The Honourable Mr Tjekero Tweya,
Minister of Information and Communication Technology
Windhoek
Namibia

13 September 2017

Dear Honourable Minister Tweya

SUBMISSIONS ON THE DRAFT PROVISIONS OF THE ELECTRONIC TRANSACTIONS AND CYBERCRIME BILL 2017

1. INTRODUCTION AND OVERVIEW

1.1. The Access to Information Namibia (ACTION) Coalition is an umbrella under which a range of civil society and media organisations are gathered to implement a holistic campaign about transparency and accountability, with the development, adoption and effective implementation of a comprehensive legal framework in Namibia that guarantees citizens the right of access to information in all its dimensions.

1.2. We are of the view that our experience and expertise requires that our submissions on issues related to information and related rights be taken seriously by the Ministry of Information and Communication Technology (MICT).

1.3. We also have been involved in commenting on the draft Electronic Transactions and Cybercrimes Bill ("the Bill") since the introduction of the Bill, along with a number of other interested stakeholders. In this regard we are aware that a number of the stakeholders have referred MICT to international and foreign jurisprudence setting out best practise guidelines for electronic transactions, cyber security and cybercrimes and has pointed out where the Bill fails to meet the standards set out therein.

1.4. Sadly, despite repeated requests therefor by us and other stakeholders, MICT has not produced a revised and updated draft of the Bill for further public comment, input and engagement. Instead, stakeholders are continually re-engaged on exactly the same text of the Bill and, to all intents and purposes, it appears as if no cognizance of the very substantive submissions made over the past months have been taken into account by MICT.

1.5. Public engagements, whether through notice and comment procedures, workshops and the like, are aimed at soliciting participation and information with a view to improving the legislative drafting process. It seems to us that all previous submissions have in effect been ignored. Indeed, we question whether or not they have in fact been read. Not only does such conduct result in wasted expense, time and effort on the part of the public participants, it also seriously undermines, in fact damages, the relationship between the public and MICT. Not applying one's mind to public submissions is to ignore them and to send a very clear message, one not in accordance with the

Namibian Constitution, that transparency, public participation, accountability and responsiveness are irrelevant to the legal drafting process. This can only bring MICT into disrepute.

1.6. We therefore request MICT to, after today's proceedings, to produce a second draft of the Bill which reflects an appropriate engagement with all of the written and oral submissions made to date. In our view this will, of necessity, result in the splitting of the Bill into two, namely, an Electronic Transactions Bill and a Cybercrime Bill. However, given that this has not happened to date, we make our submissions, and in particular the suggested amendments thereto, as if the Bill will remain a single Bill. Despite this however, we reiterate that the amalgamation is bad practise and ought not to be proceeded with.

2. ELECTRONIC INFORMATION SYSTEMS MANAGEMENT ADVISORY COUNCIL: CHAPTER II

2.1. We note the proposed establishment of this Advisory Council whose role is, as it suggests, purely advisory to the Minister responsible for technology ("the Minister") and all of whose members are appointed solely by the Minister.

2.2. Given the importance to all aspects of modern living of the Internet and online services, information, social media and the like, it is critical that anybody involved in advising the Minister ought to be independent and to act in the public interest. Advice given to a member of the Executive upon whom one depends for one's employment is unlikely to be impartial, independent and in the public interest.

2.3. The Communications Regulatory Authority of Namibia ("CRAN") is already given extensive additional powers in terms of the Bill and we are of the view that it would be excellently placed to provide the Minister with any required or necessary advice.

2.4. Consequently we suggest the following amendments to the Bill and to the Communications Act, 2009 ("the Communications Act"):

2.4.1. That section 1 of the Bill be amended by the deletion of the definition of "Council";

2.4.2. That section 3 of the Bill be amended by the the deletion of the word "Minister'' and the substitution thereof with the word "Authority" and by the deletion of the words "after consultation with the Council";

2.4.3. That Chapter II of the Bill be deleted save for sections 13 and 14 thereof. This will require consequential amendments to the chapter and section numbers of the Bill;

2.4.4. That sections 13 and 14 of the Bill be moved into Chapter 1 of the Bill as new sections 4 and 5, respectively;

2.4.5. That section 13 of the Bill be amended to delete the word "Council" and substitute it with the word "Authority";

2.4.6. That section 14 thereof be amended to delete the word "Council" and substitute it with the word "Authority";

2.4.7. That section 77 of the Bill be amended by the inclusion of a new sub-section (3) which provides for the amendment of subsection 1(i) of the Communications Act to include the

definition of ETC Act as follows: “ETC Act” means the Electronic Transactions and Cybersecurity Act, 2016”;

2.4.8. That section 77 of the Bill be amended by the inclusion of a new sub-section (4) which provides for the amendment of section 5 of the Communications Act to include the words “and the ETC Act, 2016” at the end of that subsection;

2.4.9. That section 77 of the Bill be amended by the inclusion of a new sub-section (5) which provides for the amendment of section 6 of the Communications Act to include the words “and in the ETC Act” between the word “Act” and the comma in that section;

3. ELECTRONIC TRANSACTIONS ASPECTS OF THE BILL: CHAPTERS III TO VI

3.1. As we have already stated, we are extremely concerned that this Bill is too much of an amalgamation of electronic transactions issues and cyber-security issues. These matters are extremely diverse and do not fit well together in a single statute.

