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# Submission on the Independent Communications Authority of South Africa Amendment Bill

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the Media Monitoring Project

## Introduction

The Independent Communications Authority of South Africa Amendment Bill presents a valuable piece of legislation in charting the way forward for the Independent Communications Authority of South Africa. Recent developments in the communications sector, especially around issues of convergence and telecommunications, have necessitated the Act to be amended. As a follow-up to the Independent Communications Authority of South Africa Act of 2000, it is crucial for the amended Act to be drafted in line with the public service principles contained in the original legislation. It is imperative for any amendments to bear the aims and objectives of the former Act in mind, and to act accordingly.

Since the establishment of the Independent Communications Authority of South Africa (ICASA), the Chapter 9 institution has played a significant role in regulating the broadcast media sector in South Africa, and in ensuring an accountable and diverse industry. It is critical that the Authority continues to be seen as a vital part in the media policy machinery, and that it be provided with the necessary enabling legislation to permit further valuable work in this regard, outside of the control and/or influence of government and the private sector.

The Media Monitoring Project (MMP) supports the efforts of the Bill to specifically broaden and converge communication policy considerations to include all communication-related policy, and not just telecommunications. Such a change in focus is illustrated in the calls to expand the Authority's title to include the notion of Electronic Communications. Current practice and patterns indicate an even greater role for ICASA in the future, with increased technological advancements and greater convergence between the ranges of communication services available. In such a context, it is necessary for legislation, including the ICASA Amendment Bill, to pay specific attention to facilitating the effective and efficient operation of the Authority as a watchdog over the broadcasting and telecommunications sectors.

As it currently stands, the Bill poses a number of questions relating particularly to the independence of the Authority and the appointment of councillors. This submission focuses on central issues related to independence, which the MMP submits, are crucial for the current and future operations of ICASA. The undermining of ICASA's independence and lack of emphasis on public and civil society participation in the Amendment Bill is partially explained in the Memorandum on the Objects of the Independent Communications Authority of South Africa Amendment Bill of 2005. Under Consultation there is no evidence or mention of civil society or public consultation in the process to date.

## Independence

Of particular concern is the proposed amendment to the title of the Authority through the deletion of the word "independent" from the official name, as mentioned throughout the Bill, and specifically proposed in Chapter II. The ICASA Act of 2000 established ICASA as an independent regulatory body out of the amalgamation of the Independent Broadcasting Authority (IBA) and the South African Telecommunications Regulation Authority (SATRA). While the independence of the new structure formed was explicitly recognised in the naming process, it would appear as if the Amendment Bill has removed any reference to such independence, by renaming the Authority as the Electronic Communications Authority of South Africa. There would also appear to be no justification for such a decision.

In fact, the issue of the independence of the newly named Electronic Communications Authority of South Africa is only mentioned in the preamble to the Bill, which states: "Acknowledging that the establishment of an independent body to regulate broadcasting and communications is required." The notion of independence is not discussed anywhere within the content of the Bill. The intention behind removing the word "independent" is also not clear, as it is uncertain whether such a deletion represents a deliberate attempt to negate the independence of the Authority, or whether it is felt that such independence is guaranteed elsewhere.

In this regard, the MMP submits that the deletion of the term "independent" from the title of the Authority is a matter of great concern. The MMP believes that such an amendment does not merely constitute a cosmetic change. It is submitted instead that the envisaged deletion of the term "independent" from the name of the Authority poses serious material danger to the continued effective and efficient functioning of the Authority, as an impartial and unbiased monitor, regulator, and arbitrator of the broadcasting and telecommunications sector in South Africa.

Human rights considerations necessitate a media industry that is accountable to the public and able to represent the views, opinions, and lives of the whole South African population in a fair, balanced, and equitable manner. Ensuring independent expert appraisal of the performances of the country's broadcast media in meeting their public service obligations is a crucial mechanism through which to gauge the performance of public service, private, and commercial broadcasters, on an equal footing.

