



**THE NAB'S SUBMISSION
ON ICASA'S CODE FOR PEOPLE WITH DISABILITIES
REGULATIONS**

16 May 2014

1. Introduction

1.1. On 28 March 2014, the Independent Communication Authority of South Africa (“**ICASA**”) published, in Notice Number 254 of 2014, Government Gazette Number 37486, a notice of its intention to prescribe a Code for People with Disabilities Regulations (“**the Draft Regulations**”). The closing date for public comment is 16 May 2014.

1.2. The National Association of Broadcasters (“**the NAB**”) welcomes the opportunity to make written representations. The NAB urges the Authority to hold public hearings on this critical issue, and the NAB would like to be given an opportunity to participate in oral hearings.

1.3. In July 2007, the NAB made written representations to ICASA’s Notice outlining Regulations to Meet the Needs of People with Disabilities (“**the 2007 Draft Regulations**”).¹ The NAB notes with thanks that suggestions and recommendations advanced in its written representation dated 20 July 2007 were taken into account when finalising the 2007 Code (“**the 2007 Code**”). Upon the NAB’s recommendations, ICASA published the 2007 Draft Regulations as a Code, rather than as Regulations (*“the regulation will be referred to a Code on People with Disabilities” – title of 2007 Regulations*). This is the trend the NAB would like being carried out even in the current process. The NAB therefore believes that its inputs in the current written representation will be meaningful to ICASA. The Draft Regulations seeks to repeal the 2007 Code.

1.4. The NAB is the leading representative of South Africa’s broadcasting industry, and aims to further the interests of the broadcasting industry in South Africa by contributing to its development.

1.5. The NAB membership includes:

1.5.1. Three television public broadcasting services, and eighteen sound public broadcasting services of the South African Broadcasting Corporation of South Africa (“**the SABC**”);

¹ Published in Government Gazette 29986, dated 14 June 2007.

- 1.5.2. The commercial television broadcasters and sound broadcasting licensees;
- 1.5.3. Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;
- 1.5.4. Over thirty community sound broadcasting licensees and a community television broadcasting service, Trinity Broadcasting Network (“**TBN**”).

2. National Legislative Framework Governing Persons With Disabilities

2.1. When it comes to addressing the needs of persons with disabilities in South Africa as in other jurisdictions, various pieces of legislation have been enacted, which seek to promote and protect the rights of persons with disabilities. Furthermore, the broadcasting sector is known to be a compliant sector, which prides itself with meeting, and at times even exceeding, regulatory as well as legislative obligations. The NAB is therefore glad to note that the Draft Regulations only focus on issues around access to broadcasting services and electronic communications services, and does not touch on issues such as employment issues affecting persons with disabilities, as these are adequately covered in enabling pieces of legislation.

2.2. The Constitution of South Africa

The fundamental human right as articulated in the Constitution of South Africa seek to promote equality, and non-discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Constitution stipulates that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds articulated above.²

2.3. The Promotion of Equality and Prevention of Unfair Discrimination Act

In order to give effect to section 9 of the Constitution, which requires national legislation to enact legislation aimed at promoting equality and prevention of unfair discrimination, the legislature enacted the Promotion of Equity and Prevention of Unfair Discrimination Act 4 of 2000 (“**the PEPUD Act**”) which is aimed at preventing and prohibiting unfair discrimination and harassment, and promoting equality and eliminate unfair discrimination. The ambit of the PEPUD Act extends to persons with disabilities.

² Section 9(3)(4) (5) of the Constitution of South Africa.

2.4. *The Employment Equity Act*

In addressing issues of persons with disabilities in the workplace, the Employment Equity Act 55 of 1998 (“**the EE Act**”) outlaws discrimination on the basis of disability during the recruiting process as well as within the workplace, and outlines the minimum amount of persons with disabilities an entity may employ.

2.5. *International Conventions and Treaties*

From the international perspective, South Africa is a signatory to a number of international treaties and conventions aimed at protecting the needs of persons with disabilities, and these include, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, as well as the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.

2.6. *The Electronic Communications Act*

The Electronic Communications Act also recognises the rights and interests of persons with disabilities. The EC Act sets as its out as one of its objectives “*to promote the empowerment of historically disadvantaged persons, including Black persons, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.*”

3. **A Code vs. Regulations**

3.1. Section 70 of the EC Amendment Act ³(“**the EC Act**”) enjoins the Regulator to prescribe regulations setting out a Code on persons with disabilities on matters relating to all categories of licences.