3.2. We are not aware of a single other national jurisdiction which has, as it were, “lumped” the two together in the manner which has been done in the Bill.

3.3. Further, we are concerned that the obligation to retain electronic records provided for in section 24 in the Bill is not accompanied by any concomitant rights to data protection and protection of personal information such as would protect a person from having their data abused while being retained in terms of the Bill. We are of the view that data retention obligations such as those contained in section 24 require the simultaneous passage of legislative provisions, either in the Bill or in a separate Data Protection and/or Protection of Personal Information Bills.

3.4. However, having been given such short notice of today’s proceedings and of the requirement of providing actual wording suggestions, we are not able, in this submission, to make all the necessary suggested amendments, deletions alluded to above, particularly on the issues of data protection and the protection of personal information etc. What the focus of this paragraph 3 is on, therefore, is on certain issues that are critical to:

3.4.1. the appropriately-independent regulation of the Internet and online activities relating thereto; and

3.4.2. guaranteeing the Constitutionally protected right to freedom of expression, including the rights of the media.

3.5. We are concerned at Executive level of involvement in key regulatory aspects involving functions that ought to be performed by CRAN. Consequently we are of the view that:

3.5.1. subsection 40(1) of the Bill be amended by the deletion of the words “Online Consumer Affairs Committee’’ and the substitution thereof with the word ‘’Authority’’;

3.5.2. subsubsection 40(2) of the Bill be amended by the deletion of the word “committee’’ and the substitution thereof with the word ‘’Authority’’;

3.5.3. subsection 42(2) of the Bill be amended by the deletion of the word “Minister” and the substitution thereof with the word “Authority”;

3.5.4. section 47 of the Bill be amended by the deletion of the word “Minister” and the substitution thereof with the word “Authority”;

3.5.5. section 56 of the Bill be amended by the deletion of the word “Minister” and the substitution thereof with the word “Authority”;

3.5.6. subsection 76(1) of the Bill be amended by the deletion of the word “Minister” and the substitution thereof with the word “Authority”;

3.5.7. subsection 76(3) of the Bill be amended by the deletion of:

3.5.7.1. the word “Minister” and the substitution thereof with the word “Authority”;

3.5.7.2. the words “he or she” and the substitution thereof with the word “it”; and

3.5.7.3. the words “instruct the Authority to”.

3.5.8. section 77 of the Bill be amended by the inclusion of a new sub-section (6) which provides for the amendment of subsection 129(1)(e) of the Communications Act to include the words “and by the ETC Act” at the end of that subsection;

3.5.9. section 77 of the Bill be amended by the inclusion of a new sub-section (7) which provides for the amendment of subsection 129(2) of the Communications Act to include the words “and the ETC Act” between the words “Act” and “may” in that subsection;

3.5.10. section 77 of the Bill be amended by the inclusion of a new sub-section (8) which provides for the amendment of subsection 129(3) of the Communications Act to include the words “and the ETC Act” between the words “Act” and the comma in that subsection; and

3.5.11. section 77 of the Bill be amended by the inclusion of a new sub-section (9) which provides for the amendment of subsection 129(4) of the Communications Act to include the words “and the ETC Act” between the words “Act” and the comma in that subsection.

3.6. We are also extremely concerned at the “take down” obligations imposed upon service providers in response to a take down notice as provided for in section 54 of the Bill. In this regard:

3.6.1. These provisions are extremely broad and do not sufficiently protect the public interest in the free flow of information, particularly online

3.6.2. We are also concerned that service providers, who cannot be expected to have legal training, will be expected to assess whether or not a take down notice does or does not set out an adequate case in respect of alleged “unlawful activity” as required;

3.6.3. Consequently, we are of the view that these can be easily manipulated and abused;

3.6.4. We are of the view that *bona fide* news media online services may be subject to take down notices which do not in fact reveal unlawful activity with potentially damaging effects on both the expression rights of the news media and the information rights of the public;

3.6.5. We are of the view that protections need to be built to preserve the information rights of the public and to make the default position be that publications are accessible and not immediately censored by a service provider in response to a takedown notice on pain of being liable for a wrongful take down. Happily this can be effected by a few wording changes to the provisions of section 54 of the Bill.

3.7. Consequently we suggest the following amendments to section 54 of the Bill:

3.7.1. that the word “not” be removed from subsection 54(2);

3.7.2. that the word “removes” is deleted from subsection 54(3) and is substituted with the words “is requested to remove”; and

3.7.3. that the word “restore” is deleted from subsection 54(7) and is substituted with the word “remove”; and

3.7.4. the word “lawful” be is deleted from subsection 54(7) and is substituted with the word “unlawful”.

