

## **Annexure - C**

### **Comments on the South African Public Service Broadcasting Bill**

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#### ***I. Introduction***

In July 2009, South African Minister of Communications, Sipiwe Nyanda, appointed only in May 2009, announced that his ministry would introduce new legislation to ensure that the public broadcaster was best suited to South Africa's "young democracy" and to put it on a more stable financial footing, so that it was not left to the "vagaries of the markets". A discussion paper, *Public Service Broadcasting: Repositioning Broadcasting for National Development* (Discussion Paper), was published in *Government Gazette* No. 32420 on 20 July 2009, soliciting input on public service broadcasting. On 28 October 2009, the Public Service Broadcasting Bill (the Bill) was published in *Government Gazette* No. 32663, along with Notice 1409 of 2009, inviting public comments on the Bill with a closing date of 7 December 2009.

The Bill would repeal the Broadcasting Act, No. 4 of 1999, and introduce a number of significant changes to the broadcasting environment in South Africa, in particular for the South African Broadcasting Corporation (SABC). Specifically, the Bill includes provisions establishing a new funding model for public service broadcasting, restructuring SABC, Charters for both SABC and community broadcasters, imposing new organisational and mandate obligations on community broadcasters, extending the mandate of the Independent Communications Authority of South Africa (ICASA) to take into account these changes, and granting the Minister of Communications extensive new powers in relation to broadcasting.

These Comments assess the proposals contained in the Bill against international standards on freedom of expression, as well as better practice among democracies concerning public service broadcasting and general broadcast regulation. The goal is to contribute to the debate on the Bill in South Africa, with a view to helping to ensure that it is consistent with constitutional and international guarantees of freedom of expression, and that it serves to promote democracy in South Africa and access for South Africans to public interest broadcasting.

A number of practical and non-human rights-based constitutional issues have been raised regarding the Bill, such as whether it makes sense to create further Divisions for SABC or whether this is really a money bill, which would therefore have to be presented by the Minister of Finance. These Comments are mainly limited to matters which are based on

either international human rights standards or about which the experience of other broadcasters provides clear answers.

The Bill has a number of positive features. It continues and expands the strong public interest focus of SABC and community broadcasters in South Africa. It seeks to draw on resources from a tax on income to bolster public interests in the broadcasting sector. And it promotes the idea of new educational and nature-oriented shows as part of the digital dividend.

At the same time, there are a number of concerns with the Bill. Perhaps most serious is the excessive regulatory powers it grants to the Minister, which go far beyond the policy role which is appropriate. The new funding model has potential, but it also fails to provide sufficient protection for funding for the public broadcaster, SABC. Vague terms in the Bill are used in operational contexts, providing too much discretion to regulators and decision-makers. And unduly prescriptive and controlling obligations are placed on community broadcasters.

These Comments also highlight concerns about the lack of adequate consultation that has preceded the Bill. The government has failed to publish any policy document, setting out the policy directions it is proposing and why, let alone host a consultation around this.

## **II. International Standards**

### **II.a Key Relevant Guarantees**

Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>1</sup> states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.<sup>2</sup> Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> a formally binding legal treaty ratified by 165 States, including South Africa,<sup>4</sup> guarantees the right to freedom of expression and information in the following terms:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

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<sup>1</sup> United Nations General Assembly Resolution 217A (III), 10 December 1948.

<sup>2</sup> See *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, (1980: Yale University Press, Princeton), pp. 273-74, 325-27.

<sup>3</sup> UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

<sup>4</sup> As of November 2009. South Africa ratified the ICCPR on 10 December 1998.

frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR),<sup>5</sup> also binding on South Africa.<sup>6</sup> The African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa* (African Declaration) in October 2002,<sup>7</sup> which, as an elaboration of the content of this key right in the African context, contains important standards relevant to analysing the Bill. The *African Charter on Broadcasting 2001* (African Charter), adopted under the auspices of UNESCO, also provides an authoritative statement of relevant African standards in this area.

