

ORAL SUBMISSION BY

MEDIA INSTITUTE OF SOUTHERN AFRICA – SOUTH AFRICA

[MISA-SA]



TO

**THE PORTFOLIO COMMITTEE ON COMMUNICATIONS ON THE
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
AMENDMENT BILL, GAZETTE NO. 28050 OF 20 SEPTEMBER 2005**

DATED 24 OCTOBER 2005

SUMMARY

Introductory remarks on the presentation by the South African Chapter of the Media Institute of Southern Africa to the Parliamentary Portfolio Committee on Communications on the ICASA Amendment Bill

By Raymond Louw, Deputy Chairperson of MISA-SA.

Thank you, Mr Chairman, for providing this opportunity to present our views on this important piece of legislation.

Our concerns over the Bill relate to what we perceive to be a diminution of the independence of this institution.

This is a Constitutional Chapter 9 institution, which should be able to exercise its powers independently of the government. The change has been brought about by proposing the renaming of the “independent” in various key sections of the Bill. Indeed there has been an over-emphasis on a lack of independence for the institution. We point out that the name of Electronic Communications Authority is inappropriate given that the regulator will now have a post office portfolio to deal with, a service which is not necessarily electronic and indeed has a strong physical delivery feature.

Another concern is that the Bill gives too much power to the Minister. There are a number of instances where the Bill proposes that the Minister decides on matters, which should be handled independently by the regulator.

One example is the need for ministerial approval should Icasa call on the services of a non-resident adviser or consultant -- a matter which should be within the powers of the regulator who, should there be any inappropriate conduct by the consultant or the regulator, would then be held accountable by parliament. We have also noted with concern that the Bill proposes greater centralisation of power in the hands of the Minister, which detracts from the authority of the regulator.

We noted in our representations on the draft Convergence Bill a similar trend of giving too much power to the Minister.

We say that the proposals contravene Chapter 9 of the Constitution in that the Constitution calls for an independent regulator and the Bill removes this independence. We are surprised that this Bill should have come before parliament at this particular time. South Africa is about to undergo an assessment under the African Union's NePAD African Peer Review Mechanism for good governance. The APRM is to review practices in SA and conduct by government which uphold democratic principles but here we have a Bill which detracts from democratic principle.

Indeed a number of international protocols and standards to which South Africa has subscribed and which are mentioned in our lengthy presentation to this committee insist that broadcasting and radio should be regulated by an independent body. For the independence of the regulator to be severely reduced or removed just at this time when the APRM is getting into its stride can only be regarded as extremely bad timing and could result in the APRM process making an adverse finding against SA.

I now hand over to Rene Smith to make our formal presentation.

1. INTRODUCTION

The Media Institute of Southern Africa (MISA) is a regional, member-driven, non-governmental organisation with eleven chapters in the SADC region, coordinated by a regional Secretariat. The network of national chapters aim - through monitoring, training, capacity building, research and the distribution of information - to foster free, independent and diverse media throughout southern Africa in the service of democracy and development as stated in the Windhoek Declaration of 1991 and African Charter of Broadcasting of 2001. The South African Chapter of MISA (MISA-SA) is involved in partnerships and consultative networks, in pursuance of the above-mentioned goals.

MISA's programme areas include:

Freedom of Expression and Right to Information;

Media Freedom Monitoring;

Campaign for Broadcasting Diversity;

Media Support Activities; and

Legal Support.

On 02 October 2005 the Portfolio Committee on Communications published a Request for Submissions on the Independent Communications Authority of South Africa (ICASA) Amendment Bill. The public notice did not specify a deadline for public comment, which was subsequently set for 10 October 2005. MISA-SA would like to register its concern regarding this process as the public should have been afforded sufficient time to input/make public submissions. It is worth reiterating the Convergence Bill process – however exhaustive, owing to the high number of submissions received – demonstrated the public's interest in participatory democratic processes. Indeed, as mentioned previously, the public should have had sight of both pieces of legislation at the time of submissions on the Convergence Bill.

As a lobby and advocacy organisation promoting media diversity, pluralism, independence, self-sufficiency and freedom of expression, MISA-SA's primary concern

vis-à-vis the ICASA Amendment Bill (the Bill) is the need to maintain and defend the independence of the regulator from all forms of interference. This, we believe, is critical to ensuring independent, fair regulation in the public interest.

