South African Law Reform Commission

DISCUSSION PAPER 122

STATUTORY LAW REVISION:

(LEGISLATION ADMINISTERED BY THE DEPARTMENT OF COMMUNICATIONS)

PROJECT 25

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South African Law Reform Commission

The South African Law Reform Act, 1973 (Act 19 of 1973) established the South African Law Reform Commission (SALRC).

The members of the SALRC are –

The Honourable Madam Justice Yvonne Mokgoro (Chairperson)
The Honourable Mr. Justice Willie Seriti (Vice Chairperson)
Professor Cathi Albertyn
The Honourable Mr Justice Dennis Davis
Mr Thembeka Ngcukaitobi
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The Secretary is Mr Michael Palumbo. The project leader responsible for this investigation is Professor PJ Schwikkard. The researcher assigned to this investigation is Ms Maureen Moloi.

On 31 July 2008, Ms Mabandla, the Minister of Justice and Constitutional Development appointed the following advisory committee members who assisted the SALRC to develop this Consultation Paper, namely:

Ms J Limpitlaw, communications expert and lawyer
Dr T Cohen, head of Regulatory Affairs at Neotel
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Preface

This discussion paper has been prepared to elicit responses from the Department of Communications on the preliminary findings and proposals contained in this discussion paper.. The SALRC has liaised with the Department of Communications in the phases of this investigation leading to the development of this Consultation Paper and acknowledges the valuable assistance it received, particularly from officials in the Legal Service section. This discussion paper was developed to serve as a basis for the SALRC's further deliberations in the development of a report. The discussion paper contains the SALRC's preliminary proposals. The views, conclusions and proposals that follow in this discussion paper must not be regarded as the SALRC's final views or final recommendations. The discussion paper (which includes draft legislation) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may in any event be required to release information contained in representations under the Promotion of Access to Information Act of 2000. Respondents are requested to submit written comment and representations to the SALRC by 31 August 2011 at the address appearing on the previous page. Comment can be sent by e-mail or by post.

This discussion paper is also available on the Internet at http://salawreform.justice.gov.za/dpapers.htm

Any enquiries should be addressed to the researcher allocated to the project, Ms Maureen Moloi. Contact particulars appear on the previous page.

The proposed Communications and Related Matters Laws Amendment and Repeal Bill is contained in Annexure A. Schedule 1 of the proposed Bill consists of Acts that may be wholly repealed. Schedule 2 consists of Acts that may be repealed to the extent set out in the third column of that Schedule while Schedule 3 consists of Acts that may be amended to the extent set out in the third column of that Schedule. Annexure B lists the statutes administered by the Department of Communications.

Preliminary recommendations and questions for comments

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution, redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts in the statute book. The SALRC identified 90 statutes that are administered by the Department of Communications (see Annexure B).[1] The Department indicated that the Independent Media Commission Act 148 of 1993 is not a Department of Communications Act.

2. After its analysis of these statutes, the SALRC proposes that:

(i) The Acts set out in the Communications and Related Matters Laws Amendment and Repeal Bill, contained in Annexure A, be repealed as a whole for the reasons set out in Chapter 2 of this Consultation Paper;

(ii) The Acts set out in Schedule 2 of the proposed Bill contained in Annexure A, be repealed to the extent set out in that Schedule, for the reasons set out in Chapter 2 of this discussion paper;

(iii) The provisions of Acts set out in Schedule 3 of the proposed Bill, found in the same Annexure referred to above, be amended for the reasons set out in Chapter 2 of this discussion paper.

3. Furthermore, it is possible that some of the statutes recommended for repeal are still useful, and should thus not be repealed. Moreover, it is also possible that there are statutes or provisions that are not identified for repeal in this discussion paper but are of no practical utility and could be repealed. These should be identified and brought to the attention of the SALRC.

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[1] The list of statutes was received from the Department of Communications with comments on 11 November 2008. The researcher then added two more Acts that came to her attention at a later date.

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CHAPTER 1
BACKGROUND AND SCOPE OF PROJECT 25

A INTRODUCTION

(a) The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (the SALRC) are set out as follows in the South African Law Reform Commission Act 19 of 1973: to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof, including –

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic; and
- the consolidation or codification of any branch of the law.

1.2 In short, the SALRC is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

(b) History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC undertook a revision of all pre-Union legislation as part of its project 7 that dealt with the review of pre-Union legislation. This resulted in the repeal of approximately 1 200 ordinances and proclamations of the former Colonies and Republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its project 25 on statute law: the establishment of a permanently simplified, coherent and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act No 94 of 1981) which repealed approximately 790 post-Union statutes.

1.4. In 2003 Cabinet approved that the Minister of Justice and Constitutional Development co-ordinates and mandates the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. This section prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the

previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation will be on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated right from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A recent provisional audit, by the SALRC, of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of these Acts serve no useful purpose anymore, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

B. WHAT IS STATUTORY LAW REVISION?

1.7 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.[2] Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or "live". If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.8 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.[3] Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

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[2] See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

[3] See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 6 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

1.9 In the context of this investigation, the statutory law revision process also targets statutory provisions that are obviously at odds with the Constitution, particularly section 9 thereof.

1.10 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:[4]

(a) references to bodies, organisations, etc that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
(b) references to issues that are no longer relevant as a result of changes in social or economic conditions;
(c) references to Acts that have been superseded by more modern legislation or by an international convention;
(d) references to statutory provisions (i.e. sections, schedules, etc) that have been repealed;
(e) repealing provisions e.g. "Section 28 is repealed/shall cease to have effect";
(f) commencement provisions once the whole of an Act is in force;
(g) transitional or savings provisions that are spent;
(h) provisions that are self-evidently spent – e.g. a once-off statutory obligation to do something becomes spent once the required act has duly been done;
(i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.11 The Law Commission of India notes that in England the terms "expired", "spent", "repealed in general terms", "virtually repealed", "superseded", and "obsolete" were defined in memoranda to Statute Law Revision Bills as follows:[5]

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had their object the continuance of previous temporary enactments for periods now gone by effluxion of time;
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required;

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4 See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 7 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

5 Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March1984; p 3 of Chapter 2 (p 6 of 21) accessed from http://lawcommissionofindia.nic.in/51-100/Report96.pdf on 20 February 2009.

- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate;
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise;
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.12 Statutory provisions usually become redundant as time passes.[6] Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as "pump-priming" provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.13 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.[7] Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

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6 *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 9 and 10 accessed from http://lawcommission.justice.gov.uk/docs/background-notes.pdf on 20 February 2009.

7 *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 8 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.14 The methodology adopted in this investigation is to review the statute book by department – the SALRC identifies a national government department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

C. THE INITIAL INVESTIGATION

1.15 In the early 2000s the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies (CALS) of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational structure of revising the South African statute book for constitutionality, redundancy and obsoleteness. CALS pursued four main avenues of research in their study conducted in 2001:[8]

- First, a series of role-player interviews were conducted with representatives of all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.
- Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned were compiled. The three most problematic categories of legislative provision were identified, and an analysis made of the Constitutional Court's jurisdiction in relation to each category. The three categories were: reverse onus provisions; discriminatory provisions; and provisions that infringe the principle of the separation of powers.

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8 "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand.

Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

- Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared against a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the outcomes revealed that a targeted revision of the statute book, in accordance with the guidelines, produced surprisingly effective results.
- Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all the countries have conducted or are conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differ.

1.16 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions –

- the Recognition of Customary Marriages (August 1998);
- the Review of the Marriage Act 25 of 1961(May 2001);
- the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- Traditional Courts (January 2003);
- the Recognition of Muslim marriages (July 2003);
- the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- Customary Law of Succession (March 2004); and
- Domestic Partnerships (in March 2006)

D. SCOPE OF THE PROJECT

1.17 This investigation focuses not only on obsolescence or redundancy of provisions but also on the question of the constitutionality of provisions in statutes. In 2004 Cabinet endorsed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In

practical terms this means that this leg of the investigation will be limited to those statutes or provisions in statutes that:

- differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences will be left to the judicial process.

1.20 The SALRC decided that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.[9] However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This is necessitated by, among other considerations, time and capacity. It is not foreseen that the SALRC and government departments will have capacity in the foreseeable future to revise all national statutes or the entire legislative framework to determine whether they contain unconstitutional provisions.

E. ASSISTANCE BY GOVERNMENT DEPARTMENTS AND STAKEHOLDERS

1.21 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered "inside" knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on

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[9] Cathi Albertyn prepared a 'Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006.

the assistance of departments and stakeholders. This will ensure that all relevant provisions are identified during this review, and dealt with responsively and without creating unintended negative consequences.

F. CONSULTATION WITH THE DEPARTMENT OF COMMUNICATIONS

1.22 The SALRC submitted its consultation paper containing preliminary findings and proposals to the DOC in April 2010 for its consideration. The purpose of the consultation paper was to consult with the DOC on the preliminary findings and proposals contained in the consultation paper and for the department to confirm that it has no objection to the provisionally proposed repeals and amendments. On 18 August 2010 the DOC submitted its comment to the SALRC on the preliminary findings and proposals contained in the consultation paper and additional comments were received from the Department on 19 October 2010. Although the DOC agreed with some of the recommendations it highlighted amendments proposed by the SALRC that are beyond the scope of this project. Contrary to allegations made by the DOC there seems to be few grounds for alleging bias. The SALRC acknowledges the valuable assistance it received, particularly from officials in the Legal Services section.

CHAPTER 2

Repeal and amendment of legislation administered by the Department of Communications

A. INTRODUCTION

(a) Overview of the Communications Sector

2.1 The communications sector is extremely broad and there are dozens of Acts that are currently administered by the Department of Communications or which are closely allied to the communications sector yet are administered by other departments. The SALRC deems it useful to set out a brief overview of features of the legislative landscape in a few key areas affecting communications sector, namely, the institutional framework, the regulation of electronic communications, broadcasting, e-commerce, interception and monitoring and postal services, so as to provide a framework for the recommendations for repeal or amendments set out in subsequent paragraphs.

2.2 The Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act) commenced on 11 May 2000 and established the Independent Communications Authority of South Africa (ICASA).[10] This Act effected a merger between the Independent Broadcasting Authority (IBA), which had previously regulated the broadcasting sector in terms of the Independent Broadcasting Authority Act 153 of 1993, and the South African Telecommunications Regulatory Authority (SATRA), which had previously regulated the telecommunications sector in terms of the Telecommunications Act 103 of 1996.

2.3 The ICASA Act provides for the establishment of ICASA (and the consequent dissolution of the IBA and SATRA); the transfer of functions of the latter authorities to ICASA; for the amendment of the Independent Broadcasting Authority Act of 1993, the Telecommunications Act of 1996, the Broadcasting Act of 1999; and for matters connected therewith.

2.4 ICASA is the regulator for the entire electronic communications sector, including broadcasting and postal matters.[11] The ICASA Act has been amended by the Broadcasting

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[10] Government Gazette 28945 dated 22 June 2006.

[11] The ICASA Amendment Act 3 of 2006 expanded ICASA's remit to also regulate postal matters in the public interest in terms of the Postal Services Act 124 of 1998. Regulatory function pertaining to broadcasting and electronic communications is effected through the Electronic Communications Act of 2005 and the Broadcasting Act 4 of 1999.

Amendment Act 64 of 2002, the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Independent Communications Authority of South Africa Amendment Act 3 of 2006. This latter amendment provided for new institutional arrangements, specifically, to change the appointing authority from the President to the Minister, and to increase the number of Councillors to serve on the Council. Subject to Presidential assent, the Competition Amendment Act of 2008 will also amend the ICASA Act in terms of concurrent jurisdiction.(this Act is not administered by DOC)

2.5 ICASA's primary function is to license broadcasters, the providers of electronic communications networks and services and postal services; to make regulations; to impose licence conditions; to develop policies as to how these duties should be performed; to plan, assign, control, enforce and manage the frequency spectrum; to ensure national and regional cooperation, including frequency coordination; to consult with the Ministry of Communications on certain regulatory matters, excluding the function of licensing; to prescribe a code of conduct to protect consumers against unfair business practices, poor quality services and harmful or inferior products; to prescribe and review a code of conduct according to which complaints would be dealt with by a Complaints and Compliance Committee (CCC) and where justified, advises ICASA Council which sanction to impose. The CCC also functions as a complaints commission in so far as the sector is concerned.

2.6 ICASA must also give effect to the Electronic Communications Act 36 of 2005 (ECA). The primary object of the ECA is to provide for the regulation of electronic communications in the Republic in the public interest. The Electronic Communications Act was promulgated in 2005 as the primary legislation regulating the electronic communications industry. The ECA replaced the Telecommunications Act and most of the broadcasting legislation. The object of the ECA is to provide for the regulation of electronic communications in the public interest. It establishes the Universal Service and Access Agency of South Africa (USAASA) to promote universal service. Some regulatory powers, however, are reserved for the Minister of Communications.

2.7 There are provisions in the ECA regulating various electronic communications matters, including licensing, spectrum planning and allocation, interconnection and facilities leasing, rights of way, competition matters including pricing regulation, numbering, consumer protection and universal service. The ECA also brought postal services under the regulatory authority of ICASA.

2.8 From the time of the transition to democracy broadcasting was regulated in terms of the Independent Broadcasting Authority Act of 1993 (the IBA Act) and the Broadcasting Act of 1999 (the Broadcasting Act). When the ECA came into force, it repealed the IBA Act in its entirety and also repealed much of the Broadcasting Act. Essentially the Broadcasting Act became effectively a

statute which regulates the public broadcaster and the South African Broadcasting Corporation Limited, although there are currently a few provisions which are applicable to the broadcasting sector as a whole. The ECA deals generally with the regulation of broadcasting in Chapter 9 headed "Broadcasting Services" and essentially this Chapter replicates certain of the provisions in the IBA Act. This has not been done sufficiently and critical anomalies remain as is more fully set out in this report. The broadcasting sector in South Africa is based upon a three tier system made up of public, commercial and community broadcasting. The importance of a diversity of views being broadcast over the airwaves (brought about not only through content regulation but also through ownership and control restrictions) and the necessity of guaranteeing regulatory independence to ensure this, is recognized and entrenched in section 192 of the Constitution which specifically protects the independence of the broadcasting regulator, namely ICASA.

Much of the budget of the Department of Communications goes to public enterprises involved in providing electronic communications services. In addition to regulating the industry, the government has interests in, inter alia, Telkom, Sentech, the South African Broadcasting Corporation and Broadband Infraco.

2.9 Prior to 1994 (which saw the promulgation of independent broadcasting legislation and then telecommunications legislation) the Radio Act and the Post Office Act, along with some other minor legislation such as the Telegraph Messages Protection Act, the majority of which have been repealed, primarily regulated the industry. A number of these remain in the statute book and ought to be repealed.

2.10 In South Africa, and generally, activity relating to e-commerce policy and legislation development has been considerably less than that related to telecommunications infrastructure, broadcasting regulation and information communications technologies (ICT). There are various reasons for this. Mostly the difference in evolution can be ascribed to the perception that the fundamental challenge facing ICT development is the inadequacy of the necessary infrastructure.[12] A state of affairs which governments have tried to address by privatization, or liberalization or regulation or a hybrid of all. These activities drove policy and legislation in the telecommunications sphere, but not in the ICT applications and services sector. Once the infrastructure issues are dealt with, the development of non-telecommunications related ICT skills, services, applications and capabilities including e-commerce will become the primary challenge for governments, regulators and the industry.

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12 James (ed), Part 5.6 - e-Commerce Practice and Policy in Africa.

2.11 The fundamental goal of e-commerce legislation has been to create functional legal equivalence between doing business through electronic and traditional means.[13] Simply put, if there are legal, statutory or non-statutory, barriers to conducting business electronically as compared to traditional means, development of e-commerce is stunted. E-commerce is further hindered when the legislative framework intrudes by way of providing for private contractual arrangements and by creating or facilitating unfair or anti-competitive practices.

2.12 In light of this view, it is generally recommended that e-commerce legislation deals principally with electronic contracting and electronic signatures and matters connected therewith. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce[14] on which Chapter 3 of the South African Electronic Communications and Transactions Act 25 of 2002 (ECTA) is based, supports this argument.

2.13 Whilst recognizing that there are interlinked legislative necessities to e-commerce, such as, cyber-crime and electronic security, data protection and privacy and online consumer protection which the ECTA deals with, e-commerce legislation need not prescribe the entire wider regulatory framework, nor should it attempt to fill lacunae left by existing laws. However there are definite overlaps between electronic communications and e-commerce law and policy.

2.14 The enactment of the ECTA was preceded by a lengthy policy process, commencing in 1998 with the initial framework for e-Commerce devised by the Organisation of Economic Cooperation and Development (OECD) used to structure a discussion document, namely:

- building trust for users and consumers;
- establishing ground rules for the digital marketplace;
- enhancing the information infrastructure for electronic commerce; and
- maximizing the benefits of electronic commerce[15].

2.15 The proposed framework was subsequently widened to include security and privacy, taxation and customs, intellectual property, infrastructure, electronic payment systems, internet governance and domain naming, maximising the benefits, technical standards, contracting and trade laws. Nevertheless, before March 2001 the Government decided to fast track some aspects of the e-

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13 UNCITRAL accessed on 2 February 2009 at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

14 *Supra.*

15 James, South Africa's e-Commerce Legislative Process, 2001 Part 5.7.

commerce framework into legislation. The resultant ECTA was promulgated on 31 July 2002, and was put into operation on 30 August 2002.

2.16 ECTA was South Africa's first piece of convergence legislation, albeit services convergence, not technological convergence and as a result, it cast its net too wide. ECTA did provide legal certainty in respect of a number of essential aspects of e-commerce such as agreements concluded electronically, electronic signatures and electronic evidence, amongst others while other important matters such as protection of personal information and policy-making were not paid the same respect.

2.17 The Regulation of Interception of Communications and Provision of Communication–Related Information Act 70 of 2002 (RICA) was enacted against the backdrop of a rise in organized criminal activity enabled by sophisticated communication technology such as mobile telephony, satellite communications, email and other computer communications. In the main, RICA provides for the interception and monitoring of direct and indirect communications by law enforcement personnel and the acquisition and disclosure of data relating to communications for purposes of law enforcement and national security. In this regard, RICA facilitates the investigation, detection and prevention of crime by law enforcement officers and agencies.

2.18 A schedule to the Act lists the crimes RICA aims to combat- terrorism, fraud and money laundering. RICA sets out circumstances under which law enforcement personnel may apply to a designated Judge[16] of a High Court for an interception and monitoring direction and entry warrants, and the manner in which such directions and entry warrants are to be executed. It repeals the Monitoring Prohibition Act 27 of 1992.