Several Declarations adopted under the auspices of UNESCO also address public service broadcasting. The 1996 *Declaration of Sana'a*<sup>8</sup> calls on the international community to provide assistance to publicly-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia*<sup>9</sup> notes the need for State-owned broadcasters to be transformed into proper public service broadcasters with guaranteed editorial independence and independent supervisory bodies. The 1992 *Declaration of Alma Ata*<sup>10</sup> also calls on States to, “encourage the development of journalistically independent public service broadcasting in place of existing State-controlled broadcasting structures, and to promote the development of community radio”.

These standards, which are formally binding on or applicable to South Africa, find support in legal and authoritative standard-setting under other regional human rights instruments, including the *European Convention on Human Rights* (ECHR)<sup>11</sup> and the *American Convention on Human Rights* (ACHR),<sup>12</sup> which guarantee freedom of expression, respectively, at Article 10 and Article 13. These instruments and standards are not formally binding on South Africa. However, they provide authoritative elaboration of the content and scope of the right to freedom of expression as guaranteed internationally as well as in the Constitution of the Republic of South Africa, and its implications for public service broadcasting and broadcast regulation.

The Council of Europe (COE), a European body tasked with protecting human rights, has adopted more detailed standards relevant to public service broadcasting than any other international human rights body. The COE's *Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member*

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<sup>5</sup> Adopted 26 June 1981, in force 21 October 1986.

<sup>6</sup> South Africa acceded to the Charter on 9 July 1996.

<sup>7</sup> 32<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at:

[http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).

<sup>8</sup> 11 January 1996, endorsed by the General Conference at its 29<sup>th</sup> Session, 12 November 1997, Resolution 34.

<sup>9</sup> Adopted 13 September 1997. Endorsed by the General Conference at its 29<sup>th</sup> session, 12 November 1997, Resolution 35. Clause 7.

<sup>10</sup> Adopted 9 October 1992. Clause 5.

<sup>11</sup> Adopted 4 November 1950, in force 3 September 1953.

<sup>12</sup> Adopted 22 November 1969, in force 18 July 1978.

states,<sup>13</sup> provides detailed guidance on the implications of the right to freedom of expression for public broadcasting. This is supported by Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society,<sup>14</sup> which reaffirms the public service mandate of public broadcasters, as well as the need for them to be able to operate on all platforms in the new media environment.

The Council of Europe has also adopted standards regarding general broadcast regulation. Recommendation R(2000)23 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector<sup>15</sup> sets out standards regarding general broadcast regulation. Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content<sup>16</sup> sets out standards regarding the promotion of content diversity in the media.

The *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the Inter-American Commission on Human Rights in October 2000, also contains relevant standards on broadcasting.<sup>17</sup>

## **II.b Freedom of Expression: Importance and Restrictions**

It is difficult to overestimate the importance of freedom of expression. Where information and ideas are not permitted to flow freely, good government and social progress are not possible. A government cannot help its subjects improve their lives if it does not know what their concerns and problems are. If citizens can speak their minds without fear, and the media can report what is being said without interference, the government will have an opportunity to adjust its policies to meet the concerns of the public.

Respect for the right to freedom of expression necessitates the occasional toleration of critical, nonsensical and even offensive speech. Citizens sometimes expect the impossible from their government or voice unfair criticism of its policies. In a State where such ideas are voiced in the public arena, the government can respond to them and explain why it is unable to achieve a certain goal or has chosen to follow a particular course of action. In States where people are discouraged from speaking their minds, false rumours, spread by word of mouth, cannot be refuted.

International bodies and courts have made it very clear that the right to freedom of expression is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),<sup>18</sup> which refers to freedom of information in its widest sense and states:

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<sup>13</sup> Adopted on 27 September 2006. The Declaration was preceded by Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.

<sup>14</sup> Adopted 31 January 2007.

<sup>15</sup> Adopted 20 December 2000.

<sup>16</sup> Adopted 31 January 2007.

<sup>17</sup> Adopted 19 October 2000, at the 108th Regular Session.

<sup>18</sup> 14 December 1946.

