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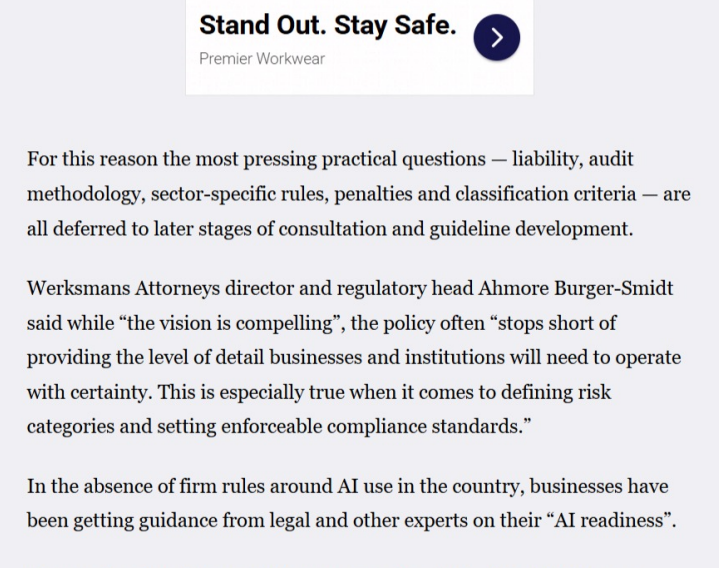
Draft AI policy leaves businesses with unanswered questions

Department of communication & digital technologies admits policy is likely incomplete

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Communication & digital technologies minister Solly Malatsi. Picture: (Refilwe Kholomonyane)

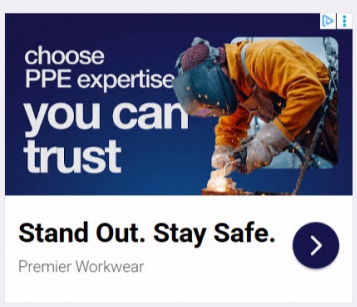
The government's draft national policy on AI appears to have generated more questions for businesses than it answers. Fortunately, the policy is still only in draft form and presently out for comment.

AI investment has grown exponentially in recent years, sparked by the rapid adoption and popularity of OpenAI's ChatGPT since it was launched in November 2022.

While businesses in the country figure out how to make the most of the new technology, the government is under pressure to create rules that protect rights such as privacy while at the same time encouraging innovation and investment.

Last week the department of communication & digital technologies, under minister Solly Malatsi, published a draft national policy for public comment, admitting in the gazetted notice that the policy is likely incomplete.

"Because of the broad range of applications and applicability in almost every conceivable sector, a general national policy cannot, and should not, address every aspect of AI," said deputy director Omega Shelembe. "Rather, a national policy's primary objective is to identify the core principles that guide sectoral approaches."



For this reason the most pressing practical questions — liability, audit methodology, sector-specific rules, penalties and classification criteria — are all deferred to later stages of consultation and guideline development.

Werksmans Attorneys director and regulatory head Ahmore Burger-Smidt said while "the vision is compelling", the policy often "stops short of providing the level of detail businesses and institutions will need to operate with certainty. This is especially true when it comes to defining risk categories and setting enforceable compliance standards."

In the absence of firm rules around AI use in the country, businesses have been getting guidance from legal and other experts on their "AI readiness".

Lizanne Engelbrecht, executive manager of content at legal intelligence platform LexisNexis, explained that companies are using the latest iteration of the King Code of Corporate Governance to guide their thinking around AI.

Known as King V, it introduces progressive guidance on technology, information governance and digital risk, placing AI, cybersecurity and data stewardship "firmly on the agenda and accountability roster of boards and executive teams".



According to Darren Olivier, a partner at the law firm Adams & Adams, a central concern for businesses is whether they own the output generated by AI tools.

Olivier told Business Day because AI is moving faster than the law, businesses must take a proactive, pragmatic approach to governance rather than waiting for legal clarity. For instance, there is a need to track human contribution to AI-generated work to establish ownership under current laws.

While some are looking for greater clarity from the new policy, others warn of the dangers associated with over-regulation.

The Foundation for Rights of Expression & Equality (Free SA) has raised concern over proposals for the establishment of multiple new institutions, including an AI regulatory authority, ethics board, commission and ombud, arguing that these structures may duplicate existing functions, increase administrative costs and create new barriers for startups and small businesses.

Free SA spokesperson Gideon Joubert said: "AI should help drive South Africa's recovery, not become another excuse for over-regulation."

Similarly, Burger-Smidt said the slew of oversight bodies "raises questions about implementation" and could create "fragmentation in an already complex regulatory landscape, without clear guidance on roles, co-ordination or resourcing".

On businesses making greater use of the new tech, Olivier highlights the danger of losing proprietary information through the casual use of AI tools. He warns that "AI tools can leak sensitive information and this is often the fastest real-world risk. Are we eroding our competitive advantage?"

For businesses worried about compliance, Olivier suggests regulators take a pragmatic view and look for intent and preparation rather than perfection. "What the regulator is concerned about generally is what have you done? What did you do? Did you foresee this risk and what steps have you taken?"

AI companies

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