

## SUBMISSIONS ON THE DRAFT CODE FOR PERSONS WITH DISABILITIES REGULATIONS FOR FURTHER PUBLIC COMMENT, NOTICE 317 OF 2020 OF 12 JUNE 2020

10 July 2020

**From: The National Council of & for Persons with Disabilities**

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**To: The Independent Communications Authority of South Africa**

Submitted to: Ms Nditsheni Hangwani

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## Overview

1. The below submissions from the National Council of and for Persons with Disabilities ("**NCPD**") are split into two sections. We note that this is the fourth version of amendments to the Regulations on a Code on People with Disabilities Applicable to All Licensees in terms of the Electronic Communications Act, 2005, GN 1613 in GG 30441 of 7 November 2007 (the "**2007 Code**"). While NCPD appreciates the efforts by ICASA to continue to amend the draft code, we note that this version of the draft code still falls short in affording equal and adequate rights to persons with disabilities where broadcasting is concerned.
2. These submissions are divided into two sections, as follows:
  - 2.1 The first section deals with NCPD's comments on specific sections of the 2020 Draft Code for Persons With Disabilities Regulations for Further Public Comment, Notice 317 of 2020 of 12 June 2020 ("**2020 Draft Code**").
  - 2.2 The second section deals with the conceptual failure of the 2020 Draft Code to adequately provide for persons with disabilities constitutional right to equality.
3. We note that in making these comments we rely heavily on definitions and concepts that are provided in the White Paper on the Rights of Persons with Disabilities, notice no 230 in Gazette 39792 of 9 March 2016 ("**WPRPD**"). The WPRPD is a key national document concerning the rights of persons with disabilities in South Africa. The purpose of the WPRPD is to give effect to section 9 of the Constitution, as it relates to persons with disabilities. Its intention is to facilitate the movement towards a fully inclusive society and is a call to action for government, civil society and the private sector to work together to ensure the socio-economic inclusion of persons with disabilities. The WPRPD was created after substantial consultations with the disabilities sector. As such, any legislation or regulations that are passed in relation to the rights of persons with disabilities, should accord to the WPRPD.

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## A. Comments on specific sections of the 2020 Draft Code

### 4. Comments on the definitions section

- 4.1 The table bellows provides for the definition of a term as it is defined in the 2020 Draft Code and NCPD's comment and suggested amendment to the definition. Underlining has been used to indicate an addition to the definition.

Definition in the 2020 Draft Code	NCPD Comment
"Accessibility" means the ability by persons with Disabilities to equally access and benefit from broadcasting and electronic communications services	There should not be a definition for "accessibility" in the 2020 Draft Code. The definition provided is not inclusive enough. The definitions of Universal Design and Universal Access must be relied upon.  Please refer to these definitions further down in the table.
"Accessibility Services" means a service such as Audio Description, Closed Captioning, Subtitles, or any other similar service	The definition should be amended to include both open and closed subtitling and captioning. It is essential that both open and closed captioning and subtitling is included in the Code.  <i>"Accessible Services" means a service such as Audio description, <u>Captioning (open or closed)</u>, <u>Subtitling (open or closed)</u>, <u>a Sign Language Interpreter</u>, depending on circumstances, or any other similar service</i>
"Applicable Channels" means all television channels broadcast by a television broadcasting licensee except a third-party channel(s) consisting predominantly of live programming content such as	We submit that it is completely unacceptable for the definition of Applicable Channels to exclude third party channels. This implies that third party channels do not need to adhere to the accessibility requirements even if they are broadcast by a television broadcasting licensee. All broadcasts,