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is fundamentally important both as an individual right and as indispensable to the exercise of all other rights. This interpretation has been upheld by international human rights bodies. For example, the UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has held:

The right to freedom of expression is of paramount importance in any democratic society.<sup>19</sup>

Statements of this nature abound in the case law of human rights courts and tribunals around the world. The European Court of Human Rights has noted, for example: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”<sup>20</sup>

It may be noted that freedom of expression has a dual nature, inasmuch as it protects not only the right to impart information and ideas (the rights of the speaker) but also the rights to seek and receive information and ideas (the rights of the listener). This duality of the right to freedom of expression has been elaborated upon clearly and forcefully by the Inter-American Court of Human Rights, which has stated:

[W]hen an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.... In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.<sup>21</sup>

The right to freedom of expression, however, is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. At the same time, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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<sup>19</sup> *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

<sup>20</sup> *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

<sup>21</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, paras. 30-2.

This has been interpreted as requiring restrictions to meet a strict three-part test.<sup>22</sup> First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>23</sup> Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>24</sup>

## II.c Regulation of Broadcasting

Because of their pivotal role in informing the public, the guarantee of freedom of expression is of particular importance to the broadcast media. Without due protection for the broadcast media’s rights, the public cannot fully realise its own right to receive information.

The special significance of the media, including broadcasters, has been widely recognised by national and international courts and tribunals. In the words of the Inter-American Court of Human Rights: “It is the mass media that make the exercise of freedom of expression a reality.”<sup>25</sup> The European Court of Human Rights has consistently emphasised “the pre-eminent role of the press in a State governed by the rule of law.”<sup>26</sup> It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in [...] free political debate [...].<sup>27</sup>

Ensuring the freedom of broadcasters, although key to the guarantee of freedom of expression, does not imply that the broadcast media should be left unregulated. A wholly unregulated broadcast sector would be detrimental to free expression, since the audiovisual spectrum used for broadcasting is a limited resource and the available bands must be distributed in a rational and fair manner to avoid interference and ensure equitable access. The problem was summarised by the US Supreme Courts in the following terms:

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<sup>22</sup> See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

<sup>23</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

<sup>24</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>25</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser. A) No. 5, para. 34.

<sup>26</sup> See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>27</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same “right” to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the [guarantee of freedom of expression], aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.<sup>28</sup>

### Pluralism

Two principles are key to effective broadcast regulation. First, the airwaves are a public resource and they must be used for the benefit of the whole public, including people with minority views or interests. This value also flows from the right of listeners to seek and receive information and ideas. A key underlying principle here is the idea of diversity. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”<sup>29</sup> The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”<sup>30</sup> This implies that the airwaves should be open to a range of different broadcasters representing a fair cross-section of the different groups and viewpoints in society. At the same time, measures should be carefully designed so that they do not unnecessarily limit the overall growth and development of the sector.

Positive measures are necessary, for example, to prevent monopolisation of the airwaves by one or two players. Article 19 of the ICCPR mandates the implementation of such measures, a point stressed by the United Nations Human Rights Committee in its General Comment on that article:

[B]ecause of the development of the modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.<sup>31</sup>

This has been recognised by other authorities as well. The African Declaration, for example, states:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.<sup>32</sup>

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<sup>28</sup> *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, et al.* No. 2, 395 U.S. 367, 389 (1969).

<sup>29</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, para. 38.

<sup>30</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.

<sup>31</sup> Human Rights Committee, General Comment 10, Article 19, adopted 26 June 1983, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994).

<sup>32</sup> Principle III.

Within the European context, the whole of Council of Europe Recommendation 2007(2) on Media Pluralism and Diversity of Media Content, noted above, is devoted to the question of the importance of pluralism in the media and measures to promote it. It states:

Member states should encourage the development of other media capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media.<sup>33</sup>

The special mandates for the protection of freedom of expression of the UN, OSCE, OAS and African Commission adopted a Joint Declaration in 2007 on Diversity in Broadcasting.<sup>34</sup> It reflects a number of ways of promoting diversity, with a particular focus on the need to ensure that all three types of broadcasters – public, commercial and community – benefit from “equitable access to, all available distribution platforms”. A 2003 Joint Declaration adopted by the special mandates on freedom of expression also refers to equitable access, stating: “The allocation of broadcast frequencies should be based on democratic criteria and should ensure equitable opportunity of access.”<sup>35</sup>

Similarly, the African Declaration calls specifically for an equitable allocation of frequencies between commercial and community broadcasters, and the particular promotion of community broadcasting “given its potential to broaden access by poor and rural communities to the airwaves”.<sup>36</sup>

In practice, ensuring that licences are awarded to different types of broadcasters is a key means of promoting access to the media, since that is an effective way of broadening the range of voices and perspectives available through broadcasting. Public service broadcasters can, if effective, play an important role in extending access to the media in a number of ways and through a number of programming formats. Community broadcasters provide access to individuals and communities which commercial and even public service broadcasters cannot.