3.2. In terms of the EC Act, ICASA’s regulations on this issue should set out a code for licensees. A code is defined as a set of guidelines to be followed by members of some profession, trade, occupation, organization etc. and does not normally have the force of law⁴. Accordingly, the Authority has been mandated to develop a code on this issue.

³ Act 1 of 20014: Electronic Communications Act 2013, published on 7 April 2014 in government gazette 37563.

⁴ http://en.wiktionary.org/wiki/code_of_practice

- 3.3. The provisions of section 70 of the EC Act, were met by the Authority in 2007, when a Code was established which served as a guideline to licensees on addressing issues of persons with disabilities. Contrary to the position adopted in the 2007 Code, it would seem that ICASA is now intent on prescribing regulations, instead of a Code (general guidelines).
- 3.4. The NAB is of the view that more robust and administratively sound process ought to have been followed, in moving from adopting a code to prescribing regulations. The NAB therefore recommends that before the decision is made to develop enforceable regulations, the Authority should conduct an audit of the milestones achieved by broadcasters since the signing of the Code in 2006⁵, and the implementation of the Code passed in 2007. The Code of 2007 required that broadcasters improve accessibility to persons with disabilities and to ensure that broadcasting content does not stereotype people with disabilities. Licensees have been reporting on an annual basis on the progress of implementation of these key focus areas.⁶
- 3.5. The NAB members have engaged in all processes undertaken by both the Authority and the Department of Communications (“**DoC**”) in increasing efforts to deliver services to persons with disabilities. Furthermore, NAB members have indicated that requests for information on progress made by individual broadcasters have been acceded to.
- 3.6. The Authority is well placed to develop key ‘findings’ or an audit since the 2007 Code process, and to conduct a detailed study with some benchmarking of relevant jurisdictions. This could assist the Authority in formulating a discussion document and engage with licensees in several workshops to unpack the feasibility of proposed regulations. Inputs would be required from a wide range of stakeholders, including the disability sector and providers of the required technology. The NAB contends that for regulations to be enforceable, they must be realistic and adequately planned for. In any regulation making process, the Authority is duty bound to consider the impact on all licensees.
- 3.7. The NAB further notes that best practice would dictate that a process of this nature should be preceded by thorough research and international bench-marking to assist

⁵ ICASA, Meeting the needs of People with Disabilities, Code of Good Practice for the Broadcasting Industry.

⁶ Pages 5 and 6 of the 2007 Code published in government gazette 30441.

the Authority in having an informed approach when introducing the Draft Regulations. The NAB further notes that there is an opportunity for the Authority to conduct collaborative research with the sector, should the Authority deem it necessary.

3.8. The NAB therefore believes that due administrative process as outlined above, should be followed when promulgating the Draft Regulations. In light of this, the NAB proposes that the Authority withdraw the draft regulations, and instead formulate a discussion document which engages licensees on the optimal mechanisms for improving the accessibility of services to persons with disabilities.

4. Comment on the Draft Regulations

4.1. The purpose of the Draft Regulations is to prescribe a Code for people with disabilities, and sets out levels at which broadcasting licensees should provide among others, subtitling, audio captioning and audio description (“**Assistance Services**”) across their broadcasting services.

4.2. From the NAB point of view, the requirements set out in the Draft Regulations are not feasible, and cannot be achieved by broadcasters, within the stipulated period of time.

4.3. The NAB notes that in the Draft Regulations, reference is made to “people with disabilities”, while, section 70 of the EC Act ⁷ refers to “persons with disabilities”. The NAB proposes that the Draft Regulations should refer to persons with disabilities, as used in the EC Act.

4.4. Clause 4⁸ of the Draft Regulations makes reference to “audio visual broadcasting licensees”. The NAB submits that the EC Act, does not provide for such a broadcasting licence category, and it does not define such a licence category⁹. The NAB is therefore of the view that the Draft Regulations should refer to the recognised broadcasting licence categories, and in so doing, draw a distinction between television broadcasting services and sound broadcasting services.

⁷ Act 1 of 20014: Electronic Communications Act 2013, published on 7 April 2014 in government gazette 37563.