2.19 There are two principal pieces of legislation that regulate the postal sector in South Africa, and which should be retained, albeit in amended form. They are:

- the Postal Services Act 124 of 1998 – which regulates the authorisation of reserved and unreserved postal services, money transfer services, the Postbank and national savings certificates; and
- the Post Office Act 44 of 1958 – which regulates the incorporation of the South African Post Office Limited (SAPO) and Telkom SA Limited (Telkom) as juristic persons that are

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16 RICA defines a designated Judge as any Judge of a High Court discharged from active service under section 3(2) of the Judge's Remuneration and Conditions of Employment Act 2001, or any retired Judge who is designated by the Minister to perform the functions of a designated judge for purposes of the Act.

legally separate from, and operationally independent of the executive arm of government, as well as related issues such as their shareholding and governance structures.

2.20 There are various other statutes on the books that regulate the postal sector that have either become obsolete or redundant, and that should accordingly be repealed in their entirety.

B. Legislation Recommended for Repeal:

(a) Telegraph Messages Protection Act 44 of 1963

2.21 The Telegraph Messages Protection Act of 1963 consolidates the laws relating to telegraph messages. It also confers temporary exclusive rights in respect of certain telephonic messages. It makes it an offence for anyone to whom a telegraph message was not addressed to publish it within a certain period. The Act furthermore repeals the Telegraph Messages Protection Act of 1917. Telegraph messages are encompassed within electronic communications, which are now regulated primarily by the Electronic Communications Act of 2005, and the Interception and Regulation of Communication-Related Information Act of 2000, regulates the interception of electronic communications. The SALRC recommends that this Act be repealed as it has become effectively repealed by the promulgation of subsequent legislation.

(b) Durban Corporation Telephone Employees' Transfer Act 88 of 1969

2.22 The Durban Corporation Telephone Employees' Transfer Act 88 of 1969 was promulgated to regulate certain matters arising out of the taking over of the telephone undertaking of the City Council of Durban by the State. The SALRC has not found any cogent reason for its continued existence in light of legislation that appears to have superseded it. To this end, the SALRC recommends repeal for the following reasons:

- The Act contains references that have been removed by legislation since 1994 and language which is inconsistent with the Constitution, such as "the Durban Corporation Non-European Pension Fund", and reference to the "Department of Social Welfare and Pensions".
- The Act appears to have survived purely as a result of being overlooked for repeal.
- "Matters incidental thereto" (transfer of benefits, employees, etc) have been catered for in subsequent legislation such as the Former States Posts and Telecommunications Reorganisation Act 5 of 1996 and the Department of Communications Rationalisation Act 10 of 1998.

(c) Post Office Re-adjustment Amendment Act 100 of 1972

2.23 The Post Office Re-adjustment Amendment Act 100 of 1972 provides for the amendment of the Post Office Re-adjustment Act of 67 1968, in order to provide for the raising of loans by the Postmaster-General, the methods by which such loans may be raised and the defrayal of costs in connection with such loans, and to apply certain provisions of the Exchequer and Audit Act 23 of 1956, and of the General Loans Act 16 of 1961, in respect of such loans; to amend sections 52 and 52B of the Exchequer and Audit Act of 1956, in order to provide for the investment of working balances of the Department of Posts and Telegraphs with the National Finance Corporation of South Africa or financial institutions outside the Republic, and for the conversion of a part of the outstanding loan liability of that Department into permanent capital.

2.24 The Post Office Re-adjustment Amendment Act of 1972 should be repealed as the primary legislation which it amends has been repealed (namely the Post Office Re-adjustment Act 67 of 1968).

(d) Public Service and Post Office Service Amendment Act 97 of 1976

2.25 The Public Service and Post Office Service Amendment Act 97 of 1976 should be repealed as the primary pieces of legislation which it amends has been repealed (namely the Public Service Act 54 of 1957 and the Post Office Service Act 66 of 1974).

(e) Radio Amendment Acts: Act 2 of 1978; Act 80 of 1980; Act 24 of 1990; and Act 99 of 1991

2.26 There are four Radio Amendment Acts which remain in force although the underlying statute which they were enacted to amend, namely the Radio Act 3 of 1952, was repealed by the Telecommunications Act 103 of 1996 which was in turn repealed by the Electronic Communications Act 36 of 2005. Thus the four Radio Amendment Acts are obsolete and the SALRC recommends that they be repealed in their entirety. They are:

- The Radio Amendment Act 2 of 1978;
- The Radio Amendment Act 80 of 1980;
- The Radio Amendment Act 24 of 1990; and
- The Radio Amendment Act 99 of 1991.

(f) Broadcasting Amendment Acts: Act 61 of 1982; Act 59 of 1986; Act 113 of 1990; Act 73 of 1993; Act 50 of 1996 and Act 24 of 1997

2.27 There are six Broadcasting Amendment Acts which remain in force although the underlying statute which they were enacted to amend, namely the Broadcasting Act 73 of 1976, was repealed by the Broadcasting Act 4 of 1999. Thus the six Broadcasting Amendment Acts are obsolete and the Commission recommends that they be repealed in their entirety. They are:

- Broadcasting Amendment Act 61 of 1982;
- Broadcasting Amendment Act 59 of 1986;
- Broadcasting Amendment Act 113 of 1990;
- Broadcasting Amendment Act 73 of 1993;
- Broadcasting Amendment Act 50 of 1996; and
- Broadcasting Amendment Act 24 of 1997.

(g) Independent Broadcasting Authority Amendment Acts: Act 36 of 1995 and Act 4 of 1996

2.28 There are two Independent Broadcasting Authority Amendment Acts which remain in force although the underlying statute which they were enacted to amend, namely the Independent

Broadcasting Authority Act 153 of 1993, was repealed by the Electronic Communications Act 36 of 2005. Thus the two Independent Broadcasting Authority Amendment Acts are obsolete and the SALRC recommends that they be repealed in their entirety. They are-

- Independent Broadcasting Authority Amendment Act 36 of 1995; and
- Independent Broadcasting Authority Amendment Act 4 of 1996.

(h) Independent Media Commission Act 149 of 1993

2.29 The Independent Media Commission Act 149 of 1993 was enacted to make provision for a particular historical event, namely, the first democratic elections which took place in 1994. The Independent Communications Authority of South Africa now performs the functions that were performed by the Independent Media Commission in the 1994 elections. The SALRC therefore recommends that the Independent Media Commission Act be repealed in its entirety.

(i) Former States Broadcasting Reorganisation Act 91 of 1996

2.30 The Former States Broadcasting Reorganisation Act of 1996 was enacted to make provision for the incorporation of the broadcasting services of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei to be incorporated into the SABC or Sentech, as the case may be. As the reincorporation process has been completed, this statute is obsolete and the SALRC recommends that it be repealed in its entirety.

(j) Former States Posts and Telecommunications Reorganisation Act 5 of 1996

2.31 The Former States Posts and Telecommunications Reorganisation Act 5 of 1996 regulates the respective integration of the postal operators and telecommunication operators for the former Transkei, Bophuthatswana, Venda and Ciskei (TVBC) states into SAPO and Telkom. In addition, the legislation deals with issues such as transfers of assets, transfers of employees and pension benefits of former TBVC employees. This Act should be repealed because it has become spent. This is because it relates to a specific event (the incorporation of postal operators from the TBVC states) the implementation of which is now complete.

(k) Department of Communications Rationalisation Act 10 of 1998

2.32 The Department of Communications Rationalisation Act 10 of 1998 came into effect on 1 April 1998. The objective of this Act is to provide for the transfer of all officers and employees of the Department of Communications to the public sector. This Act provides for transitional arrangements relating to staff and financial matters for the transfer. As the transfer envisaged has already occurred, the SALRC recommends that this Act should be repealed.

(l) Telecommunications Act Amendment Acts: Act 12 of 1997, Act 64 of 2001, and Act 2 of 2004.

2.33 It is recommended that these amendment Acts be repealed as the Telecommunications Act 103 of 1996 (the Act that these amendment Acts purports to amend) has been repealed by the Electronic Communications Act of 2005. The relevant amendment Acts are the Telecommunications Amendment Act 12 of 1997, Telecommunications Amendment Act 64 of 2001 and Telecommunications Amendment Act 2 of 2004.

(m) Electronic Communications Amendment Act 37 of 2007

2.34 The Electronic Communications Amendment Act 37 of 2007, a companion to the Broadband Infraco Act 33 of 2007, amends the Electronic Communications Act 36 of 2005 to allow the Minister to issue a policy direction for the creation of a licensing framework for public entities such as Broadband Infraco. The Minister has issued a policy direction, essentially ordering ICASA to licence Broadband Infraco (in Notice No 109 in Government Gazette 31869 dated 6 Feb 2009).

2.35 It is not likely that the provisions of this amendment Act would be able to withstand a constitutional challenge. The provisions limit the right to equal protection of the law, section 9(1) of the Constitution, which states that everyone is equal before the law and has the right to equal protection and benefit of the law. The Constitutional Court has indicated that this right is limited (and then subject to the limitations clause) where there is different treatment (which is evident) and there is no rational connection between the different treatment and a legitimate government purpose it is designed to achieve.[17]

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[17] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paragraph 42. See also *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph 25, where the test was articulated as whether the governmental action is "rational, not arbitrary or manifest naked preferences that serve not legitimate governmental purpose".

2.36 The purported legitimate purpose is set out in the preamble to the Amendment Act as follows:

> WHEREAS the current provisions of the Electronic Communications Act, 2005, do not explicitly provide for the facilitation of strategic interventions by government in the electronic communications sector in order to reduce the cost of access to information, communication and technology;
> AND WHEREAS the state intends to expand the availability of access to information, communications and technology infrastructure on wholesale basis at cost orientated rates and services to operators in the Republic;
> AND WHEREAS it is necessary to amend the Electronic Communications Act, 2005, in order to facilitate the efficient licensing of public entities.

2.37 If, on the one hand, the legitimate government purpose is to facilitate cost based services, which is already required by the ECA in respect of all licensees, including the existing public entities Telkom and Sentech. There is no rational connection between the stated purpose and the licensing of yet another public entity. The mere licensing of a public entity does not, history has shown with the licensing of Telkom and Sentech, result in the investment of necessary infrastructure or the reduction of access costs. As it is intended that Broadband Infraco compete fairly with hundreds of similarly situated licensees in terms of the ECA, without any additional obligations, that it is permitted a special dispensation to obtain a licence is not likely defensible.

2.38 If, on the other hand, the purpose is to licence additional public entities, then respectfully, that purpose is not a legitimate government purpose.

2.39 As the Electronic Communications Amendment Act 37 of 2007 limits the right found in section 9(1), the next step of the analysis is to look at section 36(1), which states that -

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

2.40 The first important aspect of section 36(1) is that it is not applicable if a law of general application is not involved. Arguably, as this provision only applies to government owned entities, it is not a law of general application. In any event, if a law of general application is involved, then the test involves considering the proportionality between the extent of the limitation and the purpose thereof. At this point, it is also appropriate to consider whether there could have been less restrictive means used to achieve that purpose.

2.41 The more appropriate way in which to ensure cost based pricing is to enforce the current provisions in the ECA regarding interconnection, facilities leasing and retail pricing regulation of dominant service providers. Alternatively, obligations requiring the roll out of infrastructure and at-cost pricing must accompany any such licensing provision.

2.42 In conclusion, the Electronic Communications Amendment Act 37 of 2007 is an unjustifiable limitation of section 9(1) of the Constitution and should be repealed.

C. Legislation in which sections thereof are recommended for deletion or amendment:

(a) Post Office Act 44 of 1958

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.43 It is recommended that certain provisions in the Post Office Act 44 of 1958 relating to telecommunications be deleted, as they have become effectively repealed by the promulgation of subsequent legislation.

2.44 Sections 89 and 90 refer to telegrams and telephonic communications, requiring that services be provided on a non-discriminatory basis, prohibiting persons from interfering with services, and allowing service providers to refuse to provide telegram services if the content is illegal or otherwise offensive. The services, telephonic communications and telegrams are now subsumed in the definition of electronic communications, which is regulated primarily by the ECA.

2.45 Specifically, the issue of non-discrimination found in section 89 is dealt with comprehensively in the ECA chapters concerning interconnection, facilities leasing, competition matters and consumer protection and ICASA's regulations made in terms thereof. Offences and penalties in respect of electric communications are dealt with in section 17H of the ICASA Act. It is recommended that section 89 be deleted. If it is determined that these provisions for some or other policy reason should not be repealed, then they should rather be included in the ECA and the ICASA Act.

2.46 Section 90 concerns certain illegal and offensive content, and allows the Post Office to refuse to send a telegram that it considers to be offensive or illegal. In the ECT Act, the policy decision was made to allow information service providers (which, by definition, includes those that transmit telegrams) to be exempt under certain circumstances from liability for acting as a mere conduit, recognising the impracticality and danger in allowing such service providers to police the content of

electronic communications messages. In addition, certain illegal content, namely child pornography, is dealt with in the Films and Publications Act 65 of 1996. It is therefore recommended that section 90 be deleted as it has been superseded by subsequent legislation.

2.47 In terms of section 99 of the Post Office Act of 1958, it is a criminal offence for any person to use "the words 'telephone directory', 'yellow page directory', 'yellow pages', 'telex directory' or any other word or a mark" in connection with any publication which may give the impression that the publication is a telephone directory, yellow page directory, telex directory or other publication published on the authority of Telkom or SAPO. It is a criminal offence not to comply with this provision. On conviction, the offender can be fined (up to a maximum of R2000) or sentenced to prison (up to a maximum of 6 months). This clause has been overtaken by the liberalisation of the directory market, in terms of section 75 of the ECA. For example, the mobile network operators (MTN, Vodacom, and Cell C) all provide their own directory enquiry services, albeit not in printed form. Various independent directory services are also available (such as iFind, which contains commercial listings which can be searched by way of SMS). We accordingly recommend that section 99 be deleted in its entirety.

2.48 Section 105 of the Post Office Act of 1958 prohibits any officer from monitoring or intercepting any telegram or telephonic communication. It is a criminal offence not to comply with this provision. On conviction, the offender can be fined (up to a maximum of R4000) or sentenced to prison (up to a maximum of 12 months). This section should be deleted, as the interception and monitoring of postal and electronic communications are now regulated by the Regulation of Communications and Provision of Communication-Related Information Act 70 of 2002.

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to section 9 – the equality clause

2.49 Sections 107, 108 and 115 of the Post Office Act of 1958 differentiate in favour of Telkom as against competitors and customers, and could not withstand a constitutional review under section 9(1) of the Constitution. They should be therefore be deleted.

2.50 Sections 107 and 108 make it a criminal offence for anyone to damage Telkom's telecommunications equipment and allow Telkom to take criminal action against such person. Offences and penalties in respect of electric communications (including telecommunications equipment) are dealt with in section 17H of the ICASA Act. It is recommended that sections 107 and 108 are deleted. If it is determined that these provisions for some or other policy reason should not be repealed, then they should rather be included in the ICASA Act.

2.51 Section 115 exempts mail carriers, Telkom and the Post Office, from liability in respect of the transmission of post and telegrams. The issue of liability of those that provide electronic communications services is dealt with in Chapter XI of the ECT Act, effectively repealing this provision.

2.52 These provisions also limit the right to equality, namely the right to equal protection and benefit of the law set out in section 9(1) of the Constitution. The Constitutional Court has indicated that this right is limited (and then subject to the limitations clause) where there is different treatment (which is evident) and there is no rational connection between the different treatment and a legitimate government purpose it is designed to achieve.[18]

2.53 There is no indication in the legislation what the purported legitimate purpose is and it is difficult to imagine one in the current competitive electronic communications market. It is, therefore, quite clear that the provisions limit the right found in section 9(1) therefore leading to the next step of the analysis which is to look at section 36(1), which states that -

2.54 The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

2.55 The first important aspect of section 36(1) is that it is not applicable if a law of general application is not involved. Arguably, as this provision only applies to Telkom and the Post Office, it is not a law of general application.

2.56 In any event, if a law of general application is involved, then the test involves considering the proportionality between the extent of the limitation and the purpose thereof. At this point, it is also

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[18] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paragraph 42. See also *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph 25, where the test was articulated as whether the governmental action is "rational, not arbitrary or manifest naked preferences that serve not legitimate governmental purpose".

appropriate to consider whether there could have been less restrictive means used to achieve that purpose.

2.57 The more appropriate way to ensure that electronic communications equipment is not damaged or destroyed is to include provisions applicable in respect of all services providers in the ECA, alternately the ICASA.

2.58 In conclusion, these provisions are unjustifiable limitations of section 9(1) of the Constitution and therefore should be deleted.

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to other provisions of the Constitution

2.59 Section 90 permits SAPO to refuse to transmit any telegram which it believes contains anything that is “blasphemous, indecent, obscene, offensive or libellous nature or anything repugnant to law or decency”. This section is unlikely to withstand constitutional scrutiny, as it permits SAPO to open and effectively censor mail in violation of the right to privacy (enshrined in section 14 of the Constitution) and the right of freedom of expression (enshrined in clause 16). Accordingly, section 90 should be deleted in its entirety.

(b) Sentech Act 63 of 1996

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.60 The Sentech Act 63 of 1996 (the Sentech Act) contains a definition of "broadcasting service licensee" although that term no longer appears anywhere in the Act. Consequently the Commission recommends that the definition to be deleted.

2.61 The Sentech Act of 1996 still contains a definition of "common carrier" although that term no longer appears in the actual text of the Act. The section, in which the term "common carrier" originally appeared, section 5, was substituted by section 97 of the Electronic Communications Act 36 of 2005 and no longer contains the term. Consequently the term is not required to be defined and the Commission recommends that it be deleted from the Sentech Act.

2.62 The Sentech Act of 1996 contains definitions of "broadcasting signal distribution", "SABC" and "Sentech (Pty.) Ltd", which definitions are used only in those sections which have become spent, as the purposes for which they were enacted have been completed, and the Sentech Act needs no longer to refer to "broadcasting signal distribution", "the SABC", or to "Sentech (Pty.) Ltd." should the spent sections be deleted as suggested below. Consequently, the Commission recommends their deletion.

2.63 The Sentech Act of 1996 contains a number of sections which have become spent, that is, the purposes for which they were enacted have been completed and the Sentech Act of 1996 need no longer contain these sections. In this regard the SALRC recommends that the following sections be deleted:

- Section 2 "Transfer of shareholding in Sentech (Pty.) Ltd to State": as the actions contemplated in this section have long since been completed, it is recommended that this section be deleted as having become spent.
- Section 3 "Transfer of assets and liabilities of the SABC relating to signal distribution to Sentech (Pty.) Ltd or to Sentech Limited": as the actions contemplated in this section have long since been completed, it is recommended that this section be deleted as having become spent.
- Section 4 "Conversion of Sentech (Pty.) Ltd.": as the actions contemplated in this section have long since been completed, it is recommended that this section be deleted as having become spent.