### Independence

Second, due to the universally observed tendency of governments and businesses to want to minimise access of their critics and competitors to the broadcast media, it is vital that all bodies with regulatory powers in this area are protected, legally and practically, against political, commercial and other forms of interference.

The African Declaration states very clearly, at Principle VII(1):

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

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<sup>33</sup> Para. 4.

<sup>34</sup> Adopted on 12 December 2007.

<sup>35</sup> Adopted on 18 December 2003.

<sup>36</sup> See Principle V.

The need for protection against political or commercial interference was also stressed in the 2003 Joint Declaration by the three specialised mandates for the protection of freedom of expression, which stated:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.<sup>37</sup>

Within Europe, an entire recommendation of the Council of Europe is devoted to this matter, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, noted above. The very first substantive clause of this Recommendation states:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

## **II.d Public Service Broadcasting**

A key principle of public broadcasting is that these broadcasters should be protected against interference of a political or commercial nature, often referred to as the idea that they should be independent. The Declarations of UNESCO noted above all focus on this idea. Similarly, the African Declaration states:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed.<sup>38</sup>

This is the central thrust of COE *Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states*, as the name clearly implies.

The same principle is also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”<sup>39</sup>

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<sup>37</sup> Adopted 18 December 2003.

<sup>38</sup> Principle VI.

<sup>39</sup> *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

True independence for public service broadcasters is only possible if their funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In addition, public service broadcasters can only fulfil their mandates if they are guaranteed sufficient funds for that task. The African Declaration states: “public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets”. The 2007 Joint Declaration of the special mandates on freedom of expression states:

Innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public service mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.

Articles 18-20 of the COE Declaration on public broadcasting highlight that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public service broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

Finally, the 4th European Ministerial Conference on Mass Media Policy,<sup>40</sup> Council of Europe Member States agreed on a number of guarantees with respect to funding of public broadcasters:

Participating states undertake to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions. There exist a number of sources of funding for sustaining and promoting public service broadcasting, such as: licence fees, public subsidies, advertising and sponsorship revenue; sales of their audio-visual works and programme agreements. Where appropriate, funding may also be provided from charges for thematic services offered as a complement to the basic service.

### **III. Overview of the Bill**

The Bill is divided into twelve chapters, which roughly parallel its main features. The first chapter, Definitions and Interpretation, defines the key terms used in the Bill, as well as several that are not. Some of the more important definitions include:

- ‘community broadcasting’, which is unchanged from the previous legislation, apart from in respect of funding, which is updated to reflect the Electronic Communications Act 2000 and the proposed changes in the Bill;
- ‘public broadcasting service’ (PBS), which is defined as any service provided by the SABC, apart from its commercial services; and
- ‘public service broadcasting’ (PSB), which is defined as broadcasting “in pursuance of national goals relating to democracy, culture and development”, regardless of whether this is provided by a public, community or commercial broadcaster.

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<sup>40</sup> 4th European Ministerial Conference on Mass Media Policy, Prague, 7 and 8 December 1994, *The media in a democratic society*, Resolution No. 1: The Future of Public Service Broadcasting.

Chapter 2 sets out the objective of the Bill, which is “to align the broadcasting services to the developmental goals of the Republic” (section 1). It also sets out a long list of purposes flowing from this, including to contribute to development and to promote access to content of national interest. Chapter 3 supplements this with a number of characteristics of the South African broadcasting system as a whole, such as operating in the public interest and providing a range of South African content.