Definition in the 2020 Draft Code	NCPD Comment
news, reality or sports	<p>including third party programs broadcasts should adhere to the Code as is applicable to broadcasting licensees.</p> <p>As is mentioned in the definition of “applicable channels”, third party contents comprise mainly of live programming such as news. Ensuring that the broadcasting of news is accessible to persons with disabilities is imperative to ensuring that persons with disabilities are able to get equal access to information that is provided by broadcasts. To deny them of this is a breach of their right to equality.</p> <p>Third-party channels must be included in the definition of "Applicable Channels."</p>
“Closed Captioning” means a process of converting the audio content of television broadcast or other production into text and displaying the text on a screen or monitor	<p>Closed captioning should not be defined without "open captioning" and "live captioning" being defined. All three concepts need to be included in the 2020 Draft Code's definition of captioning</p> <p>Please refer to paragraph 4 below for a description of the differences between the three concepts.</p> <p>We propose the following wording for the definition of "Captioning":</p> <p><u><i>Captioning means a service where a transcript version of the audio dialogue and a description of all background sounds and soundtracks of a video programme are made available to the viewer via on-screen text. Captions can be either open or closed. Closed captions are not embedded in the video</i></u></p>

Definition in the 2020 Draft Code	NCPD Comment
	<p><u>display and are capable of being turned on or off. Open captions are completely embedded in the video display and cannot be turned off. Live captioning is utilised for live events where the audio dialogue and background sounds are transcribed by a transcriber as the event takes place. Live captions can be open or closed</u></p>
<p>"Disability" For the purpose of these regulations, Disability refers to a long-term or recurring hearing and visual impairment;</p>	<p>This definition of disability does not accord with the WPRPD's explanation of disability in its glossary of terms. This definition of disability is not inclusive enough. The concept of disability as provided in the WPRPD should be included in place of this definition of disability.</p> <p>"Disability" means <u>disability is imposed by society when a person with a physical, psychosocial, intellectual, neurological and/or sensory impairment is denied access to full participation in all aspects of life, and when society fails to uphold the rights and specific needs of individuals with impairments.</u></p> <ul style="list-style-type: none"> <li>• <u>Persons with disabilities experience three main types of interrelated barriers:</u></li> <li>• <u>social (including high cost, lack of disability awareness, and communication difficulties);</u></li> <li>• <u>psychological (such as fear for personal safety); and structural (including infrastructure, operations and information).</u></li> </ul>

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Definition in the 2020 Draft Code	NCPD Comment
"Subtitles" means a service by which both the audio dialogue and sound representations of a video programme, are made visible by the user via on-screen text that is synchronized with the audio content	<p>This definition is incorrect as it accords more closely with captioning than it does with subtitles. Sub-titles only describe the audio dialogue and not the surrounding noises or background tracks ("sound representations") of a video.</p> <p>Where subtitling is defined, it should be defined in terms of "closed", "open" and "live" subtitling. Please refer to paragraph 4 below for a description of the differences between the three concepts.</p> <p>The definition of subtitling should be amended as follows:</p> <p><u>Subtitling means a service by which a transcript version of the audio dialogue of a video programme is made visible to the viewer via on-screen text. Subtitles can be either open or closed. Closed subtitles are not embedded in the video display and are capable of being turned on or off. Open subtitles are completely embedded in the video display and cannot be turned off. Live subtitling is utilised for live events where the audio dialogue is transcribed by a transcriber as the event takes place. Live subtitles can be open or closed</u></p>
"Universally Designed" means the design of products, environments, programmes and services usable by all people, to the greatest extent possible, without the need for	<p>The definition in the glossary of terms in the WPRPD should be used for this definition. Only the first part of the definition of "Universal Design" from the WPRPD is included in the definition. The second section in the WPRPD definition regarding assisted</p>



Definition in the 2020 Draft Code	NCPD Comment
adaptation or specialised design;	<p>devices must be included.</p> <p>The term must be "Universal Design" rather than "Universally Designed".</p> <p>The definition should be as follows:</p> <p><i><u>"Universal Design" means the design of products, environments, programmes and services usable by all people, to the greatest extent possible, without the need for adaptation or specialised design</u></i></p> <p><i><u>Assistive devices and technologies for particular groups of persons with disabilities where these are needed, must also respond to the principles of universal design. Universal Design is therefore the most important tool to achieve universal access.</u></i></p>
	<p>A definition for "Universal Access" must be included in the definition sections. Universal Design cannot be included without Universal Access. The definition from the glossary of terms of the WPRPD should be used, which is as follows:</p> <p><i><u>Universal access means the removal of cultural, physical, social and other barriers that prevent people with disabilities from entering, using or benefiting from the various systems of society that are available to other citizens and residents. The absence of accessibility or the denial of access is the loss of opportunities to take part in the community on an equal basis with others.</u></i></p>