(c) Postal Services Act 124 of 1998

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to section 9 – the equality clause

2.64 Section 45 of the Postal Services Act 124 of 1998 entitles SAPO to make good on any loss if any unauthorised person obtains payment of any deposit by fraudulent means. In addition, SAPO may pay compensation for the loss of or damage to any postal article whether conveyed by the postal company or by any third party mail carrier. If SAPO has paid such an amount as a result of the commission of an offence, it must be regarded as having suffered a loss to the extent of the amount paid (for purposes of section 300 of the Criminal Procedure Act 51 of 1977). Third party mail carriers must compensate SAPO on demand for the amount paid by SAPO (or any lesser amount that SAPO may determine) in respect of postal articles which were lost or damaged whilst in its possession. These provisions differentiate in favour of SAPO, albeit on a non-listed ground in section 9 of the Constitution, as third party mail carriers do not have similar rights. In the SALRC's view the differentiation amounts to unfair discrimination as there is no reasonable and justifiable purpose for it. It is accordingly suggested that this section should be deleted in its entirety.

(d) Broadcasting Act 4 of 1999

Sections which have expired, have become spent, virtually repealed, superseded and/or obsolete

2.65 The Broadcasting Act 4 of 1999 (the Broadcasting Act), contains a definition of a "common carrier". The Commissions recommends that the definition of "common carrier" be deleted from the Broadcasting Act for two reasons: First, the definition makes reference to a service for broadcasting signal distribution and refers to the Sentech Act 63 of 1996 (the Sentech Act). However, the Sentech Act no longer uses the term "signal distribution" except in sections which are themselves spent and ought to be deleted and thus the term has become obsolete. Second, the only section in which the phrase "common carrier" appears in the Broadcasting Act, namely, section 8(g), which requires the SABC to make use of Sentech exclusively. The Commission is of the view that this creates an anomaly a converged regulatory environment as is more fully set out under the heading: "*Sections which ought to be considered for deletion or amendment because they give rise to anomalies"*, below.

2.66 The Broadcasting Act contains a definition of "due diligence report", which definition is used only in subsection 8A(12)(a) which has become spent, as the purpose for which it was enacted has

been completed, and the Broadcasting Act needs no longer to refer to “due diligence report” should the spent sections be deleted as suggested by the salrc below.

2.67 The Broadcasting Act contains a definition of “inventory”, which definition is used only in subsection 8A(13)(a) which has become spent, as the purpose for which it was enacted has been completed, and the Broadcasting Act needs no longer to refer to “inventory” should the spent sections be deleted as suggested by the SALRC below.

2.68 Section 8A “Conversion” of the Broadcasting Act contains a number of sub-sections relating to the conversion of the SABC into a corporation which have become spent, that is, the purposes for which they were enacted have been completed and section 8A need no longer contain these sub-sections. Consequently the SALRC suggests that the following sub-sections of section 8A be deleted: Subsections (4), (11), (12), (13) and (14).

2.69 Section 10 “Public Service” of the Broadcasting Act contains a subsection (3) which deals with various matters to be effected before the conversion of the SABC. This sub-section has become spent, that is, the purpose for which it was enacted has been completed and the Broadcasting Act need no longer contain this sub-section. Consequently the SALRC suggests that sub-section 10(3) be deleted.

2.70 Section 11 “Commercial Services” of the Broadcasting Act contains a subsection (2) which deals with various matters to be effected before the conversion of the SABC. This sub-section has become spent, that is, the purpose for which it was enacted has been completed and the Broadcasting Act need no longer contain this sub-section. Consequently the SALRC suggests that sub-section 11(2) be deleted.

Sections which ought to be considered for deletion or amendment because they give rise to anomalies

2.71 The Broadcasting Act was substantially amended by the Electronic Communications Act 36 of 2005, (the ECA) such that it is, today, essentially an SABC Act. However there are some sections that still pertain to broadcasting generally although many of these have been virtually repealed by the provisions of the ECA in any event. The SALRC recommends that it is anomalous to have two pieces of legislation dealing with broadcasting when the Broadcasting Act contains very little that is generally applicable and further recommends that these either be deleted where they no longer serve any useful purpose or else be inserted into the ECA instead. In this regard, the SALRC recommends that:

- section 2 “Object of Act” be substantially amended to set out the objects for public broadcasting services only and not for broadcasting more broadly as general broadcasting issues are regulated in terms of the ECA. The SALRC therefore recommends that section 2 be amended to read as follows:

  The object of this Act is to establish and develop a public broadcasting service in the Republic in the public interest and for that purpose to –
  - contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society;
  - safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa;
  - ensure plurality of news, views and information and provide a wide range of entertainment and education programmes;
  - cater for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled;
  - encourage the development of human resources and training, and capacity building within the public broadcasting service amongst historically disadvantaged groups;
  - establish a strong and committed public broadcasting service which will service the needs of all South African society; and
  - encourage the development of local programming content.

2.72 If this recommendation is taken up, this will require consequential amendments to the definitions section contained in section 1 of the Broadcasting Act in that the following definitions will no longer be required in the Broadcasting Act:

- “channel”; and
- “multi-channel distribution service”;

- section 3 “Broadcasting system” be deleted in its entirety and not inserted into the ECA given that the ECA contains a detailed framework for broadcasting generally in various chapters, including: Chapter 1 “Introductory Provisions”, “Chapter 2 “Policy and Regulations”, Chapter 3 “Licensing Framework”, and Chapter 9 “Broadcasting”. All of the issues dealt with in section 3 of the Broadcasting Act have been effectively superseded by the provisions of the ECA and it is anomalous to have two pieces of legislation governing the same issues, particularly when the ECA takes precedence over the provisions of the Broadcasting Act in terms of section 94 of the ECA;

- Section 5 “Classes of licences” be deleted in its entirety and not inserted into the ECA given that the ECA contains a detailed licensing framework in Chapter 3 thereof which supercedes the provisions of section 5 of the Broadcasting Act. Further the provisions of section 5 of the Broadcasting Act are not technology neutral and one of the aims of the

ECA is to create a technology neutral licensing framework[19]. If this recommendation is taken up, this will require consequential amendments to the definitions section contained in section 1 of the Broadcasting Act in that the following definitions will no longer be required in the Broadcasting Act:

- "low power broadcasting service";
- "community";
- "community broadcasting service";
- "subscription broadcasting service"; and
- "satellite broadcasting service"; and

- Section 38 "South African Broadcast Production Advisory Agency" be deleted in its entirety and not inserted into the ECA given that the body produced only one report which was never made public and which the Minister of Communications did not act upon and that the body has effectively ceased to function. Consequently the section is effectively obsolete. If this recommendation is taken up, this will require a consequential amendment to the definitions section contained in section 1 of the Broadcasting Act in that the definition of "Advisory Body" will no longer be required in the Broadcasting Act.

2.73 The Broadcasting Act contains a sub-section 8(g) which is part of the "Objectives of the Corporation" and which requires the South African Broadcasting Corporation (the SABC) to broadcast its programmes on a free to air basis and to make use of Sentech (Pty) Ltd (Sentech) exclusively. It is recommended that the sub-section be amended for two reasons: First, the reference to "common carrier" ought to be deleted because it appears to be out of step with the aims of the Electronic Communications Act 36 of 2005 in that it appears to discriminate against all electronic communications network service (ECNS) providers other than Sentech. In effect this also unfairly requires the SABC to make use only of Sentech notwithstanding that other ECNS providers may be able to provide a cheaper and/or better broadcasting signal distribution service. Second, the words "subject to section 33 of the Act" ought to be deleted because they have been virtually repealed by the repeal of section 33 itself by the provisions of the ECA. Consequently the SALRC recommends that the sub-section be amended to read as follows: "to provide television and radio programmes and any other material to be transmitted or distributed for free to air reception by the public".

2.74 The Broadcasting Act makes provision for the appointment of a Board of Directors of the SABC made up of both executive and non-executive members. Parliament has recognized that a number of the provisions of the Broadcasting Act relating to the removal of Board members are

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19 Section 2(b) of the ECA.

defective in that they do not provide for a proper process for the removal of a member or members of the board. As a result Parliament has recently passed the Broadcasting Amendment Bill. Unfortunately, the Broadcasting Amendment Bill deals only with the appointment and removal of the executive members of the SABC Board and does not deal with the *lacunae* in the Broadcasting Act arising from the fact that the Broadcasting Act is silent as to who appoints and removes the non-executive members of the Board. This has been the subject of some five High Court cases in the recent past and is the crux of the on-going crisis between management and the Board of the SABC. The SALRC recommends that this be addressed through the insertion of a new section 13(1A) to read: "The executive members of the Board are appointed by the non-executive members of the Board."

(e) Independent Communications Authority of South Africa Act 13 of 2000

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.75 The Independent Communications Authority of South Africa Act 13 of 2000 (the ICASA Act), was significantly amended by the Independent Communications Authority of South Africa Amendment Act 3 of 2006, which was being debated in Parliament at the same time as the Electronic Communications Act 36 of 2005 (the ECA). As a result there is a vague definition of the "Electronic Communications Act" in section 1 which does not identify that Act correctly or in a manner that is consistent with the identification of statutes elsewhere in the ICASA Act. Consequently the SALRC recommends that the definition be amended to read: "'Electronic Communications Act' means the Electronic Communications Act, 2005 (Act 36 of 2005)".

2.76 The ICASA Act was significantly amended by the Independent Communications Authority of South Africa Amendment Act 3 of 2006, and as a result the definition of "Telecommunications Act" contained in section 1 is no longer relevant as that term no longer appears anywhere in the ICASA Act except in Schedule 1 thereto in which the Telecommunications Act is identified in full and the definition is not in fact used. Consequently the SALRC recommends that the definition be deleted.

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to other provisions (ie non-equality provisions) of the Constitution

2.77 The importance of an independent and impartial regulator for the communications sector cannot be overstated. There are dicta on the importance and bounds of independence in state

institutions.[20] Moreover, impartiality is a critical aspect of natural justice, now protected by the Promotion of Administrative Justice Act 3 of 2000.

2.78 The IBA was established in 1993 to inter alia, oversee free and fair broadcasting election coverage for the 1994 elections. The importance of an open and democratic broadcasting environment is critical to the support of the rights enshrined in section 16 of the Constitution which guarantees the right to freedom of speech and expression; and section 32 which guarantees the right of access to information (specifically section 32(1)(b), information required for the exercise and protection of any rights). Owing to the content related issues inherent in broadcasting, the role of an Independent Broadcasting Authority was enshrined in Chapter 9 of the Constitution. This section provides for "State Institutions supporting Constitutional Democracy".

- Section 181 provides a list of such institutions but does not make specific reference to an independent broadcasting Authority.
- Section 192 of the Constitution however, explicitly requires the establishment of an independent regulatory authority to provide for the regulation of broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

2.79 As such, any concerns regarding the independence or impartiality of ICASA raise issues of constitutionality that need to be addressed. It is also important to note that ICASA is the only Chapter 9 institution that has as one of its functions, the issuance of licences. In order to address constitutional concerns, the SALRC recommends that the following sections be amended:

- Section 3 should be amended to ensure that when the Minister makes any policy recommendations to ICASA on matters of national policy applicable to the ICT sector such recommendations do not pertain to, or affect the licensing of any entity. To date, various policy directions have been issued by the Minister which have a direct impact on licensing, and read with section 192 of the Constitution affect the constitutional validity of this provision;[21]
- Section 5 provides for the appointment of eight councilors and a chairperson appointed by the Minister upon the approval by the National Assembly. Councilors appointed must

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20 See for example, *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); *R v Valente* (1985) 24 DLR (4th) 162 (SCC); and *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C).

21 See for example, Government Gazette 31773, 9 January 2009; and Ministerial Budget Vote Speech and Policy Directions, 24 May 2007.

fulfill certain criteria, possess suitable qualifications and be committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service; and when viewed collectively must be representative of a broad cross-section of the population of the Republic.

2.80 The Constitutional Court has stated that an institution will only be considered to be "independent" if it enjoys a certain degree of protection from government control. In order to determine whether an institution is independent, regard must be had to provisions regarding the appointment of officers of the institution; provisions regarding the tenure and removal of officers in the institution; and provisions concerning institutional independence.[22]

2.81 A public nomination process, followed by a short-listing of names is provided for, from which the Minister must choose candidates to serve on the Council. Prior to the 2005 amendment, this task and the process, provided for the President to be the appointing authority on the advice of Parliament. This arms-length appointment mechanism removed the current risk of possible undue influence by the Executive on ICASA.[23] The extent of the Minister's involvement in the appointment of Councillors may serve to create a perception that ICASA is not an independent institution. While there is no closed list of factors to determine independence and impartiality, the Constitutional Court has stated that the correct standard is an objective one, involving an enquiry into how the reasonable observer would perceive the independence of the institution in question.[24]

2.82 Moreover, apart from the Pan African Language Board, ICASA is the only Chapter 9 institution in respect of which the Minister and not the President appoints office-bearers. Finally, while the National Assembly may request the Minister to review an appointment if it is not satisfied that the person is suitable in terms of section 5(3) of the Act, the Act is silent on what is to happen should the Minister and the National Assembly disagree on the National Assembly's request. In order to address the constitutional concerns this provision raises, the SALRC recommends:

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22 See *First Certification Judgment – Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC*); Second Certification Judgment – Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 2 SA 97 (CC).*

23 See Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa, 31 July 2007 (the Asmal Committee Report), at 195-197.

24 Van Rooyen and Others v the State and Others 2002 (5) SA 246 (CC) at paras 32-34. See also South African National Defence Union and Another v Minister of Defence and Others 2004 (4) SA 10 (T) and New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC).

- An amendment to section 5(1A)(a) to re-instate the position prior to 2006 where the President appoints Councilors on the advice of the National Assembly, subject to the public process entrenched in law;
- Deletion of section 5(1A)(b) and section 5(1A)(c); section 5(1B)(a); section 5(1B)(b) and section 5(1B)(c) too give effect to the above.

2.83 Section 6A of the ICASA Act was introduced through the Independent Communications Authority of South Africa Amendment Act 3 of 2006 and requires that the Minister must, in consultation with the National Assembly, establish a performance management system to monitor and evaluate the performance of the Chairperson and other Councillors. Performance agreements are to be concluded between every Councillor and the Chairperson and between the Chairperson and the Minister. The evaluation process is to be undertaken by a panel constituted by the Minister in consultation with the National Assembly. The panel's report is to be submitted to the National Assembly for consideration.

2.84 It should be noted that the Asmal Committee Report tasked with reviewing Chapter 9 institutions, noted this section with concern and specifically the fact that all other Chapter 9 institutions are accountable to the National Assembly, as per section 181(5) of the Constitution.[25] In the Committee's view, it is inconsistent with the constitutional guarantee of independence for ICASA or individual Councillors to be accountable to any institution or group of persons other than the National Assembly.[26] Specifically, refusal to sign a performance agreement is included as a ground for the removal of Councillors from office. The Act provides that the evaluation of the performance of the Chairperson or other Councillor must be conducted by a panel constituted by the Minister, in consultation with the National Assembly. However, the Act offers no guidance on what the performance criteria will be. These factors impede the independence of the Councillors and are unconstitutional.

2.85 Moreover, the fact that the Council, by virtue of these provisions is accountable to and is evaluated by the Minister, whether directly or indirectly impedes the independence and perceived independence of the Council. This is not saved by the evaluation by a panel as it is in turn appointed by the Minister. This is also not saved by the fact that the panel must submit its report the National Assembly for consideration, as there is no mechanism for the National Assembly to ensure

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25 Asmal Committee Report Chapter 13 at 189-203.

26 Case law supports this view. See *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC), where the Court held that "judicial officers are not accountable to the government. They are accountable to the Constitution and the law and to the courts as independent institutions." The Court held that any contrary position would not be compatible with judicial independence.

the impartiality of the panel or to disagree with its findings and as such, the provision is unconstitutional.

2.86 Whilst acknowledging the importance of an accountability mechanism for performance of the Council, the SALRC recommends that this section be amended to cater for a single performance management system measure for the Council as a whole, rather than on an individual basis. Parliament should specify clear criteria for the evaluation of Councilors, rather than by the Minister.

2.87 Section 7(6) of the ICASA Act requires every Councilor to serve in a full-time capacity to the exclusion of any other remunerative employment, occupation or office which is likely to interfere with the exercise of his or her functions; or create a conflict of interests between such employment, occupation or office and his or her office as Councilor. The perception of conflict is sufficient to render independence and impartiality void. Moreover, the appointment of Councilors is full-time and any other remunerative employment is likely to create an interference with the demands of a full-time Councilor, creating concerns for properly constituted meetings; quorums and the effective functioning of the institution.

2.88 Given the importance of independence and impartiality and the constitutional imperatives thereof, the SALRC proposes an amendment to explicitly exclude any other remunerative employment of any nature – whether or not it is likely to create a conflict of interest or whether or not is likely to interfere with the exercise of any functions by a Councilor. However, given the public nature of the position of a Councilor, the SALRC proposes that an exception should apply to academic work and any other work that could reasonably be perceived to advance the work of the Authority, public talks for which an honorarium is paid and incidental gifts for attendance at conferences and public lectures. All such benefits however must be declared in a register to be held by the Authority, along with declarations of any other gifts or gratuities received.[27] The ICASA Act was amended in 2005 by the insertion of section 14A which provides that ICASA may appoint as many experts as may be necessary with a view to assisting it in the performance of its functions. However, where an expert is not a citizen or permanent resident of the Republic, the Minister must approve the appointment before such expert is appointed.[28]

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27 The Asmal Committee recommended that the disclosures of pecuniary and other interests of Councilors and staff members should be kept available in a register and an indication should be given in the annual report of where such information is available, at 217.

28 Section 14A(2).

2.89 The Constitutional Court has referred to two elements of independence relevant to ICASA. The first is "financial independence" which implies the ability to have access to funds reasonably required to enable the discharge of the functions the institution is obliged to perform in law. The second factor is "administrative independence", which implies that there will be control over those matters directly connected with the functions the institution has to perform under the Constitution and relevant legislation.[29]

2.90 The provision as it stands allows the Minister to have an influence over the administration of ICASA which may give rise to a reasonable perception of a lack of independence.

2.91 It is quite common to appoint foreign experts in this field. The requirement in law that the Minister must approve of such appointments is unconstitutional and also creates a potential barrier to effective and efficient functioning of the Authority, which may serve to also limit the discretion, independence and impartiality of ICASA. The legislation also does not offer any guidance as to what should occur if the Minister does not approve the appointment. The Asmal Committee also stated that this provision appeared to be in conflict with, or potentially curtails the Authority's independence and that this type of power afforded to the Minister by the legislation may negatively affect the independence of the Authority from the Executive and should, therefore, be revised.

2.92 For the reasons stated above, the SALRC recommends deletion of section 14A(2).

Sections which ought to be considered for deletion or amendment because they give rise to anomalies

2.93 Section 11A of the ICASA Act requires the Council and any committee of Council to prepare and keep minutes of the proceedings of every meeting of the Council or committee and cause copies of such minutes to be circulated to all Councilors or members of such committee. In the interests of transparency, the promotion of administrative justice and sound governance, the SALRC proposes an amendment to the ICASA Act to require the publication of decisions of meetings of the Council affecting licensing and regulatory matters, to be published on its website and within the ICASA library within 14 days of the minutes being signed by the presiding chairperson of the meeting.

