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Honourable Minister Simaata, Mses Aipinge, Mulilo, Ssemboga and Thornton

SUBMISSIONS BY THE NAMIBIAN MEDIA TRUST ON THE ICT POLICIES AND COMMUNICATIONS ACT REVIEW

1. INTRODUCTION

1.1. The Namibian Media Trust (NMT) is a civil society organisation which is a registered non-profit organisation under the laws of Namibia with registration number T128/13. The NMT is a leading civil society in respect of promote media freedom and related issues as well as the regulation of the media (print, broadcast and online) in line with international best practice.

1.2. Herewith our submissions on the proposed Review and Amendment of Information and Communication Technologies (ICT) Policies and the Communications Act (collectively, the ICT Review) which is being undertaken by an ITU expert and a

consultant on instruction of the Government of Namibia, more specifically, the Ministry of Information and Communication Technology (MICT).

1.3. In this regard, we thank MICT for the opportunity of making these submissions and request an opportunity to make these submissions at the public stake-holders workshop which is to take place on 28 November 2018.

1.4. Our submissions are set out below.

2. WHAT APPROACH OUGHT TO BE ADOPTED BY MICT WHEN UNDERTAKING THE ICT REVIEW

2.1. We are of the view that Namibia's particular history, with its legacy of Colonialism and Apartheid, require it to clearly stand against these dubious legacies and in favour of an approach to ICT policy and legislative reforms that reflects a commitment to:

2.1.1. upholding the Constitution of the Republic of Namibia, 1990 (the Constitution), particularly the right to freedom of expression and freedom of the media enshrined in Article 21(1)(a) of the Constitution;

2.1.2. meeting Namibia's human rights obligations under international law, including with respect to its obligations as a member of the United Nations (UN) and of the African Union (AU);

2.1.3. ridding its statute books of its colonial legal past, particularly, those laws which undermine the human rights of its people in relation to ICT, specifically with regard to the right to freedom of expression and its inherent corollary right, access to information; and

2.1.4. providing its people with policies and laws that meet the highest international best practice standards as a mark of respect for the inherent dignity of every Namibian. Many of these best practice standards have been articulated in statements and declarations on key aspects of ICT policy developed by civil society organisations as well as international bodies such as UNESCO, the UN and AU.

2.2. In making these submissions, we will be supporting each of our policy/legislative proposals from the sources referred to above¹.

¹ Much of the statements on the international best practice standards are taken from the *Media Law Handbook for Southern Africa*, Volume 1, Justine Limpitlaw. KAS, (2012).

2.3. We set out below its submissions on each of the eight broad topics it considers relevant to the ICT Review, namely, the need:

2.3.1. to strengthen the independence of the Communications Regulatory Authority of Namibia (CRAN) (assuming that body stays in place as a result of the ICT Review);

2.3.2. for CRAN to become responsible for regulatory issues pertaining to the Namibian Broadcasting Corporation (NBC);

2.3.3. for a complete overhaul of the Broadcasting Act to provide for an independent public broadcaster with a clearly-identified public mandate that requires it to act in the public interest;

2.3.4. to strengthen the self- and co-regulatory provisions provided for in the Communications Act in respect of broadcasters;

2.3.5. to ensure that the role and position of Over The Top (OTT) Internet-based services such as Netflix and the like, are appropriately legislated for and regulated to guard against them competing against Namibian content providers and broadcasters unfairly and to ensure compliance with Namibian legislation and regulations, including, among others, tax, codes of conduct, local content and audience advisories, classification requirements etc;

2.3.6. to provide for and/or strengthen legislative provisions regarding privacy and data protection online in accordance with recent international developments in this area;

2.3.7. to provide for and/or strengthen legislative provisions regarding online/Internet rights and freedoms in accordance with Namibia's obligations in terms compliance with the African Union's declarations of same and in accordance with international best practice; and

2.3.8. to provide for and/or strengthen legislative provisions regarding the interception and monitoring of electronic communications to protect fundamental privacy rights while balancing legitimate national security interests.

3. STRENGTHENING THE INDEPENDENCE OF THE COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

3.1. Introduction:

- 3.1.1. NMT recognises the great strides that MICT has made in shepherding the ICT Sector to the point where it is today – with a converged regulator (the Communications Regulatory Authority of Namibia (CRAN) acting in terms of the Communications Act, 2009 (the Communications Act).
- 3.1.2. However NMT respectfully submits that CRAN is insufficiently independent from the executive branch of government to meet the standards for independent regulation of broadcasting (a key component of ICT) which is required of Namibia.
- 3.1.3. In this regard, NMT is of the opinion that given the reality of convergence in the ICT sector, the standard of independence required for broadcasting regulators ought to be the standard for all electronic communications/ICT regulators.

3.2. Independent regulation – what is required:

- 3.2.1. **The African Charter on Broadcasting:** The African Charter on Broadcasting was adopted by participants at a 2001 UNESCO conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration focuses mainly on the print media, the African Charter on Broadcasting focuses on the broadcast media. Article 2 of Part I of the African Charter on Broadcasting states that '[a]ll formal powers in the areas of broadcast ... regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any political party'.
- 3.2.2. **The African Principles of Freedom of Expression Declaration:** The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights, a body established under the auspices of the AU. Article V(2.) of the African Principles of Freedom of Expression Declaration states in its relevant parts that 'the broadcast regulatory system shall encourage private and community broadcasting' and that an 'independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions ...'. Further, Article VII of the African Principles of Freedom of Expression Declaration provides:
 1. Any public authority that exercises powers in the areas of

broadcast ... regulation 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, should involve the participation of civil society, and shall not be controlled by any particular political party.
3. Any public authority that exercises power in the areas of broadcast ... should be formally accountable to the public through a multi-party body.

