



# **SUBMISSION**

## **ON THE COMMUNICATIONS BILL**

**September 09, 2009**

FOR THE ATTENTION OF:

THE SECRETARY  
NATIONAL COUNCIL  
STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENSE AND SECURITY  
PARLIAMENT BUILDINGS  
WINDHOEK

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## **EXECUTIVE SUMMARY**

MISA Namibia wishes to express gratitude toward this august house in having been considered a worthy stakeholder to be extended this invitation.

MISA Namibia graciously accepted the opportunity to submit thoughts, concerns, wishes and compliments towards the Communications Bill as it is being reviewed by this honorable Standing Committee on Foreign Affairs, Defense and Security of the National Council of Namibia.

## **INTRODUCTION**

The Namibian Chapter of the Media Institute of Southern Africa (MISA) was officially launched in November 1998. The chapter is one of 11 chapters from SADC countries that form MISA. Since its inception MISA has its focus on the need to promote Free, Independent, and Diverse and Pluralistic media as envisaged in the Windhoek Declaration.

The Namibian Communications Bill, 2009 is designed to:

- i) regulate the country's telecommunications services and networks
- ii) regulate the broadcasting and postal services
- iii) regulate the use and allocation of the radio spectrum
- iv) establish an Independent Namibian Communications Regulatory Authority ("the Authority")
- v) make provision for the Authority's powers and functions
- vi) grant special rights to telecommunication licensees
- vii) create an Association to manage the .na Internet domain name space
- viii) deal with all other matters connected with the issues outlined herein above

MISA Namibia is of the opinion that this proposed law, like any other statute in Namibia, must be primarily consistent with the provisions of the Constitution of the Republic of Namibia, as established in the Preamble of said constitution.

Namibia as a member of the international community must ensure that its domestic laws are consistent with international standards and guidelines, as Namibia is a signatory to most, if not all such instruments.

These international and regional instruments referred to under this analysis include:

- The African Charter on Broadcasting.
- The Universal Declaration of Human Rights.
- The African Charter on Human and People's Rights.
- The International Covenant on Civil and Political Rights.
- The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

The Bill carries many positive aspects. For instance, by centralizing the regulation of telecommunications, broadcasting, postal, and other forms of communications into one statute, the legislator has taken another giant step towards convergence. Further, the Bill provides for a three-tier system for broadcasting – public service, commercial and community, which is consistent with Article 1 of Part I of the African Charter of Broadcasting.

MISA Namibia applauded the amendments the Minister made to clause 70 that impose the requirement to take an oath by a member before such member performs any function with relation to interception or monitoring of telecommunations.

We are also happy with the setting up of a Universal Fund. But we would urge that the fund be run by a separate board that can make decisions on what projects to support. More importantly the objectives of the Universal Fund must be made clearer that is it should support **community media** projects of disadvantaged groups to enhance access to information to all and also that it should support communication projects in schools, health centers among others.

Despite the many positive aspects, which we find highly commendable, there are some areas of concerns. Most of the invited presenters concur that the Bill is overall good, but need more meat, more details in its structures and functionaries to allay the fears of the populace.

## **DEFINITIONS**

There is a lack of clear definitions in a few of areas that MISA Namibia would humbly like to point out...

The definition of “**tariffs**” should be better clarified in whether it refers to publication in the national press, in the Government gazette, or elsewhere.

The term “**political offense**” as used in 10(e) and elsewhere in the Bill need to be defined, for avoidance of doubt and contradiction.

There is no clear definition on the **3-tiers of Broadcasting**. Commercial broadcasting, Public broadcasting, and Community broadcasting should be clearly defined in the Bill, the overriding piece of legislation, and not be left to Regulations and or Policies.

Definition of Self Regulation of the Media industry is **omitted**

## **OBJECTS OF THIS ACT**

One of the main objects of this Bill is to establish an Independent Regulatory Authority (2(a)).

However, the Independence and Autonomy of this Authority is NOT clearly spelled out in this bill. The enforceability of the independence of this Authority should be embedded in this Bill, and not in Policies or Regulations later.

## **POWERS OF AUTHORITY**

There are a number of instances wherein the Minister is empowered by this bill to guide or direct the authority in its functions. MISA is of the opinion that this may compromise the autonomy and independence of the authority....