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[29] See New National Party v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC).

2.94 Section 12 of the ICASA Act regulates the voting and participation of a Councilor in any meeting of the Council where he or she may have an interest which may preclude him or her from performing his or her functions as a Councilor in a fair, unbiased and proper manner. Section 12(2)(a) requires disclosure and that the Councilor concerned, depart from that meeting. The Commission has proposed an amendment to section 9 of the ICASA Act to preclude such conflicts which will significantly minimize the risk of conflicts arising. However, the SALRC is of the view that the ICASA Act is not explicit on this issue and should be amended as the SALRC is of the view that disclosure alone is not sufficient to prevent a likelihood of bias or partiality from arising.

2.95 As such, the SALRC recommends that an amendment to section 12 to require that any directorships, partnerships and consultancies of Councilors and senior officials in ICASA should be disclosed in the annual report to Parliament.[30] It is the SALRC's view that the section should also be amended to require a Code of Ethics which specifies the procedure for such declarations and the governance principles according to which the Authority and its Council function. While this requirement is not uniformly made of all Chapter 9 institutions, the *sui generis* nature of ICASA as the only Chapter 9 institution that has as its main function, the issuance of licences, requires sound governance and declaration principles and procedures to ensure the impartiality of the Council at all times.

2.96 Section 16 of the ICASA Act specifies the requirement for ICASA to table an annual report and financial statements on an annual basis. Section 16(3) requires the Minister to table ICASA's annual report in Parliament within 30 days after it has been received by him or her if Parliament is then sitting and, if Parliament is not in sitting, within 14 days after the next ensuing sitting of Parliament.

2.97 Given the concerns raised in this report regarding the Minister's role with respect to ICASA and the negative perception of independence, the SALRC proposes that the section should be amended for the Authority to table its own Annual Report in Parliament. This section is also anomalous in fact, as the Authority in practice and in effect, tables its own report to Parliament. This would also accord with findings in the Asmal Committee Report which suggested a need for stronger and more effective interaction between ICASA and the Portfolio Committee, and the need to strengthen the role of committees when exercising oversight of the institutions under review.[31]

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30 This recommendation was a direct finding of the Asmal Committee, at 217.

31 Asmal Committee Report at 197.

2.98 The ICASA Act was significantly amended by the Independent Communications Authority of South Africa Amendment Act 3 of 2006. One of the most significant changes introduced by that Amendment Act was the establishment of the Complaints and Compliance Committee (CCC) to investigate violations of the Independent Communications Authority of South Africa Act and of the underlying statutes, namely: the Broadcasting Act 4 of 1999, the Postal Services Act 124 of 1998, and the Electronic Communications Act 36 of 2005.

2.99 Unfortunately, the efficacy of the Act and of the CCC itself has been undermined because, as it is currently worded, there exists significant *lacunae* in the Act as regards violations of the Act or the underlying statutes by persons other than licensees (our emphasis). In order to rectify this problem and to ensure appropriate enforcement of the legislative requirements of the Act and of the underlying statutes, the SALRC recommends that the following sections be amended:

- Section 17C(1)(a): The word "licensee" ought to be replaced with the word "person" throughout this section in order to ensure that persons who are not licensees yet who are violating the Act or the underlying statutes can be the subject of a complaint in terms of this section. Note further that unless this amendment is made, the section will continue to contradict the provisions of section 17B(a)(iii) which clearly envisage that the CCC has the ability to investigate all allegations of non-compliance with the Act and underlying statutes and not merely non-compliance by licensees.

- Section 17D(2): The word "licensee" ought to be replaced with the word "person" throughout this section in order to ensure that persons who are not licensees yet who are violating the Act or the underlying statutes can be the subject of a recommendation to the Independent Communications Authority of South Africa ("ICASA") by the CCC on action to be taken against such person. Note that unless this amendment is made, the section will continue to contradict the provisions of section 17B(a)(iii) which clearly envisage that the CCC has the ability to investigate all allegations of non-compliance with the Act and underlying statutes and not merely non-compliance by licensees.

- Section 17E(1)(e) and (f): The word "licensee" ought to be replaced with the word "person" in these subsections in order to ensure that persons who are not licensees yet who are violating the Act or the underlying statutes can be appropriately dealt with by the CCC and, ultimately, by ICASA.

- Section 17E(2): The word "licensee" ought to be replaced with the word "person" throughout this section (except in respect of subsection (d)) in order to ensure that

persons who are not licensees yet who are violating the Act or the underlying statutes can be the subject of a recommendation to ICASA by the CCC on an appropriate order to be made by ICASA. Note further that unless this amendment is made, the section will continue to contradict the provisions of section 17B(a)(iii) which clearly envisage that the CCC has the ability to investigate and make recommendations on all allegations of non-compliance with the Act and underlying statutes and not merely non-compliance by licensees.

- Section 17F(5)(c): A new subsection (iv) ought to be inserted worded as follows: "non-compliance with the provisions of this Act or the underlying statutes;". If this amendment is not made then the efficacy of the section and of the role of the inspectors, provided for in the Act, will be undermined. As it is currently worded, there exists a significant *lacuna* in the Act as regards violations of the Act or the underlying statutes by persons other than licensees. Thus a rogue unlicensed broadcaster cannot currently be the subject of an investigation by an investigator in terms of section 17F.

(f) Media Development and Diversity Agency Act 14 of 2002

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.100 The Media Development and Diversity Agency Act 14 of 2002 contains a reference in section 3(b)(vii) to the "Universal Service Agency". That body was renamed, in terms of section 80(1) of the Electronic Communications Act 36 of 2005 (the ECA), the "Universal Service and Access Agency of South Africa". Consequently the SALRC recommends that the new name be reflected in the Media Development and Diversity Agency Act in order to keep it up to date with the legislative changes introduced by the ECA.

(g) Electronic Communications and Transactions Act 25 of 2002

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.101 The ECTA contains a definition of the 'Internet' as an 'interconnected system of networks that connects computers around the word using TCP/IP and includes future versions thereof'. The SALRC submits that this definition as been superseded as courts have made a ruling on the nature of the Internet.

2.102 In the matter of *Telkom SA Limited v Napa Maepe and two others*[32], the Transvaal Provincial Division of the High Court, as it then was, provides an overview of the workings of a network, differentiating between packet- and circuit –switching networks and inferring certain efficiencies, including the cost and time savings of a packet-switched network. Buys[33] developed Du Plessis J's inferences and proposes the following technical definition of the Internet:

> The internet is binary code, or data, communicated through a network made up of electronic communications facilities using packet switching technology and communicating through TCP/IP, and includes future versions thereof. (Paraphrased)

2.103 The SALRC proposes the same. Section 5(1) of the ECTA has become spent as it deals with the development of the three-year national e-strategy within two years of the ECTA being promulgated. The rest of the section sets out what must be dealt with in the national e-strategy. The policy has not been developed.

2.104 In the interim, the ECA was promulgated and provides for the making of policy related to universal service and access, small, medium and micro enterprises and previously disadvantaged persons and communities in sections 3(1)(b), (d), (f), (g) and (i), also provided for in sections 6, 7 and 9 of ECTA. The SALRC proposes the deletion of the following sections from ECTA;

- Section 6 "Universal access": as the making universal service and access policy is dealt with in sections 3(b) and 82(3)(a)(i) and (ii) of the ECA.
- Section 7 "Previously disadvantaged persons and communities": as section 3(1)(f) of the ECA deals with policy-making in respect of universal service in under-serviced areas. Section 88(2) of the ECA further makes provision for the Independent Communications Authority of South Africa (ICASA) to define underserved areas and 88(4) provides that the Minister may determine the types of needy persons that may receive subsidies from the Universal Service and Access Fund.
- Section 9 "Small, medium and micro enterprises" as section 3(1)(g) provides that the Minister may make policy in relation to the mechanisms to promote SMME participation in the ICT sector.

2.105 Section 5(1) should be amended to provide anew of the Minister to develop a national e-strategy which deals with the policy issues not covered by the ECA namely; development of human resources and electronic transactions policy[34].

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32 Telkom SA Limited v Napa Maepe, South Africa Telecommunications Regulatory Authority and the Internet Service Providers Association, unreported case, case number 258940/97 TPD.

33 Buys, Cyberlaw, p233.

34 ECTA, sections 8, 10

Sections which ought to be considered for deletion or amendment because they give rise to anomalies

2.106 The ECTA contains a definition of 'Universal Access' as "access by citizens of the Republic to internet connectivity and electronic transactions". The purpose of this definition is in relation to policy-making in ECTA.

2.107 Universal access and universal service (UA/US) is defined differently in the ECA. In addition, section 82(3) of the ECA empowers the Minister of Communications (Minister) to further determine what constitutes universal service and access, upon the recommendations of the Universal Service and Access Agency of South Africa (USAASA). In this regard, the Commission proposes the deletion of the definition of "Universal Access".

2.108 The ECTA contains definitions of 'registry' and 'registrar' that do not include the .za Domain Name Authority (.zaDNA) as a registrar and registry or registry operator, as they are known in practice. It is best practice internationally to enable the relevant authority or the country code top-level domain (ccTLD) administrator, like .zaDNA, to have the same responsibilities as registries or registrars operators, with respect to updating repositories and the second-level domain administration.

2.109 In South Africa the registry operators administering the second-level domain names are a mixed bag; namely, non-governmental UNIFORUM South Africa (.co.za), the state-owned State Information Technology Agency (.gov.za) and privately-owned Internet Solutions (Proprietary) Limited (.org.za). In addition to these entities, the Internet Corporation for Assigned Names and Numbers (ICANN) has overall responsibility for managing the Domain Naming System (DNS). It administers the root domain, delegating control over each Top Level Domain (TLD) to a ccTLD administrator, such as .za Domain Name Authority (DNA). Because the DNS is not centralized, the administration of the second-level domain is further delegated to above-mentioned registry operators who administer the DNS with a great degree of independence. Some countries have third and fourth level domain administrators. To ensure the stability of the system, however the ccTLD, namely .zaDNA must take the final and overall responsibility of the DNS in its territory, therefore it must be able to perform the functions of the registrars and registry operators, as and when required.

2.110 The changes to the definitions of registry and registrar must further be reflected in sections 64(1) and 65(1) which deals with the licensing of registries and registrars and the functions of the .zaDNA, respectively.

2.111 In this regard the SALRC proposes that the definitions be amended, and that the following sections reflect these responsibilities of the .zaDNA:

- Section 64 “Licensing of registrars and registries”: Subsection 1 should include the .zaDNA as a deemed licensed registry and registrar.
- Section 65 “Functions of the Authority”: Subsection 1 should be amended to include the functions of a registrar and registry as part of the functions of the .zaDNA.

2.112 Section 50(2) of the ECTA provides that the principles governing the processing of electronically collected personal information[35] are voluntary. The SALRC proposes the amendment of section 50(2) in order to make the principles obligatory. The voluntary principles do not give effect the right to privacy provided for in the Constitution. These principles and more, known as the information protection principles are provided for in Chapter 3 of the draft Protection of Personal Information Bill and will govern the processing of personal information, once the Bill is enacted.

2.113 The Bill is a general information protection statute, which will be supplemented by codes of conduct for the various sectors and will be applicable to both the public and private sector. It covers both automatic and manual processing and will protect identifiable natural and juristic persons.

2.114 Chapter XI of ECTA deals with conditions under which the liability of service providers will be limited. One of the conditions is the membership of a service provider to an industry representative body recognised by the Minister.

2.115 The SALRC’s recommendation in this regard is to add a deeming provision to section 71 “Recognition of representative body”; which will provide that once a representative body has requested recognition and received no response from the Minister within a period of six months, the industry body will be deemed recognised, thus its membership will be eligible for the service providers’ limitation of liability.

Future amendments that may be required to be made with the passage of pending legislation

2.116 It is recommended that Chapter VII “Consumer Protection” of ECTA is reviewed once the Consumer Protection Act 28 of 2008 comes into operation. Sections 47 and 48 extend the ECTA consumer protection provisions in the following terms:

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35 ECTA, section 51

- Consumer protection applies irrespective of the legal system applicable to the agreement in question; and
- Any provision which excludes any of the rights granted in this chapter is void.

2.117 The application of the Consumer Protection Bill is slightly less broad, therefore the SALRC recommend the retention of this chapter.

(h) The Regulation of Interception of Communications and Provision of Communication–Related Information Act 70 of 2002

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.118 A number of definitions in the Regulation of RICA, were substituted by new definitions in terms of section 97 of and read with the Schedule to the Electronic Communications Act, 36 of 2005 (the ECA). Unfortunately, the consequential amendments of the sections of RICA in which those substituted definitions appeared were not effected by the ECA. Consequently, the SALRC recommends that:

- the term "telecommunication system" be substituted with the term "electronic communication system" in the following sections in RICA: section 6(1); section 6(2)(c)(d); section 10(b) and section 37(2)(a)(iii);
- the term "telecommunication service provider" be substituted with the term "electronic communication service provider" in the following sections in RICA: section 7(2); section 7(3); section 7(5); section 8(3); section 8(4)(a); section 8(5); section 8(5)(a); section 12; section 13; section 14; section 16(10); section 23(10); section 28(1); section 28(1)(b); section 28(2); section 30(1); section 30(2); section 30(2)(a); section 30(4); section 30(5); section 30(7); section 30(7)(a); section 30(1); section 39(1); section 39(2); section 39(3); section 39(4); section 42(2); section 45(2) and section 50(1); and
- the term "telecommunication service" be substituted with the term "electronic communication service" in the following sections in RICA: section 10(a); section 30(5)(a)(i); section 30(7); section 30(8); section 31(2)(a) and section 31(3).

(i) Electronic Communications Act 36 of 2005

Sections which have expired, or have become spent, virtually repealed, superseded and/or obsolete

2.119 In terms of the ECA, in respect of licensing the provision of electronic communications network services (ECNS), electronic communications services (ECS) and broadcasting services

(BS) requires either an individual or class licence or licence exemption. Those licensees that are individual include ECNS of national or provincial scale, voice telephony ECS that use numbers allocated by ICASA, and any licensee where the state owns 25 percent or more. Licence applications for individual licences may only be made in response to an invitation, and in respect of individual ECNS licences, an invitation may be extended only after a policy direction issued by the Minister.

2.120 Class licences include ECNS of municipal scale, data ECS and voice ECS where numbers are sub-allocated by individual licensees. ICASA must act on class registration applications within 60 days and it if fails to do so, there will be a deemed registration.

2.121 ICASA has prescribed that certain services may be exempt from licensing, including non-profit ECS, resellers of ECS and private ECNS; however, service providers must in terms of ICASA's regulations nevertheless apply for exemptions. The ECA, being a fairly new piece of legislation, has not been tested much. However, the recent decision of *Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Council of the Independent Communications Authority of South Africa and Others* (unreported judgment dated 31 October 2008) confirmed that the electronic communications market is open to network competition and to the competitive provision of voice telephony, not only by the former public switched and mobile cellular telecommunication services licensees, but also by the former value added network services licensees. The court made a judgment that effectively has made the licensing framework in a number of respects obsolete.

2.122 In the wake of the *Altech* judgment, ICASA has in the licence conversion process, issued hundreds of individual ECNS and ECS licences. It is therefore not necessary for any policy reasons for the Minister or ICASA to retain the power to limit new entrants into the market. It is recommended that section 5(6) is deleted and that section 9(2) as it relates to ECNS and ECS is deleted. Sections 9(1) correspondingly should be amended to indicate that any person may apply for an individual ECNS or ECS licence in the prescribed manner without the need to wait for an invitation.

2.123 It is also recommended that section 6 be amended to provide that certain listed services, namely, private and resale services, require no approval at all from ICASA. The current wording allows ICASA to determine whether and what services may be provided without a licence. Instead of doing this, ICASA created a new category of services that need its approval, i.e., licence exempt services. ICASA determined that certain services, e.g., private and resale, may be provided without a licence, but then promulgated regulation requiring service providers of licence exempt services to nevertheless get ICASA's permission before providing the licence exempt services.

2.124 Arguably, this is beyond the powers of ICASA given in the ECA to require its approval before someone may provide a licence exempt service. Given this, and the recent *Altech* judgment, which effectively liberalised the market, it is suggested that the meaning of section 6 should be clarified - that no licence (or any other approval) is necessary to provide licence exempt services. Section 6 should therefore be replaced with the following:

> (1) The following electronic communications services, electronic communications networks, and electronic communications network services may be provided without a licence—
> (a) services provided on a not-for-profit basis;
> (b) services that are provided by resellers;
> (c) private electronic communications networks used principally for or integrally related to the internal operations of the network owner, except that where the private electronic communications networks' additional capacity is resold, the Authority may prescribe terms and conditions for such resale; and
> (d) such other service as prescribed by the Authority.
> (2) The Authority may prescribe regulations in terms of this section containing terms and conditions applicable to the exempted electronic communications services, electronic communications networks, and electronic communications network services and declare contravention of the regulation an offence, subject to section 17H of the ICASA Act.

2.125 Note that references to radio frequency spectrum are deleted because ICASA is given that authority already in section 31(6) of the ECA.

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to section 9 – the equality clause

2.126 Although not yet challenged, some of the provisions of the ECA are unlikely to withstand constitutional equality challenges. These include sections 34(16) and 43(11). It is recommended therefore that these provisions be amended, the details of which follow.

- Section 34(16) should be amended to allow the Minister to intervene in radio frequency spectrum migration only if the spectrum migration involves the "security services", and not all "governmental entities or organisations". As currently written, the provision allows the Minister to intervene in respect of spectrum migration whenever the government has an interest in the entity using the spectrum. As the government still holds interests in a number of competitive licensees, this creates an unconstitutional regime for spectrum re-allocations.

  In particular, the section limits the right to equal protection and benefit of the law set out in section 9(1) of the Constitution. The Constitutional Court has indicated that this right is limited (and then subject to the limitations clause) where there is different treatment

(which is evident) and there is no rational connection between the different treatment and a legitimate government purpose it is designed to achieve.[36]

There is no indication in the legislation what the purported legitimate purpose is and it is difficult to imagine one outside of the "security services". It is, therefore, quite clear that the provisions limit the right found in section 9(1) which leads to the next step of the analysis which is to look at section 36(1), which states that –

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

The first important aspect of section 36(1) is that it is not applicable if a law of general application is not involved. Arguably, as this provision only applies in favor of certain government owned entities, it is not a law of general application.

In any event, if a law of general application is involved, then the test involves considering the proportionality between the extent of the limitation and the purpose thereof. At this point, it is also appropriate to consider whether there could have been less restrictive means used to achieve that purpose.