3.2.3. **The Access to the Airwaves Principles:** Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation is a set of standards on how to promote and protect independent broadcasting while ensuring that broadcasting serves the interests of the public. The principles were developed in 2002 by Article 19, an international NGO working on freedom of expression issues as part of its International Standards series. Principle 11 of the Access to the Airwaves Principles provides in its relevant part that '[t]he independence of regulatory bodies ... should be specifically and explicitly provided for in the legislation which establishes them and, if possible, also in the constitution'. Principle 12 of the Access to the Airwaves Principles provides in its relevant part that '... [r]egulatory bodies should be required to ... act in the public interest at all times'.

3.3. Where does Namibia fall short:

3.3.1. **Appointments**

- 3.3.1.1. CRAN is managed by a Board that consists of five members and its Board is appointed in accordance with sections 14 and 15 of The State Owned Enterprises Governance Act, 2006 (the SOE Governance Act) – section 8 and 9(1) of the Communications Act.
- 3.3.1.2. Unfortunately, sections 14 and 15 of the SOE Governance Act, provide for an appointments process that is dominated by the executive branch of government in that the State-Owned Enterprises Governance Council (SOE Council) is made up entirely of members of the executive branch of government and that is the body, together with the Secretariat thereto, which is responsible for making recommendations to the Minister responsible for Communications in respect of the appointment of the CRAN Board.

3.3.1.3. Consequently the appointments process falls short of international standards because:

3.3.1.3.1. there is no public nominations process;

3.3.1.3.2. Parliament, that is a multi-party body is not involved in the appointments process, whether through making recommendations or otherwise and so a single party is entirely responsible for the appointments process;

3.3.2. **Functional Independence**

3.3.2.1. CRAN is required to exercise the powers vested in it by the Communications Act subject to “general policy guidelines... Not inconsistent with the provisions of...[the Communications] Act” issued by the Minister responsible for Communications” in terms of section 7(1) of the Communications Act.

3.3.2.2. We are of the respectful view that this is contrary to the requirements of independent regulation of the ICT sector. While it is standard practice for the executive branch of government to develop policy guidelines which must be considered and taken into account by regulatory authorities, ultimately such authorities, including CRAN, must have the independence to act in the public interest whether or not this accords with policy guidelines developed by the executive branch of government or not.

3.4. Issues the ICT Review must Address:

As a result of the foregoing, NMT is of the view that the dissatisfactory levels of independence which accorded to CRAN under the Communications Act must be addressed in respect of four key issues, namely:

3.4.1. members of the Board of CRAN (or its proposed successor regulator, if any) must be subject to a public nominations process and recommendations for appointment must be made by multi-party body such as Parliament. Further, NMT is of the respectful view that the ICT sector is so crucial to economic and social development, that board members of CRAN ought to be appointed by the President and not by the Minister responsible for Communications;

3.4.2. the independence of CRAN (or its proposed successor regulator, if any) ought to be specifically provided for in the new ICT Policy and in the Communications Act or its successor statute;

- 3.4.3. the general requirement that CRAN (or its proposed successor regulator, if any) must act in the public interest be specifically provided for in the new ICT Policy and in the Communications Act or its successor statute; and
- 3.4.4. the requirement that CRAN act subject to Ministerial policy guidelines must be amended to provide that CRAN must take such policy guidelines into account in the new ICT Policy and in the Communications Act or its successor statute.

4. CRAN TO BECOME RESPONSIBLE FOR REGULATING THE NAMIBIAN BROADCASTING CORPORATION

4.1. Introduction

- 4.1.1. The Namibian Broadcasting Corporation (NBC) is governed in terms of the Broadcasting Act, 1991 (the Broadcasting Act).
- 4.1.2. While the provisions of Chapter VI of the Communications Act which is headed “Broadcasting Services” appear to have general application to the broadcasting sector, it is important to note that in terms of section 93(1) of the Communications Act, CRAN is specifically prohibited regulating the NBC in terms of the Communications Act until a date specified by the Minister responsible for Communications. This has yet to happen.

4.2. What is Required

- 4.2.1. Principle 14 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]he powers and responsibilities of regulatory bodies, for example in relation to licensing or complaints, should be set out clearly in the legislation which establishes them ... These powers and responsibilities should be framed in such a way that regulatory bodies have some scope to ensure that the broadcasting sector functions in a fair, pluralistic and smooth manner and to set standards and rules in their areas of competence ...’.
- 4.2.2. Article V(2.) of the African Principles of Freedom of Expression Declaration states in its relevant part that an ‘independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions ...’. Further, Article VII(1) of the African Principles of Freedom of Expression Declaration provides that any public authority that exercises powers in the areas of broadcast ... regulation should be

independent and adequately protected against interference, particularly of a political or economic nature.

4.3. Where Namibia Falls Short:

By not having, as a matter of law and fact, the regulation of the NBC being carried out by an independent regulator, Namibia is failing to provide its people with a regulatory environment that complies with international best practice.

4.4. Issues the ICT Review Must Address:

As a result of the foregoing, NMT is of the view that the CRAN (or its successor regulator) must be responsible for regulating the NBC along with all other broadcasting and ICT licensees. In our view, this will require:

- 4.4.1. provision to be made for such regulation in any new ICT Policy;
- 4.4.2. the repeal of section 93 of the Communications Act; and
- 4.4.3. specific mention to be made of CRAN (or its successor regulator) in the Broadcasting Act (or its successor legislation) as the regulator of the NBC.

5. OVERHAULING THE BROADCASTING ACT TO PROVIDE FOR AN INDEPENDENT PUBLIC BROADCASTER WITH A CLEARLY-IDENTIFIED PUBLIC MANDATE THAT REQUIRES IT TO ACT IN THE PUBLIC INTEREST

5.1. Introduction

- 5.1.1. The Namibian Broadcasting Corporation (NBC) is governed in terms of the Broadcasting Act, 1991 (the Broadcasting Act).
- 5.1.2. NMT is of the respectful view that the transformation of the NBC from a state or national broadcaster into a public broadcaster in line with international best practice is long overdue and is an issue that must be addressed in the ICT Review.