Fair, balanced and equitable regulation of the broadcasting and telecommunications sector requires an Authority that provides equal treatment to all broadcasting and telecommunication entities in South Africa without undue influence from external parties. While the original legislation was informed by such concerns, the removal of the notion of independence (as detailed in Chapter II of the Amendment Bill) would seem to run counter to the constitutionally enshrined purpose of the Authority, as

set out in Chapter 9 of the South African Constitution. In this regard, clause 192 of the Constitution clearly and purposefully states: "National legislation must establish an *independent* authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society" (South African Constitution, own emphasis).

In addition, the Bill, while calling for the deletion of the word "independent", fails to provide any explanation as to the reasoning for such an amendment. There is also no indication of how such an amendment would be accommodated under the current South African constitutional order, which sets out the independence of the authority from both political and commercial interests.

In light of South Africa's political past, and concomitant patterns of ownership and control, it is vital that the institutions established to regulate broadcasting in South Africa continue to operate and be seen to operate independently from government control and the influence of business. Calls for the retention of independence have become even more relevant within the context of current debates surrounding the independence of the South African Broadcasting Corporation (SABC).

While it may be felt that such specific reference to independence is not necessary, and that independence would still be possible with the current wording, the MMP submits that without the inclusion of the word independent, unwarranted external pressure might be placed on the Authority. The MMP, therefore, submits for the retention of the concepts of impartiality and neutrality, as accounted for by the use of the word independent. It is submitted that the Authority should be renamed as the Independent Electronic Communications Authority of South Africa.

### **"Yes, Minister": Yielding independence to the minister**

The new Bill appears to represent an improvement on earlier legislation in terms of transferring decision-making powers from the minister and Department of Communications, into the hands of the regulator itself. However, in detailing the process to be followed in appointing people to the council of ICASA, the Bill makes it clear that the eight council members and the chairperson of the council will now be appointed directly by the minister, following a notice in the Government Gazette (Chapter II, Section 5).

Such developments present a significant deviance from the nomination process regulated under the Act of 2000. The 2000 Act placed the responsibility of appointing council members on the National Assembly, following the completion of a public nomination process and an extensive process of broader consultation with industry stakeholders and the general public. The Amendment Act, however, takes this power away from the national assembly and the public, and places it firmly in the hands of the minister. While the Amendment Act offers some level of distance from the minister through the appointment of "an independent and impartial



selection panel" (Section 5(b) 1A), this is insufficient. The amendment is further concerning when it is considered that the principles of transparency and openness, as outlined in Section 5 of Act 13 of 2000, have also been removed.

The MMP submits that the amendments outlined in this regard, under Chapter II, Section 5 of the Amendment Bill, are to be seen as limiting public discussion and participation, rather than as a progressive move to improve the functioning of ICASA. It would appear as if the democratic principles of public participation, inter-party discussion, openness and transparency, as contained in the original Act, have been replaced by a more top-down approach, in which councillors are appointed by and accountable to the minister, rather than to the South African public.

It is crucial for ICASA council members to be drawn from as wide a range of interests and organisations as possible. It is also imperative that a diversity of opinions, knowledge, experiences, and views are represented on the ICASA council. Good media policy and regulations look to the future. While the current minister would clearly not act in a way that would serve to undermine the independence of ICASA, it is essential that policies and regulations that are designed and developed now have sure-fire mechanisms built into them to ensure that less scrupulous ministers' attempts to undermine the independence of the communications sector are thwarted, and not aided and abetted, by legislation.

Democratic consolidation in the electronic media sector requires the active participation of media sector role-players, civil society groupings, opposition political parties, academic and policy think tanks, and the general public. It is crucial for these sectors, as well as government's input to be heard in the nomination and appointment process of the independent regulator's council members. However, as it is currently outlined, the process would seem to limit the impact that such groupings can have in deciding the composition of the council of ICASA.

The MMP submits that the current clauses laid out in the Act 13 of 2000 are retained, and endorsed by the Amendment Bill. The concern of ministerial interference and the undermining of ICASA's independence is serious, and it is not only the change of the name and the appointment of council members that has led the MMP to make this submission. The Amendment Bill is riddled with instances that undermine ICASA's independence, in most instances, by the minister. The inclusion of Section 6A, performance management system, in the Amendment Bill, places a direct managerial function in the hands of the minister. The MMP strongly supports the development of a performance management system, but would like to stress that as this would comprise a direct managerial function, not only is it ill placed in the minister's hands, but it also serves to further undermine the independence of ICASA.