Assuming that the legitimate government purpose is the protection of the security services, then the use of the phrase all "governmental entities or organisations" is overly broad. It should be replaced with the narrowly stated "security services" in order to pass the limitations clause.

- It is recommended that section 43(11) be amended to state that any "exclusivity provision contained in any agreement or other arrangement that is prohibited under subsection (10) is invalid from a date equal to three years after the coming into force of this Act." This will eliminate discriminatory treatment in favour of Telkom. As the former monopoly provider

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[36] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paragraph 42. See also *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph 25, where the test was articulated as whether the governmental action is "rational, not arbitrary or manifest naked preferences that serve not legitimate governmental purpose".

of public switched telecommunication services, Telkom was permitted to enter into discriminatory agreements in respect of international telecommunication facilities. Section 43(11) grandfathers that discrimination but does not allow new competitors to enter into similar exclusive agreements.

This is manifestly a limitation to the right to equal protection and benefit of the law set out in section 9(1) of the Constitution. The Constitutional Court has indicated that this right is limited (and then subject to the limitations clause) where there is different treatment (which is evident) and there is no rational connection between the different treatment and a legitimate government purpose it is designed to achieve.[37]

There is no indication in the legislation what the purported legitimate government purpose is and it is difficult to imagine one in the current competitive electronic communications market. It is, therefore, quite clear that the provisions limit the right found in section 9(1) therefore leading to the next step of the analysis which is to look at section 36(1), which states that -

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

The first important aspect of section 36(1) is that it is not applicable if a law of general application is not involved. Arguably, as this provision was designed only to apply to Telkom, it is not a law of general application.

In any event, if a law of general application is involved, then the test involves considering the proportionality between the extent of the limitation and the purpose thereof. At this point, it is also appropriate to consider whether there could have been less restrictive means used to achieve that purpose.

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[37] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paragraph 42. See also *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph 25, where the test was articulated as whether the governmental action is "rational, not arbitrary or manifest naked preferences that serve not legitimate governmental purpose".

Arguably, the legitimate government purpose was to not invalidate existing agreements. However, the grandfathering of existing discriminatory agreements could have been limited in duration, allowing Telkom the time necessary to amend the agreement to conform to the law. Therefore, it is recommended that this section be amended to set a sunset clause on the grandfather, which sunset clause it is suggested is three years after the coming into force of the Act.

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to other provisions of the Constitution

2.127 As a result of proposed amendments to section 3 of the ICASA Act (set out above), section 3(3) of the ECA should be consequentially amended specifically to exclude any reference whatsoever to licensing that impinges on or affects the licensing of any entity in the electronic communications sector.

Sections which ought to be considered for deletion or amendment because they give rise to anomalies

2.128 It is recommended that some provisions be amended to bring clarity to the regulatory framework, thereby avoiding future litigation. Such provisions include certain definitions; sections 13(3-5); sections 37(6) and 43(7); sections 38(5), 44(5), 41, and 47; section 43(8); sections 64-66; sections 67(4), (5), (6) and (7); and certain provisions in chapter 14 regarding universal service, all of which are discussed below.

- "End user" should be defined in relation to not only licensees, but also those exempt from licensing. Similarly, the terms, "radio frequency spectrum" and "radio station" should be defined in relation to BS, as well as ECS.

- Sections 13(3), (4) and 5) should be renumbered as a new section 13A(1), (2) and (3). This amendment will make clear that ICASA may impose limitations on ownership and control even outside the context of a transfer application. As the provisions are currently, ie, subsections of the provisions on transfers, it could be argued that they only apply in that context. Section 9(2)(b) as it is currently written allows ICASA to place limitations on ownership on applicants for new individual licenses, however, it is recommended that this provision, as it is part of the section regarding invitation to apply, be deleted. The proposed amendment to sections 13(3), (4) and 5) will take care of that issue without the

need to keep the provision in section 9, which by the way, only concerns individual licences (and not class licences).

- Sections 37(6) and 43(7) should indicate that interconnection and facilities leasing must be non-discriminatory in all respects (including, but not limited to price) when compared to the licensee itself or its affiliates. As written, the provisions allow licensees to discriminate in their own favour except in respect of "technical standards and quality". In the context of interconnection and facilities leasing, entities should not be able to discriminate in their own favour at all. It should however, be clear that non-discriminatory interconnection and facilities leasing does not preclude ICASA from mandating or allowing asymmetrical interconnection in appropriate circumstances. Thus, subsection (6) should be amended to read as follows, and section 43(7) be should be similarly amended:

  The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection or approved or required by the Authority, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or be in any other way discriminatory to the comparable network services provided by such licensee to itself or an affiliate.

- Sections 38(5), 44(5), 41, and 47 should be de-linked from chapter 10. In other words, it should be clear that ICASA must regulate interconnection before, during and after any decisions made in terms of chapter 10 of the ECA. Section 38(5) should be amended to state as follows, and section 44(5) amended similarly.

- The interconnection regulations may exempt (in whole or in part) licensees from the obligation to interconnect under section 37(1), however, the Authority may not exempt any such licensee until it has determined that such licensee does not have significant market power in the relevant market or market segment in terms of Chapter 10.

- Section 41 should be amended to state as follows, and section 47 amended similarly:

  The Authority may prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services.

- Section 43 should clearly distinguish facilities that must be provided upon request unless the request is unreasonable, and "essential facilities", which must always be provided regardless of the provider's opinion whether the request is reasonable. Therefore, it is suggested that section 43 be amended to include the following as section 43(8A).

  Requests for essential facilities are deemed to be reasonable and all electronic communications network services licensees receiving such requests are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement within ten days of receiving the request, failing which the Authority will impose terms and conditions consistent with this Chapter within five days of receiving notification that the licensee has failed to conclude an agreement.

2.129 The Electronic Communications Act 36 of 2005 (the ECA) repealed the Independent Broadcasting Authority Act 156 of 1993 (the IBA Act) in its entirety and, in many instances, key provisions of the IBA Act were incorporated as is into the ECA. Unfortunately a major anomaly occurred with respect to the ownership and control provisions – the heart of the existing broadcasting regulatory regime which, if unattended to, will result in the effective collapse of the current system of ensuring diversity of ownership of broadcasting licences. In this regard:

- Sections 48, 49 and 50 of the IBA Act became sections 64, 65 and 66 of the ECA, respectively. These sections deal with 'Limitations on Foreign Control of Broadcasting Services, Limitations on Control of Broadcasting Services and Limitation on Cross Media Control of Broadcasting Services', respectively.
- The provisions of sections 48 to 50 of the IBA Act were fleshed out and given content to by Schedule 2 to the IBA which contained three sections setting out:
  - instances of *de facto* control of a private broadcasting licensee;
  - instances of *de facto* control of a newspaper; and
  - provisions regarding the deemed control of a company.
- The provisions of Schedule 2 read with sections 48 to 50 of the IBA Act gave rise to the current commercial broadcasting environment and were critical to the development of the diversity currently existing in that environment. Of particular importance were the provisions of section 3 of Schedule 2 which effectively set deemed control of a company at a 25% shareholding – far higher than the 50% + 1 which is the norm in terms of ordinarily-applicable Company Law.
- Unfortunately, due to what was undoubtedly a legislative oversight, the provisions of Schedule 2 to the IBA Act did not find their way into the ECA with the consequence that while sections 64 – 66 of the ECA replicate the provisions of 48 to 50 of the IBA Act, there is no content given to what is meant by "control" in those sections, leaving this to

the interpretation of a judge or to, for example, ordinary interpretation under Company Law.

2.130 The SALRC is concerned that if the ownership and control provisions in sections 64-66 of Chapter 9 of the ECA are not amended to rectify this *lacuna*, the diversity of ownership which is a current feature of our commercial broadcasting environment will undoubtedly fall away as companies take advantage of the legislative *lacuna*. Consequently the SALRC makes the following recommendations, namely that:

- sections 1 and 2 of the now-repealed Schedule 2 to the IBA Act be inserted into a new Schedule 2 to the ECA, such that the existing schedule to the ECA becomes Schedule 1 (which will require a consequential amendment to section 97 of the ECA); and
- section 3 of the now-repealed Schedule 2 to the IBA Act be amended in accordance with the Final Recommendations made by ICASA to the Minister as a result of its Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences dated 13 January 2004, which recommendations were never tabled before Parliament, such that it is to read: "A person shall be regarded as being in control of a company if he or she holds, directly or indirectly, issued share capital equal to or exceeding twenty-five percent of the issued share capital in the company, irrespective of whether or not such issued share capital confers *de facto* control." and be inserted into a new Schedule 2 to the ECA, such that the existing schedule to the ECA becomes Schedule 1 (which will require a consequential amendment to section 97 of the ECA).

2.131 Sections 67(4), (5), (6) and (7) require determinations to be made by ICASA in respect of competition matters, i.e., defining and identifying markets, determining whether there is effective competition in those markets, determining whether any person has significant market power in those markets, and setting pro-competition licence conditions on those determined to have SMP in markets where there is ineffective competition. These provisions as written, however, are not workable because the construction of the provisions, namely, subsections 67(4) and (6) is not precise. For example, subsection (6) arguably requires intractable circular analyses. In addition, there is no manifest requirement for licensees to provide ICASA necessary information for ICASA to make the determinations required. This is a fatal omission if the provisions are to be implemented effectively by ICASA. It is also recommended, as with the recommended changes to sections 38(5), 44(5), 41, and 47, that the issues of interconnection and facilities leasing be divorced from these provisions. Interconnection and facilities leasing are regulated specifically, separately, differently in chapters 7 and 8 of the ECA. Accordingly, changes to subsection 67(7) are recommended.

2.132 It is recommended that sections 67(4), (6) and (7) be re-written as follows.

(4) The Authority must prescribe regulations defining and determining the relevant markets and market segments, as applicable, where there is ineffective competition, and whether any licensee has significant market power in such markets or market segments, and if so imposing appropriate and sufficient pro-competitive licence conditions on such licensees. The regulations must, among other things—
(a) define and identify the retail or wholesale markets or market segments in which it intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition;
(b) set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection (6) and determine whether there is effective competition in those markets and market segments;
(c) set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition taking into account subsection (7);
(d) determine which licensees in the relevant market or market segments, as applicable, have significant market power, as determined in accordance with subsection (6), and the pro-competitive conditions applicable to each such licensee;
(e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and
(f) provide for monitoring and investigation of anti-competitive behaviour in the relevant markets and market segments.

(4A) Licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section.

(6) The methodology contemplated in subsection (4)(b) must include but is not limited to an assessment of the following:
(a) the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments;
(b) the relative market share of the various licensees in the defined markets or market segments; and
(c) A forward looking assessment of the market power of each of the market participants over a reasonable period.

(7) Pro-competitive terms and conditions may include but are not limited to—
(a) an obligation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, to act fairly and reasonably in the way in which the licensee responds to requests for access, provisioning of services, interconnection and facilities leasing;
(b) a requirement that the obligations contained in the licence terms and pro-competitive conditions must be complied with within the periods and at the times required by or under such terms and conditions, failing which a penalty may be imposed;
(c) a prohibition, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, against discriminating in relation to matters connected with access, provisioning of services, interconnection and facilities leasing;
(d) an obligation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, requiring the licensee to publish, in such manner as the Authority may direct, all such information for the purpose of ensuring transparency in relation to—
(i) access, interconnection and facilities leasing; or

(ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;
(e) an obligation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, to publish, in such manner as the Authority may direct, the terms and conditions for—
(i) access, interconnection and facilities leasing; or
(ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue which may take the form of a reference offer;
(f) an obligation to maintain a separation for accounting purposes between different matters relating to—
(i) access, interconnection and facilities leasing;
(ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; and
(iii) retail and wholesale prices;
(g) a requirement relating to the accounting methods to be used in maintaining the separation of accounts referred to in paragraph (f);
(h) such price controls, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, including requirements relating to the provision of wholesale and retail prices in relation to matters connected with the provision of—
(i) access, interconnection and facilities leasing; or
(ii)electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;
(i) matters relating to the recovery of costs and cost orientation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, and with regard to broadcasting services, the appropriate amount of South African programming, including—
(i) music content;
(ii) news and information programmes; and
(iii) where appropriate, programming of local or regional significance;
(j) matters relating to the accounts, records and other documents to be kept and made available for inspection by the Authority.

2.133 Certain provisions of chapter 14 regarding universal service should be amended to facilitate workability. ‘Universal access’ is defined in the ECA as “universal access to electronic communications network services, electronic communications services and broadcasting services, as determined from time to time in terms of Chapter 14”. Section 82(3)(a)(i) provides that the Minister must determine what constitutes universal access by all areas and communities to ECS and ECNS. There is no mention of BS, like there is in the definition of universal access. Therefore, it is suggested that the section is amended to indicate that the Minister must determine what constitutes universal access by all areas and communities to ECNS, ECS and “broadcasting services”. The ECA defines ‘universal service’ as “the universal provision of electronic communications services and broadcasting services as determined from time to time in terms of Chapter 14”. Section 82(3)(a)(ii) provides that the Minister must determine what constitutes the universal provision for all persons to ECS. Again, BS are not mentioned although they are mentioned in the definition. It is

therefore suggested that the section is amended to indicate that the Minister must determine what constitutes the universal provision to all persons of ECNS, ECS and "broadcasting services".

2.134 Section 82(3)(a)(ii) provides that the Minister must also determine what constitutes access to ECN including elements or attributes thereof. In the definitions, the concept of access to ECN is found in the definition of universal access, where in section 82(3)(a) it is found in the discussion of universal service. It is suggested that a new section be included to indicate that in determining universal access and universal service, the Minister must determine what constitutes access to an ECN, thereby ensuring that access to an ECN is relevant to both the determination of what is universal access as well as universal service.

2.135 Section 88(1) provides that subsidies may be paid out of the Universal Service and Access Fund for certain things. There are inconsistent references to ECNS, ECS and BS and therefore it is suggested that section 88(1)(a) is amended to include reference also to ECNS; that section 88(1)(b) is amended to include reference only to ECNS; and that section 88(1)(e) is amended to state "for the establishment and operation of community access centres, including for training and allowances for personnel, in order that communities may gain access to ECNS, ECS and BS".

2.136 Section 88(3) requires ICASA to bi-annually review the definition and designation of under-serviced areas. What is meant by the word bi-annual is often, every six months. Therefore, it is recommended that "bi-annually" be replaced with "every two years".

2.137 Section 88(4) provides the Minister with the authority to make determinations for the payment of subsidies out of the USAF in respect of needy persons. As the USAASA is established to administer the USAF, inter alia, it is suggested that section 88(4) be amended to state that USAASA must determine the meaning of "needy persons" for the purposes of the ECA. Section 88(4) also should be amended to indicate that USAASA must create application procedures for such persons to apply for subsidies from the USAF as well as for all of the other purposes for which funds may be distributed.

(j) Broadband Infraco Act 33 of 2007

Sections which ought to be considered for deletion or amendment because they raise constitutional concerns in relation to section 9 – the equality clause

2.138 The Broadband Infraco Act was promulgated to provide for the creation of Broadband Infraco, a government-owned entity, to provide ECNS and ECS in terms of the ECA. The

companion Electronic Communications Amendment Act, was promulgated to provide for the licensing of Broadband Infraco as a licensed entity with the same rights and responsibilities of its competitors in a liberalised market.

2.139 Section 7 of the Broadband Infraco Act provides that the government may expropriate land on behalf of Infraco. This right is not afforded competitors licensed in terms of the ECA, favouring Broadband Infraco.

2.140 It is not likely that these provisions will be able to withstand a constitutional challenge. The provisions limit the right to equal protection of the law, section 9(1) of the Constitution, which states that everyone is equal before the law and has the right to equal protection and benefit of the law. The Constitutional Court has indicated that this right is limited (and then subject to the limitations clause) where there is different treatment (which is evident) and there is no rational connection between the different treatment and a legitimate government purpose it is designed to achieve.[38] In order to imaging the legitimate government purpose it is necessary to look at the Act. In the Act, the main objects of Infraco are set out as follows:

2.141 The main objects of Infraco are to expand the availability and affordability of access to electronic communications, including but not limited to underdeveloped and under serviced areas, in accordance with the Electronic Communications Act and commensurate with international best practice and pricing

2.142 The specific provisions relating to expropriation begin as follows:

> If Infraco satisfies the Minister that it reasonably requires any particular land or right in land for public purposes or in the public interest and for the attainment of its objects and that it is unable to acquire such land or right in land on reasonable terms, the Minister may expropriate such land or right in land on behalf of Infraco, subject to the obligation to pay compensation as contemplated in section 25 (3) of the Constitution.

If, on the one hand, the legitimate government purpose is to facilitate available and affordable services, that is already the very purpose of the ECA, including provisions relating to licensing including the imposition of licence conditions, interconnection and facilities leasing and pricing regulations, as well as the provisions relating to universal service. There is no rational connection between that purpose and the power to allow one competitor to require the government to expropriate land on its behalf. As it is intended that Broadband Infraco compete fairly with hundreds

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[38] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paragraph 42. See also *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph 25, where the test was articulated as whether the governmental action is “rational, not arbitrary or manifest naked preferences that serve not legitimate governmental purpose”.

of similarly situated licensees in terms of the ECA, without any additional obligations, that it is permitted a special dispensation to force the expropriation of land is not likely defensible.

If, on the other hand, the purpose is to permit the expropriation of land for public purposes, then this is already allowed by the Expropriation Act, with sufficient safeguards set out therein. The Broadband Infraco Act goes much further and allows the expropriation of land “in the public interest” and “for the attainment” of Broadband Infraco’s objects.

The provisions limit the right found in section 9(1), leading to the next step of the analysis which is an examination of section 36(1). The first important aspect of section 36(1) is that it is not applicable if a law of general application is not involved. Arguably, as this provision only applies to Broadband Infraco, it is not a law of general application. In any event, if a law of general application is involved, then the test involves considering the proportionality between the extent of the limitation and the purpose thereof. At this point, it is also appropriate to consider whether there could have been less restrictive means used to achieve that purpose. Assuming that the legitimate government purpose is to allow expropriation in for public purposes, then the use of the phrases “in the public interest” and “for the attainment” of Broadband Infraco’s objects, are overly broad. It is suggested that these provisions be deleted in their entirety with the matter to be governed by the Expropriation Act.

LIST OF ACRONYMS OR ABBREVIATIONS USED IN THE REPORT

CCC:	Complaints and Compliance Committee
ECA:	Electronic Communications Act 36 of 2005
ECTA:	Electronic Communications and Transactions Act 25 of 2002
ICT:	Information Communication Technologies
IBA:	Independent Broadcasting Authority
ICASA:	The Independent Communications Authority of South Africa
PMS:	Performance Management System
RICA:	Regulation of Communications and Provision of Communication-Related Information Act 70 of 2002
SABC:	South African Broadcasting Corporation Limited
SAPO:	South African Post Office Limited
SATRA:	South African Telecommunications Regulatory Authority
TBVC:	Transkei, Bophuthatswana, Venda and the Ciskei.
Telkom:	Telkom SA Limited
TLD:	Top Level Domain
UA:	Universal Access
US:	Universal Service
USAASA:	Universal Service and Access Agency of South Africa
USAF:	Universal Service and Access Fund
.zaDNA	.za Domain Name Authority

ANNEXURE A

COMMUNICATIONS AND RELATED ACTS REPEAL AND AMENDMENT BILL

To repeal or amend certain laws of the Republic

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

1. Repeal or amendment of laws

(1) The laws specified in Schedule 1 are hereby repealed.