5.2. What is Required

- 5.2.1. **The African Charter on Broadcasting:** The African Charter on Broadcasting was adopted by participants at a 2001 UNESCO conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration

focuses mainly on the print media, the African Charter on Broadcasting focuses on the broadcast media. It contains a number of provisions on the requirements of public broadcasting, including:

- 5.2.1.1. article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including ... a three-tier system for broadcasting: public service, commercial and community';
- 5.2.1.2. article 1 of Part II of the African Charter on Broadcasting states that '[a]ll State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender';
- 5.2.1.3. article 2 of Part II of the African Charter on Broadcasting states in its relevant part that 'public service broadcasters should, like broadcasting ... regulators, be governed by bodies which are protected from interference';
- 5.2.1.4. article 3 of Part II of the African Charter on Broadcasting states in its relevant part that 'the public service mandate of public service broadcasters should be clearly defined';
- 5.2.1.5. article 4 of Part II of the African Charter on Broadcasting states in its relevant part that '[t]he editorial independence of public service broadcasters should be guaranteed';
- 5.2.1.6. article 5 of Part II of the African Charter on Broadcasting states in its relevant part that '[p]ublic service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets';
- 5.2.1.7. article 6 of Part II the African Charter on Broadcasting states in its relevant part that '[w]ithout detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers'.

5.2.2. Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part the following principles governing public service broadcasters:

- Public broadcasters should be governed by a board which is protected from interference, particularly of a political or economic nature.
- Editorial independence of public service broadcasters should be guaranteed.
- Public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.
- Public broadcasters should strive to ensure that their transmission system covers the whole territory of the country.
- The public service mandate of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

5.3. Where Namibia Falls Short

- 5.3.1. By the Broadcasting Act not providing, as a matter of law and fact, for the NBC to operate as a public as opposed to a state broadcaster, Namibia is failing to provide its people with a public broadcaster that operates in accordance with international best practice.
- 5.3.2. NMT notes that the objectives of the NBC provided for in section 3 of the Broadcasting Act are inadequate as a proper public mandate for a public broadcaster as they do not stipulate providing the people of Namibia with adequate news and current affairs programming, including politically balanced material, particularly during elections and independently-commissioned programming.
- 5.3.3. NMT notes that nowhere in the Broadcasting Act is the editorial independence of NBC even mentioned, much less guaranteed.

- 5.3.4. NMT notes that the Board of the NBC is, in terms of section 6(1) of the Broadcasting Act, appointed by the Minister responsible for broadcasting and information, acting entirely on her or his own.
- 5.3.5. NMT notes that in terms of section 27 of the NMT, all regulations concerning the NBC are to be made by the Minister responsible for broadcasting and information. NMT is of the view that while it is permissible for the Minister to make same in respect of television licence fees, general regulations applicable to the NBC ought to be made by CRAN in accordance with the Communications Act.

5.4. Issues the ICT Review Must Address

- 5.4.1. As a result of the foregoing, NMT is of the view that Namibia's ICT Review must include detailed policy statements on the need to transform the NBC from a state into a public broadcaster in accordance with international best practice requirements and in accordance with the suggested amendments to the Broadcasting Act set out immediately below.
- 5.4.2. NMT is of the view that as part of the ICT Review, the Broadcasting Act needs to be overhauled in its entirety and replaced with an NBC Act that provides for a legislative framework in line with international best practice for the NBC. Such an Act must ensure that the following is provided for, namely that:
- 5.4.2.1. the NBC is to operate as a public as opposed to a state broadcaster;
- 5.4.2.2. a new NBC Act must provide, in detail, for a comprehensive public mandate for the NBC including, without limitation, providing the people of Namibia with adequate news and current affairs programming, including politically balanced material, particularly during elections as well as independently-commissioned programming. Such a mandate will require to go far beyond the objectives currently listed in section 3 of the Broadcasting Act;
- 5.4.2.3. the NBC's editorial independence must be guaranteed;
- 5.4.2.4. members of the Board of the NBC must be appointed through a process characterised by a public nominations process and recommendations for appointment must be made by multi-party body such as Parliament. Further, NMT is of the respectful view that the NBC plays such a crucial role in the life of the nation in ensuring that

citizens have sufficient news and information to make informed choices at the ballot box, that NBC board members ought to be appointed by the President and not by the Minister responsible for broadcasting and information as is currently the case;

- 5.4.2.5. section 27 or its equivalent section be amended such that the only regulations for which the Minister is responsible is those which deal with the setting and collection of television licence fees, all other NBC-related regulations being promulgated by CRAN (or its successor regulator).

6. STRENGTHENING SELF- AND CO-REGULATION FOR BROADCASTERS

6.1. Introduction

- 6.1.1. In the 2008 Broadcasting Policy for the Republic of Namibia, the policy statement included that: “Namibian broadcasters, in conjunction with the Regulatory Authority, will be responsible for developing self-regulatory codes”². The justification for this policy statement was that: “media self-regulation and co-regulation are emerging international general and best practices. Namibia will foster the development of codes of media ethics that promote the desired pro-social behaviour by broadcasters and content providers whilst safeguarding overriding constitutional and other commitments to human rights, notably to freedom of expression”³.
- 6.1.2. The 2008 Namibian Broadcasting Policy also made policy statements regarding self-regulatory agencies, namely: “government encourages broadcasters and media to establish a self-regulatory agency to formulate, revise and update codes and to undertake adjudication of complaints”⁴. The justification for this policy statement is that: “regulation is most effective when you effective practice of norms of good conduct are internalised within organisations, rather than enforced by an external agency. Both the beneficial internalisation of norms and the effective operation of a self-regulatory agency or assisted by the formulation of codes of conduct to establish norms for user protection and re-dress and for the safeguarding of editorial and journalistic independence in conformity with the provisions of Namibia’s constitution... The essence of an effective code is that it enjoys the support of those who are to abide by it and this is best secured by their drafting it. The

² At paragraph 8.4.

