

Convergence Bill MISA-SA Oral Submission

Presented by:
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Introduction

MISA= Media Institute of Southern Africa
MISA-SA =South African Chapter of MISA

- Regional, member –driven NGO
- Chapters in 11 SADC countries

Aims:

- Monitoring, capacity building, research, training to
- Foster independent and diverse media & promote freedom of expression in the service of democracy and development

Supported/endorsed by

- Media Institute of Southern Africa (MISA)
- Media Monitoring Project (MMP)
- Freedom of Expression Institute (FXI)

Context

- No Green or White Paper to provide context for Bill & a guideline for ICASA on how to implement the Bill
- Policy framework will provide medium to long-term objectives for sector (e.g. access, development)
- Public has not had sight of amendments to ICASA Act
- Public should be allowed to amend submissions upon sight of ICASA Amendment Act

Guiding Principles

The Constitution of the RSA (1996)

- Section 16, 7(2), 8(1) & 192

Universal Declaration of Human Rights

- Article 19

African Commission on Human and Peoples' Rights

**Declaration of Principles on Freedom of
Expression in Africa (2002) – Clause 9**

African Charter on Broadcasting (2001)

World Summit on the Information Society (WSIS) :

Declaration of Principles on the Media (clause 55)

Primary Areas of Concern

- **Supremacy of the Constitution**
- **Right to Freedom of Expression**
- **Independent Regulation in the Public Interest**
- **Role of the Minister & Ministerial Influence**
- **Promoting Diversity & Pluralism**

Proposed Amendments:

[] indicates delete & ____ indicates insert

1. Preamble

1.1 The Right to Freedom of Expression

- Constitution (Chapter 2, section 16 – the Bill of Rights)
- Right to receive & impart info
- Includes the means of transmission and reception of content

❖ Proposed Amendment

- To provide for the regulation of ... and to provide for matters incidental thereto. The objects of the Bill and the application of the various provisions shall be predicated on the principles of freedom of expression and the maintenance of free and independent media and access to, and the dissemination of, information in accordance with Article 19 of the Universal Declaration of Human Rights and the acceptance of these principles by the World Summit on the Information Society as a core value of the information society.

Preamble

1.2 Regulation in the Public Interest

- ❖ **Proposed Amendment**
- To provide for the regulation of broadcasting, broadcasting signal distribution and telecommunications sectors in the public interest and to provide ...

2. Chapter One

- Regulation in the public interest must demonstrate due regard for equality and non-discrimination

❖ Proposed Amendment

2. The primary object ... and for that purpose to -

- Ensure that, in relation to the provision of communication services, the needs of women, children and people with disabilities are duly taken into account.

2. Chapter One

Definitions

Referred to but not defined in the Bill:

- - *Historically Disadvantaged Individuals* (s2(g), 9(b) & 13(b))
- - *Ministerial Policy Directions* (s3)
- - *Convergence*

■ **2.2 Object of the Act**

Constitutional right to freedom of expression must be included in s2 of Bill

3. Chapter Two

Independent Regulator, Ministerial Policy & Policy Directions

- **“Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature”.**
... African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of Expression in Africa (2002)

- MISA-SA is concerned by the intrusion of the Minister of Communications on the independence of the regulator, ICASA
- ICASA has been set up as an independent authority in terms of Chapter 9 of the Constitution
- Independence = Subject to the Constitution, must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice

- MISA-SA contends the Minister's power to lay down policies is subject to the approval of the National Assembly
- It is for ICASA as an independent regulator to interpret and implement those policies
- Our proposed amendments aim to ensure the Minister does not act unilaterally without reference to the National Assembly - against the letter and spirit of the Constitution - and without consulting ICASA before s/he issues a policy statement

❖ Proposed Amendments

- (5) The Authority [may] shall conduct public hearings in respect of a draft regulation.
- (6) The provisions of subsection (4) [do not] apply with regard to - ...

