Comment[1] by the LINK Centre,
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on the
Proposed Independent Communications Authority of South Africa Amendment Bill

The Department of Communications (DoC) has invited written comments by 25 July 2010 on its "proposed" (sic) Independent Communications Authority of South Africa Amendment Bill (Notice No 650, Government Gazette No 33324, 25 June 2010).

The LINK Centre is the leading research and training body in the field of information and communications technology (ICT) policy, regulation and management in Southern Africa.

LINK has examined the proposed Bill and takes this opportunity to respond to it publicly as part of the notice and comment process.

Link is also a member of the civil society coalition, 'SOS: Supporting Public Broadcasting', and has contributed to and endorses their submission.

The proposed Bill has profound public interest implications and potentially a far-reaching impact on policy, governance and regulation across the entire ICT sector. The proposed Bill will substantially alter how both telecommunications and broadcasting are regulated, with potential long-term impact on ICT-enabled economic growth and social development, and on South Africa's network knowledge economy. LINK therefore feels it essential that we issue our own comment and response.

For reasons that we will outline below, LINK believes that the proposed Bill, if adopted as it stands, will have the unfortunate consequence of fundamentally undermining the regulatory independence of the Independent Communications Authority of South Africa (ICASA). We believe that its adoption is inappropriate, because the centralisation of decision-making in government and the removal or dilution of the powers of the regulator will create an even weaker policy and regulatory environment than has historically been the case. It is regrettable that this change is mooted in a context where there has been consistent advocacy over the last decade and more for strengthening the regulator and its independence.

Accordingly, LINK calls upon the DoC to withdraw the proposed Bill in its entirety. Further, LINK calls upon the DoC to embark instead upon a formal and structured public policy stakeholder consultation process to discuss and formulate appropriate, fully-analysed and evidence-based changes to legislation in order to ensure effective

[1] The text of this comment differs slightly from the formal submission by the LINK Centre to the Department of Communications, but does not differ in any material respect. Please direct any comment or feedback you may have to charley.lewis@wits.ac.za.

and independent regulation and management of the entire ICT sector in the interests of the public of South Africa.

Independent Regulation

Effective regulation of the broad ICT sector in a modern democracy is deeply dependent upon the structural independence of the national regulatory authority. This does not mean that regulation is separate or independent from government policy - rather, in the words of a leading regulatory scholar, that it is given the "power to… implement policy without undue interference". An effective balance must be struck between the role of the policy-maker and the role of the regulator, in order that each can contribute in distinct but important ways to advancing the growth and development of the ICT sector and the evolution of the information society. Many of the provisions of the proposed Bill, however, as we shall show, unfortunately amount to "undue interference" in the independence and functioning of ICASA.

Structural regulatory independence is a cornerstone of the system of checks and balances in any modern democracy - between executive, legislative, judicial and regulatory functions and competencies. An independent regulator is universally and internationally recognised, including by such bodies as the ITU and the WTO, as essential to the growth and development of the ICT sector, and requires independence in the following areas:

- Financial self-sufficiency;
- Decision-making autonomy;
- Implementation authority.

The proposed Bill would reduce or undermine the degree of independence of ICASA in each of these three key areas, most particularly in respect of decision-making autonomy. We will examine each of these issues in turn.

Financial self-sufficiency

An independent sector regulator requires sufficient financial resources to carry out its activities. 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 constrained in this respect, given that its funding comes through Parliament rather than from licence fees, and that both its budget and annual report require the involvement of the Minister, albeit they are approved by Parliament.

The section of the proposed Bill (Section 1) that seeks to replace ICASA's Chief Executive Officer with a Chief Operations Officer appears problematic in that it effectively downgrades the status of ICASA's financial control and accountability. Not only that, it appears to be in conflict with the Public Finance Management Act of 1999.

It would be far preferable to give ICASA its own source of funding, directly from the fees levied on spectrum and other licences, and to require ICASA to account transparently to the South African public via an annual report, financial statements and budget tabled directly before Parliament.