### **Examples**

Chapter 2.6 (a) if the Minister has to approve the acquisition/alienation or mortgaging of immovable property, it may make the authority beholden to said minister.

Section 12(2) and (3) the Minister removing any member may compromise the autonomy and independence of the board

Section 13(1) the Minister appointing the chairperson and vice-chairperson of the board

Section 22(6) the Board needing approval of the Minister and the Finance Minister to make investments

Section 14.1 The provision wherein the Minister “in consultation with the Minister of Finance” would determine the remuneration levels of a member is problematic as it compromises the financial independence of the Authority.

Section 15 (1) and (2) may compromise the autonomy of the Authority if permission of the board to hold meetings is beholden to the blessing of the Minister. Care must be taken not to facilitate for the incidence of political interference through dependence on the Minister or the State.

**The Bill seeks to establish an “Independent Namibian communications Regulatory Authority”. The Authority must be truly independent.**

Reference to ACT 2 of 2006 is relevant to State-owned enterprises. If the Authority is to be truly independent and autonomous, compliance with said act may compromise its power.

MISA Namibia proposes that in order to avoid the abovementioned situations and other relevant circumstances, that the Authority is established by order of Parliament, and to report to Parliament.

**Furthermore, MISA Namibia humbly submits that:**

Section 23(1) the legislator must take care to ensure that the levies charged, are not prohibitive. It might help for the Bill to include the term “... regulatory and reasonable levy ...”, so that in the event of an unreasonable imposition, citizens would have more solid grounds upon which to challenge the levy.

Section 29 the Bill does not address the situation where the Authority declines a request. The Bill could for instance provide that in the case of refusal, the Authority would have to provide written reasons for the refusal. That would enable applicants to challenge the refusal on solid grounds, if necessary.

Section 32 (1) and (2) refer to a Review procedure, but without pointing out the authority that shall have powers of review. It would help if the Bill spells out the Review Authority. The High Court is often the forum for review.

Section 38 (6) the inclusion of the phrase “(which need not be more than one)”, in brackets, creates the danger of encouraging the formation of monopolies. That clause is not necessary.

Section 38 (12) Paragraphs (a) and (b) of subsection (12) are identical. One must be struck out, so that subsection (12) would remain with just paragraphs (a) and (b), or if (a) or (b) is meant to read something else, one of them must be corrected to read differently from the provisions of the other.

Section 39 (1) it might be necessary to include the word “service” in-between ‘telecommunications’ and ‘licences’, to read as “telecommunications service licences” so as to achieve consistency with the sub-heading.

Section 39 (3) (a) refers to “national defence”, and “public security.” It might be necessary to define these terms, as they could be vague and over-broad and therefore be liable for abuse those who should define them or interpret their meaning in search of interception.

Section 39 (d) the provision is harsh, and may result in double punishment for citizens, that is in having to pay a fine, then subsequently facing the refusal of a licence. The revision of this provision might be necessary.

Section 41 (1) it would help for the legislator to specify the notice period for bidding and tender submission to avoid ambiguity.

Section 41 (3) the provision seems to defeat the whole point of bidding. If the drafters of the Bill cannot supply a satisfactory explanation as to the need for the subsection, the subsection might have to be deleted. The whole point of a tender system is to ensure transparency, and to get the best service at the best cost. Indeed, the drafters might argue that the highest tender might not necessarily render the best service, but MISA Namibia wishes to hear about the justification for this clause.

Section 50 (1.c) the discretion granted to the dominant carrier is too broad, and could easily be abused. Should that wide discretion be maintained, then it would be fair and just to create a provision that allows for the challenging of a dominant carrier’s decision to refuse to make infrastructure available.

Section 60 the authority granted for carriers to have access to “any land”, seems to be excessive, and could potentially violate the citizen’s property rights. Particular Articles of the Constitution of the Republic of Namibia are threatened by this section, notably:

Article 13 (1) – the right to privacy.

Article 16 (1) – the right to property, which would by inference include the right to exercise discretion over one’s property.

MISA Namibia humbly submits that care must be taken to ensure that the rights of the State do not excessively override the private rights of individuals. The same comment made above is also relevant to Section 61 (1) of the Bill, as far as it relates to private property.