MISA-SA's oral submission will amplify comments raised in our written submission and will be delivered by Mr Raymond Louw (Deputy Chairperson, MISA-SA) and René Smith (Researcher: Broadcasting Diversity)

2. GUIDING PRINCIPLES

In making these submissions to the Portfolio Committee on Communications, MISA-SA is guided by the principles contained in the following national, continental and universal instruments:

2.1 The Constitution of the Republic of South Africa 1996, section 192 and section 16:

Section 192

"Broadcasting Authority - Independent Authority to Regulate Broadcasting: National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of use broadly representing South African society."

Section 16

- "(1) Everyone has the right to freedom of expression, which includes –*
- (a) freedom of the press and other media;*
 - (b) freedom to receive or impart information or ideas;*
 - (c) freedom of artistic creativity; and*
 - (d) academic freedom and freedom of scientific research.*
- (2) The right in subsection (1) does not extend to –*
- (a) propaganda for war;*

- (b) *incitement of imminent violence; or*
- (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

2.2 **The African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa (2002)¹:**

1. *"Any public authority that exercises powers in the areas of broadcast or telecommunications regulations should be independent and adequately protected against interference, particularly of a political or economic nature.*
2. *The appointments process for members of a regulatory body should be open and transparent, involve the participation of society, and shall not be controlled by any particular political party.*
3. *Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body."*

2.3 **Article 19 of the Universal Declaration of Human Rights²**

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

2.4 **The African Charter on Broadcasting (2001): Part 4 Telecommunications and Convergence³:**

1. *All formal powers in the area of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by*

¹ The Declaration can be found at <http://www.article19.org/docimages/1600.pdf>

² The text can be found at <http://www.un.org/Overview/rights>

³ The Charter can be found at <http://www.misa.org>, or <http://www.chr.up.ac.za/hr/docs/african/docs/other/other4.doc>. See also: AU, Bamako Declaration 2002, UNESCO.

among other things, an appointments process for members, which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.

2.5

3. COMMENTS ON SPECIFIC SECTIONS IN THE BILL

3.1. PREAMBLE - Amendments and Insertions to / in the ICASA Act 13 of 2000

3.1.1 According to the proposed amendments to the Preamble of the ICASA Act, the term ‘communications’ would replace ‘telecommunications’. It follows then that ‘communications’ can be understood to incorporate electronic transmission including telegraph, telephone, mobile phones, radio and television for example. Reference to ‘broadcasting’ would thus be redundant.

3.1.2 The term communication is an all encompassing one, which refers to all forms of information or data emission, transmission and reception – including broadcasting and telecommunications. Consequently, MISA-SA proposes the following:

3.1.2.1 **“Recognising** that technological and other developments in the **[fields of broadcasting and telecommunications] communications field**⁴ are causing a rapid convergence of these fields;

3.1.2.2 **Acknowledging** that the establishment of an independent body to regulate **[broadcasting and telecommunications] communications** is required.”

3.1.3. Significantly, these proposed amendments are consistent with amendments to section 2(b) of the principal Act, which states: “regulate **[telecommunications] communications** in the public interest”.

3.1.4 In light of the Bill’s proposed inclusion of the Postal Services in ICASA, it remains critical to reflect communication in the broader sense instead of just “electronic communication” as postal services include hand-delivered mail and not just

⁴ Bold, underline indicates an insertion by MISA-SA, while bold, square parenthesis indicates delete.

telegraphs and telegraphy (electronic transmission of mail). Therefore, Independent 'Communications' (Authority) in the title ICASA - should not be changed. The current title reflects regulation of communications in the broader sense, inclusive of broadcasting, telecommunications and postal services.

3.1.5 Moreover, the objects of the Amendment Bill does not - and should - refer to the inclusion of the Postal Regulator established for by the Postal Services Act (124 of 1998) and should be amended to provide for such services:

3.1.5.1 "To amend the Independent Communications Authority of South Africa Act, 2000, so as to amend certain definitions and insert certain new definitions; to determine in greater detail the function of the Authority; to consolidate certain powers and duties of the Authority; to provide for inquiries by the Authority; to amend the procedure for the appointment of councillors; to further regulate the financing of the Authority; to provide for the establishment of a Complaints and Compliance Committee; to provide for the creation of new offences and penalties; **to provide for the inclusion of the South African Postal Services under ICASA's authority; [and]** to amend the short title; and to provide for matters connected therewith."