⁸ At page 8 of the Draft Regulations.

⁹ The Draft Regulations do not define Audio Visual Broadcasting licensee either.

- 4.5. The standards outlined in Clause 4 of the Draft Regulations, i.e. subtitles and audio captioning are not technically possible in the current analogue sound broadcasting environment. Subtitles and audio captioning are concepts applied to television only and are not feasible in the radio environment. Similarly, audio description cannot be implemented on radio by virtue of the fact that radio is an audio-only service. Providing audio descriptions of audio programming is impossible.
- 4.6. It is therefore the view of the NAB that the standards outlined in Clause 4 of the regulations cannot apply to sound broadcasting services due to technical impossibilities.
- 4.7. Clause 6¹⁰ of the Draft Regulations is titled “General Requirements for Communication and Information to People with Disabilities”. However, when looking at the sub-clauses in Clause 6, they are not related to broadcasting service licensees but rather have relevance to ECS licensees, save for sub-clause 8 addressing access to facilities. The NAB therefore proposes that Clause 6 should be restricted to ECSs licensees.
- 4.8. When looking further at the Draft Regulations, there are obligations that all licensees can implement, and these are provisions of Clauses 7 and 8 of the Draft Regulations, which relate to the promotion of awareness and compliance as well as developing a complaints process for persons with disabilities¹¹. These provisions could be developed and included in a code.

5. Targets for audio captioning and audio description

- 5.1. In terms of the Draft Regulations, the Authority requires that broadcasters must implement a minimum of 50% audio captioning and audio description within the first year of the Regulations coming into effect. The Draft Regulations further require that in the second year of the coming into effect of the Draft Regulations, broadcasting service licensees must ensure that there is 100% implementation of audio captioning and audio description.
- 5.2. The NAB submits that these requirements are highly unrealistic. Most South African television broadcasters are still broadcasting in analogue and it would be impossible

¹⁰ On page 15 of the Draft Regulations.

¹¹ At page 17 of the Draft Regulations.

to provide audio captioning and audio description in the analogue environment, as required by the Draft Regulations.

5.3. The NAB suggests that if the Authority decides that such targets are needed, they should only be introduced when digital broadcasting systems become widely available. When this is the case, the NAB recommends that the Authority should opt for a more flexible set of guidelines which allow for a phased- in approach, which will enable gradual and steady implementation by broadcasters. The NAB has assessed Ofcom in the UK's approach, which allows television broadcasters to implement targets over a period of 10 years. The targets rise gradually up to the tenth year of implementation.

5.4. The table below depicts the percentage rates set by Ofcom, at which television broadcasters should avail assistance services:

Anniversary of relevant date	Subtitling	Signing	Audio Description
First	10%	1%	2%
Second	10%	1%	4%
Third	35%	2%	6%
Fourth	35%	2%	8%
Fifth	60%	3%	10%
Sixth	60%	3%	10%
Seventh	70%	4%	10%
Eighth	70%	4%	10%
Ninth	70%	4%	10%
Tenth	80%	5%	10%

Figure 1: Ofcom Regulations on Television Access Services

6. Excluded Programmes

The NAB supports the view in the Draft Regulations that; persons with disabilities must have access to public service announcements, emergencies services, and programming of national importance. To this end, broadcasting service licensees have been active in so providing. To this end, signing and subtitling are generally availed on news and national events (amongst others). On the other hand the Draft Regulations require the expected target percentages to be implemented on all channels right from the onset. It will not be feasible for financial and other reasons for broadcasters to provide accessibility services with such immediate effect, and across all programming.

7. Exemption Provisions

The NAB recommends that the Authority introduce exemptions for instances where compliance is demonstrably difficult, impractical or impossible. In the following sections, the NAB will outline its proposed exemptions.

7.1. Technical difficulty of providing the assistance

7.1.1. Where a broadcaster is able to demonstrate to the Authority that it is technically impossible to avail the assistance services to one or more broadcast programming, such a broadcaster should be exempted from providing the assistance services.

7.1.2. In the UK for example, there are instances where a television programme is broadcast in several different language feeds, making a choice of language for signing purposes problematic, and pose a technical difficulty. Such programming would be exempted.