³ Ibid.

⁴ At paragraph 8.4.1.

code should ensure that the entitlements specified in the preamble to the Namibian constitution, the basic consumer entitlements to access, choice, representation, redress and information are secured and that journalists' and editors' rights and duties are clearly defined⁵."

6.1.3. The 2008 Namibian Broadcasting Policy also made policy statements regarding self-regulatory enforcement: "to give effect to Namibia's policy on self-regulation, the primary responsibility for the implementation of self-regulation rests with broadcasters"⁶.

6.1.4. Immediately following up the formulation and publication of the 2008 Namibian Broadcasting Policy, the Namibian Government enacted the Communications Act. The Communications Act clearly gives effect to the self- and co-regulatory aims of the 2009 Broadcasting Policy in section 89 of the Act.

6.1.5. Section 89(1) of the Communications Act empowers (but does not absolutely require) CRAN to prescribe the broadcasting code that "must prescribe the duties with which licensees must comply". The fact that this power is discretionary is of utmost importance. In this regard the ground upon which CRAN may decide not to prescribe such a broadcast code is if "the Authority finds that the making of the broadcasting code is not worthwhile as contemplated in subsection (5)".

6.1.6. In this regard, sections 89(4) and (5) must be read together.

6.1.7. Section 89(4) is the provision in the Communications Act that gives statutory effect to the principle of broadcasting self-regulation as recognised in the 2008 Namibian Broadcasting Policy. It provides: "if the Authority is of the opinion that a licensee belongs to an organisation that enforces the compliance of its members with broadcasting standards that comply with the requirements of this section, it may with the concurrence of the Minister make a determination that the licensee concerned does not require regulation by broadcasting code." The effect of this sub-section requires further elucidation and is as follows: In order to meet the requirements for self-regulation a broadcaster must be a member of an organisation that has:

6.1.7.1. broadcasting standards that meet the requirements of section 89, namely, they deal with some or all of the regulatory matters set out in section 89(1)(a) to (j);

⁵ Ibid.

⁶ At paragraph 8.4.2.

- 6.1.7.2. the ability to enforce compliance of that member with its broadcasting standards; and
- 6.1.7.3. been determined by both the Authority and the Minister to be such an organisation and therefore that the licensee will not require regulation by the broadcasting code referred to in section 89(1).
- 6.1.8. Section 89(5) provides that “If a determination under subsection (4) has been made in respect of a substantial percentage of licensees, the Authority may with the concurrence of the Minister decide that the making of the broadcasting code is no longer worthwhile due to the small number of licensees that will be subject to the broadcasting code.” The effect of this subsection requires further elucidation and is as follows:
- 6.1.9. Essentially it envisages the possibility of an entirely self-regulatory content environment with no regulatory broadcasting code being developed at all by the Authority.
- 6.1.10. Such a possibility will arise when a “substantial percentage” of broadcasters are part of an approved self-regulatory organisation as envisaged in section 89(4).
- 6.1.11. The NMT is of the view that the new ICT Policy must continue to support self- and co-regulation as was provided for in the 2008 Broadcasting Policy and that the existing provisions in the Communications Act, subject to what is said immediately below, be carried over into its successor legislation (if any).
- 6.1.12. We think it imperative to bring to the attention of those conducting the ICT Review, the work done by the Editors’ Forum of Namibia in developing a self-regulatory code⁷ that is applicable to print, broadcast and online media. The NMT funded the development of the EFN Code and we are not aware of another example on the African continent where self-regulatory code has covered all three types of media: print, broadcast and online. We think it is a remarkable achievement.

6.2. What is Required

⁷ Available at:

<https://www.namibian.com.na/public/uploads/documents/5922bc565ea0f/code%20of%20ethics%20online.pdf>

The importance of self-regulation is emphasized in a number of different Declarations and Protocols of inter-governmental bodies of which Namibia is a part and is also recognised as part of the stable of international best practice for media regulation, including broadcasting regulation.

- 6.2.1. Principle 23.2 of the Access to The Airwaves Principles provides “where an effective self-regulatory system for addressing broadcasting content concerns is in place, and administrative system should not be imposed.”
- 6.2.2. Article IX.3 of the Declaration on African Principles of Freedom of Expression specifically provides that “Effective self-regulation is the best system for promoting high standards in the media”.
- 6.2.3. The Southern African Development Community’s **Protocol on Culture, Information and Sport**⁸ was adopted in 2000. Article 21 of the SADC protocol provides “states parties shall encourage the establishment or strengthening of codes of ethics to build public confidence and professionalism in the information sub-sector”.

6.3. Where Namibia Falls Short

The one criticism that NMT has of the current co-regulatory regime is the requirement that the Minister responsible for Communications be required to consent to CRAN’s proposed co-regulatory functions as is provided for in section 89(4) and (5) (discussed above). In our view, this undermines the functional independence of CRAN and respectfully submit that the new policy and proposed amendments to the Communications Act must delete the reference to the Minister’s concurrence in this regard.

6.4. Issues the ICT Review Must Address

- 6.4.1. We are delighted to submit that, generally, Namibia complies with international best practice when it comes to self- and co-regulation for broadcasters in respect of their content. However we note that it appears that the EFN has yet to apply to CRAN for the requisite recognition of its Code and therefore currently broadcasters are required to comply with the EFN self-regulatory Code (where the broadcaster is a member of EFN) and with CRAN’s own prescribed Code.

⁸Available at:
http://www.sadc.int/files/3213/5292/8362/Protocol_on_Culture_Information_and_Sport2001.pdf

6.4.2. We reiterate that the one criticism that NMT has of the current co-regulatory regime is the requirement that the Minister responsible for Communications be required to consent to CRAN's proposed co-regulatory functions as is provided for in section 89(4) and (5) (discussed above). In our view, this undermines the functional independence of CRAN and respectfully submit that the new policy and proposed amendments to the Communications Act must delete the reference to the Minister's concurrence in this regard.