Chapter 4 introduces fundamental changes to the funding model for public broadcasting, replacing the television licence fee with a Public Service Broadcasting Fund, to be administered by the Media Development and Diversity Agency (MDDA). The sources of revenue for the Fund include personal income tax. SABC would have to compete with other interests, including any broadcaster providing PSB, for monies from the Fund.

Chapter 5, the longest chapter, deals with PBS, or SABC. It sets out in some detail the public interest mandate of SABC and divides it into three separate operational divisions, public service, commercial and international. The former is to be funded from the Fund, subsidies from its commercial operations, grants and advertising/sponsorship revenues. The executive members currently on the board are removed, and the mandate of the boards is described as being primarily to ensure that SABC complies with the new Charter of the Corporation, which the Bill also introduces.

Rules for community broadcasting are set out in Chapter 6, which imposes quite onerous programming obligations on them, including to promote local development. The Bill also proposes new and significant structural rules for community broadcasters, with prescriptive language about the new Governing Councils they are required to establish. Community broadcasters are also required to enter into partnerships with municipalities to deliver their development mandate. The Bill proposes the development of a Charter for community broadcasting services, very much along the lines of the proposed Charter for SABC.

Chapter 7 declares Sentech, the public sector communications company, to be a ‘common carrier’ due to the ‘essential facility’ character of its signal distribution network. As such, it must provide universal access to broadcasting and carry both PBS and community broadcaster channels. To help it achieve this, Sentech is eligible to receive support from the Fund.

The role of ICASA in relation to PSB is detailed in Chapter 8, and it is given specific oversight roles in relation to SABC, community broadcasters, Sentech, and MDDA and the Fund. ICASA is tasked with monitoring compliance by SABC and community broadcasters with their Charters, and overseeing the use by SABC of monies from the Fund. ICASA is also tasked with holding public hearings into MDDA’s performance and investigating complaints regarding the Fund.

Chapter 9 gives overall responsibility for implementation of the law to the Minister, who may create an “advisory body” to assist him or her with this task, including by monitoring the fulfilment by SABC and community broadcasters of their “mandate”,

funding and local content. The Minister is given the power to make regulations on contributions to the Fund, along with very wide powers regarding PSB, including to make regulations and to direct any entity specified in the law to take any action where it is unable to perform its functions. The power to direct the Board of SABC is even wider, and applies whenever it is in financial difficulty, is unable to perform its functions effectively, or has acted unfairly or in a discriminatory or inequitable way.

Chapter 10 provides for the establishment of a Broadcasting and Signal Distribution Museum, while Chapter 11 provides for the establishment of a Local Content Advisory Board to advise the Minister on local content issues. It also provides for ICASA, after the digital switchover, to invite applications for specialist channels devoted to children, ethno-documentaries and wild-life. The Minister is to set the terms for the Local Content Advisory Body.

The Bill also includes the Charters for SABC and community broadcasters which, together, are actually longer than it is. The relevant detail from the Charters is described in the appropriate sections below.

## ***IV. Detailed Comments on the Bill***

### **IV.a Process**

The process leading to the publication of the Bill, as noted above, started with the presentation of the Discussion Paper on 20 July 2009. The Discussion Paper does not present government proposals but, rather, describes the current situation, along with some of the problems facing broadcasting, and asks for input on 67 specific questions. About thirty submissions were provided in response to the Discussion Paper, from a range of civil society and other organisations.

This was followed, on 28 October, just over two months after the closing date for submissions on the Discussion Paper, by the publication of the Bill. No Green or White Paper or other form of policy document was made publicly available for discussion prior to the publication of the Bill itself. As the Discussion Paper itself makes clear in its Foreword, the Broadcasting White Paper, 1998, which was followed by the Broadcasting Act, 1999, was the last major consultation on broadcasting issues, although a number of legislative initiatives since that time, including the Electronic Communications Act, 2005, have impacted on broadcasting.