7.2. Change in audience share and relevant turnover

7.2.1. When imposing obligations on broadcasters to avail assistance services, the Authority must be cognisant of the fact that audience changes and audience shifts play a role in the choice and scheduling of programming. Furthermore, due to the prohibitively high costs of availing assistance services, the Authority must take account of these factors. In the UK, where a television broadcaster can demonstrate to the Regulator that its audience share has fallen below 0.05%, such a broadcaster may be exempted from ramping up the target percentage for that year.

7.2.2. Further, if a television broadcaster demonstrates to Ofcom that continuation of access service obligations would jeopardise the viability of its broadcasting service, the Ofcom may reduce, suspend or terminate those obligations. Similarly, the NAB proposes that ICASA considers this approach.

7.3. Regulatory Holidays

7.3.1. The NAB is concerned that the Draft Regulations are set to apply to broadcasting service licensees¹², without paying attention to the dynamics within the three tier broadcasting system. Each tier of broadcasting has its own challenges and complexity and each broadcaster is at a different stage of financial growth and stability.

7.3.2. Given the dynamic nature of the broadcasting sector, the NAB recommends that newly licenced Greenfield broadcasting service licensees, as well as community broadcasting licensees, be given a special concession in meeting targets for assistance services. Similarly, the NAB proposes that for those broadcasting service licensees who will be migrating from analogue to digital broadcasting, a regulatory holiday be given, particularly during the time when these broadcasters will be broadcasting in dual illumination.

7.3.3. It is also necessary for the Authority to carefully consider the funding realities and challenges of all broadcasting licensees.

8. General concerns with the proposed regulations

8.1. Although the NAB is of the view that the Authority should withdraw the Draft Regulations, and initiate a thorough process towards the development of Discussion Document, the NAB addresses general concerns with the current Draft Regulations below:

8.2. The Draft Regulations seem to be television (audio visual) centric. As explained above, the Draft Regulations set out standards which are impossible to implement by sound broadcasting services.

8.3. Furthermore, given that South Africa will be migrating to digital broadcasting, the Draft Regulations are not suitable for a multi-channel digital environment. Since this process is a repeal of the 2007 Code, the NAB proposes that a broader and more flexible set of guidelines would be the optimal within the digital broadcasting space.

8.4. In light of the very restrictive time frames proposed, the NAB is concerned that the Draft Regulations incorporates a Contraventions and Penalties Clause which imposes a fine not exceeding R1 000 000.00 (should broadcasters not comply with

¹² At page 7 of the Draft Code.

the regulations). Both the time-frames and the penalties would need to be revisited in consultation with licensees.

9. Implementation Challenges

9.1. The NAB wishes to remind the Authority that being a highly regulated and compliant sector, broadcasters continuously innovate and have aimed to exceed the guidelines in order to meet the needs of persons with disabilities. It is the NAB's concerted view that from 2007, there has generally been an increase in the delivery of services to persons with disabilities and across all television broadcasting services.

9.2. The NAB submits that if the Draft Regulations are passed in their current form, the NAB foresees immense implementation difficulties, which may yield undesired consequences for the Regulator. We wish to highlight the challenges as these require further investigation by the Authority to inform and shape the draft regulations. These are:

9.2.1. Impossibility of compliance by analogue television broadcasters;

9.2.2. Impossibility of compliance by sound broadcasters;

9.2.3. Financial implications;

9.2.4. Implementation/operational difficulties;

9.2.5. Additional staffing requirements and training;

9.2.6. Required system implementation and system know-how.

10. Funding of Assistance Services

10.1. The NAB notes that the Universal Service and Access Fund (“**USAAF**”)¹³ may be utilised for the payment of subsidies for the assistance of ‘needy persons’ towards the costs of the provision to, or the use by them of broadcasting and electronic communications services.

10.2. The NAB recommends that the Authority engages further with organisations like the Universal Service and Access Agency (“**USAASA**”) on meeting the needs of persons with disabilities to enable the funding of technologies required for assistance services.

¹³ Section 88(1)(a) of the EC Act.

11. Conclusion

11.1. In conclusion, the NAB is committed to serving the needs of persons with disabilities.

11.2. The NAB recommends that the Authority commences with a process to devise a workable and flexible code which will make a meaningful difference to improving the accessibility of broadcasting services by persons with disabilities. The current draft regulations should therefore be withdrawn.

11.3. NAB thanks the Authority for the opportunity to make its written representation and looks forward to a regulation making process that is robust and sustainable.