Decision-making autonomy

The ability of a national regulatory authority to exercise autonomy in respect of decision-making - in accordance with its overall policy mandate as set out in the enabling legislation and conveyed through government policy formulation from time to time - is a key component of its independence, analogous to the independence of the judiciary. The separation of powers and functions further requires that an independent regulator be both structurally separate from the executive in terms of appointment and accountability, and able to exercise its mandate without political or administrative interference.

Many of the key provisions of the proposed Bill have potentially serious implications for ICASA's decision-making autonomy, and suggest a worrying intention on the part of the DoC to turn the independent regulator into a simple transmission belt for the will of the policy-makers in the Ministry and the Department.

Furthermore, the drafters of the Bill appear to misunderstand the regulatory role of ICASA. It is the Department of Communications which must implement the policy and policy directions of the Minister, as is the nature of the relationship between all ministries and departments in the public service. So, the implementing agency for government policy on the ICT sector and the information society is the DoC, not ICASA.

For example, the import of section 2(d) of the proposed Bill - which requires that ICASA "must implement policy and policy directions made by the Minister" - will be to remove at one stroke the entire decision-making autonomy and independence of the regulator. This provision effectively turns the independent regulator into an implementation arm of the DoC, puts it directly at the behest of the Minister, and removes any ability of ICASA to exercise due deliberation and probity in respect of its broad national and public interest mandate. A regulator that is subject to direct interference by the Minister in this way can easily be made to operate under the whims and changing political pressures of the government of the day, and has in effect lost all independence. It is also important to note that this section of the proposed Bill contradicts the provisions of the Electronic Communications Act of 2005, which adopts an approach with far greater checks and balances, empowering the Minister to issue policies and policy directions, and requiring ICASA to "consider" these in the exercise of its mandate.

But the proposed Bill goes further, requiring the chairperson of the ICASA Council to perform "other functions" as determined by the Minister. Even if this authority granted to the Minister is "subject to prior notification being given to the National Assembly", it effectively places the chairperson under line accountability to the Ministry. Elsewhere, the proposed Bill allows the Minister to "assign" primary responsibilities to individual councillors. Taken together, these provisions constitute undue interference in the functioning and autonomy of ICASA, potentially replacing its public interest mandate with a directly Ministerial one. Taken together they are likely to deal a debilitating blow to the independence of ICASA.

Elsewhere (section 2 (b)), the proposed Bill further downgrades ICASA's responsibility in respect of the key national ICT resource of spectrum, a standard

regulatory competence, allowing ICASA only to "assign" spectrum, potentially in conflict with the far wider spectrum powers given to ICASA under the 2005 Electronic Communications Act. It is unclear what the purpose of this changed provision is, but it is a further instance of where ICASA's existing decision-making autonomy is undercut.

ICASA already has its decision-making autonomy constrained by the current appointment process of councillors. Although they are selected by a public process under Parliament, councillors are, since 2006, appointed by the Minister rather than by the President. Changes to the appointments process set out in the proposed Bill for members of ICASA's key Complaints and Compliance Committee, who must now be nominated "by the Minister in consultation with the National Assembly" and "appointed" by ICASA, would seem a further example of undue interference in a key aspect of regulatory independence. This would allow the Minister a direct and overriding role in the composition of one of ICASA's key committees, and potentially further weakens ICASA's decision-making autonomy.

Implementation authority

Regulatory independence further requires a national structure that has the authority to ensure the implementation of its decisions. While this is largely related to the power to promulgate and ensure compliance with regulatory rulings and decisions, it is also underpinned by the right to constitute the structures and processes necessary for effective regulation.

Since 2005 ICASA has enjoyed considerably enhanced independence, with the authority directly to issue regulations without recourse to the Minister. Although the proposed Bill does not make any changes in respect of this right, there are a number of proposed provisions that undermine ICASA's independence and the ability to effect the implementation of its decisions.

Several of the proposed provisions interfere with ICASA's own authority to manage and execute its functions and mandate as it best sees fit. For example, sections 2 (f) and 2(g) take away ICASA's right to delegate individual licensing decisions as it determines. Worse, the proposed Bill further complicates some of the existing structural tensions within the terrain of regulatory authority by adding a statutory Tariff Advisory Council to the existing Universal Service and Access Agency of South Africa and by elevating the authority of ICASA's existing Complaints and Compliance Committee alongside that of ICASA itself.