(2) The laws specified in Schedule 2 are hereby repealed to the extent set out in the third column of that Schedule.

(3) The laws specified in Schedule 3 are hereby amended to the extent set out in the third column of that Schedule.

2. Short title and commencement

This Act shall be called the Communications and Related Acts Repeal and Amendment Act,… and comes into operation on a date to be determined by the President by proclamation in the Gazette.

Schedule 1

Number and Year of Law	Title or Subject of Law
Act 44 of 1963	Telegraph Messages Protection Act, 1963
Act 88 of 1969	Durban Corporation Telephone Employees' Transfer Act, 1969
Act 100 of 1972	Post Office Re-adjustment Amendment Act, 1972
Act 97 of 1976	Public Service and Post Office Service Amendment Act, 1976
Act 2 of 1978	Radio Amendment Act, 1978
Act 80 of 1980	Radio Amendment Act, 1980
Act 24 of 1990	Radio Amendment Act, 1990
Act 99 of 1991	Radio Amendment Act, 1991
Act 61 of 1982	Broadcasting Amendment Act, 1982
Act 59 of 1986	Broadcasting Amendment Act, 1986
Act 113 of 1990	Broadcasting Amendment Act, 1990
Act 73 of 1993	Broadcasting Amendment Act, 1993
Act 50 of 1996	Broadcasting Amendment Act, 1996
Act 24 of 1997	Broadcasting Amendment Act, 1997
Act 149 of 1993	Independent Media Commission Act, 1993
Act 36 of 1995	Independent Broadcasting Authority Amendment Act, 1995
Act 4 of 1996	Independent Broadcasting Authority Amendment Act, 1996
Act 91 of 1996	Former States Broadcasting Reorganisation Act, 1996
Act 5 of 1996	Former States Posts and Telecommunications Reorganisation Act, 1996
Act 10 of 1998	Department of Communications Rationalisation Act, 1998
Act 12 of 1997	Telecommunications Amendment Act, 1997
Act 64 of 2001	Telecommunications Amendment Act, 2001
Act 2 of 2004	Telecommunications Amendment Act, 2004
Act 37 of 2007	Electronic Communications Amendment Act, 2007

Schedule 2

Number and Year of Law	Title or Subject	Extent of Repeal
Act 44 of 1958	Post Office Act, 1958	Sections: 89, 90, 99, 105, 107, 108 and 115.
Act 63 of 1996	Sentech Act, 1996	Section 1 Definitions: Repeal of definitions of: "broadcasting service licensee", "broadcasting signal distribution", "common carrier", "SABC" and "Sentech (Pty.) Ltd"; Sections: 2, 3, and 4.
Act 124 of 1998	Postal Services Act, 1998	Section 45.
Act 4 of 1999	Broadcasting Act, 1999	Section 1 Definitions: Repeal of definitions of "channel", "common carrier", "community", "community broadcasting service", "due diligence report", "inventory", "low power broadcasting service", "multi-channel distribution service", "satellite broadcasting service", and "subscription broadcasting service"; Sections: 3, 5 and 38. Subsections: 8A(4), (11), (12), (13) and (14); 10(3) and 11(2).
Act 13 of 2000	Independent Communications Authority of South Africa Act, 2000	Section 1 Definitions: Repeal of definition of "Telecommunications Act". Subsections: 5(1A)(b) and (c); 5(1B)(a), (b) and (c); 6A(3); 7(6)(a) and (b) and 14A(2).
Act 25 of 2002	Electronic Communications and Transactions Act, 2002	Section 1 Definitions: Repeal of definitions of: "Consumer Affairs Committee" and "Universal Access" Sections: 6, 7 and 9. Subsections: 2(1)(b) and 50(4).
Act 36 of 2005	Electronic Communications Act, 2005	Subsections: 13 (3), (4) and (5).
Act 33 of 2007	Broadband Infraco Act, 2007	Section 7. Subsection 5(6).

Schedule 3

Number and Year of Law	Title or Subject	Amendments
Act 4 of 1999	Broadcasting Act, 1999	Section 2 "Object of the Act" is to be substituted by the following: **2. Object of Act.**—The object of this Act is to establish and develop a public broadcasting service **[policy]** in the Republic in the public interest and for that purpose to— (*a*) contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society; (*b*) safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa; **[(*c*) encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;]** (*d*) ensure plurality of news, views and information and provide a wide range of entertainment and education programmes; (*e*) cater for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled; (*f*) encourage the development of human resources and training, and capacity building within the public broadcasting service **[sector]** especially amongst historically disadvantaged groups; **[(*g*) encourage investment in the broadcasting sector;** **(*h*) ensure fair competition in the broadcasting sector;** **(*i*) ensure efficient use of the broadcasting frequency spectrum;** **(*j*) provide a clear allocation of roles and assignment of tasks between policy formulation, regulation and service provision as well as articulation of long-term and intermediate-term goals;** **(*k*) provide for a three tier system of public, commercial and community broadcasting**

		services;] (*l*) establish a strong and committed public broadcasting service which will service the needs of all South African society; and **[(*m*) ensure that the commercial and community licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa;** **(*n*) ensure that broadcasting services are effectively controlled by South Africans;** **(*o*) integrate multi-channel distribution systems into the broadcasting framework;** **(*p*) provide access to signal distribution services for content providers;** **(*q*) provide access to signal distribution services for broadcast content receivers;]** (*r*) encourage the development of local programming content. Section 8(g) is to be substituted by the following: "to provide television and radio programmes and any other material to be transmitted or distributed **[by the common carrier]** for free to air reception by the public **[subject to section 33 of this Act]**;" Section 13 is to be amended by the insertion, after subsection (1) of a new subsection (1A) to read as follows: """(1A) The executive members of the Board are appointed by the non-executive members of the Board."
Act 13 of 2000	Independent Communications Authority of South Africa Act, 2000	Section 1 Definitions: Definition of "Electronic Communications Act" to be substituted with the following "**Electronic Communications Act**" means **[an Act of Parliament providing for convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors]** the Electronic Communications Act, 2005 (Act 36 of 2005);". Section 3- Establishment of Independent Communications Authority of South Africa.—to be amended by the insertion of sub-section (5) to reads as follows: "(5) The Authority may receive Ministerial Policy Directions on any matter of policy provided it does not pertain to, or affect the licensing of any entity/licensee" Subsection (1) of Section 5 - Constitution of and appointment of councillors to Council, to be amended to read as follows: "(1) The Council consists of a chairperson and eight other councillors appointed by the **[Minister]** President upon the recommendation of **[approval by]** the National Assembly according to the following principles, namely—"

		Subsection (1A) (a) of section 5 is to be amended to read as follows: "The National Assembly must submit to the **[Minister]** President a list of suitable candidates **[at least one and a half times the number of councilors]** to be appointed." Subsection (1) of section 6A is to be amended as follows: "(1) The **[Minister must, in consultation with the]** National Assembly must establish a collective performance management system to monitor and evaluate the performance of the **[chairperson and other councilors]** Council, which performance management system shall be reviewed annually." Subsection (4) and (5) of section 6A are to be amended to read as follows: "(4) The evaluation of the performance of the **[chairperson or other councillor]** Council must be conducted by a panel constituted by the **[Minister, in consultation with the]** National Assembly for that purpose. (5) The panel contemplated in subsection (4) must, after an evaluation of the **[chairperson or other councillor]** Council submit a report to the National Assembly for consideration." Section 7(6) is amended to read as follows: "Every councillor serves in a full-time capacity to the exclusion of any other remunerative employment, occupation or office **[which is likely to—]**." Section 7 is amended by the insertion of subsections (7) and (8) to read as follows: "(7) The provisions of subsection (6) shall not apply to part-time academic or public sector appointments, public talks for which an honorarium is paid and incidental gifts for attendance at conferences and public lectures, or any other work which reasonably may be perceived as advancing the work of the Authority, provided any such associated benefits are disclosed in writing as provided for in section 12(5). (8) The Authority shall keep a register of all declarations by Councillors of any gift, benefit or gratuity received or derived as a result of the activities set out subsection (7) or in any way whatsoever." Section 11A is amended by the insertion of a new subsection (3) to read as follows: "(3) The decisions of meetings of the Council regarding any licensing and regulatory matters must be published in the ICASA library within 14 days of such minutes being signed by the person presiding at the meeting." Section 12 is to be amended by the insertion of new subsections (5) and (6) to read as follows: "(5) All councillors and the Chief Executive Officer must

		disclose in writing, any interests, whether financial or otherwise, direct or indirect, in directorships, partnerships, consultancies to the Council, and in the annual report to Parliament. (6). The Authority must make publicly available on its website and in the ICASA library, a Code of Ethics, which addresses inter alia, the processes for such disclosure and which specifies the governance principles according to which the Authority and the Council functions." Subsection 16(3) is to be amended to read as follows: "(3) The **[Minister]** Authority must table a copy of **[the]** its annual report in Parliament within 30 days **[after it has been received by him or her]** of the publication thereof if Parliament is then sitting and, if Parliament is not in sitting, within 14 days after the next ensuing sitting of Parliament." Section 17(C)(1)(a) is to be amended as follows: "(*a*) A person who has reason to believe that a **[licensee]** person is guilty of any non-compliance with the terms and conditions of its licence or with this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance." Section 17(D)(2) is to be amended as follows: "(2) The Complaints and Compliance Committee must recommend to the Authority what action by the Authority should be taken against a **[licensee]** person, if any." Section 17E(1)(e) is to be amended as follows: "(*e*) the steps taken by the **[licensee]** person to remedy the complaint;" Section 17E(1)(f) is to be amended as follows: "(*f*) the steps taken by the **[licensee]** person to ensure that similar complaints will not be lodged in the future." Section 17E(2) is to be amended as follows: "(2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely— (*a*) direct the **[licensee]** person to desist from any further contravention; (*b*) direct the **[licensee]** person to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence; (*c*) direct the **[licensee]** person to take such remedial or other steps in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee; (*d*) where **[the]** a licensee has repeatedly been found guilty of material violations— (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this

		subsection for a period in excess of 30 days; or (ii)amend or revoke his or her licence; and (*e*) direct the **[licensee]** person to comply with any settlement. Section 17F(5)(c) is to be amended by the insertion of a new subsection (iv) to read as follows: "non-compliance with the Act or the underlying statutes;"
Act 14 of 2002	Media Development and Diversity Agency Act, 2002	Section 3(b)(vii) is to be amended to read as follows: "liaise with other statutory bodies such as the Independent Communications Authority of South Africa and the Universal Service and Access Agency of South Africa."
Act 25 of 2002	Electronic Communications and Transactions Act, 2002	Section 1: Definition of "National Consumer Commission" is to be inserted to read as follows once the Consumer Protection Bill is enacted: "National Consumer Commission" means the National Consumer Commission established by section 85 of the Consumer Protection Act; The definition 'Internet' is to be substituted by the following: ""Internet" means **[the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions thereof]** binary code, or data, communicated through a network made up of electronic communications facilities using packet switching technology and communicating through TCP/IP, and includes future versions thereof;" The definition of 'registrar' is to be substituted by the following: ""registrar" means an entity which is licensed by the Authority to update a repository, and includes the Authority." The definition of 'registry' is to be substituted by the following: ""registry" means an entity which is licensed by the Authority to manage and administer a specific subdomain, and includes the Authority." Subsection (1) of section 5 is to be amended to read as follows: "(1)The Minister must **[within 24 months after the promulgation of this Act, develop a three-year national e-strategy for the Republic]** develop a three-year national e-strategy, which must be submitted to Cabinet for approval." Section 49 is to be amended to read as follows: "49. A consumer may lodge a complaint with the **[Consumer Affairs Committee]** National Consumer Commission in respect of any non-compliance with the provisions of this Chapter by a supplier." Subsection (2) of section 50 is to be amended to read as follows: "(2) A data controller **[may voluntarily]** must subscribe to the principles outlined in section 51 **[by recording]** and must record such fact in any agreement with a data subject." Section (1) of section 64 is to be amended as follows: "No

		person, except the Authority, may update a repository or administer a second level domain unless such person is licensed to do so by the Authority." Sections 65(1) is to be amended by the insertion of a new subsection 65(1)(f): "(f) update and maintain registries and perform any function necessary to ensure the proper functioning of the .za domain name space, including the second level domain, in the event that a licensed entity fails or is unable to perform such functions." Section 71 is to be amended by the insertion of a new subsection (3) to read as follows: "(3) A representative body will be deemed recognised, for the purposes of section 72, if the Minister fails to take a decision on any application by a representative body for recognition within a period of six months."
Act 70 of 2002	Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002	Subsection 6(1) is amended to read as follows: "6.(1) Any person may, in the course of the carrying on of any business, intercept any indirect communication – (a) by means of which a transaction is entered into in the course of that business; (b) which otherwise relates to that business; or (c) which otherwise takes place in the course of the carrying out of that business, in the course of its transmission over **[a telecommunication system]** an electronic communications network." Subsection 6(2)(b)(i)(bb) is amended to read as follows: "(*bb*)for purposes of investigating or detecting the unauthorised use of that **[telecommunication system]** electronic communications network;" Subsection 6(2)(c) is amended to read as follows: "(*c*) if the **[telecommunication system]** electronic communications network concerned is provided for use wholly or partly in connection with that business;" Subsection 6(2)(d) is amended to read as follows: "(*d*) if the system controller has made all reasonable efforts to inform in advance a person, who intends to use the **[telecommunication system]** electronic communications network concerned, that indirect communications transmitted by means thereof may be intercepted or if such indirect communication is intercepted with the express or implied consent of the person who uses that **[telecommunication system]** electronic communications network." Subsection 7(1) is amended to read as follows: "7(1) Any law enforcement officer may, if— (*a*) he or she is satisfied that there are reasonable grounds to believe that a party to the communication has— (i) caused, or may cause, the infliction of serious bodily harm to another person; (ii) threatens, or has threatened, to cause the

		infliction of serious bodily harm to another person; or (iii) threatens, or has threatened, to take his or her own life or to perform an act which would or may endanger his or her own life or would or may cause the infliction of serious bodily harm to himself or herself; (*b*) he or she is of the opinion that because of the urgency of the need to intercept the communication, it is not reasonably practicable to make an application in terms of section 16 (1) or 23 (1) for the issuing of an interception direction or an oral interception direction; and (*c*) the sole purpose of the interception is to prevent such bodily harm, intercept any communication or may orally request **[a telecommunication service provider]** an electronic communications service provider to route duplicate signals of indirect communications specified in that request to the interception centre designated therein." Subsection 7(2) is amended to read as follows: "(2) **[A telecommunication service provider]** An electronic communications service provider must, upon receipt of a request made to him or her in terms of subsection (1), route the duplicate signals of the indirect communications concerned to the designated interception centre." Subsection 7(3) is amended to read as follows: "(3) The law enforcement officer who made a request under subsection (1) must as soon as practicable after making that request, furnish the **[telecommunication service provider]** electronic communications service provider concerned with a written confirmation of the request which sets out the information given by that law enforcement officer to that **[telecommunication service provider]** electronic communications service provider in connection with the request." Subsection 7(5) is amended to read as follows: "(5) **[A telecommunication service provider]** An electronic communications service provider who, in terms of subsection (2), has routed duplicate signals of indirect communications to the designated interception centre must, as soon as practicable thereafter, submit an affidavit to a designated judge setting forth the steps taken by that **[telecommunication service provider]** electronic communications service provider in giving effect to the request concerned and the results obtained from such steps." Subsection 8(1) is amended to read as follows: "8(1) In circumstances where— (*a*) a person is a party to a communication;