## **BROADCASTING SERVICES**

Whilst modern discourse in democratic societies leans in favour of self-regulation in the print media, there has always been an acceptance that there is need for a degree of regulation in the broadcast media. In the context of broadcast legislation in Africa, the African Charter on Broadcasting constitutes one of the most basic references.

If the intention of the regulator is to address satellite broadcasts whose content might be harmful, for instance hard pornography or content promoting terrorism and crime, relevant provisions would have to be drafted, to address the particular mischief.

Whilst Section 84 (2) (d) is extremely valuable and consistent with the African Charter on Broadcasting in providing for a three-tier system of broadcasting, regrettably the Bill does not go on to announce in detail the basic terms that must apply to the categories of the licences.

Section 84 or s85 should be expanded, or a new section should be created, to specifically entrench the guarantees and provisions given in the African Charter of Broadcasting in respect of those categories of broadcasting.

Whereas section 85 generally empowers the Authority to issue licences, there is no reference in the Bill to the pace at which licences should be issued, nor for advertisements to be made by the authority for the invitation of applications for licences whenever there is scope for the issuance of new licences. Such processes would pressurize the Authority to entrench plurality of the media in the broadcasting sector, and to do so through fair and competitive processes.

## **NBC SUBJECTION TO THE BILL**

MISA Namibia would advocate for the inclusion of the Namibian Broadcasting Corporation (NBC) in being subject to the lofty aspirations of this Bill. The adherence of NBC to Digitalization and Convergence as promoted in this Bill, may be compromised by exclusion, otherwise the current NBC may necessitate its amendment to accommodate these new concepts. MISA Namibia would propose a two-year deadline for the inclusion of NBC, in addition to its conversion to a full-fledge Public Broadcaster. MISA would encourage the clarification of the delay, subject to the Minister, of when NBC is to be falling under the regulations of the Bill.

## **SELF REGULATION FOR THE MEDIA**

The Ministry has introduced a Broadcasting Policy that endorses SELF REGULATION by the MEDIA. However, this policy and its provision do not inform the Bill, as the specifications and empowerment of such Self Regulation is not clearly spelled out in the Bill. This creates anxiety on the part of the media industry in that government may impose statutory regulation measure on the industry that will or can stifle media freedoms. MISA humbly proposes that the empowerment of SELF REGULATION and the autonomy vested in it, be clearly spelled out in the Bill.

## **INTERCEPTION CLAUSE**

In concurrence with so many others in society, MISA Namibia humbly reiterates the expressed need for clarity, transparency and reasonable justification of the establishment of Interception centres and the functions of said centres, so as to ensure that the freedoms and rights of the citizens as enshrined by the Constitution of the republic of Namibia are not violated. If these cannot be accomplished, we would recommend that this clause be revisited in its entirety, or be abolished.

As MISA-Namibia we remain concerned that the law does not state what crimes will result in interception being instituted, more so the law still is not stating the process, reviews, and oversight measures that the interception process will be subjected to.

MISA Namibia argues that for citizens to fully comply with national laws, such laws must be clear on why they were set up, what they intend to do, and how other rights are protected by such laws. If interception is meant for curbing terrorism, corruption, money laundering, human trafficking, poaching, child pornography and any other social ills, then the law must simply state so, so that if I am not doing any of these issues I know I am not subjected to any form of interception. Leaving the law vague as it is means that it will instill fear, and suspicion in the thinking of ordinary citizens.

As MISA Namibia we want guarantees as an example that Investigative journalists will not be subjected to interception especially in those cases that the government is not comfortable with. We want guarantees that whistle blowers will not be subjected to interception in those cases the media exposes and authorities are not comfortable with. Without these issues being clarified and put in black and white, the media in Namibia will now be afraid of carrying out its work and talking to sources who might fear that they are being snooped on. While interception laws are the norm in most developing countries as a result on terrorism, we also note that these laws have been so controversial in America and even in Britain citizens are complaining on the covert nature of interception. Namibia comes from a history of a struggle against oppression and we cherish our hard won freedom and independence. We therefore don't want to see a return of any form of laws that instill fear in us. All laws should have the confidence and support of all law abiding citizens and the best way to do so is to make the laws as transparent, as possible. In this way the Interception clause should be made more transparent as to who is the target. And who reviews the decisions to intercept.

