned complicated and near unfathomable in this regard, but here are the basics. First, online publishers must apply for an “online distribution agreement” and pay a fee, after which they will be allowed to self-classify their own content so long as they do so according to the FPB’s guidelines (section 5.1.2). Then, each time a distributor posts content online, that content has to be submitted to the FPB and another fee paid (section 5.1.3).

If online distributors want to be permitted to classify their own content, this first needs to be authorised by the FPB (section 5.5.1). Online distributors would need to employ either full-time or part-time “classifiers” who would have to screen anything going into the online space (section 5.5.6). If an online distributor cannot afford to employ a FPB-approved classifier, presumably they would then need to submit each bit of new content to the FPB directly for pre-classification and pay an additional fee to do so.

Realistically speaking, it is unlikely that smaller online publishers will be able to afford these costs (of the distributor’s agreement and the employ of classifiers). Even if smaller publishers do attain an online distributor’s agreement, they will not be able to self-classify. They are also not likely to be able to carry the additional cost of applying for pre-classification from the FPB for each new segment of content. In this scenario, one of two things will happen.

Smaller publishers will ignore the pre-classifications regime and publish content regardless, in which case they will be automatically criminalised. Or, smaller publishers, many of whom do not turn a profit, will be bankrupted by the additional costs. Under its guiding principles the policy states that, “(7) the classification regulatory framework should not impede competition and innovation, nor disadvantage South African media content and service providers in international markets”. But it will

do exactly that.

The FPB is out of sync with the current national conversation on media diversity and transformation. A widely mooted political argument is that the South African media, particularly the print sector, remain untransformed and offer too little scope for access to a broad range of opinions and ideas. Although the cost of data and widespread access to the internet remains a challenge, the internet nonetheless holds a democratising potential in this regard. Non-profit-generating online community news websites, civil society orientated online news publications, small independent online publishers and individual bloggers offer stories told from perspectives which are rarely carried in the mainstream commercialised and highly monopolised news media.

The ANC listed the issue of media transformation as a concern in its 53rd National Conference resolutions saying, “[t]he reality arising out of this situation is that the majority of South Africans do not have media that report and project their needs, aspirations and points of views onto the national discourse”. The FPB’s current policy, if realised, would have an undoubtedly negative impact on the encouragement of media diversity within South Africa, and be at odds with the variety of efforts to do the opposite.

The policy would serve as a dis-enabler of media diversity and transformation because smaller publishers will not be able to compete. Small distributors, operating on tight shoe-string budgets would also be criminalised, because: “Failure to pay the said classification fee within the stipulated period may result either in the Board withdrawing the online distributor’s registration certificate until the fee is paid, or in the online distributor being penalised and legal action being taken against the distributor in terms of section 24A of the Act”. As if it’s not bad enough that small distributors could have their slim coffers emptied by the FPB itself, they could further be financially ruined by legal fees.

Media accountability

There are soon to be other measures to deal with the administration of complaints against cases of unethical journalistic content online.

A new media accountability system is currently being established by a cross-platform committee (involving Sanef, PCSA, IABSA, NAB) which will include the administration of complaints against online news media, in a similar way to how the Press Council currently deals with complaints

against printed newspapers. The FPB's policy completely ignores that process and makes no mention of it. But again, the FPB is here extending its regulatory tentacles into an arena in which it has no place. Two separate processes of review, including that performed by the Press Freedom Commission, as well as a number of international protocols including the Declaration of Principles on Freedom of Expression in Africa (2002), agree that self-regulation is the most appropriate mechanism for the regulation of journalistic content, and this ought to be performed via the post-publication administration of complaints.

Journalism ethics is a highly specialised field of enquiry and expertise. The FPB have not yet employed this expertise. To enact the regulation of journalistic content, you have to employ expertise in journalism ethics, an expert ombudsman, set up a code of ethics, institute a viable complaints procedure, and establish an appeals panel which commonly is headed up by a retired judge. These structures are considered best practice in democracies all over the world for the regulation of journalism content, in terms of ethics and accountability. The FPB policy puts none of this in place.

Understanding the digital age

The FPB displays a dearth of understanding of how the internet actually works. It boggles the mind to imagine that the FPB believes that it is even possible to monitor or restrict the swathes of content which is uploaded onto the internet each minute. This is impossible. Hundreds of hours of YouTube content is uploaded in South Africa each day, while millions of pieces of new text content are posted online daily.

The FPB has also not taken the aspect of audience expectation into account. We are talking of at least three generations of people who have either grown up in the digital age, or had the digital sphere grow up with them. These audiences are now fully accustomed to experiencing the internet as an almost entirely-free medium. They have simply never known things to be any other way. To infringe even in the slightest way upon a freedom which is ingrained in the apriori collective knowledge of three or more generations is simply asking for a backlash of magnificent proportions. Ordinary people are likely to ignore the FPB's requirement of pre-classification as they do e-tolls. The FPB is inviting the most widespread civil disobedience that this country has ever seen.

It is worth noting that the Right2Know Campaign is not alone in its opposition to the policy. Many others have voiced dismay and outrage

Remembering that the FPB is arguing its online policy is necessary for the protection of children, and considering all of the above, it is difficult not to become enraged. To attempt something which is such a blatant and outrageous abuse of free expression and human rights in the name of our children is disgusting and morally reprehensible.

too, and for the record, have done so independently of the Right2Know Campaign. These include among the country's top and most prominent media lawyers, and various civil society organisations, most notably the SOS – Support Public Broadcasting Coalition, Media Monitoring Africa (MMA), the Freedom of Expression Institute (FXI), the Association for Progressive Communications (APC) amongst others. Also worried are various media representative bodies such as Sanef and the Interactive Advertising Bureau of South Africa (IABSA), media stakeholders themselves including Google and the SABC, local and international tech journalists, and local and international prominent freedom of expression activists. Individual members of the public have independently taken to the web to set up a slew of different online petitions, Facebook pages and websites. Significantly, the only public support we have heard for the policy has been from Communications Minister Faith Muthambi and from the ANC study group on communications.

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which is such a blatant and outrageous abuse of free expression and human rights in the name of our children is disgusting and morally reprehensible. The policy does nothing to actually protect children, but the FPB (ab)uses the cause of children to surface its own moralistic, draconian, authoritarian position. Our children can be deeply offended. In principle at least, it is the Film and Publications Board who are here, the real child abusers.

An edited version of this column was published on the Daily Maverick online news website on 10 June 2015 and can be found at

<http://www.dailymaverick.co.za/opinionista/2015-06-10-africas-worst-new-internet-censorship-law-everything-you-dont-want-to-know-but-need-to/#.VXft6hujhD4>



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