3. 2. CHAPTER II

ICASAs Independence

- 3.2.1 The term “Independent” in the title ICASA must be retained. It has been part of the title of ICASA and its predecessor, the IBA, for more than 10 years. This has emphasised the independent nature of this institution, and is something, which the public expects. This independence was campaigned for before 1994 by the Campaign for Open Broadcasting whose wide membership included representatives of the current ruling party and whose principles and many of its recommendations were accepted by CODESA.
- 3.2.2 ICASA’s independence is provided for by section 192 of the Constitution of the RSA (1996). Such independence is not only a requirement of section 192 of the Constitution of the RSA but is a requirement under the (African Union’s) Declaration (see Guiding Principles) endorsed by all democratic states and SA’s civil society. Not only is the emphasis on independence lost by removing the term ‘Independent’ from the title but significantly, it will not be seen to be functioning “*without any political and commercial interference*” (section 3(4) of the ICASA Act).
- 3.2.3 The independence of the regulator as provided for in Chapter Nine of the Constitution is confirmed by section 3(3) of the ICASA Act (13 of 2000) which states: “*The Authority is independent, and subject only to Constitution and the law, and must be impartial and must perform functions without fear, favour and prejudice*”. This reflects clearly section 181(2) of the Constitution: “*These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*”.
- 3.2.4 It is important to note, this guarantee is also provided for in statutes of other Chapter Nine institutions. Significantly, the Commission on Gender Equality Act (1996) has a specific section dealing with Independence:

“10.1. a. *The Commission shall be independent.*”

b. A member of the Commission as well as a member of the staff of the commission shall perform his or her functions in good faith without fear, favour, bias or prejudice.

3.2.5 Similarly, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act (2002) - concurring with section 181(1) (c) of the Constitution - provides for that Commission's independence and impartiality (cf. section 3(a)-(c)). And, the same is true for the Electoral Commission (cf. section 3(2) of the Electoral Commission Act (1996).

3.2.6 MISA-SA submits further that in keeping with the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa (2002) (see above: Guiding Principles), the process of selecting councillors must be independent of political or other influences – consistent with open and transparent regulation. MISA-SA thus proposes the following approaches as alternatives to the proposed amendments vis-à-vis the appointment of Council members:

3.2.6.1 The adoption of a process, which includes a selection committee comprising eminent persons from civil society, which are nominated by the public and decided upon by the President, who would also select a retired judge of the Appellate Division of the Supreme Court to act as a Chairperson. ICASA would thus be accountable to this independent panel, whose Chairperson in turn, would account to the National Assembly and the President.

3.2.6.2 In keeping with Chapter Nine of the Constitution, the process of appointment of persons to the regulator's Council must be on recommendation of the National Assembly. Moreover, the National Assembly – and not the Minister – should be responsible for ensuring Council fulfils their duties according to agreed upon performance management criteria. This is clearly set out in section 181 (5) of the Constitution: “[t]hese institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year”.

- 3.2.6.2.1 Indeed, the role of the National Assembly in the appointment & removal process is evident in the Electoral Commissions Act (cf. s (2) (c) & (d); s 3(a) (ii) & (iii) and sections 2 (c) and 5 (b) of the Commission on Gender Equality Act. Significantly, appointments follow a *public process*, which includes the Minister inviting interested parties to nominate candidates - through the media and the government Gazette.

3.3. Substitution of section 4 of the ICASA Act 13 of 2000

3.3.1 In pursuance of its mandate to “regulate communications in the public interest” (cf. section 2(b) of the Bill), ICASA ‘*must*’ be allowed to make recommendations to the Minister. In this respect the public expects the regulator to provide input on policy matters. The public also expects the Minister in turn to consider these recommendations and to demonstrate consultation with the independent regulator of communications.

3.3.2 In consolidating the powers and duties of the Authority, the Bill must state clearly, ICASA’s duties to develop regulations in accordance with the objects of the Bill. MISA-SA proposes the following amendments to section 4(c) be the following:

3.3.2.1 (3) Without derogating form the generality of subsection (1), the Authority –

(a) [may] **shall** make recommendations to the Minister on policy matters and amendments to this Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote development in the postal and communication sectors;

(b) the Minister shall communicate a response to the Authority within 60 days;

(c) the Authority shall develop regulations and guidelines in accordance with the objects of this Act and underlying statutes;

- (d) [must] **shall** grant, renew, [and] amend **and revoke licences in accordance with the objects of this act and underlying statutes;**
- (e) [must] **shall manage the radio frequency spectrum in accordance with bilateral agreements and international treaties entered into by the Republic**
- (f) [must] **shall** monitor the [postal and] communication sectors to ensure compliance with this Act and underlying statutes;
- (g) [must] **shall** develop and enforce licence conditions consistent with the objects of this Act and the underlying statutes for different categories of licences;
- (h) [must] **shall** approve technical parameters ...
- (i) [must] **shall**, by notice in writing ...
- (j) [must] **shall** conduct research on all matters affecting the [postal] communication sectors ...
- (k) may attend conferences, **which contribute to the fulfilments of the Authority's mandate** [convened by ...party].