### **Principles on Interception of Communications**

Any discussion on communication, information technology or the media must, in a democratic society, proceed from the pro-human rights paradigm on freedom. The starting point in discussing interception of communications, is to acknowledge that legislation enabling such interceptions generally infringes of the citizen's rights to freedom of expression, freedom of speech, freedom of communication, the right to privacy, free-flow of information, and other fundamental human rights related principles.

According to the Universal Declaration of Human Rights (UDHR), "no one should be subjected to arbitrary interference with his privacy, family, home or correspondence..." The article goes on the state that "everyone has the right to the protection of the law against such interferences..."

The law proposed via the Bill also threatens the citizens' right to freedom of thought, conscience

and belief, as envisaged in Article 21 (1) (b) of the Constitution of Namibia. Thoughts, conscience and belief are notions that may be communicated by citizens through electronic, telephonic, print or written forms of communication. The interception of such communication would therefore infringe upon the citizens' rights as given in Article 21 of the Constitution.

It is in recognition of the infringement of such legislation that many countries with interception laws, such as Austria, New Zealand, Canada and Hong Kong have adopted a privacy protection system that introduces the use of Privacy Impact Assessments.

As a general rule, the Constitution of the Republic of Namibia provides under Article 13 that: "no persons shall be subject to interference with the privacy of their homes, correspondence or communications ..."

The exception follows soon thereafter in the Constitution, providing that the privacy of correspondence and communication may be violated "in accordance with law and as is necessary in a democratic society in the interests of ..."

The law to be made out of the Bill under review, shall therefore be the first leg to be relied upon by the State for interference with the right to privacy of correspondence and communication. The violation would therefore be in accordance with the new law.

In the United States of America for instance, the authorities made it clear that they had to enact the interception law for purposes of fighting serious crime and terrorism. As such, the interception statute requires the applicant to state the crime/s about which authority for electronic surveillance is sought, the location and identity of targeted persons, certification that normal investigative procedures have been implemented without success, are likely to fail or too dangerous to implement, and a promise to limit communications about the interceptions only to those who are relevant to the subject investigation.

Section 70 (1) of the Bill compels the President to establish interception centres through the use of the word "must". Since the establishment of interception systems curtails the freedoms and rights of citizens, the use the term "may" would be more desirable/ appropriate, so that interception would not be a compulsory activity.

Section 71 (1) of the Bill requires licensees to provide the service in such a manner that it is capable of being intercepted. Care must be taken that the legislation is not made to have a retrospective effect on existing service providers. If there is in existence today a service provider whose service does not enable interception, the enactment of the Bill in the present form would adversely affect that service provider as far as the new law would apply retrospectively.

Section 71 (2) would also adversely affect such providers in reference to the ability to store such information is dictated by the law.

Interception equipment is extremely expensive. The requirements made in Section 71 (3) and Section 71 (4) of the Bill are therefore unfair to the existing and potential future service providers. Should these provisions stand, the lawmakers would then have to consider the tenure of licences. The duration of a licence would have to be significantly longer than it is now, so that investments into the telecommunications industry would not be too risky.

Section 70 (4) concentrates powers into one individual – the Director-General. That is dangerous.

It might be necessary to decentralise powers and vest certain powers in other officials besides the DG.

The clarity that is needed for inclusion in this Bill may be learnt from Article 13 (2) (b) of the Constitution of Namibia, for instance, which directs that any searches into private property may be justified only “where these are authorised by a competent judicial officer”. Indeed, correspondence and private information or documents of individuals should be at the same level with private property, whose privacy is protected under the Constitution.

Section 70 (5) of the Bill directs authorised persons to make a request to the interception centre. The section however does not indicate what the request should be made up of, or the format to be adopted. A standard format in the form of a schedule to the Bill would be desirable.

The protection offered to service providers under Section 71 (5) (b) might be inconsistent with the position taken in Sections 71 (2), (3) and (4). To make the protection in s71 (5) (b) effective, the law should provide for exemptions or financial or technical support in cases where specified actions would make the provision of service uneconomical or technically infeasible.

As stated earlier, the requirement for telecommunications service providers to acquire at own cost, interception facilities is unreasonably onerous, at least in financial terms. It might be necessary for the Authority to set up a fund for the financing of interception activities, if interception of communications is at all necessary. Such a fund would enable service providers to concentrate on their core-business.

Interception of communications is not and should not be the core business, or key activity of telecommunication service providers.

