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Re: Icasa Amendment Bill

1. The Freedom of Expression Institute became aware of the date of written submission, which, according to the information that we received from informal sources, was the 7th of October 2005.
2. While careful not to make sweeping statements the FXI would like to express concern at the short time given for public comment. We note that the Bill was released on the 20th September 2005. The date for submission (the 7th October 2005, if correct) clearly was not sufficient to give the public adequate time to prepare submissions. Nonetheless, we would like to express our interests and keenness to form part of the public debate that will ultimately formulate the new Icasa Act. To this end we submit our request.
3. Given the short period of time given to produce satisfactory and thoroughly written submissions we submit here only the main points that we would present in a our main submission, which we hope to submit in a few weeks time.
4. The major point for the FXI is the seeming increase in the powers for the ministry of communications over the regulator. It would seem to us that the Bill, once translated into an Act, will effectively lead to the ministry of communications having more powers than is currently the case over regulation.
5. It is our considered view that increased powers for the ministry will effectively lead to a less efficient and independent regulator than we currently have.
6. The Bill makes serious incursions into the independence of Icasa's Council, whose composition will now be determined by the Minister on advice of an 'independent' panel. While this process may have been proposed to address some of the deficits of the existing Portfolio Committee-based system, it introduces another layer of problems that may negatively affect the independence of Icasa as a whole.

7. The fact that the Minister will appoint an independent panel does not rescue the integrity of the process, as the Minister will decide which Councilors to appoint based on recommendations from the panel, which will produce a shortlist. This means that in reality the panel is not independent, as it does not have the powers to make decisions about who should be appointed and is therefore of little use in ensuring the independence of the selection process. The impartiality of the individuals involved will therefore be overridden by the Minister, even if they make adventurous and politically controversial recommendations (they may recommend a candidate that is highly critical of the performance of the Ministry of Communications, for instance, but who fits the bill in every respect).
8. The process may lead to situations where such politically controversial candidates, who may be perfect for the position except in spite of the fact that they may be unpopular with the Ministry, may be eliminated from the process in anticipation of them creating too many headaches for the powers that be once they are in the regulator. Therefore while the proposed process has the semblance of credibility, in reality it will probably be bedevilled by damaging controversy over the politics of the successful candidates, who will still be considered in the public domain to be Ministerial appointments. This may well result in uncontroversial and uncritical candidates being appointed, which will probably translate into a timid and tame regulator unwilling to stand up and be counted when it may be necessary to contest aspects of Ministerial policy (as was the case with an earlier price cap review). The regulator needs strong, independent Councilors who are willing to stand up to pressure from both the government and the private sector.
9. The regulator is, after all, supposed to act as a watchdog of the public interest in the communications sector, which is why it has been included in the constitution as an oversight body to assist Parliament in assessing the performance of the Executive. This requires it to be as independent of the main line department that it supposed to watchdog, namely the Department of Communications. It will be unable to perform this function without fear of favour if the very Department has the power to select Councilors and monitor their performance.
10. Another sensitive matter that, while not necessarily a technical/legal matter, and therefore might be difficult to argue within the confines of lawmaking, is the transfer of the postal regulation staff from the DoC to Icasa. At face value this might not present any serious problem, other operational/logistical arrangements and challenges. However, it might be worth to consider the political ramifications of 'cultural' changes, from a government department, whose operations are openly politically

aligned to one (the regulator) which must, because of its nature, try to remain independence even though advancing the broader transformation agenda that even the government must be party to. It may as well turn out that the directorate (postal) might either struggle to 'fit into' the culture at Icasa or may unconscious try to influence. This should be looked into quite carefully.

11. On the other the Bill makes provision for the creation of the Complaints and Compliance Committee. If structured well this will serve as a good innovation for the regulator.
12. We submit this short document to express our desire to participant in the public hearings and any other processes.

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