



RIGHT2KNOW

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Attention: Ms M Mphahlele
Chief Director: Economic Policy Development
ICT Policy Development
Department of Communications
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Submission by the R2K Campaign, Proposed ICASA Amendment Bill, 2012

1 Introduction

- 1.1 The Department of Communications (DoC) has invited written comments on the proposed Independent Communications Authority of South Africa Amendment Bill 2012 (Notice No 970, *Government Gazette* Vol 569 No 35901, 23 November 2012).
- 1.2 The Right2Know Campaign (R2K) launched in August 2010 to contribute to seek a country and a world where we all have the right to know – that is to be free to access and to share information. This right is fundamental to any democracy that is open, accountable, participatory and responsive; able to deliver the social, economic and environmental justice we need.
- 1.3 R2K welcomes the opportunity to engage with the Department of Communications, and requests to make an oral presentation, should public hearings be held on the proposed Bill.
- 1.4 R2K believes that it is essential that we have a strong, independent Independent Communications Authority of South Africa (ICASA). Simply put the Campaign believes that without a strong ICASA, R2K's vision for entrenching the right to communicate will not be realised in the current context.
- 1.5 ICASA needs to systematically drive down telecommunication costs and create a broadcasting landscape conducive to the thriving of a host of diverse players including in particular public and community players. Further, it needs to rigorously enforce local content quotas and African language programming. To play this role ICASA needs to be strong, independent and well-resourced.

- 1.5 In terms of resourcing issues, R2K wants to place on record its deep concerns about government's systematic underfunding of ICASA. The Campaign believes that this is one of the key reasons for ICASA's weakness and inefficiencies the proposed Bill seeks to address. The Campaign believes that one of the first issues that needs to be addressed is adequate resourcing of our Regulator.
- 1.6 R2K will not necessarily address every issue in the proposed Bill, but will focus on the areas we consider most important. These include:
- the relationship between the proposed Bill and the recently launched ICT Policy Review Process;
 - regulatory independence, ICASA, the Minister and sector policy; and
 - the Complaints and Compliance Commission.

2 The Proposed Bill and the ICT Policy Review Process

- 2.1 The R2K Campaign is deeply concerned that this proposed Bill contains amendments that go far beyond mere technical adjustments. The Bill introduces substantial and far-reaching changes. These proposed changes include substantive revisions to the relationship between ICASA and the Minister. We believe these revisions are unconstitutional as they fundamentally undermine the independence of ICASA.
- 2.2 R2K believes that such far-reaching proposals signal a significant shift in policy. The Campaign therefore questions the timing of the tabling of this Bill in advance of the recently launched ICT Policy Review process. R2K understands that the ICT Policy Review has been instituted to "examine the policy and regulatory frameworks that apply to telecommunications, broadcasting, postal and e-commerce" and to "make recommendations [to the Minister] on... the appropriate ICT policy and regulatory framework" which will lead to Green and White Papers¹. The Campaign questions why this Bill has been tabled in advance of this important process.
- 2.3 R2K believes that the proposed Bill should be withdrawn in its entirety, pending the outcome and recommendations of the ICT Policy Review process.

3 ICASA's Regulatory Independence

- 3.1 There are a number of provisions within the proposed Bill that fundamentally undermine the independence of ICASA. Foremost amongst these is the proposed Section 4(4)(a), which requires ICASA to perform its functions "in accordance with sector policy and policy directions".
- 3.2 The effect of this new clause is to reduce ICASA to a mere implementation arm of the Department of Communications and of the Minister, with little or no discretion in the interpretation, consideration and implementation of policy.

¹ DoC (2012) 'Terms of Reference of ICT Policy Review Panel', Department of Communications, Pretoria, available online at http://www.doc.gov.za/index.php?option=com_docman&task=doc_download&gid=98&Itemid=104.

- 3.3 R2K believes that the structural independence of ICASA is crucial for the effective regulation of a converging ICT sector. The role of the Minister in relation to entities like Telkom, Sentech and so forth requires effective separation of ICASA from the Department of Communications and the Minister in order to avoid structural conflicts of interest. As mentioned above we believe that this is essential to ensure that our Campaign goal of ensuring the right to communicate is entrenched.
- 3.4 Further, R2K believes that provisions such as Section 4(4)(a) fundamentally undermine Section 192 of the Constitution. Section 192 requires the establishment of an “independent authority to regulate broadcasting in the public interest”.

4 Complaints and Compliance Commission

- 4.1 A second and equally substantial inroad into the regulatory independence of ICASA is the Bill’s proposal to abolish the Complaints and Compliance Committee (CCC) of ICASA. The Bill proposes the latter’s replacement by a Complaints and Compliance Commission.
- 4.2 Although R2K acknowledges that there are a number of problems with the effectiveness and efficiency of the CCC, the Campaign believes that this body should be strengthened rather than abolished.
- 4.3 The Campaign believes there are a number of substantive problems with the new proposed body. One of the key problems is that the latter lacks sufficient independence. For instance its proposed appointment process is problematic - appointments take place at the sole discretion of the Minister (Section 17A(1)).

5 Conclusion

- 5.1 R2K recognises that there are substantial problems with the functioning and effectiveness of ICASA as a regulatory institution.
- 5.2 R2K submits, however, that the ICT Policy Review Process is the correct forum through which to undertake a comprehensive assessment of these issues, and to formulate and adopt options to address them through a proper Green and White Paper process with full transparency and stakeholder consultation.
- 5.3 R2K calls upon the Department of Communications to withdraw the proposed Bill in its entirety, pending the recommendations of the ICT Policy Review Process.
- 5.4 As part of the policy review process, R2K urges the Department to look at the key issue of funding. The Campaign believes that many of the capacity and inefficiency issues plaguing the Regulator could immediately be solved by putting a new funding model in place that ensures independent, long-term, sustainable funding.
- 5.5 R2K thanks the Department of Communications for the opportunity of making these comments on the proposed Independent Communications Authority of South Africa Amendment Bill 2012.
- 5.6 For further information please do not hesitate to contact R2K via our National Coordinator, Mark Weinberg on 0214471000 or mark@r2k.org.za.