3.3.3 MISA-SA submits, that while section 4(5) refers to the chairperson of Council explicitly, there exists no compelling reasons for the title "Functions of the Authority" to reflect "Functions of the Authority and chairperson". The current phraseology creates the impression that the chairperson of the Council is distinct/different from the Authority, when in fact the Chairperson forms part of the Authority.

3.3.4 MISA-SA is concerned by the insertion of section 4C (5) (c) in Act 13 of 2000 in so far as it provides for an in-camera hearing decision to be taken by any councillor rather than the Chairperson of Council. Moreover, MISA-SA proposes the inclusion of a provision for review of any of the decisions made in terms of 4C (5), particularly 4C (5) (c):

3.3.4.1 **A decision excluding the public from an inquiry is subject to the right of appeal by an interested party.**

3.4. Substitution of section 5 of Act 13 of 2000

3.4.1 MISA-SA is of the opinion section 5(1) of Act 13 of 2000 must be retained except in so far as the inclusion of the Postal Services would necessitate an additional two members of Council.

3.4.2 MISA-SA is particularly concerned by the omission of the following clauses, which demonstrate a more inclusive, public, participatory and democratic process:

Section 5 (1)

(a) participation by the public in the nomination process;

(b) transparency and openness; and

(c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.

3.4.3 MISA-SA does not support the proposed insertions, in Act 13 of 2000, after subsection (1). MISA-SA is opposed to the amendments to section 5 (1) as the current amendments will grant further powers to the Minister over what should be an independent and impartial process and create the impression the public's mind, that ICASA is not an independent and impartial organisation but one appointed by the Minister as an appendage of the Ministry – a government department in fact. The power to appoint the Chairperson should be vested in the proposed selection panel (cf. s5 (1A)).

3.4.4 While the selection panel proposed by the insertions (cf. s5 (1A)) to section 5 of Act 13 of 2000 sounds similar to the one proposed in section 3 (ii) of this submission, MISA-SA contends that the process of selecting and appointing a panel must be done by a "multi party body" as espoused by the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa (2002): *"Any public authority that exercises*

powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body."

3.4.5.1 To this extent, MISA-SA proposes the following:

3.4.5.1.1 5(1A) (a) Whenever it is necessary to appoint a chairperson or other councillor, the [Minister] **Portfolio Committee on Communications shall** appoint an independent and impartial selection panel consisting of five persons, who have an understanding of issues relating to the [postal and] communications sectors, **made after interviews conducted by the committee in public, from a shortlist of no more than ten people selected by the committee.**

3.4.6 MISA-SA is particularly concerned by provision (1C) "If the Minister is not satisfied that the persons recommended by the panel comply with subsection (3), the Minister may request the panel to review its recommendation". This provision could be misused by an ongoing process of referral until the individual/s selected conforms to the Minister's interest. This provision must be deleted so as to avert the potential for legal action and the loss of public confidence in what is supposed to be an impartial and independent process.

3.4.7 With regards to the clause relating to qualification of councillors, MISA-SA is of the opinion section 5(2) (d) (ii) should be reworked to reflect expertise in one or more of the communication fields listed.

3.5. Insertion of section 6A in Act 13 of 2000

3.5.1 MISA-SA contends operational control of ICASA should be vested in hands of the Council and CEO of ICASA. The latter of which is accountable to the former, which in turn is accountable to the National Assembly, which would be in keeping with section 181 (5) of the Constitution. The current proposals merely entrench control by the Minister of Communications on the operational functioning of the regulator and should be expunged accordingly.

3.6. Amendment to section 7 of Act 13 of 2000

- 3.6.1 With regards to section 7(3)(d), the requirement that a councillor tender his/her resignation to the Minister is another example of undesirable ministerial control over ICASA and the reduction of the body's independence which is contrary to its Constitutional status as independent. See also, comments in section 3.2 above.

3.7. Amendment to section 8 of Act 13 of 2000

- 3.7.1 In keeping with the aforementioned comments vis-à-vis section 181 (5) of the Constitution, MISA-SA contends subsections (2) and (3) of section 8 should not be deleted. A councillor's "removal from Office", should be upon the finding of and the adoption of a [*unanimous*- our emphasis] resolution by the National Assembly. See also, comments in section 3.2 above.