Definition in the 2020 Draft Code	NCPD Comment
	<p>A definition of "Assistive Devices", taken from the glossary of terms of the WPRPD must be included in the definitions section.</p> <p>Such definition should read as follows:</p> <p><u>"Assistive devices" means any device, product, equipment or tool that is designed or adapted to enable persons with disabilities to participate in activities, tasks or actions. They may include: (i) mobility aids such as wheelchairs, prostheses and crutches; (ii) Communication aids such as hearing aids, FM systems; (iii) Sensory aids such as white canes; noise reducing headphones and coloured lenses (iv) Technology aids such as computers for alternate and augmentative communication, screen readers, magnifiers, text in audio format.</u></p>
	<p>A definition of "Assistive technology", taken from the glossary of terms of the WPRPD must be included in the definitions section.</p> <p>Such definition should read as follows:</p> <p><u>"Assistive technology" means an umbrella term that includes assistive, adaptive, and rehabilitative devices and services for persons with disabilities, which enable persons with disabilities and learning differences to attain independence. They include for example, loop systems, sub texting and alternative input for cognitive assistance and computer or</u></p>

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Definition in the 2020 Draft Code	NCPD Comment
	<u>electrical assistive devices.</u>

## 5. Comments on Regulation 3: Basic Standards for Broadcasting Service Licensees

### 5.1 General comment on subtitling and captioning

5.1.1 The inclusion of "closed captioning" and "subtitles" as they are defined in the 2020 Draft Code is problematic. The 2020 Draft Code fails to take recognition of the difference between "closed", "open" and "live" captioning and subtitles. An explanation of the difference between subtitles and captioning and when they are open, closed and live is provided below:

#### Captioning

5.1.2 Captions constitute a transcript version of the spoken word as well as captions descriptions of background noise and alert viewers to the presence of a soundtrack. Captions can, therefore, be used to transcribe according to the same language or a different language of the verbal part of a television presentation or news bulletin. Captions are designed to supplement verbal dialogue, and assume that the audience is deaf or hearing impaired (which is why background sounds are also described in the text)

5.1.3 Captions can be either 'open' or 'closed'. Closed captions are not entirely embedded in the video display, and are capable of being turned on or off. Accordingly, for the use of closed captions the viewer has to have access to a system that enables them to turn the captions on or off, such as with a DSTV decoder, Netflix or YouTube.

5.1.4 Open captions, however, are completely embedded in the video and are therefore a material part of the video display and cannot be turned off.

- 5.1.5 Lastly, for live broadcasts such as news channels, real time / live captioning will be required. This requires a specialist (a transcriber) using special technology to follow a live news broadcast and transcribe the spoken words and sounds, as they are spoken and made.
- 5.1.6 Live captions can either be open or closed. Where open live captions are utilised the captions will be seen by all viewers without the option to turn the captions off.
- 5.1.7 Closed live captions exist in certain applications such as YouTube and Microsoft teams as the user can elect whether it wants the live captioning. While this is a very helpful tool it has its limitations as often the transcriptions are not completely correct due to the different languages, tones and volumes a person speaks in. It would accordingly be very risky for such an automated system to be used for live news broadcasts as incorrect information could be relayed as a result. Furthermore, the majority of the South African population does not have access to these types of applications.