		(*b*) that person, as a result of information received from another party to the communication (in this section referred to as the "sender"), has reasonable grounds to believe that an emergency exists by reason of the fact that the life of another person, whether or not the sender, is being endangered or that he or she is dying or is being or has been seriously injured or that his or her life is likely to be endangered or that he or she is likely to die or to be seriously injured; and (*c*) the location of the sender is unknown to that person, the person referred to in paragraph (*a*) may, if he or she is— (i) a law enforcement officer, and if he or she is of the opinion that determining the location of the sender is likely to be of assistance in dealing with the emergency, orally request, or cause another law enforcement officer to orally request, the **[telecommunication service provider]** <u>electronic communications service provider</u> concerned to— (*aa*)intercept any communication to or from the sender for purposes of determining his or her location; or (*bb*) determine the location of the sender in any other manner which the **[telecommunication service provider]** <u>electronic communications service provider</u> deems appropriate; or (ii) not a law enforcement officer, inform, or cause another person to inform, any law enforcement officer of the matters referred to in paragraphs (*a*), (*b*) and (*c*). Subsection 8(2) is amended to read as follows: "(2) A law enforcement officer who has been informed as contemplated in subsection (1) (ii), may, if he or she is of the opinion that determining the location of the sender is likely to be of assistance in dealing with the emergency, orally request, or cause another law enforcement officer to orally request, the **[telecommunication service provider]** <u>electronic communications service provider</u> concerned to act as contemplated in subsection (1) (i) (*aa*) or (*bb*)." Subsection 8(3) is amended to read as follows: "**8(3) [A telecommunication service provider]** <u>An electronic communications service provider</u> must, upon receipt of a request made to him or her in terms of subsection (1) (i) or (2) — (*a*) intercept any communication to or from the sender for purposes of determining his or her location; or (*b*) determine the location of the sender in any other manner which the **[telecommunication service provider]** deems appropriate,

		and if the location of the sender has been so determined, the **[telecommunication service provider]** electronic communications service provider concerned must, as soon as practicable after determining that location, provide the law enforcement officer who made the request with the location of the sender and any other information obtained from that interception which, in the opinion of the **[telecommunication service provider]** electronic communications service provider concerned, is likely to be of assistance in dealing with the emergency." Subsection 8(4)(a) is amended to read as follows: "(*a*) as soon as practicable after making that request, furnish the **telecommunication service provider** electronic communications service provider concerned with a written confirmation of the request which sets out the information given by that law enforcement officer to that **[telecommunication service provider]** electronic communications service provider in connection with the request; Subsection 8(5) is amended to read as follows: "(5) **[A telecommunication service provider]** An electronic communications service provider who has taken any of the steps contemplated in subsection (3), must, as soon as practicable thereafter, submit to a designated judge— (*a*) an affidavit setting forth the steps taken by that **[telecommunication service provider]** electronic communications service provider in giving effect to the request concerned and the results and information obtained from such steps; and (*b*)if such steps included the interception of an indirect communication, any recording of that indirect communication that has been obtained by means of that interception, any full or partial transcript of the recording and any notes made by that **[telecommunication service provider]** electronic communications service provider of that indirect communication." Subsections 10(a) and (b) are amended to read as follows: "(*a*) installation or connection of any equipment, facility or device used, or intended to be used, in connection with **[a telecommunication service]** an electronic communications service; (*b*) operation or maintenance of **[a telecommunication system]** an electronic communications network;" Section 12 is amended to read as follows: "**12** Subject to this Act, no **[telecommunication service provider]** electronic communications service provider or employee of **[a telecommunication service provider]** an electronic communications service provider may intentionally provide or

		attempt to provide any real-time or archived communication-related information to any person other than the customer of the **[telecommunication service provider]** electronic communications service provider concerned to whom such real-time or archived communication-related information relates." Section 13 is amended to read as follows: "**13** Subject to this Act, any **[telecommunication service provider]** electronic communications service provider to whom a real-time communication-related direction or an archived communication-related direction is addressed, may provide any real-time or archived communication-related information to which that real-time communication-related direction or archived communication-related direction relates." Section 14 is amended to read as follows: "**14**. Any **[telecommunication service provider]** electronic communications service provider may, upon the written authorisation given by his or her customer on each occasion, and subject to the conditions determined by the customer concerned, provide to any person specified by that customer real-time or archived communication-related information which relates to the customer concerned." Subsection 16(10)(a) is amended to read as follows: "10(*a*) **[A telecommunication service provider]** An electronic communications service provider to whom an interception direction referred to in subsection (8) (*b*) is addressed, may in writing apply to a designated judge for an amendment or the cancellation of the interception direction concerned on the ground that his or her assistance with respect to the interception of the indirect communication cannot be performed in a timely or reasonable fashion." Subsection 23(10)(a) is amended to read as follows: (*a*) immediately after the issuing thereof, inform the applicant and, if applicable, the postal service provider or **[telecommunication service provider]** electronic communications service provider to whom it is addressed, orally of such an oral direction or oral entry warrant, including the— (i) contents thereof; and (ii) period for which it has been issued; and" Subsection 23(12)(a)(ii) is amended to read as follows: "(ii) if applicable, the postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder concerned," Subsections (1) and (2) of section 28 are amended to read as follows "28(1). If an interception direction or a copy thereof is handed to the postal service provider or **[telecommunication service provider]** electronic communications service provider

		to whom the interception direction is addressed by the authorised person who executes that interception direction or assists with the execution thereof, the— (*a*) postal service provider concerned must intercept the postal article to which the interception direction applies and hand it to the authorised person concerned; or (*b*) **[telecommunication service provider]** <u>electronic communications service provider</u> concerned must immediately— (i) route the duplicate signals of indirect communications to which that interception direction applies to the designated interception centre concerned; or (ii) make available the necessary assistance and, subject to section 46 (7) (*b*), the necessary facilities and devices to enable the authorised person concerned to effect the necessary connections in order to intercept any indirect communications to which the interception direction applies. (2) If a real-time communication-related direction or an archived communication-related direction or a copy thereof is handed to the **[telecommunication service provider]** <u>electronic communications service provider</u> to whom the real-time communication-related direction or archived communication-related direction is addressed by the authorised person who executes that real-time communication-related direction or archived communication-related direction or assists with the execution thereof, the **[telecommunication service provider]** <u>electronic communications service provider</u> concerned must— (*a*) route the— (i) real-time communication-related information specified in the real-time communication-related direction concerned immediately; or (ii) archived communication-related information specified, and within the period stated, in the archived communication-related direction concerned, to the designated interception centre concerned; or (*b*) provide the— (i) real-time communication-related information specified in the real-time communication-related direction concerned immediately; or (ii) archived communication-related information specified, and within the period stated, in the archived communication-related direction concerned, to the law enforcement agency concerned, in the form

		as specified in that real-time communication-related direction or archived communication-related direction." Subsection 30(1) is amended to read as follows: "30(1) Notwithstanding any other law, **[a telecommunication service provider]** an electronic communications service provider must— (*a*) provide **[a telecommunication service]** an electronic communications service which has the capability to be intercepted; and (*b*) store communication-related information." Subsection 30(2) is amended to read as follows: "(2) The Cabinet member responsible for communications, in consultation with the Minister and the other relevant Ministers and after consultation with the Authority and the **[telecommunication service provider]** electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers concerned, must, on the date of the issuing of a **[telecommunication service licence]** electronic communications service licence under the Electronic Communications Act, to such **[telecommunication service provider]** an electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers — (*a*) issue a directive in respect of that **[telecommunication service provider]** electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers, determining the— (i) manner in which effect is to be given to subsection (1) by the **[telecommunication service provider]** electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers concerned; (ii) security, technical and functional requirements of the facilities and devices to be acquired by the **[telecommunication service provider]** electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers to enable the— (*aa*) interception of indirect communications in terms of this Act; and (*bb*) storing of communication-related information in terms of subsection (1) (*b*); and (iii) type of communication-related information which

		must be stored in terms of subsection (1) (*b*) and the period for which such information must be stored, which period may, subject to subsection (8), not be less than three years and not more than five years from the date of the transmission of the indirect communication to which that communication-related information relates; and (*b*) determine a period, which may not be less than three months and not more than six months from the date on which a directive referred to in paragraph (*a*) is issued, for compliance with such a directive, and the period so determined must be mentioned in the directive concerned." Subsection 30(4) is amended to read as follows: "(4) Notwithstanding any other law, agreement or licence, **[a telecommunication service provider]** an electronic communications service provider must, subject to section 46 (1) (*a*), at own cost acquire, whether by purchasing or leasing, the facilities and devices determined in a directive referred to in subsection (2) (*a*)." Subsection 30(5) is amended to read as follows: "(5) Any costs incurred by **[a telecommunication service provider]** an electronic communications service provider under this Act in— (*a*) enabling— (i)**[a telecommunication service]** an electronic communications service to be intercepted; and (ii) communication-related information to be stored, including the investment, technical, maintenance and operating costs; and (*b*) complying with section 28 (1) (*b*) (i) and (2) (*a*), must be borne by that **[telecommunication service provider]** electronic communications service provider". Subsection 30(7) is amended to read as follows: "(7) The Cabinet member responsible for communications must, within two months after the fixed date and in consultation with the Minister and the other relevant Ministers and after consultation with the Authority and **[a telecommunication service provider]** an electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers to whom, prior to the fixed date, a **[telecommunication service licence]** electronic communications service licence has been issued under the Electronic Communications Act— (*a*) issue a directive referred to in subsection (2) (*a*) in respect of such a **[telecommunication service**

		provider] electronic communications service provider or category of **[telecommunication service providers]** electronic communications service providers; and (*b*) determine a period, which may not be less than three months and not ore than six months from the date on which a directive referred to in paragraph (*a*) is issued, for compliance with such a directive, and the period so determined must be mentioned in the directive concerned." Subsection 30(8) is amended to read as follows: "(8) If a period of more than three years has been determined in terms of subsection (2) (*a*) (iii), the Cabinet member responsible for communications may, upon application by the **[telecommunication service provider]** electronic communications service provider concerned and in consultation with the relevant Ministers, reduce that period to a period which may not be less than three years by issuing an amended directive under subsection (2) (*a*)." Subsection 31(1)(a) and (b) are amended to read as follows: "(*a*) The Minister, after consultation with the Cabinet members responsible for communications and national financial matters and the postal service providers or **[telecommunication service providers]** electronic communications service providers concerned, as the case may be, must by notice in the *Gazette* prescribe— (i) the forms of assistance in the execution of a direction for which a postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder must be compensated; and (ii) reasonable tariffs of compensation payable to a postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder for providing such prescribed forms of assistance. (*b*) The tariffs prescribed under paragraph (*a*) (ii)— (i) may differ in respect of different categories of postal service providers, **[telecommunication service providers]** electronic communications service providers or decryption key holders; and (ii) must be uniform in respect of each postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder falling within the same category."

		Subsection 31(2)(a) is amended to read as follows: ""(*a*) **[telecommunication service provider]** electronic communications service provider, the making available of a facility, device or **[telecommunication system]** electronic communications network; and" Subsection 31(3) is amended to read as follows: "(3)The compensation payable to a postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder in terms of this section will only be for direct costs incurred in respect of personnel and administration which are required for purposes of providing any of the forms of assistance contemplated in subsection (1) (*a*) (i)." Subsection 37(2)(a)(iii) is amended to read as follows: "(iii) any defects in any **[telecommunication system]** electronic communications network or in the operation of the interception centre which have been discovered;" Section 39(1) is amended to read as follows: "39(1) Before **[a telecommunication service provider]** an electronic communications service provider, other than **[a telecommunication service provider]** an electronic communications service provider who provides a mobile cellular **[telecommunication service]** electronic communications service, enters into a contract with any person for the provision of **[a telecommunication service]** an electronic communications service to that person, he or she— (*a*) must, if that person is a natural person— (i) obtain from him or her— (*aa*) his or her full names, identity number, residential and business or postal address, whichever is applicable; and (*bb*) a certified photocopy of his or her identification document on which his or her photo, full names and identity number, whichever is applicable, appear; (ii) retain the photocopy obtained in terms of subparagraph (i) (*bb*); and (iii) verify the photo, full names and identity number, whichever is applicable, of that person with reference to his or her identification document; or (*b*) must, if that person is a juristic person— (i) obtain from the person representing that juristic person—

		(*aa*) his or her full names, identity number, residential and postal address, whichever is applicable; (*bb*)the business name and address and, if registered as such in terms of any law, the registration number of that juristic person; (*cc*)a certified photocopy of his or her identification document on which his or her photo, full names and identity number, whichever is applicable, appear; and (*dd*)a certified photocopy of the business letterhead of, or other similar document relating to, that juristic person; (ii) retain the photocopies obtained in terms of subparagraph (i) (*cc*) and (*dd*); and (iii) verify the— (*aa*) photo, full names and identity number, whichever is applicable, of that person with reference to his or her identification document; and (*bb*) name and registration number of that juristic person with reference to its business letterhead or other similar document; and (*c*) may obtain from such person any other information which the **[telecommunication service provider]** <u>electronic communications service provider</u> deems necessary for purposes of this Act." Subsection 39(2) is amended to read as follows: "(2) **[A telecommunication service provider]** <u>An electronic communications service provider</u> referred to in subsection (1) must ensure that proper records are kept of— (*a*) the information, including the photocopies, referred to in subsection (1) and, where applicable, any change in such information which is brought to his or her attention; (*b*) the telephone number or any other number allocated to the person concerned; and (*c*) any other information in respect of the person concerned which the **[telecommunication service provider]** <u>electronic communications service provider</u> concerned may require in order to enable him or

		her to identify that person." Subsection 39(3) is amended to read as follows: "(3) An applicant may, for purposes of making an application for the issuing of a direction, in writing request **[a telecommunication service provider]** an electronic communications service provider referred to in subsection (1) to— (*a*) confirm that the person specified in the request is a customer of that **[telecommunication service provider]** electronic communications service provider concerned; (*b*) provide the applicant with the telephone number or any other number allocated to that person by that **[telecommunication service provider]** electronic communications service provider; and (*c*) furnish the applicant with a photocopy of the identification document of that person which is retained by that **[telecommunication service provider]** electronic communications service provider in terms of subsection (1) (*a*) (ii). Subsection 39(4) is amended to read as follows: "(4) **[A telecommunication service provider]** An electronic communications service provider who receives a request referred to in subsection (3) must immediately comply with that request if the person specified in the request is a customer of the **[telecommunication service provider]** electronic communications service provider concerned." Subsection 42(2) is amended to read as follows: "(2) No— (*a*) postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder may disclose any information which he or she obtained in the exercising of his or her powers or the performance of his or her duties in terms of this Act; or (*b*) employee of a postal service provider, **[telecommunication service provider]** electronic communications service provider or decryption key holder may disclose any information which he or she obtained in the course of his or her employment and which is connected with the exercising of any power or the performance of any duty in terms of this Act, whether that employee is involved in the exercising of that power or the performance of that duty or not, except for the purposes mentioned in subsection (1)." Subsection 45(2) is amended to read as follows: "(2) Subsection (1) does not apply to any **[telecommunication service provider]** electronic communications service provider or other person who, or law enforcement agency which, manufactures, assembles, possesses, sells, purchases or

		advertises listed equipment under the authority of a certificate of exemption issued to him or her or it for that purpose by the Minister under section 46." Section 50(1) is amended to read as follows: "50(1) Any **[telecommunication service provider]** electronic communications service provider or employee of **[a telecommunication service provider]** an electronic communications service provider who intentionally provides or attempts to provide any real-time or archived communication-related information to any person other than the customer of the **[telecommunication service provider]** electronic communications service provider concerned to whom such real-time or archived communication-related information relates, is guilty of an offence."
Act 36 of 2005	Electronic Communications Act, 2005	Section 1, the definition of "end user" is amended to read as follows: ""end-user" means a subscriber and persons who use the services of a licensed service referred to in Chapter 3 or a service provided in terms of a licence exemption." The definition of "radio frequency spectrum" is amended to read as follows: ""radio frequency spectrum" means the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting." The definition of "radio station" is amended to read as follows: ""radio station" means one or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying an electronic communications service or broadcasting service or any electronic communications or broadcasting authorised by the authority." Section 3(3) to be amended as follows: "(3) No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, or regarding any matter pertaining to licensing in general, except as permitted in terms of this Act." Section 6 is amended to read as follows: "(1) [Subject to subsection (2), the Authority may prescribe the— (a) type of electronic communications services that may be provided; (b) type of electronic communications networks that may be operated; (c) type of electronic communications network services that may be provided; and (d) radio frequency spectrum that may be used, without a licence. **(2)]** The following electronic communications services, electronic communications networks, and electronic communications network services **[and radio frequency**

		spectrum contemplated in subsection (1) may include, but are not limited to] may be provided without a licence— (a) **[electronic communications]** services provided on a not-for-profit basis; (b) **[electronic communications]** services that are provided by resellers; (c) private electronic communications networks used principally for or integrally related to the internal operations of the network owner, except that where the private electronic communications networks' additional capacity is resold, the Authority may prescribe terms and conditions for such resale; and (d) [small electronic communications networks such as local area networks] such other service as prescribed by the Authority; [(e) uses of the radio frequency spectrum that were permitted without a licence prior to the coming into force of this Act and uses of the radio frequency spectrum that the Authority finds would not cause harmful interference with radio frequency spectrum licensees such as low power uses; and such other services considered to be exempted, as may be prescribed by the Authority. **(3) Any regulations prescribed by t]** (2) The Authority may prescribe regulations in terms of this section **[may contain]** containing terms and conditions applicable to the exempted electronic communications services, electronic communications networks, and electronic communications network services **[and radio frequency spectrum use]** and declare contravention of the regulation an offence, subject to section 17H of the ICASA Act." Subsections 9(1) and (2) are amended to read as follows: "(1) Any person may**[, upon invitation by the Authority]**, subject to the provisions of this Act, apply for an individual electronic communications network or electronic communications service licence in the prescribed manner: Provided that the Authority must invited interested persons to submit written representations in relation to the application. (2) Any person may, upon invitation by the Authority, subject to the provisions of this Act, apply for an individual broadcasting service licence in the prescribed manner. The Authority must give notice of the application in the Gazette and— (a) invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice; (b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups**[, which must not be less than 30%, or such higher percentage as may be prescribed]**; (c) set out the proposed licence conditions that will apply to the

		licence; (d) give interested persons an opportunity to submit written responses to any representations submitted in terms of paragraph (a); and (e) may conduct a public hearing in relation to any application for an individual broadcasting service licence." A new section 13A is to be inserted to read as follows: "13A **Ownership and Control of Licensees** (1) The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to— *(a)* promote the ownership and control of electronic communications services by historically disadvantaged groups; or *(b)* promote competition in the ICT sector. (2) The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to promote a diversity of views and opinions. (3) Regulations contemplated in subsection (1) and (2) must be made— *(a)* with due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation; and *(b)* after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study." Subsection 34(16) is amended to read as follows: "(16) The Authority may, where the national radio frequency plan identifies radio frequency spectrum that is occupied and requires the migration of the users of such radio frequency spectrum to other radio frequency bands, migrate the users to such other radio frequency bands in accordance with the national radio frequency plan, except where such migration involves **[governmental entities or organisations]** the security services, in which case the Authority— (a) must refer the matter to the Minister; and (b) may migrate the users after consultation with the Minister."