4. CYBERCRIME ASPECTS OF THE BILL: CHAPTER VIII

4.1. We reiterate that to attempt to regulate the entire gamut of cybercrime in a single chapter of only some 14 sections is foolhardy and cannot possibly do justice to the scope of the problem. We reiterate the call for a standalone Cybercrime Act that can fully ventilate all legal issues arising from the phenomenon of cybercrime and the need for cyber security.

4.2. Nevertheless, there is one section of Chapter VIII that is entirely unconstitutional and which we feel must be amended immediately. In this regard, we are extremely concerned by the provisions of section 69 of the Bill. This section allows for warrantless searches and seizures by police officers and others with “special knowledge that is relevant for the search”.

4.3. Section 69 of the Bill is ostensibly linked to Chapter 2 of the Criminal Procedure Act, 1977 (“the CPA”), however, it is clear that its provisions go far beyond what is envisaged in Chapter 2 of the CPA as section 22 of the CPA (which is found in Chapter 2) provides for only very limited circumstances in which warrantless searches can be carried out.

4.4. It is entirely dangerous and indeed in our view an unconstitutional violation of the right to privacy found in Article 13 of the Namibian Constitution to provide for warrantless police searches except in exceptional circumstances. As Article 13(2)(b) of the Namibian Constitution provides: warrantless police searches have to be “prescribed by an act of Parliament to preclude abuse” (our emphasis). The provisions of section 69 of the Bill provide for an entirely unfettered discretion on the part of a police officer in relation to searches of data, computer systems or data storage mediums. This is clearly *ultra vires* the provisions of Article 13 of the Namibian Constitution because it does not contain wording to preclude abuse.

4.5. Further, given that the media work almost exclusively electronically, the ability to search and seize computer systems belonging to the media by a police officer without judicial oversight in the form of a warrant requirement, renders the media helpless in the face of a politically-motivated campaign using the police force to shut down dissenting media voices, or media which expose corruption, maladministration and the like in the echelons of government.

4.6. We have seen far too many examples on the Continent of government abusing police powers to stop critical media houses from performing their roles as watch dogs over public institutions or to force the revealing of media sources.

4.7. This is a real threat not only to the media but to the public which relies on the media to make informed political choices. The threats are real. Consequently, we are also of the view that the section 69 of the Bill is an unconstitutional violation of Article 21(1)(a) of the Namibian Constitution which protects the right to freedom of expression which includes "freedom of the press and other media".

4.8. Consequently, we are of the view that a number of changes are required to be made to this section 69, as follows:

4.8.1. Subsection 69(1) of the Bill is to be amended by the addition of the words "and to all searches, seizures, and the like provided for in this section."

4.8.2. Subsection 69(3) of section 69 must be deleted in its entirety, thus no additional search and seizure powers, other than those already provided for in Chapter 2 of the CPA are to exist. This will require consequential numbering amendments to the rest of the subsections in section 69.

5. WAY FORWARD

5.1. At the consultative workshop which took place on 12 September 2017, it was agreed by stakeholders and the Ministry representatives that an updated and revised version of the Bill would be circulated for public notice and comment. This version would incorporate the considered amendments arising out of the three stakeholder engagements which have taken place thus far.

5.2. We are in full agreement with the need for the circulation of an updated Bill for further written submissions. It is critically important that, on such a controversial Bill, the public has an opportunity to see which of the public submissions have been incorporated or not. We are of the view that this ought to be accompanied by a list of the substantive issues raised in the submissions together with indications as to whether or not such proposed amendments have been incorporated or not, and the reasons therefor.

6. CONCLUSION

6.1. In the extremely short time available to us to make these suggested amendments to the Bill, we have focused our attention on those aspects of the Bill that undermine the authority of CRAN in regulating electronic communications and, most importantly, that undermine the freedom of expression and privacy rights of the media and the public.

6.2. It is clear, in our respectful view, that the current draft of the Bill would open a Pandora's box of increased self-censorship by service providers and, potentially, the abuse of search and seizure powers by members of the Namibian police. Not only is this not in the public interest, it is clearly an unconstitutional violation of fundamental rights provided for in the Namibian Constitution.

6.3. If the suggested amendments set out above are made to the Bill, we are of the view that this would go a long way to ameliorating the particularly egregiously unconstitutional aspects of the

Bill although we reiterate that this Bill is a messy amalgam of electronic transactions and cybercrime legislation and that it has to be accompanied by the passage of data protection laws.

6.4. We thank you for the opportunity of making these submissions and look forward to making additional written and oral submissions on the next iteration of the Bill.

Yours sincerely
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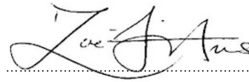

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