7. ENSURING THAT OTT SERVICES ARE APPROPRIATELY LEGISLATED FOR AND REGULATED

7.1. Introduction

7.1.1. As you are aware broadcasters worldwide are facing challenges from so-called Over The Top (OTT) services, that is, broadcasting-like or audio-visual content delivered via the internet. OTT services are a product of the convergence of traditional broadcasting and telecommunications services and are a technological reality.

7.1.2. Some OTT services deliver such content free to the audience, for example, You Tube and other free OTT websites, while others require payment. Sometimes the payment is once off (for example Google Movies on the Google Play service charges a once off fee per movie) while others require a monthly subscription (for example Netflix (which launched in Namibia in 2016) or DStv's Showmax).

7.1.3. There is no doubt that OTT services contribute to content diversity available audiences in a country but there are definite economic and other downsides. In South Africa, commentators have noted the following:

Let's think about it: a licensed television service such as DStv has to make the following contributions to the SA economy: pay VAT, company tax, PAYE, UIF, Skills Development Levies, pay a percentage of its turnover to the Media Diversity and Development Agency, invest in local content development (including independent productions) as well as contribute to self-regulatory bodies such as the BCCSA through its membership of the NAB. Besides these investment and taxation requirements, DStv is required to be 30% BBBEE owned in accordance with the ICT Charter and the Electronic Communications Act.

Now think about what Netflix pays.

VAT. *Just VAT*⁹.

- 7.1.4. DStv estimates that it has lost of 100 000 premium South African subscribers to Netflix in the last financial year¹⁰.
- 7.1.5. The South African regulator ICASA has already taken certain regulatory steps but this are, in our view, insufficient. For example, in its Position Paper in relation to Internet Protocol Television (IPTV) And Video-On-Demand (VOD Services¹¹, ICASA concluded that IPTV services (as defined by the ITU) fall within the definition of broadcasting services for the purposes of the South African Electronic Communications Act (the ECA), thereby requiring a broadcasting service licence, while VOD services are electronic communications services for the purposes of the ECA and requiring an ECS licence. However ICASA clarified that where “programming in content is made available over the public Internet this does not fall within the Authority’s regulatory jurisdiction even where the programming content which is provided is the same as that provided on a broadcasting service.”¹² NMT is of the view that ICASA’s Position Paper is now outdated and effectively toothless and has not been able to keep up with the regulatory challenges posed by OTT services in the South African media market.
- 7.1.6. The South African Government is one of a number of governments on the Continent grappling with the regulation of OTT services¹³. Sadly the South African Government was badly affected by former President-Zuma’s 2014 Cabinet reshuffle which split the Department of Communications into two, making policy development in respect of converged technologies such as oh DTT services extremely difficult. While the Department of Telecommunications and Postal Services had developed an excellent set of proposals for the regulation of OTT services in Chapter Five of its National Integrated ICT Policy Discussion Paper – Options Paper dated 14 November

⁹ Gibb, D and Limpitlaw, J *The Pros and Cons of the Digital Revolution*. Business Day. 2 July 2018. Available at: <https://www.businesslive.co.za/bd/opinion/2018-07-02-the-pros-and-cons-of-the-digital-revolution/>

¹⁰ Gibb, D and Limpitlaw, J *The Pros and Cons of the Digital Revolution*. Business Day. 2 July 2018. Available at: <https://www.businesslive.co.za/bd/opinion/2018-07-02-the-pros-and-cons-of-the-digital-revolution/>

¹¹ Notice 770 published in Government Gazette No. 33436 dated 3 August 2010.

¹² Ibid at paragraph [98].

¹³ The Communications Authority of Kenya has recently put out a tender for consultancy services for the study on an OTT technologies/services in Kenya.

2014¹⁴. Sadly no actual policy has to date resulted from the Options Paper due to the splitting of the departments.

7.1.7. We are of the of the view that OTT services are required to be regulated in some way¹⁵ in order to prevent so-called forum shopping by a content providers who steer clear of broadcasting as being subject to so-called heavy touch regulation in favour of OTT services which are subject to light-touch or no regulation. The aim is to ensure that all service providers that make money off the people of Namibia contribute to the development and societal goals of the country.

7.2. What is Required

7.2.1. The availability of OTT services which replicates or provides alternatives to traditional broadcasting services is a relatively new phenomenon. Consequently, national examples of appropriate regulation of OTT services is extremely rare and is, world-wide, in its infancy. However a number of countries are beginning to grapple with them as their own national media, both print, broadcast and online suffer decline (with consequential challenges for other local industries such as the local cultural sectors and content developers) due to the enormous global market power of the so-called FANGs (Facebook, Amazon, Netflix and Google).

7.2.2. In early 2018, the African Union has passed a Declaration on Internet Governance and Development of Africa's Digital economy¹⁶ (AU Internet Declaration). We think that Namibia ought to be guided thereby and in particular, by the relevant key provisions thereof that talk to OTT regulation directly, namely:

7.2.2.1. Clause 14 which provides that member states “undertake to ensure legal and regulatory environments that will enable growth of Africa's Digital economy through innovative applications and services, making the Internet central to Africa's development agenda”; and

¹⁴ Available at:

https://www.dtps.gov.za/index.php?option=com_phocadownload&view=category&id=45:discussion-paper&Itemid=143

¹⁵ Japan, Australia, India and the European Union are other jurisdictions which are investigating what such regulation could look like.

¹⁶ https://au.int/sites/default/files/newsevents/workingdocuments/34444-wd-_declaration_on_internet_governance_adopted_au_summit_2018.pdf

7.2.2.2. Clause 15 which provides that the member states undertake to “promote local content and put in place the necessary mechanisms to ensure equitable distribution of Internet revenues”.

7.2.3. It is clear that the AU Internet Declaration recognises the importance of OTT and other Internet applications and services to the growth of the African Digital economy. However, such growth will not happen if OTT services such as the FANGs operate in a manner that draws advertising and subscription revenue out of a national jurisdiction without being required also to contribute adequately to the country’s social goals including: employment and skills transfers, taxes, local content development and the like.