Should the costs of acquiring interception equipment be prohibitive, section 71 (4) would have the effect of violating freedom of speech and expression. A fairer mode of compensation would be the payment of the practical market fees/ costs incurred or to be incurred by the service provider. To leave the determination of the tariff to the discretion of the Minister as presently proposed under s72 (1) (b) might be prejudicial to the service provider.

The limitation of compensation under s 72 (7), to direct costs only, is not fair. What is the justification for excluding indirect costs when the benefit arising from such indirect costs are enjoyed by the Interception Centre, not by the service provider?

Section 74 (1) of the Bill also poses the danger of making a retrospective provision in relation to current licence holders whose licence conditions might exclude the directions of the Bill, or of proposed future regulations.

While section 74 (2) of the Bill rightly provides for the possibility of adjudication by the Authority, the Bill does not provide for review or appeal mechanisms. Complainants must have the opportunity to turn to a higher or more independent forum for further adjudication. In fact, complainants should be given the option of taking disputes to other forums, such as courts of law or arbitrators in the first instance.

The punishment directive given under section 75 (b) of the Bill is too rigid. It leaves the court or other adjudicating authority without any discretion as to the appropriate sanction to impose. The provision must be revised so as to show minimum or maximum levels of punishment.

The imposition of a rigid imprisonment period under section 76 (1) results in the stripping from

magistrates, judges or other presiding officers, of the discretion that they should have in assessing levels of punishment. It would be better to provide minimum or maximum durations.

Section 76 (2) of the Bill would have the effect of criminalizing the possession of, or trade in equipment and software that “may be used” to defeat the purposes of the law. It goes without saying, that punishment for what may or may not be is too harsh. It is not right to legislate on ambiguous issues.

### **General Comments on Interception of Communications and Comparative Analysis**

The Interception of Communications section of the Bill is weakened by the deficiencies outlined below, and could be improved by the inclusion of some of or all of the corresponding recommendations:

#### **Concern: Lack of checks and balances.**

The provision specifying the person/s or bodies who may issue warrants or authorise interceptions would also have to carry in-built mechanisms restricting or limiting:-

Who may be authorised to make the interception.

What is to become of mail or other communication once it has been intercepted;

Who has access to the contents in the intercepted communication;

What steps are to be taken to ensure that any lawyer-client, doctor-client, husband-wife and other traditionally and legally recognised privileges are not unduly interfered with.

Further, under the Namibian Bill, where a warrant has been issued, the Bill does not impose an obligation on the interceptor to report to a court or the issuer of a warrant or to tell whose telecommunication has been intercepted, what the interceptor has done. The Namibian Bill also does not specify the duration of each warrant, nor the scope of each warrant.

#### **Proposal:**

A better checks and balances system would be one where an interception warrant is issued by a court of law, subject to the target’s right to appeal.

Of course the right to appeal can be problematic in that sometimes the targeted person is not aware of the existence of a Warrant issued against him/ her due to the nature of the warrant. All the same, the authorisation of a judicial officer for the issuance of a warrant is better.

Requirements for the issue of a warrant must be specifically spelt out for use by the issuing authority. Such requirements would include identification of the object of the interception, and proof that the particular information or communication to be acquired is relevant to the object of the application. A standard of proof, such as proof on a balance of probabilities would have to be a requirement.

The costs of carrying out an interception exercise should be borne by the intercepting authority not by business since interception is not part of the profit-making or business sustenance function.

The law should also make strict guidelines about the use of information gathered from interception

activities in prosecutions. For instance, if interception was related to terrorism activities, information from the interception could not be admissible in prosecutions not related to terrorism.

A provision should be included to require law enforcement and the intelligence service, to submit annual reports to parliament so that reviews on the effectiveness and continued need of the interception measures, are possible.

The Bill should include a specific list of crimes, for which a warrant may be issued.

Interception legislation should be limited in its tenure. For instance, most of the surveillance portions of the USA Patriot Act of 2001, would last only until 31 December 2005. The sponsor of the Namibian Communications Bill would have to justify any lengthy life of surveillance provisions.

The best authority to issue interception warrants would be courts of law, either ordinary and existing courts, or special courts that may have to be specifically established in respect of telecommunication legislation. These courts would also be empowered to exercise oversight in respect of the implementation of the surveillance laws.

**Thank you greatly for considering our input**