Not only does this unnecessarily complicate the regulatory institutional landscape by creating a proliferation of committees and competing regulatory structures, it puts in place a set of co-jurisdictional tensions and may open up possibilities for forum shopping. It also constitutes unnecessary interference in the structure, administration and functioning of ICASA, which already has the power to establish whatever committees it considers necessary to execute its mandate.

Again the proposed Bill goes further, requiring the composition of the Tariff Advisory Council to be subject to the "concurrence" of the Minister, and giving it separate and independent channels of communication through which it is expected to "advise" both the Minister and ICASA.

The proposed Bill additionally undermines the implementation authority of ICASA in respect of the existing Complaints and Compliance Committee (CCC) by giving the CCC the right to "issue… orders" and by elevating a finding of the CCC to be "deemed a finding or order of [ICASA]". This appears to set up a series of problematic tensions, undercutting the decision-making integrity of ICASA, and interfering with its ability to exercise its implementation authority.

Without wanting to excuse ICASA's history of poor performance or to defend its failures, it is unlikely that the numerous performance micro-management provisions of the proposed Bill will have the desired effect. It is arguable that much of ICASA's poor track record to date derives from its lack of regulatory independence and from the poor calibre of some of the council appointments. Further undermining ICASA's independence, as the proposed Bill does, is likely to exacerbate rather than ameliorate the problem. And performance micro-management in the absence of competent regulatory leadership is likely to achieve very little.

It is in this light that requiring Parliament to carry out a "performance management system" twice a year now seems unlikely to achieve much - especially when Parliament seems never to implemented the existing annual performance review, which already interferes with ICASA's independence. Having performance management done through a panel "chaired by the Minister or his or her delegate" is also disturbing in that in that it places line accountability for ICASA's performance with the Minister and the DoC rather than to the nation through Parliament. Publicly-transparent self-evaluation is a more common approach utilised by independent agencies and judicial bodies, and would be a better approach to ensuring accountability, drawing on models of good governance from the private sector.

Constitutionality

A number of the provisions of the proposed Bill discussed above are arguably unconstitutional.

Although ICASA's mandate covers telecommunication and postal services, along with broadcasting, it is the regulation of broadcasting that enjoys constitutional protection. It is from this protection that ICASA as a converged regulator of the broad ICT sector enjoys constitutional protection of its independence. Section 192 of the Constitution thus provides for the establishment through "national legislation" of "an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society".

While independence is not specifically defined in respect of the regulation of broadcasting, similar Chapter 9 institutions are required to be ""independent, and subject only to the Constitution and the law, and [to] be impartial and [to] exercise their powers and perform their functions without fear, favour or prejudice". Further, "other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions" and "no person or organ of state may interfere with the functioning of these institutions".

Many of the provisions of the proposed Bill discussed above either undermine the "independence, impartiality, dignity and effectiveness" of ICASA, or prevent it exercising its duties "without fear, favour or prejudice", or constitute unwarranted interference in its "functioning". There are therefore serious and substantial concerns about the constitutionality of the proposed Bill.

It is for these reasons, along with its considerable deleterious impact on the regulatory independence of ICASA, and undue interference in the exercise of ICASA's functions, that the LINK Centre calls for the withdrawal of the proposed Bill.

Policy process

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.

Conclusion

The LINK Centre aligns itself with the legally formal and more detailed submission of the civil society coalition, 'SOS: Supporting Public Broadcasting', to which it has contributed. That submission, while specifically structured around broadcasting issues and concerns, reflects, highlights and addresses fundamental issues affecting the entire ICT sector and is therefore endorsed by LINK.

The LINK Centre thanks the Department of Communications for the opportunity of making these written comments on the Proposed ICASA Bill. LINK remains committed to supporting effective policy-making and regulation across the entire ICT sector through the provision of quality academic and professional training and through undertaking public-interest applied research. LINK looks forward to an opportunity to discuss these issues further and in more depth as part of a constructive contribution to effective policy and independent regulation.

Please contact the LINK Centre via Charley Lewis charley.lewis@wits.ac.za or on 083-356-2505 should there be any queries with regard to this submission or if any further information is required.

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