

ence in the workings of the regulator," Skinner notes.

Fifth, in order to remain independent, she says, Icasa must have the power to appoint the people it feels will best serve on the Complaints and Compliance Committee. Assigning this responsibility to the Minister will undermine that.

Sixth, enabling Icasa to continue working on something while it is subjected to legal challenges is problematic. "The amendment states that the authority must continue with function until a

more information on how it will operate. I do not like the notion of a body sitting in Icasa that is appointed by the Minister and can act at his behest. I don't see how that will help Icasa function effectively. It introduces a political element and raises the independence argument. The same argument arises with amendments to the Complaints and Compliance Committee, which propose greater involvement of the Minister. Without further information, it is impossible to see how that will improve Icasa's functioning."

constrained in this respect, given that its funding comes from licence fees, and that both its budget and annual report require the involvement of the Minister, albeit they are approved by Parliament."

"If we had a proper policy review process, we could look at it to ensure the regulator is funded properly so it can work in favour of users, not private organisations or government," says Skinner, raising a common complaint – proposed legislation or amendments no longer go

Said body, Mamodupi Mohlala, director general of the DoC, was on leave pending redeployment at the time of writing, having been fired by the Minister and then reinstated. Should an alternative position not be found for her, she will be reinstated into the department in full. As Cull notes, while she's been away, it seems as if people at the DoC have been attempting to distance themselves from the document. What these political shenanigans will mean for the bill going forward, however, remains to be seen.

“... OBVIOUS [THAT] THE DOC IS TRYING TO DEAL WITH ICASA’S INEFFICIENCIES AND SLOW TURNAROUND TIMES.”

KATE SKINNER, SOS

court order directs otherwise. I love the idea," says Cull, "but I have no idea how it's going to operate in real life.

"So Telkom, for example, will go and get an interdict that says Icasa cannot implement the call termination rate (CTR) regime when it is published. If Icasa continues in the face of that, it would open itself up to legal liabilities. Say it publishes a CTR regime that says mobile operators must reduce rates from 89c to 65c on 1 March 2011 and an operator challenges that in court, and Icasa carries on until a court decides otherwise. If the operator implements the new rates, it could lose millions in revenue. If the court finds in its favour, it will have lost that revenue needlessly. What does it do then – sue the regulator?"

As for the Tariff Advisory Council, he says: "In principle it's not a bad idea but we need

Lastly, amending Icasa's function from managing spectrum to merely assigning it is in conflict with the Electronic Communications Act.

Bolstering Icasa

What the regulator needs, Skinner and Cull agree, is money.

"An independent regulator requires sufficient financial resources to carry out its activities," said the LINK Centre, Wits University's ICT research and training arm, in its submission on the proposed amendments. "Icasa should not be subject to any form of financial pressure from the Minister or the DoC, which could be used to punish it for actions or decisions unpopular with the government of the day, or to apply indirect political pressure upon its mandate. And the regulator should further be required to account to the nation publicly and transparently. Icasa is already

through the green and white paper consultation process, which means legislation that is fundamentally flawed gets to bill stage before this becomes apparent once public consultation starts.

"There's clearly a problem with Icasa," says Cull. "This is nothing new. Since the dawn of Satra in 1996, the regulator has suffered under capacity and finance constraints and has not been able to discharge its duty in a competent manner. It would be lovely if the bill took the view that we should bolster Icasa and allow it to discharge its current function. The bill in its current form gives every appearance of seeking to undermine Icasa and gives every indication of a deteriorating relationship between Icasa and the DoC."

That the body at the DoC pushing this legislation forward is an ex-Icasa councillor has probably not helped matters.

The LINK Centre summed it up succinctly in its submission: "There are certainly problems with the legislation governing the broad ICT sector and with the effectiveness of the regulatory institutions governing the sector. But these cannot be resolved by the introduction of what appears to be a hastily conceived and poorly drafted 'proposed' bill, several aspects of which appear to be manifestly unconstitutional, and which deeply undermines the possibility of effective and independent regulation of the sector."

"The LINK Centre, therefore, calls upon the Department of Communications and the Minister to institute a formal, structured, consultative stakeholder process to debate and consider the most appropriate policy and legislative interventions to ensure effective, independent regulation of the ICT sector in the future." **B**