### Subtitling

- 5.1.8 Sub-titles, like captioning, can also be open or closed as well as live / real time. Sub-titles do not necessarily assume that the viewer is deaf or hearing impaired but assume that the audience is able to hear the audio part of a video display. Accordingly, Sub-titles are normally used where an audience is of a foreign language and the sub-titles translate the spoken word into a language that the audience understands.
- 5.1.9 The above understanding accords with the WPRPD. We note that our comments on captioning apply throughout the 2020 Draft Code, wherever only "closed captioning" or "subtitling" is mentioned.

## 5.2 Basic Standards for subtitling and captioning

- 5.2.1 We note that the 2020 Draft Code includes basic standards for Audio Description, Sign Language and Subtitles, but not for captioning. Basic Standards for Captioning need to be included. The basic standards provided in the 2020 Draft Code must be in line with international standards and best practice

**6. Comments on Regulation 4: General Requirements for Communication and Information Provision to Persons With Disabilities for Broadcasting Service Licensees**

**6.1 Improving accessibility**

- 6.1.1 Compliance monitoring is not included in the 2020 Draft Code. There must be strict guidelines to monitor broadcasting licensee's adherence to improving accessibility.
- 6.1.2 In terms of television broadcasters websites (paragraph 4(a)), clear guidelines must be implemented and provided for in the 2020 Draft Code in relation to criteria for accessible websites.
- 6.1.3 The basic criteria for website accessibility should include the following:
- 6.1.3.1 The website must be accessible for persons using screen readers. PDF files are not always accessible when using screen readers
- 6.1.3.2 Websites must have the option for persons who are partially sighted to enlarge the font size of information on the website as well as change the colour of fonts (the website of SANCB is a great example of this option).
- 6.1.3.3 Background colours are also important, the brighter and busier the back ground are the more inaccessible it will be for persons who are partially sighted to try and read what is posted on a website. The colours and background images must be as plain as possible

6.1.3.4 If any pictures are posted on a website, it should not be dark pictures as persons who are partially sighted will battle to make out what the picture is

6.1.4 Useful guidelines on web content accessibility can be accessed here: <https://www.w3.org/WAI/standards-guidelines/wcag/glance/>

## 6.2 Warning to Photosensitive viewers

6.2.1 It is important that the warning to photosensitive viewers has subtitles as many persons have multiple disabilities, for example hearing impairment and epilepsy.

## 6.3 Time Frames for implementation

6.3.1 The time frames provided for under this section, in terms of subtitling and closed captioning (which should be "captioning") must be aligned with the Implementation Matrix of the WPRPD. We note that the WPRPD only refers to captioning in relation to the above. However, this must apply to both captioning and subtitling.

6.3.2 We refer to item 1.4.2 in the Implementation Matrix which provides as follows:

Policy Directive	MTSF outcome	2015 - 2019 Target	2020 – 2030 Target	Lead Agency
Provide captioning on all television programmes.  This must be done by all public and private television channels.	14	100% of all news content of local television stations have captioning	25% of all locally produced television programming have captioning	ICASA

- 6.3.3 We note that the 2015 - 2019 target in the implementation matrix has already passed and was not met at all. Accordingly, the 2020 Draft Code must require that captioning and / or subtitling of news content (which includes events of national importance) must be implemented within months of the 2020 Draft Code being passed. Whether subtitling or captioning is provided must be based on what is reasonably achievable by broadcasting services licensees. However, broadcasting services licensees must push to ensure that either captioning or subtitles are available to all viewers. This will most likely mean open, and sometimes open and live, captioning or subtitles.
- 6.3.4 Accordingly, the Draft Code should provide that 100% of news programs must have open subtitles or open captioning (where applicable) in the language that the news is presented in.
- 6.3.5 We further submit that 25% of all locally produced programmes must have open subtitles or open captioning (where applicable) in English, making provision for phasing in of other languages.
- 6.3.6 We note that closed captions / closed subtitles can only take place when all people have access to decoders, and as is pointed out in section B below, the majority of the South African population do not have access to a decoder.