The amendment of Section 9 of Act 13 of 2000 serves to place further control in the minister's hands by removing from the national assembly the power to appoint councillors for longer periods of time. The insertion of Section 14A, appointment of

experts, provides an example of a governance issue being placed in the minister's hands. The section requires:

Where an expert contemplated in subsection (1) is not a citizen or permanent resident of the republic, the minister must approve the appointment before such expert is appointed (Section 14A (2)).

Given that this section only applies to non-South African residents, it appears not only unnecessary, but may also be interpreted as xenophobic. The MMP submits that if the appointment of international or non-permanent South African residents is a crucial governance issue, these decisions be made by the councillors.

Schedule 1 of the Amendment Bill sets out a litany of instances where the regulator's authority is replaced by the minister, or described as "subject to the approval of the minister". This includes the amendment of Section 19 of the Postal Services Act, where, instead of going to the regulator, licence fees will go to the department.

The MMP submits that the Amendment Bill include specific regulations that encourage wider consultation, greater transparency, openness, and increased accountability in the process of appointing ICASA's council members and in the operations of ICASA. In the interests of democratic governance principles and in line with the South African Constitution, it is essential that the legislation enacted represent a balance of power and control. Such considerations should inform the provisions contained in the ICASA Amendment Bill.

## Hearing complaints

The MMP welcomes the establishment of a Complaints and Compliance Committee (CCC), but seeks clarity on the following issues:

- It is not clear whether the envisaged CCC is to take over the role of the former Broadcast Monitoring Complaints Commission (BMCC);
- It is not clear how the envisaged CCC will operate with the current self-regulatory Broadcasting Complaints Commission of South Africa (BCCSA), or whether the CCC is intended to replace the BCCSA;
- The role of inspectors, as outlined in Section 17B, is not clear. There appears to be overlap between the functions of the inspectors and the functions of the CCC.

The MMP welcomes the inclusion of requirements for the appointment of the members of the CCC, but notes the exclusion of civil society or non-governmental organisation (NGO) experience as one of the key criteria envisaged in Section 17A (4)(a). The MMP, therefore, submits that civil society movement or related NGO experience is included. The MMP also welcomes Section 17A (4)(c), which excludes office bearers, employees of political parties, movements or organisations of a party-political nature from the list of possible CCC members. However, the MMP would



like to submit that significant commercial and business interests could also have substantial material impact on the CCC member's ability to adjudicate in a free, fair, balanced, and impartial manner. The MMP, therefore, submits that potential commercial interference is also included as exclusionary criteria for CCC members.

## Conclusions

The MMP recognises that amendments to the mandate and obligations of the Independent Communications Authority of South Africa, as outlined in the ICASA Amendment Bill of 2005, are necessary, following the rapid technological advancements witnessed since the ICASA Act of 2000.

The MMP is concerned that the Amendment Bill is blind to issues of gender equality, children, race and racism, and HIV and AIDS awareness. The MMP submits that these considerations be mainstreamed in the Amendment Bill. The MMP would be happy to assist the Portfolio Committee in the mainstreaming of these critical social issues.

The MMP's submission has focused on the undermining of the independence of the Authority through:

- The removal of the word "independent" from the Authority's title;
- The appointment of new councillors by the minister;
- Active ministerial involvement in ICASA's day-to-day governance and managerial processes;
- The repositioning of final authority not with ICASA, but with the minister;
- The exclusion of principles of openness, transparency, and public and civil society participation;

In addition, the MMP seeks clarification on the operations and intention behind the Complaints and Compliance Committee, and submits that further clauses be included to ensure better operation of the committee.

The MMP's submission has shown that additional amendments are necessary, in order to permit the Authority to continue its sterling work in regulating the public service, private, and community electronic media sectors, as well as in the realm of telecommunications. The MMP would like to reiterate the need to retain not only the word "independent" in the new title of the Authority, but also the principles and realisation of independence.



Should you require further information, please do not hesitate to contact the MMP. The MMP would also welcome the opportunity to make an oral presentation of this submission to the Portfolio Committee.

Yours sincerely

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Media Monitoring Project