3.8. Amendment to section 9 of Act 13 of 2000

- 3.8.1 MISA-SA calls for the retention of National Assembly instead of Minister. This is perceived as another example of undesirable ministerial control over ICASA and the reduction of the body's independence, which is contrary to its Constitutional status as independent.

3.9. Insertion of section 14A in Act 13 of 2000

Appointment of experts

- 3.9.1 MISA-SA of the view the regulator should be allowed to appoint experts, where necessary, in pursuance of its duties. There exist no compelling reasons as to why the provisions of section 14A (1) should not extend to experts who are "not a citizen of the Republic or permanent resident of the Republic". This could be perceived as another attempt to exercise ministerial control over ICASA and the reduction of the body's independence, which is contrary to its Constitutional status as independent.
- 3.9.2. MISA-SA is of the opinion this operational decision should be sanctioned by the CEO and ratified by Council.
- 3.9.3 MISA-SA proposes the removal of additional 'and' before expert in section 14A (3).

3.10. Insertion of section 14C in Act 13 of 2000

3.10.1 MISA-SA is deeply concerned about the wording of section 14C, which appears to impose unacceptable censorship on councillors and officials. The clause is contrary to the concept of transparency and open government as outlined in the Constitution and casts an aura of undesirable secrecy over the conduct of affairs by ICASA. Councillors and officials must be able to impart information about the conduct of ICASA and its affairs and to respond to questions from the public and the media about those affairs.

3.10.2 There is a case for the maintenance of confidentiality of 'confidential' information relating to ICASA and its affairs (for e.g. matters pending ratification by Council) and this section should be reworded to make provision for such confidentiality to be maintained with the qualification that it may be disclosed when so ordered by a competent court of law or when disclosure is required or made permissible by any law. In any event, confidential information (pertaining to licensing processes for example) submitted to the Authority is provided for in section 4D.

3.11 Amendment of section 15 of Act 13 of 2000

3.11.1 MISA-SA supports the provision (section 15 (1A)) pertaining to additional avenues for funding as the regulator's ability to effectively execute its duties has been affected by capacity and funding challenges.

3.11.2 In entrenching the regulator's independence, MISA-SA proposes negotiations should be between the Portfolio Committee on Communications and the Minister of Finance instead.

3.12. Insertion of sections 17A-H in Act 13 of 2000

3.12.1 MISA-SA is particularly concerned by provisions, which grant powers to inspectors, which could interfere with the editorial independence of broadcasters. MISA-SA finds it difficult to comprehend why there should be a necessity for inspectors to be given such wide ranging powers to enter, search and seize materials and documents as if they were police officers. It is certainly

undesirable that they should have these powers over broadcasters with the danger they pose of interfering with editorial freedom and we believe they might be excessive for the commercial and administrative branches of broadcasters and the postal services.

3.12.2 MISA-SA is also concerned by the size of the penalties, which we believe to be excessive. The justification for imposing such heavy penalties must be explained before a standard fine of up to R1 000 000 is inserted in the legislation.

3.12.3. We propose sections 17A-H insertions be reconsidered to make them more palatable and appropriate to current conditions.

3.12.4 Moreover, MISA-SA proposes a provision pertaining to the appointment of a Deputy Chairperson of the Complaints and Compliance Committee be included in section 17A (3). In addition, the length of term should be stipulated and a limit of two terms placed on the number of terms all members, including the Chairperson and Deputy Chairperson, are allowed to serve.

3.13. Substitution of section 25 of Act 13 of 2000

3.13.1 MISA-SA notes again the disappearance of Independent from ICASA's title and its replacement by Electronic, which we oppose on the grounds stated above.

3.14 Laws Amended or Repealed –Act 124 of 1998

3.14.1 MISA-SA requests clarity as to why an application for reserved postal services should be made only on invitation by the regulator. We fail to see why an application should not be made by a person or company, which feels competent to carry out such a service, without having to seek an invitation to do so.

4. CONCLUSION

5. 4.1 MISA-SA wishes to thank the Portfolio Committee for the opportunity to make submissions on the ICASA Amendment Bill.

6. **ENQUIRIES TO:**

5.1 Raymond Louw, Deputy Chairperson, MISA-SA,

5.2 Tusi Fokane, National Director, MISA-SA, or

5.3 René Smith, Researcher/ Broadcasting Officer, MISA-SA

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