7.3. Where Namibia Falls Short

NMT is of the view that Namibia simply lacks any real policy or legislation with regard to the regulation of OTT Services and that in order to meet its AU undertakings it ought to comply with the AU Internet Declaration by developing same.

7.4. Issues the ICT Review Must Address

7.4.1. NMT respectfully submits that a key priority for the ICT review will be the development of policy and subsequent legislative provisions to make provision for the appropriate regulation of OTT services in a manner that enhances the delivery of a diversity of services to the people of Namibia and that meets the social goals already established for the Namibian broadcasting and electronic communications sectors.

7.4.2. In this regard, NMT is of the view that the provisions of Chapter 5 of the South African Government’s Department of Telecommunications and Postal Services’ National Integrated ICT Policy Discussion Paper – Options Paper dated 14 November 2014¹⁷ might provide a useful starting point given the similarities of the two countries in respect of: history, Constitutions, currently converged regulators and general legal systems.

8. ESTABLISHING AND/OR STRENGTHENING THE LEGISLATIVE PROVISIONS REGARDING PRIVACY AND DATA PROTECTION ONLINE

8.1. Introduction

¹⁷ Available at: https://www.dtps.gov.za/index.php?option=com_phocadownload&view=category&id=45:discussion-paper&Itemid=143

- 8.1.1. Recently the world has come to learn about how social media platforms Facebook and search engines such as Google sell personal information about you to their advertisers in return for which advertisers are able to engage in highly sophisticated target advertising using algorithms.
- 8.1.2. Importantly such information can be used not only for selling you to advertisers but also to political parties and formations. The furor over Cambridge Analytica's activities (using information gleaned from Facebook among others) during the 2016 US Elections and the Brexit Referendum and also in the 2017 Kenyan elections has highlighted the need to protect online users' personal data.
- 8.1.3. Some jurisdictions have moved swiftly to protect their citizens' personal data, the European Union's (EU) General Data Protection Regulation (GDPR)¹⁸ being a case in point. Importantly the GDPR also requires companies doing business with EU companies to have data protection in place so this will, shortly, become a very real issue for Namibian trade relations with the EU.
- 8.1.4. And yet Namibia does not have personal data protection policies let alone enacted statutes.

8.2. What is Required

- 8.2.1. The African Internet Rights Declaration contains a number of principles that speak to the issue of privacy as well as security issues, including, **Principle 8 - Privacy and personal data protection:** Everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the Internet, and to use appropriate technology to ensure secure, private and anonymous communication. The right to privacy on the Internet should not be subject to any restrictions, except those that are provided by law, pursue legitimate aim is expressly listed under international human rights law, (as specified in Article 3 of this Declaration) and are necessary and proportionate in pursuance of a legitimate aim.
- 8.2.2. The African Union has also developed a Convention on Cyber Security and Personal Data Protection¹⁹ (AU Convention) which deals with a range of topics including personal data protection. The section in the AU Convention dealing with personal data protection contains a number of detailed Articles which sets

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

¹⁹ https://www.au.int/web/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf

out how data protection ought to be secured and which comport with international best practice standards.

8.3. Where Namibia Falls Short

- 8.3.1. We are not aware of any attempts by the Government of Namibia to secure people's personal data protection rights with regard to the Internet. The NMT is of the view that the increasing importance of the Internet in the daily lives of Namibians makes it incumbent upon those undertaking the ICT review to include positive policy statements in respect of personal data protection in any forthcoming ICT policy and resultant legislation.
- 8.3.2. We are also of the view that such a policy (and resultant legislation) will become essential for economic development as European companies (critical sources of direct foreign investment in Namibia) will have to secure their own client's data protection rights in regard to any transactions with a Namibian company under the European Union's General Data Protection Regulation²⁰.

8.4. Issues the ICT Review Must Address

- 8.4.1. The NMT requests that those responsible for the ICT Review take cognizance of the provisions of both the African Internet Rights Declaration and the AU Convention and incorporate key aspects of the personal data protection provisions of same in the development of a Namibian Personal Data Protection Policy (and consequential legislation) as part of the Policy Review.
- 8.4.2. Such a Personal Data Protection Policy must be in accordance with international best practice and accord with the African Internet Rights Declaration and the AU Internet Declaration. It is important that such a policy and resulting legislation give concrete expression to the personal data protection rights not only of people within Namibia but also of those transacting with Namibians.

9. STRENGTHENING LEGISLATIVE PROVISIONS REGARDING ONLINE/INTERNET RIGHTS AND FREEDOMS

9.1. Introduction

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

- 9.1.1. Across Africa, people rights of access to the Internet are under threat in a number of ways, including:
- 9.1.1.1. Internet shutdowns or blackouts²¹;
 - 9.1.1.2. partial Internet and social media shutdowns blocking only certain websites or social media platforms²²;
 - 9.1.1.3. Internet throttling, where Internet speeds are deliberately reduced to prevent accessing particular kinds of information or communicating over the Internet²³;
 - 9.1.1.4. the imposition of taxes on Internet users²⁴; and
 - 9.1.1.5. the imposition of licensing requirements and unreasonably high fees on Internet content providers such as bloggers²⁵.
- 9.1.2. The NMT is of the view that it is essential that the ICT Review engages in the development of national Internet policy, particularly given the increasing importance of the Internet in the social, cultural and political life of the Namibian nation and that the rights of Namibians to the Internet and to the enjoyment of the Internet be unequivocally provided for in such Internet policy.