## 7. Comments on Regulation 5: Basic Stands for Electronic Communications Service Licensees

### 7.1 Hearing Aid Compatibility Requirements for Fixed Line Handsets

- 7.1.1 Telephones that are available for purchase must be compatible for hearing aids with telecoil. A telecoil is a small copper wire coil located within some hearing aids and cochlear implants. It is designed to communicate with telephones and loop systems through an electromagnetic wireless signal. The goal of a telecoil is to enhance and “clean up” the speech signal coming through the audio system, whether it be a telephone or a

microphone, such as in an auditorium or place of worship. Because it's a direct wireless transmission, the telecoil signal volume can be adjusted by the listener.

- 7.1.2 We note that landline and digital phones are becoming more and more outdated and VOIP is the system that is globally accepted. The government must therefore supply phones that work on VOIP and that are telecoil compatible. This will meet the standards of Universal Design.

**8. Comments on Regulation 7. General Requirements for Communication and Information Provision to Persons With Disabilities for Individual Electronic Communication Service ( "I – ECS") Licensees**

- 8.1 In relation to Emergency Services, we submit that a SMS line must be available for deaf or hearing-impaired persons. The response to the caller must also be via text

- 8.2 In this regard we refer to the WPRPD as a guideline. Section 6.3.1.5 of the WPRPD provides for protection for persons with disabilities during situations of risk and disaster. It provides the following:

- 8.2.1 Persons with disabilities, when compared to the general population, face higher risks in emergency situations and are disproportionately affected by natural and other disasters. Humans are emotional beings; their mental health and psychosocial well-being play key roles in resilience, recovery and reconstruction. Integration of mental health and psychosocial well-being makes disaster risk reduction more effective, resilient and robust.

- 8.2.2 Persons with psychosocial disabilities may require additional support services. Persons with disabilities and their families requiring assistance during situations of risk and disaster and must be prioritised for evaluation and disaster management procedures. This requires that all emergency and disaster management services be staffed with personnel who have immediate access to the required reasonable accommodation support systems and who have been trained in assisting persons with disabilities.



- 8.2.3 Persons with disabilities and their families are a unique resource of knowledge and experience, which is often overlooked, and should therefore be included in actions aimed at reducing the risk of disasters, building resilient communities and finding solutions during situations of disasters and emergencies.

**9. Comments on Regulation 8: Promotion of Awareness and Compliance by a Broadcasting Service Licensee**

- 9.1 An accessibility plan, referred to in Regulation 8(1), must include all five groups of impairments as stipulated in the WPRPD: physical, sensory, intellectual, psychosocial and neurological impairments. Regulation 8(2) only provides that accessibility services for blind and visually impaired and deaf and hearing-impaired person should be included in an accessibility plan.
- 9.2 According to the Glossary of terms in the WPRPD, Impairment is a perceived or actual feature in the person's body or functioning that may result in limitation or loss of activity or restricted participation of the person in society with a consequential difference of physiological and/or psychological experience of life. For example, the International Classification of Disease (ICD) could be utilised for purposes of defining physical, sensory, intellectual, psychosocial and neurological impairments
- 9.3 Regulation 8(4) provides that ICASA may request the television broadcasting service licensee to make amendments to the accessibility plan. We submit that the expertise of persons with disabilities must be utilised when decisions in this regard are made.
- 9.4 In this regard we refer to the definition of inclusion in the glossary of terms in the WPRPD, which is as follows: Inclusion is regarded as a universal human right and aims at embracing the diversity of all people irrespective of race, gender, disability or any other differences. It is about equal access and opportunities and eliminating discrimination and intolerance for all. It is about a sense of belonging: feeling respected, valued for who you are; feeling a level of supportive energy

and commitment from others so that you can best fully participate in society with no restrictions or limitations. Inclusion implies a change from an 'individual change model' to a 'system change model' that emphasises that society has to change to accommodate diversity, i.e. to accommodate all people. This involves a paradigm shift away from the specialness' of people to the nature of society and its ability to respond to a wide range of individual differences and needs. Inclusion is the ultimate objective of mainstreaming.