4. Chapter Three

■ 4.1 Licensing

- The definitions of whom this section applies to are extremely broad, vague and not clearly defined.
- MISA-SA is concerned this chapter could thus be interpreted as an attempt to license individuals who publish items on-line
- Such an application could be seriously abused by being used as a censorship weapon – i.e. refusing licences to persons whose statements are not acceptable

Licensing

- ❖ **Proposed Amendment**
 - MISA-SA proposes definitions presented by Lisa Thornton (2005) in '*South Africa's legislative response to convergence*' be used to amend or replace existing definitions in the Bill.

■ **4.2 Ministerial influence**

- MISA-SA believes the licensing process in its entirety must fall within the regulator's power, subject to the regulator being guided by policy issued by the Minister and approved by the National Assembly.
- The regulator's independence is violated by the provision in section 5(5), and it has the potential of creating serious conflict of interest issues for the Minister because of the major infrastructure provider still being State owned.

❖ Proposed Amendment

■ Section 5

(5) The [Minister may] Authority shall determine, subject to policy issued in terms of subsection (2), the date when and the geographical area within which communications network services licences may be granted

Requiring the Minister to approve licence conditions is an unacceptable interference with the regulator's independence,

Where the license concerns broadcasting services, this requirement is clearly unconstitutional as it violates the provisions of section 192 of the Constitution which requires independent regulation of broadcasting.

- ❖ **Proposed Amendment 21**
- **Remove clause (2) (e) of section 9**

- **4.3 Period of Licence**
- MISA-SA submits that a period of 25 years (cf. s5(9) (a)) for the validity of an individual license is too long.

- ❖ **Proposed Amendment 22**
- **Section 5**
- (9) (a) are issued for a period of between 15 and 25 years [...], as determined by the Authority

5. Chapter Four

5.1 Construction of lines & other network infrastructure development

- Section 22 (1) is a dictatorial clause providing for the laying of cables & other construction work, etc. across private and other land.
- The owner has no recourse to any tribunal to argue an alternative or to gain compensation
- There is no realistic provision for compensation.
- The provisions in this section and section 27 (3) should be subject to the rights of the owners of the land.

- Communication network service licensees should be required to demonstrate the cutting or trimming of trees, construction or removal of pipes or tubes for example is for a public purpose or in the public interest.
- Regulation in the public interest should emphasise the protection of consumer rights
- E.g. Chpt 10 – Consumer Rights, instead of Issues

6. Chapter Five

- **6.1 Ministerial Influence**
- Section 34(14)(a) is an unwarranted interference with the Regulator's power to control, plan, administer and manage the radio frequency spectrum
- The security services should apply for radio frequency spectrum in the same manner as the South African National Defence Force, under section 30(5)(b) of the Telecommunications Act.
- Emergency Centres (s68) should be accountable to the regulator
- ❖ **Proposed Amendment**
- **Section 34 (14) (a)** The [Minister] **Authority** may allocate radio frequency spectrum for the exclusive use of the security services

- **6.2 Radio frequency plan**
- The Bill should include a provision that requires ICASA to publish a frequency band plan that includes frequencies in use, as well as those available for allocation
- This would improve transparency in the process

- ❖ **Proposed Amendment**
- Section 34 (10)
- **The entire radio frequency band, including** any radio frequency plan approved in terms of this section and all the comments, representations and other documents received in response ...

6.3 Prioritising digital communications facilities

Regulation should be technology neutral.

The Bill favours players who use digital technology, thus posing a serious threat to achieving pluralism and diversity

The Bill must include measures which protect the promotion of diversity: this is a constitutional obligation

The proposed regulatory regime should encourage fair competition by giving the Authority the flexibility to regulate the industry in a technological neutral way in order to promote and encourage a diversity of views

Once the conversion from analogue to digital (cf section 30 (2) (d)) is achieved, all applications will need to propose the use of digital communication, thus limiting potential discrimination against applicants utilising analogue facilities.

- ❖ **Proposed Amendment**
Remove clause (2)(c) of section 30

9. Chapter Thirteen

- Section 86 of the Bill is inconsistent with following provisions of the Constitution:
 - The Constitution is the supreme law of the Republic (s2)
- -Establishment of an independent body to regulate broadcasting (s192)

❖ Proposed Amendment

- Section 86
- "In the event of any conflict between the provisions of this Act, the related legislation ... and, subject to the Constitution, the provisions of this Act shall prevail."

Conclusion

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