9.2. What is Required

- 9.2.1. In 2014 a number of civil society organisations from across the African continent came together to develop the African Declaration on Internet Rights and Freedoms²⁶ (the African Internet Rights Declaration). This document is a critical statement of principles and rights that ought to inform the development of policy, law and regulation in respect of the Internet generally by African governments. While the document is voluminous, NMT is of the view that its rights-focused provisions would be of significant benefit those undertaking the ICT Review given the growing importance of the Internet to meeting the communications needs of the Namibian Population. In NMT's respectful view only a rights-based approach to Internet regulation would meet Namibia's

²¹ As has happened in a number of countries including: Cameroon (Anglophone) Ethiopia, Democratic Republic of the Congo, Gabon, Republic of Congo, Togo, The Gambia, Niger, Mali, and Chad.

²² As has happened Ethiopia.

²³ As has happened Chad.

²⁴ As has happened in Uganda.

²⁵ As has happened in Tanzania.

²⁶ Available at: <http://africaninternetrights.org/wp-content/uploads/2015/11/African-Declaration-English-FINAL.pdf>

Constitutional requirements in respect of protecting freedom of expression and its corollary right – the right to information. In brief, relevant general aspects of Key Principles provided for in the African Internet Rights Declaration include:

- 9.2.1.1. **Principle 2 - Internet access and affordability:** Access to the Internet should be available and affordable to all persons in Africa without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Access to the Internet plays a vital role in the full realisation of human development, and facilitates the exercise and enjoyment of a number of human rights and freedoms, including the right to freedom of expression and information, the right to education, the right to assembly and association, the right to full participation in social, cultural and political life and the right to social and economic development;
- 9.2.1.2. **Principle 3 - Freedom of expression:** ... Everyone has the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the Internet and digital technologies and regardless of frontiers... The exercise of this right should not be subject to any restrictions, except those which are provided by law, pursue a legitimate aim as expressly listed and an international human rights law (namely the writer reputation of others, the protection of national security, or of public order, public health or morals) and are necessary and proportionate in pursuance of a legitimate aim.
- 9.2.1.3. **Principle 4 – Right to information:** Everyone has the right to access information on the Internet. All information, including scientific and social research, produced with the support of public funds, should be freely available to all, including on the Internet.
- 9.2.1.4. **Principle 5 – Freedom of assembly and association and the Internet:** Everyone has the right to use the Internet and digital technologies in relation to freedom of assembly and association, including through social networks and platforms. No restrictions on usage of and access to the Internet and digital technologies in relation to the right to freedom of assembly and association may be imposed a lesser restriction as prescribed by law, pursues a legitimate aim as expressly listed under international human rights

law (as specified in Principle 3 of this Declaration) and is necessary and proportionate in pursuance of a legitimate aim.

- 9.2.1.5. **Principle 6 - Cultural and linguistic diversity:** Individuals and communities have the right to use their own language or any language of their choice to create, share and disseminate information and knowledge through the Internet...
- 9.2.1.6. **Principle 7 – Right to development and access to knowledge:** Individuals and communities have the right to development, and the Internet has a vital role to play in helping to achieve the full realisation of nationally and internationally agreed sustainable development goals. It is a vital tool for giving everyone the means to participation in development processes.
- 9.2.1.7. **Principle 10 – Marginalised groups and groups at risk:** The right of all people, without discrimination of any kind, to use the Internet as a vehicle for the exercise of enjoyment of the human rights, and for participation in social and cultural life, should be respected and protected.
- 9.2.1.8. **Principle 11 – Right to due process:** Everyone has the right to due process in relation to any legal claims of violations of the law regarding the Internet. Standards of liability, including defences and several criminal cases, should take into account the overall public interest in protecting both the expression and a forum in which it is made; for example the fact that the Internet operates as a sphere for public expression and dialogue.
- 9.2.1.9. **Principle 12 – Democratic multi-stakeholder Internet governance:** Everyone has the right to participation in the governance of the Internet. The Internet should be governed in such a way as to uphold and expand human rights to the fullest extent possible. The Internet governance framework must be open, inclusive, accountable, transparent and collaborative.
- 9.2.1.10. **Principle 13 – Gender equality:** To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the Internet. Efforts to increase access should therefore recognise and redress existing gender inequalities, including

women's underrepresentation in decision-making roles, especially in Internet governance.

9.2.2. In early 2018, the African Union has passed a Declaration on Internet Governance and Development of Africa's Digital economy²⁷ (AU Internet Declaration). In brief, relevant key aspects of the AU Internet Declaration are:

9.2.2.1. Clause 3 which "acknowledges the importance of maintaining an open Internet based on open standards development processes as key enablers for inclusive knowledge and information societies";

9.2.2.2. Clause 4 which provides that the member states "remain committed to facilitating a resilient, unique, universal and interoperable Internet that is accessible to all and will strive to ensure universal and affordable Internet access for all African citizens including people with specific needs

9.3. Where Namibia Falls Short

We are not aware of any attempts by the Government of Namibia to curtail people's rights of expression or information with regard to the Internet despite rhetorical threats to regulate social media. Nevertheless, the NMT is of the view that the increasing importance of the Internet in the daily lives of Namibians makes it incumbent upon those undertaking the ICT review to include positive policy statements in respect of fundamental Internet rights and freedoms in any forthcoming ICT policy and resultant legislation.

9.4. Issues the ICT Review Must Address

9.4.1. The NMT requests that those responsible for the ICT Review take cognizance of the provisions of both the African Internet Rights Declaration and the AU Internet Declaration and incorporates key aspects of same in the development of a Namibian Internet Policy as part of the Policy Review.

9.4.2. Such an Internet Policy must be in accordance with international best practice and accord with the African Internet Rights Declaration and the AU Internet Declaration. It is important that such a policy not only set out obligations in respect of Internet users but also set out the rights and freedoms with regard

²⁷ https://au.int/sites/default/files/newsevents/workingdocuments/34444-wd-_declaration_on_internet_governance_adopted_au_summit_2018.pdf

to the Internet that are recognised by the government of Namibia as being the inherent right of every Namibian.