## B. Failure to promote persons with disabilities' rights to equality

10. The 2020 Draft Code does not go far enough in ensuring that persons with disabilities are given equal access to broadcasts and this infringes on their rights to equality, as enshrined in the Constitution of the Republic of South Africa, 1996 (**"the Constitution"**).
11. Section 9(1) of the Constitution states that *"everyone is equal before the law and has the right to equal protection and benefit of the law."* Under section 9, disability is a listed protected ground upon which no person or the state can unfairly discriminate against another person. The Promotion of Equality and the Prevention of Unfair Discrimination Act, 4 of 2000 (**"PEPUDA"**) was enacted to give effect to section 9 of the Constitution. Section 9 of PEPUDA refers specifically to the prohibition of unfair discrimination on the ground of disability. Of particular importance to the 2020 Draft Code is section 9(c) which provides that *"no person may unfairly discriminate against any person on the ground of disability, including failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons."* ICASA thus has a duty to take steps to reasonably accommodate the needs of person with disabilities and the regulations providing for a code for persons with disabilities is an excellent platform to take such steps.
12. The rights of persons with disabilities in relation to equal access to broadcasting services are further provided for in the underlying statutes that give ICASA its power. Section 8(2)(o) of the Electronic Communications Act, 36 of 2005 (**"ECA"**) provides that terms and conditions of a broadcasting license may include a provision that deals

with the "access to broadcasting, postal and electronic communications services for persons with disabilities that include, but are not limited to, services designed to improve accessibility for persons with disabilities, such as videotext, subtitling, audio description and Sign Language." Section 70 of the ECA makes it mandatory for ICASA to prescribe regulations setting out a code for persons with disabilities.

13. One of NCPD's primary concerns with the 2020 Draft Code is that its applicability to live broadcasting is specifically excluded. This is particularly problematic in relation to live news broadcasts. Live news broadcasts are of the utmost importance for persons with disabilities to have fair and equal access to information. Persons with disabilities should have an equal right to accessing news as and when persons without disabilities can access it.
14. While the 2020 Draft Code refers to Universal Design and Accessibility Services, it does not go far enough in ensuring that persons with disabilities are accommodated with such products and services. Our submissions in relation to providing products and services to persons with disabilities free of charge have reference here. Given that a large portion of persons with disabilities in South Africa live in complete poverty, it is the responsibility of the government and ICASA to ensure that these persons have access to universally designed products and services.
15. We further submit that the 2020 Draft Code is wholly inadequate in relation to providing broadcast services to hearing-impaired or deaf persons. The fact that only closed captioning is provided for in the 2020 Draft Code is indicative of the fact that the access of the majority of South Africans has not been taken into account in drafting the 2020 Draft Code as most South Africans do not have access to devices, or adequate access to the internet, to utilise closed captions. The 2020 Draft Code thus fails in offering the requisite protection to the rights of persons with disabilities, as is guaranteed under the ECA, PEPUDA and the Constitution. It is imperative that ICASA recognises and considers the difference between "closed", "open" and "live captioning and subtitles so that it can make informed choices as to when each type of captioning or subtitles is applicable. While closed (and live where necessary) captioning on all broadcasts is the ultimate goal, while the majority of South Africans do not have

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access to adequate internet or applications that allow them to have closed captioning, open captioning must be applied.

16. We further note that captioning is more difficult to implement than subtitles, particularly where live subtitles or captioning is concerned as live captioning requires particular expertise. Accordingly, until such time as captioning services can be implemented nationally, open subtitles should be made mandatory, at least, in relation to certain broadcasts, such as news broadcasts and events of national importance, so that persons with disabilities are not excluded from receiving vital information as and when it is released. If the 2020 Draft Code fails to include these considerations, it fails in upholding persons with disabilities' constitutionally enshrined rights to equality.
17. NCPD submits that the 2020 Draft Code needs to undergo substantial amendments for it to reach the level it should be at with regard to providing and protecting the rights of persons with disabilities.
18. The NCPD is available for further consults with ICASA should ICASA wish to reach out to us.



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