		Subsection 37(6) is amended to read as follows: "(6) The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection or approved or required by the Authority, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or be in any other way discriminatory to the comparable network services provided by such licensee to itself or an affiliate." Subsection 38(5) is amended to read as follows: "(5) The interconnection regulations may exempt (in whole or in part) licensees from the obligation to interconnect under section 37(1), however, **[where]** the Authority **[has not found such licensees to]** may not exempt any such licensee until it has determined that such licensee does not have significant market power in the relevant market or market segment in terms of Chapter 10. Section 41 is amended to read as follows: "41. Interconnection pricing principles.—The Authority may prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services **[taking into account the provisions of Chapter 10]**." Subsection 43(7) is amended to read as follows: "(7) The lease of electronic communications facilities by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the leasing party or approved or required by the Authority, be non-discriminatory as among comparable types of electronic communications facilities being leased and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate or be in any other way discriminatory to the comparable network services provided by such licensee to itself or an affiliate." Section 43 is amended by the insertion, after subsection (8), of a new subsection (8A) to read as follows: "(8A) Requests for essential facilities are deemed to be reasonable and all electronic communications network service licensees receiving such requests are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement within ten days of receiving the request, failing which the Authority will impose terms and conditions consistent with this Chapter within five days of receiving notification that the licensee has failed to conclude an agreement." Subsection 43(11) is amended to read as follows: "(11) Any exclusivity provision contained in any agreement or other arrangement that is prohibited under subsection (10) is invalid from a date **[to be determined by the Minister after consultation with relevant parties]** which is equal to three years after the coming into force of this Act." Subsection 44(5) is amended to read as follows: "(5) The electronic communications facilities leasing regulations may exempt (in whole or in part) electronic communications network

		service licensees from the obligation to lease electronic communications facilities in terms of section 43(1), however **[where]** the Authority **[has not found, in terms of Chapter 10,]** may not exempt any such electronic communications network service licensee until it has determined that such licensee does not **[to]** have significant market power in the relevant market or market segment in terms of Chapter 10." Section 47 is amended to read as follows: "47. Facilities leasing pricing principles.—The Authority may prescribe regulations establishing a framework for the establishment and implementation of wholesale rates applicable to specified types of electronic communication facilities and associated services **[taking into account the provisions of Chapter 10]**." Subsection 67(4) is amended to read as follows: "(4) The Authority must prescribe regulations defining and determining the relevant markets and market segments, as applicable, where there is ineffective competition, **[that pro-competitive conditions may be imposed upon licensees having]** and whether any licensee has significant market power in such markets or market segments, and if so imposing appropriate and sufficient pro-competitive licence conditions on such licensees **[where the Authority determines such markets or market segments have ineffective competition]**. The regulations must, among other things— (a) define and identify the retail or wholesale markets or market segments in which it intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition; (b) set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection **[(8)]** (6) and determine whether there is effective competition in those markets and market segments; (c) set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition taking into account subsection (7); (d) **[declare]** determine which licensees in the relevant market or market segments, as applicable, **[that]** have significant market power, as determined in accordance with subsection (6), and the pro-competitive conditions applicable to each such licensee; (e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and (f) provide for monitoring and investigation of anti-competitive behaviour in the relevant markets and market segments." Section 67 is amended by the insertion after subsection (4) of a new subsection (4A) to read as follows: "(4A) Licensees must provide to the Authority any information specified by the

		Authority in order that the Authority may carry out its duties in terms of this section." Subsection 67(6) is amended to read as follows: "(6) The methodology contemplated in subsection (4)(b) must include but is not limited to an assessment of the following: (a) **[When defining the relevant market or market segments the Authority must consider]** the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments; (b) [When conducting an analysis of the effectiveness of competition in the relevant markets or market segments the Authority must take the following factors, among others, into account: **(i) An assessment of]** the relative market share of the various licensees in the defined markets or market segments; and **[(ii)]** (c) A forward looking assessment of the market power of each of the market participants over a reasonable period **[in terms of, amongst others:** (aa) actual and potential existence of competitors; (bb) the level, trends of concentration, and history of collusion, in the market; (cc) the overall size of each of the market participants; (dd) control of essential facilities; (ee) technological advantages or superiority of a given market participant; (ff) the degree of countervailing power in the market; (gg) easy or privileged access to capital markets and financial resources; (hh) the dynamic characteristics of the market, including growth, innovation, and products and services diversification; (ii) economies of scale and scope; (jj) the nature and extent of vertical integration; **(kk) the ease of entry into the market, including market and regulatory barriers to entry]**." Subsection 67(7) is amended to read as follows: "(7) Pro-competitive terms and conditions may include but are not limited to— (a) an obligation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, to act fairly and reasonably in the way in which the licensee responds to requests for access, provisioning of services, interconnection

		and facilities leasing; (b) a requirement that the obligations contained in the licence terms and pro-competitive conditions must be complied with within the periods and at the times required by or under such terms and conditions, failing which a penalty may be imposed; (c) a prohibition, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, against discriminating in relation to matters connected with access, provisioning of services, interconnection and facilities leasing; (d) an obligation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, requiring the licensee to publish, in such manner as the Authority may direct, all such information for the purpose of ensuring transparency in relation to— (i) access, interconnection and facilities leasing; or (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; (e) an obligation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, to publish, in such manner as the Authority may direct, the terms and conditions for— (i) access, interconnection and facilities leasing; or (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue which may take the form of a reference offer; (f) an obligation to maintain a separation for accounting purposes between different matters relating to— (i) access, interconnection and facilities leasing; (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; and (iii) retail and wholesale prices; (g) a requirement relating to the accounting methods to be used in maintaining the separation of accounts referred to in paragraph (f); (h) such price controls, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, including requirements relating to the provision of wholesale and retail prices in relation to matters connected with the provision of—

		(i) access, interconnection and facilities leasing; or (ii)electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; (i) matters relating to the recovery of costs and cost orientation, in addition to those imposed by Chapters 7 and 8 or regulations made in terms thereof, and with regard to broadcasting services, the appropriate amount of South African programming, including— (i) music content; (ii) news and information programmes; and (iii) where appropriate, programming of local or regional significance; (j) matters relating to the accounts, records and other documents to be kept and made available for inspection by the Authority." Subsection 82(3)(a) is amended to read as follows: "(a) The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes— (i) universal access by all areas and communities in the Republic to electronic communications services, broadcasting services, and electronic communications network services; and (ii) the universal provision for all persons in the Republic of electronic communications services, broadcasting services, and **[access to]** electronic communications network**[s]** services**[, including any elements or attributes thereof]**; and in making such determinations, the Minister must determine what constitutes access to an electronic communications network including any elements or attributes thereof. Subsection 88(1) is amended to read as follows: "(1) The money in the Universal Service and Access Fund must be utilised exclusively for the payment of subsidies— (a) for the assistance of needy persons towards the cost of the provision to, or the use by, them of broadcasting, electronic communications network and electronic communications services; (b) subject to subsection (2), to any **[broadcasting service licensee and]** electronic communications network service licensee for the purpose of financing the construction or extension of electronic communications networks in under-

		serviced areas as prescribed; (c) to public schools and public further education and training institutions as defined in the South African Schools Acts, 1996 (Act No. 84 of 1996), and the Further Education and Training Act, 1998 (Act No. 98 of 1998), respectively, for the procurement of broadcasting and electronic communications services and access to electronic communications networks; (d) to schools and further education and training institutions as defined in the South African Schools Acts, 1996 (Act No. 84 of 1996), and the Further Education and Training Act, 1998 (Act No. 98 of 1998), respectively, for the procurement of broadcasting and electronic communications services and access to electronic communications networks: Provided that— (i) in the case of public schools, they are recognised by their provincial Departments of Education as falling into the lowest three quintiles for socio-economic redress in terms of the National Norms and Standards for School Funding (1998); and (ii) in the case of independent schools and independent further education and training institutions— (aa) they are registered with the Commissioner for Inland Revenue as public benefit organisations in terms of section 10 (1) (cN) of the Income Tax Act, 1962 (Act No. 58 of 1962); and (bb) they are registered with their provincial Departments of Education or the National Department of Education (as the case may be) for the receipt of state subsidies; (e) for the establishment and operation **[of broadcasting services and for the establishment and operation]**, including training of and the payment of allowances to personnel of <u>community access</u> centres where access can be obtained to electronic communications network**[s]**, <u>electronic communications and broadcasting services</u>. Subsection 88(3) is amended to read as follows: "(3) The Authority must at least **[bi-annually]** <u>every two years</u> review and update the prescribed definition of under-serviced area and the list of designated under-serviced areas eligible for construction payments from the Universal Service and Access Fund. Subsection 88(4) is amended to read as follows: "(4) The **[Minister]** <u>Agency</u> may, for the purposes of payments referred to in subsection (1) **[(a)]**, by notice in the Gazette determine— (a)types of needy persons to whom assistance may be given; (b) the persons who must apply for assistance and the manner in which such applications must be made; (c) the manner in which and persons to whom subsidies may be paid." Section 97 is amended to read as follows: "The laws referred to in the first column of **[the]** Schedule <u>1</u> are repealed or amended to the extent indicated in the third column."

		The title of the Schedule to the ECA is amended to read as follows: "SCHEDULE 1" The ECA is amended by the insertion of a new Schedule 2, after the existing Schedule to read as follows: **"SCHEDULE 2** INSTANCES OF CONTROL OF COMMERCIAL BROADCASTING LICENSEES, NEWSPAPERS AND COMPANIES **1. Control of a commercial broadcasting licensee.**—(1) For the purposes of this Act, a person shall control or be in a position to exercise control over any existing or prospective commercial broadcasting licensee if, *inter alia*— (*a*) such person, either alone or together with an associate, is in a position to exercise control over such broadcasting licensee; (*b*) such person, either alone or together with an associate, is in a position to exercise direct or indirect control over the selection or provision of a significant proportion of the programmes broadcast or proposed to be broadcast by such broadcasting licensee; (*c*) such person, either alone or together with an associate, is in a position to exercise direct or indirect control over a significant proportion of the operations of such a broadcasting licensee in providing a broadcasting service under the broadcasting licence; (*d*) such person, either alone or together with an associate, is in a position— (i) where the licensee or prospective licensee is a company, to veto any action taken by the board of directors of such licensee or to appoint or secure or veto the appointment of at least half of the board of directors of such licensee; or (ii) to give or exercise in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the broadcasting licensee; or (*e*) the existing or prospective broadcasting licensee or, where such a licensee is a company, more than fifty percent of the directors of such company— (i) acts or is accustomed to act; or (ii) under a contract, arrangement or understanding (whether formal or informal) is destined, required or expected to act, in accordance with the directions, instructions or wishes of, or in concert with, such person or

		such person and his or her associate acting together or, if such person is a company, the directors of the latter company. (2) Subparagraph (1) (*b*) shall not apply in relation to the provision of programmes by a person to a broadcasting licensee under any agreement if the conditions of such agreement relate only to the programmes so provided or to the promotion thereof. (3) An employee of a broadcasting licensee shall not by virtue of the provisions of subparagraph (1) be regarded as being in a position to exercise control over such licensee merely because of his or her being an employee, except where he or she is placed in such a position of control by virtue of his or her association with any other person. (4) More than one person may be in a position to exercise control over a licensee. **2. Control of a newspaper.**—(1) For the purposes of this Act, a person shall control or be in a position to exercise control over a newspaper if— (*a*) such person is the publisher of the newspaper; (*b*) such person is in a position, either alone or together with an associate, and either directly or indirectly— (i) to exercise control over a significant proportion of the operations of the publisher in publishing the newspaper; or (ii) to exercise control over the selection or provision of a significant proportion of the material to be published in the newspaper; (*c*) where the newspaper is published by a company, the person, either alone or together with an associate, is in a position— (i) to exercise control over such company; (ii) to veto any action taken by the board of directors of such company; (iii) to appoint or secure or veto the appointment of at least one half of the board of directors of such company; or (iv) to give or exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management of the affairs of such company; or (*d*) where the newspaper is published by a company, the company or more than fifty percent of its directors— (i) acts or is accustomed to act; or (ii) under a contract or an arrangement (whether formal or informal) is destined, required or expected to act,in accordance with the directions, instructions or wishes

		of, or in concert with, such person or such person and his or her associate acting together or, if such person is a company, the directors of the latter company. (2) Subparagraph (1) (*b*) (ii) shall not apply in relation to the provision of material by a person to a newspaper under any agreement for the supply of material of that kind if the conditions of such agreement relate only to the material so provided. (3) An employee of the publisher of a newspaper shall not by virtue of the provisions of subparagraph (1) be regarded as being in a position to exercise control over such newspaper merely because of his or her being an employee, except where he or she is placed in such a position of control by virtue of his or her association with any other person. **3. Deemed control of a company -** A person shall be regarded as being in control of a company if he or she holds, directly or indirectly, issued share capital equal to or exceeding twenty-five percent of the issued share capital in the company, irrespective of whether or not such issued share capital confers *de facto* control."

STATUTES ADMINISTERED BY THE DEPARTMENT OF COMMUNICATIONS

Number	Name of Act, number and year	Status
1.	Post Office Act 44 of 1958	I have highlighted all the DoC Acts in green. The PO Act cannot be repealed yet since a number of provisions need to be migrated to the Postal Services Act, 1998 after consultation with Telkom and SAPO. It follows that none of the PO Amendment Acts below can be repealed.
2.	Telegraph Messages Protection Act 44 of 1963 (partly)	In my view this Act has become obsolete and can be repealed
3.	Post Office Amendment Act 80 of 1965	See comment under 1
4.	Durban Corporation Telephone Employees' Transfer Act 88 of 1969 (repealable)	In my view this Act has become obsolete and can be repealed
5.	Post Office Re-adjustment Amendment Act 100 of 1972	I am uncertain whether any of the PO Appropriation Acts or Unauthorised Expenditure Acts are still necessary. In my view, not. Confirm with Office of the Chief State Law Adviser whether it can be repealed
6.	Post Office Amendment Act 101 of 1972	See comment under 1
7.	Post Office Amendment Act 56 of 1973	See comment under 1
8.	Post Office Amendment Act 13 of 1974	See comment under 1
9.	Public Service and Post Office Service Amendment Act 97 of 1976 (partly)	See comment under 5
10.	Post Office Amendment Act 113 of 1976	See comment under 1
11.	Post Office Amendment Act 1 of 1978	See comment under 1
12.	Radio Amendment Act 2 of 1978	Repeal since main Act repealed
13.	Post Office Additional Appropriation Act 22 of 1979 (partly)	See comment under 5
14.	Post Office Appropriation Act 33 of 1979 (partly)	See comment under 5
15.	Post Office Appropriation Act 18 of 1980 (partly)	See comment under 5
16.	Radio Amendment Act 80 of 1980	Repeal since main Act repealed
17.	Post Office Part Appropriation Act 50 of 1981 (partly)	See comment under 5
18.	Post Office Appropriation Act 74 of 1981 (partly)	See comment under 5
19.	Post Office Amendment Act 75 of 1981	See comment under 1
20.	Post Office Appropriation Act 57 of 1982 (partly)	See comment under 5
21.	Broadcasting Amendment Act 61 of 1982	Repeal since main Act repealed
22.	Post Office Amendment Act 80 of 1982	See comment under 1
23.	Additional Post Office Appropriation Act 11 of 1983 (partly)	See comment under 5
24.	Post Office Appropriation Act 26 of 1983 (partly)	See comment under 5

Number	Name of Act, number and year	Status
25.	Post Office Amendment Act 27 of 1983	See comment under 1
26.	Additional Post Office Appropriation Act 22 of 1984 (partly)	See comment under 5
27.	Post Office Amendment Act 37 of 1984	See comment under 1
28.	Post Office Appropriation Act 41 of 1984	See comment under 5
29.	Post Office Service Amendment Act 27 of 1985	Repeal since main Act repealed
30.	Post Office Appropriation Act 40 of 1985 (partly)	See comment under 5
31.	Post Office Amendment Act 7 of 1986	See comment under 1
32.	Post Office Appropriation Act 28 of 1986 (partly)	See comment under 5
33.	Broadcasting Amendment Act 59 of 1986	Repeal since main Act repealed
34.	Post Office Appropriation Act 15 of 1987 (partly)	See comment under 5
35.	Post Office Appropriation Act 28 of 1987 (partly)	See comment under 5
36.	Post Office Appropriation Act 34 of 1988 (partly)	See comment under 5
37.	Post Office Appropriation Act, Additional, 2 of 1989 (partly)	See comment under 5
38.	Post Office Appropriation Act 38 of 1989 (partly)	See comment under 5
39.	Additional Post Office Appropriation Act 2 of 1990 (partly)	See comment under 5
40.	Post Office Appropriation Act 22 of 1990 (partly)	See comment under 5
41.	Radio Amendment Act 24 of 1990	Repeal since main Act repealed
42.	Broadcasting Amendment Act 113 of 1990	Repeal since main Act repealed
43.	Post Office Appropriation Act 35 of 1991 (partly)	See comment under 5
44.	Post Office Amendment Act 85 of 1991	See comment under 1
45.	Radio Amendment Act 99 of 1991	Repeal since main Act repealed
46.	Post Office Appropriation Act 48 of 1992 (partly)	See comment under 5
47.	Posts and Telecommunications Acts Amendment Act 101 of 1992	It seems that this Act can be repealed in part except the amendment of the PO Act, 1958, that is still active
48.	Post Office Appropriation Act 35 of 1993 (partly)	See comment under 5
49.	Unauthorized Post Office Expenditure Act 52 of 1993	See comment under 5
50.	Broadcasting Amendment Act 73 of 1993	Repeal since main Act repealed
51.	Independent Media Commission Act 148 of 1993	This is not a DoC Act
52.	Independent Broadcasting Authority Act 153 of 1993	Already repealed
53.	Post Office Amendment Act 171 of 1993	See comment under 1
54.	Post Office Second Amendment Act 176 of 1993	See comment under 1
55.	Post Office Appropriation Act 11 of 1994 (partly)	See comment under 5
56.	Unauthorised Post Office Expenditure Act 12 of 1994	See comment under 5
57.	Additional Post Office Appropriation Act 4 of 1995 (partly)	See comment under 5
58.	Post Office Appropriation Act 17 of 1995 (partly)	See comment under 5
59.	Post Office Amendment Act 35 of 1995	See comment under 1
60.	Independent Broadcasting Authority Amendment Act 36 of 1995	Repeal since main Act repealed

Number	Name of Act, number and year	Status
61.	Post Office Service Amendment Act 70 of 1995	Repeal since main Act repealed
62.	Independent Broadcasting Authority Amendment Act 4 of 1996	Repeal since main Act repealed
63.	Former States Posts and Telecommunications Reorganisation Act 5 of 1996	Confirm with Office of the Chief State Law Adviser whether can be repealed
64.	Post Office Appropriation Act 30 of 1996 (partly)	See comment under 5
65.	Broadcasting Amendment Act 50 of 1996	Repeal since main Act repealed
66.	Sentech Act 63 of 1996	Required
67.	Former States Broadcasting Reorganisation Act 91 of 1996	Confirm with Office of the Chief State Law Adviser whether can be repealed
68.	Telecommunications Act 103 of 1996	Already repealed
69.	Post Office Appropriation Act 2 of 1997 (partly)	See comment under 5
70.	Post Office Amendment Act 11 of 1997	See comment under 1
71.	Telecommunications Amendment Act 12 of 1997	Repeal since main Act repealed
72.	Broadcasting Amendment Act 24 of 1997	Repeal since main Act repealed
73.	Unauthorised Post Office Expenditure Act 40 of 1997	See comment under 5
74.	Post Office Second Amendment Act 53 of 1997	See comment under 1
75.	Additional Post Office Appropriation Act 9 of 1998	See comment under 5
76.	Department of Communications Rationalisation 10 of 1998	Confirm with Office of the Chief State Law Adviser whether can be repealed
77.	Postal Services Act 124 of 1998	Required
78.	Broadcasting Act 4 of 1999	Required
79.	Sentech Amendment Act 44 of 1999	Required since main Act still active
80.	Independent Communications Authority of South Africa Act 13 of 2000	Required
81.	Postal Services Amendment Act 33 of 2001	Required since main Act still active
82.	Telecommunications Amendment Act 64 of 2001	Repeal since main Act repealed
83.	Electronic Communications and Transactions Act 25 of 2002	Required
84.	Broadcasting Amendment Act 64 of 2002	Required since main Act still active
85.	Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (partly)	Not a DoC but a DoJ&CD Act
86.	Postal Services Amendment Act 33 of 2003	Required since main Act still active
87.	Telecommunications Amendment Act 2 of 2004	Repeal since main Act repealed
88.	Electronic Communications Act 36 of 2005	Required
89.	Independent Communications Authority of South Africa Amendment Act 3 of 2006	Required since main Act still active
90.	Postal Services Amendment Act 22 of 2006	Required since main Act still

Number	Name of Act, number and year	Status
		active
91.	Electronic Communications Amendment Act 37 of 2007	Required since main Act still active
92.	Broadband Infraco Act 33 of 2007	Added by researcher
93.	Broadcasting Amendment Act 4 of 2009	Added by researcher