10. STRENGTHENING LEGISLATIVE PROVISIONS REGARDING THE INTERCEPTION MONITORING OF ELECTRONIC COMMUNICATIONS TO PROTECT FUNDAMENTAL PRIVACY RIGHTS WHILE BALANCING LEGITIMATE NATIONAL SECURITY INTERESTS

10.1. Introduction

10.1.1. Namibia has undergone a process of developing an Electronic Transactions and Cybercrime Bill (ETC Bill) this has yet to be passed by Parliament and be enacted. The NMT was instrumental in assisting civil society to make representation on the ETC Bill and so has detailed knowledge that the ETC Bill was and remains deeply flawed and ought not be enacted in its current form. In brief, civil society commented that:

10.1.1.1. the ETC Bill be split into an Electronic Transactions Bill and a separate Cybercrimes Bill;

10.1.1.2. the level of independence of the proposed Electronic Information Systems Management Advisory Council was insufficient;

10.1.1.3. the takedown obligations imposed upon service providers in terms of section 54 of the ETC Bill were too broad and did not sufficiently protect the public interest in the free flow of information online;

10.1.1.4. The provisions of section 69 of the ETC Bill which allow for warrantless searches and seizures by police officers are:

10.1.1.4.1. unconstitutional in that they violate the provisions of Article 13(2)(b) of the Constitution which provides that warrantless police searches have to be prescribed by an act of Parliament “to preclude abuse”;

10.1.1.4.2. out of step with the countries administration of justice laws as section 22 of the Criminal Procedure Act, 1977, provides for only very limited circumstances in which warrantless searches can be carried out.

- 10.1.2. Namibia also has provisions in its Communications Act in relation to the interception of telecommunications, namely, Part 6 thereof. The NMT is also concerned with the breadth of discretion that is given to the Minister responsible for Communications in relation to such interception activities.

10.2. What is Required:

- 10.2.1. The African Internet Rights Declaration contains a number of principles that speak to the issue of privacy as well as security issues, including:
- 10.2.1.1. **Principle 8 - Privacy and personal data protection:** Everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the Internet, and to use appropriate technology to ensure secure, private and anonymous communication. The right to privacy on the Internet should not be subject to any restrictions, except those that are provided by law, pursue legitimate aim is expressly listed under international human rights law, (as specified in Article 3 of this Declaration) and are necessary and proportionate in pursuance of a legitimate aim.
- 10.2.1.2. **Principle 9 – Security, stability and resilience of the Internet:** Everyone has the right to benefit from security, stability and resilience of the Internet. As a universal global public resource, the Internet should be a secure, stable, resilient, reliable and trustworthy network. Different stakeholders should continue to cooperate in order to ensure effectiveness in addressing risks and threats to security and stability of the Internet. Unlawful surveillance, monitoring and interception of users’ online communications by state or non-state actors fundamentally undermine the security and trustworthiness of the Internet.
- 10.2.2. The AU Internet Declaration contains important provisions on Internet security in clause 19 thereof, in terms of which member states have pledged “to work together in the fight against the inappropriate use of ICT is in a bid to reach a consensus, in the medium term, on the best cyber security mechanisms and practices in Africa.”

10.2.3. The African Union has also developed a Convention on Cyber Security and Personal Data Protection²⁸ (AU Convention) which deals with a range of topics including promoting cyber security and combating cybercrime. The section in the AU Convention dealing with cybercrime contains number of detailed Articles which sets out how cybercrime ought to be regulated in accordance with international best practice standards.

10.3. Where Namibia Falls Short:

NMT is of the view that Namibia does not comply with the African Internet Rights Declaration, the AU Internet Declaration or AU Convention when it comes to protecting privacy against intrusive, unwarranted monitoring and interception. The extant legal provisions are also unconstitutional and even fall short of existing standards set in fairly old legislation such as the Criminal Procedure Act.

10.4. Issues the ICT Review Must Address

10.4.1. The NMT reiterates its suggestion that those responsible for the ICT Review take cognizance of the provisions of both the African Internet Rights Declaration and the AU Convention and incorporate key aspects of the personal data protection provisions of same in the development of a Namibian Personal Data Protection Policy (and consequential legislation) as part of the Policy Review.

10.4.2. Such a Personal Data Protection Policy must be in accordance with international best practice and accord with the African Internet Rights Declaration and the AU Internet Declaration. It is important that such a policy and resulting legislation give concrete expression to the personal data protection rights not only of people within Namibia but also of those transacting with Namibians.

10.4.3. At the same time, the NMT recognises that objective, legitimate, national security concerns will, at time, require the interception and monitoring of electronic communications. Nevertheless this must be done in accordance with international law, international best practice standards and the Constitution. Consequently the NMT recommends the development of specific policy statement which set out in principle policy statements on when

²⁸ https://www.au.int/web/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf

such privacy intrusions would be in the public interest. In this regard, the NMT recommends that the persons undertaking the ICT Review have regard to the Johannesburg Principles²⁹ on National Security, Freedom of Expression and Access to Information as these provide useful guidelines for when national security interests can legitimately limit rights. Thereafter the ICT Review must consider amendments to the Communications Act (or its successor legislation) to overhaul the interception and monitoring provisions contained therein.

10.4.4. The NMT is also of the view that it is critical that cybersecurity be dealt with as a matter of policy development and that the ETC Bill be considered in the light of international developments such as the AU Internet Declaration and the AU Convention. Again this will require the development of a detailed cybersecurity policy as well as proposals for overhauling the ETC Bill or replacing it all together.

11. THE PROCESS GOING FORWARD

NMT is of the view that this is part of a longer process of stakeholder engagement and participation in the ICT Review and we respectfully suggest and request that each of the above issues be addressed in the ICT Review and that all draft policies and draft legislative amendments or new draft legislation that results from the ICT Review be subject to a thorough public notice and comment procedure with adequate time frames in respect of each step in the ICT Review process.

12. CONCLUSION

Again, we thank MICT for the opportunity of making these written submissions and look forward to making them orally at the stakeholder workshop scheduled for 28 November 2018.

//Ends

²⁹ <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>