

From:	Members of the ICT Committee of the Law Society of the Cape of Good Hope
To:	Ms Adelaide Masemola (Director: Economic Analysis and Scenario Construction, Department of Communications)
Copy to:	Mr Sizwe Snail, member of the Ministerial ICT Policy Review Committee
Subject:	Comments of the proposed ICT Policy Review Framing Paper 2013
Date:	15 June 2013

Framing Paper Question:

Do you agree freedom of expression is the core principle that should guide the policy review process? Are there any other key considerations relating to the right to freedom of expression which should be considered?

Submission:

Freedom of expression is a core principle to be reflected on when reviewing National ICT policy but not the only core principle. Another equally important core principle to guide the ICT policy review is the right of access to information and the corresponding obligation of the State to promote access to information.

Freedom of expression, in its purest form, implies a freedom to impart information, whereas the right of access to information implies the right to obtain information. In a world where “information is power”, citizens are not empowered unless they are able to access the information they need to improve their lives and to make free and informed decisions about matters affecting them.

Although freedom of expression and access to information are distinct concepts, in practice the right of access to information and the right to freedom of expression are often paired. Guarantees of freedom of expression in constitutions and international instruments expressly or implicitly include recognise aspects of the right to access information¹, viz the right to seek and impart information. Neither of these twin principles is more important than the other and they should be viewed as the two lanes of the ICT highway. Most consumers of Internet services demand far more information than they transmit (which is catered to by Internet service providers providing more bandwidth for downloads than uploads).

In a developing knowledge economy such as South Africa, it is submitted that the right of access to information should be emphasised as the core principle when

¹ See sections 16 and 32 of the Constitution of the Republic of South Africa, Act 108 of 1996.

reviewing ICT policy. This is because access to information and knowledge has become a key determinant of the extent to which individuals, communities, societies and whole regions can shape their own lives and compete for jobs and services.²

Access to information impacts on many key areas of ICT policy for the following reasons:³

By providing and ensuring access to information, it will encourage e-learning growth in the country and open up educational opportunities and resources by providing an educational platform which surpasses geographical and financial challenges facing South Africans.

Access to reliable, affordable and secure communication services by all citizens will promote economic development and growth by creating new jobs, attracting and developing new industries and providing access to local, provincial, national and global markets.

In the medical sector access to information can potentially reduce the physical distance between medical institutions if medical data is readily available as and when needed. It may also facilitate medical care to previously underserved communities through remote diagnosis, treatment, monitoring and consultations with medical specialists.

Reliable access to information can help streamline people's interaction with government agencies by providing information about government policies, procedures, benefits and programs.

It can also assist in protecting the public by facilitating and promoting public safety information and procedures.

Access to information is vital to bridge the gap in providing access to the enabling infrastructure of communication services being developed in our country to build a knowledge economy and information society for accelerating growth and development of the South African economy. Without access the infrastructure will not reach its objectives and provide a potential accelerator of economic and social development.

The core principles of freedom of expression together with access to information should be used to inform and guide the new communications sector related policy and legislative framework in order to enhance the government policy objectives in

² A point recognised by the current ruling party: see <http://www.anc.org.za/docs/discus/2012/communication.pdf>

³ See General Notice 350 of 2013 (No. 36332) – National Broadband Policy for South Africa available at <http://www.info.gov.za/view/DownloadFileAction?id=187543>

the provision of education, health services, job creation, reducing crime and building sustainable rural communities.

Framing Paper Question:

The right to benefit from the ability of the communications sector to facilitate social development and improve the quality of life for individuals and communities.

Has this principle been adequately covered and its full meaning captured in existing policy and legislation? What other core issues should be considered?

Comment:

No, the framing paper does not contemplate the development of policies designed to result in free Internet services under any particular conditions. Freedom of access to information must mean free access in certain conditions and not merely freedom to pay for access.

There are no websites that are free to access in South Africa. There are many websites that do not charge for their content but there are no websites that Internet Service Providers are required to provide free Internet access to.

In the same way that telecommunications companies are required to place free calls to emergency services, so too should Internet Service Providers be required, as a condition of their ECNS licences, to permit a limited amount of free access to critical resource sites identified by the Minister, including official government service websites, **Wikipedia.org**, www.saflii.org.za, university websites, etc. The campaign started by the students of Sidenjongo High School is a realistic, achievable and incredibly significant one: <https://www.facebook.com/FreeAccessToWikipedia> and would, if implemented by the Minister, change the lives of millions of students and the destiny of our country at a penstroke.⁴

We submit that the framing paper should create a framework for engaging with licensed Internet Service Providers and members of the public over policy interventions designed to bring about free access to a limited number of sites.

Framing Paper Question:

Government has responsibility to maximise the overall public benefit derived from

⁴ <http://www.iol.co.za/mercury/change-lives-of-millions-of-children-with-penstroke-1.1532548#.Ubsd9-cmtWU>

the use of public resources.

Is this principle adequately reflected in existing policy and legal frameworks? What, if any, additional considerations are relevant to this principle?

How, if at all, do technological advances affect the considerations underpinning the governance of spectrum?

Comment:

Spectrum scarcity is predominantly a terrestrial radio frequency issue.

Terrestrial television broadcasters propagate waves across the surface of the earth within relatively limited frequency bands and two or more broadcasters operating at the same frequency within the same region would cause interference to each others' signals. Terrestrial broadcasting frequencies (e.g. the FM radio or UHF and VHF television frequency bands) have therefore traditionally been regarded as scarce resources justifying tight control in the public interest.

By contrast, satellite broadcasting entails transmitting a signal from a large "up-linking" dish to a satellite in orbit above the earth which then "downlinks" a typically encrypted signal back to earth using the C- or Ku- frequency bands to smaller receiving satellite dishes linked to decoders.

Unlike terrestrial broadcasting frequencies which are quite limited, satellite broadcasting frequencies are unlimited and thousands of satellite channels may be beamed simultaneously into a region without causing any interference to each other whatsoever.

The Electronic Communications Act provides uniformly for the licensing of broadcasting services generally. However, current ECNS licensing frameworks do not distinguish sufficiently between the different types of broadcasting services. This may be an unintended result of the "convergence" ideology that permeates the EC Act (formerly known as the Convergence Bill).

Section 51 of the EC Act does not properly recognise the distinction between the different policies that should be evident when licensing terrestrial vs satellite broadcasters. As a result, satellite broadcasting licenses are significantly under-utilised as a means of achieving transformation of the communications sector and the uptake of communications services by a broad range of communities because satellite broadcasting frequencies are being treated by the licensing authority as a "scarce resource" resulting in an overly conservative approach to the award of such licenses.