It seems clear that the preparation of the Bill has been rushed. For example, it includes a number of technical errors. These include grammatical errors and related mistakes (for example, the definitions section does not have a section number and there are two provisions numbered section 14(2)); mistaken references (for example, in section 9, which addresses the accounts of the Fund, section 9(3) refers to the audited accounts of the Corporation, instead of MDDA) and cross-references (for example, section 36(5) refers to the Local Content Advisory Body established by section 28, whereas the Body is

in fact established by section 42); repeated definitions (for example, the important term “Public broadcasting service” is defined twice, differently); and definitions which do not apply to anything in the Bill (for example, the Bill defines both the “Appointing Authority” and the “Appointing body” as the body charged with appointing members of the board of SABC but members are to be appointed by the President and there is no reference in the Bill to any other appointing body). The two Charters are even more sloppy, with frequent mistaken numbering references, many definitions cut and pasted from the main Bill which have no relevance and even bits of language missing (suggesting that even the cutting and pasting has not been done properly; see, for example, the definition of “Broadcasting service licence” in the SABC Charter).

There is also a lack of precision in the Bill which suggests that its preparation has been rushed. For example, the sources of funding for the Fund, a very important matter, include unacceptably vague notions, such as the business contribution. Powers are allocated to ICASA and the Minister to enforce public service broadcasting, although this is a programming genre, not an obligation. The categories prescribed in the Bill for the Community Broadcasting Charter are exactly the same as for the SABC Charter, despite massive differences between them. The actual draft Charter for Community broadcasting includes large sections basically cut and pasted from the SABC Charter (in many cases key references – for example to “the Corporation” – have not even been changed), thereby failing to take into account the massive differences between these two types of broadcaster.

Certainly the process is being rushed, and so far it has been limited to an open consultation document which does not make any proposals (the Discussion Paper) and the actual Bill. There has been no opportunity to discuss policy proposals or assess different options, for example regarding funding, in light of clear background information, for example about how much each option would cost and the pros and cons associated with it. This significantly undermines the quality of the consultation process. Indeed, this is also the case for these Comments, which has had to rely on assumptions due to a lack of information, for example in relation to the goal of the required partnerships between municipalities and community broadcasters, and the way the Fund is expected to work.

Sometimes government needs to rush through legislation and not every piece of legislation requires extensive consultations before being adopted. However, the Bill makes wide-ranging proposals for major reform affecting core freedom of expression interests which are central to the democratic process, as well as the defence of human rights and other important constitutional matters. It is accepted, in democracies, that there should be fulsome public consultations around laws like this. Certainly it is good practice but it is arguably an international obligation to conduct them, as part of the right to participate.

Furthermore, although the matters the Bill addresses no doubt need immediate attention, there is nothing which is so urgent as to warrant dispensing with a proper consultative process, for example taking place over a period of six months. As a result, it is incumbent

on the government to conduct a proper consultation before introducing the proposed reforms.

Recommendation:

- The government should conduct a proper consultation – including by providing a policy paper outlining different options for key policy issues, along with information on the pros and cons of each – before moving forward to adopt legislation along the lines of the Bill.

#### **IV.b Key Concepts: Development Goals and Public Service Broadcasting**

The Bill introduces a number of key concepts into the regulatory framework for broadcasting, without providing proper definitions or delineating clearly the role these concepts are expected to play in broadcast regulation.

Development

The Bill places much emphasis on the notion of “development”. For example, it signals the need to “align the broadcasting system [or services] to the development goals of the Republic”. This appears in the preamble (twice), as well as in the initial statement of the objective of the Bill, in section 1. It also appears in the title of Chapter 4, on Funding, as well as in the mandate of the SABC (section 10(2)) and in the definition of what constitutes public service broadcasting. Interestingly, the SABC Charter places less focus on this issue, although it also contains far less on the mandate of the SABC.

Development takes on particular importance in relation to community broadcasting, where the objective of fostering development becomes a condition of licensing (section 21). Core objectives for community broadcasters include contributing to community development, offering developmental programming and focusing on programmes that highlight developmental issues (sections 20(1)(b) and (c), and 20(2)(a)(iii)). Members of the Governing Councils for community broadcasters must be both “committed to community development” and have “passion and commitment for development” (sections 22(2)(b) and (d)). Finally, to further their developmental mandate, community broadcasters are required to enter into partnership with municipalities (section 25(1)). This focus on development is largely repeated in the Community Broadcasting Charter (see, for example, clauses 1.4(1) and 5.4(1)), although again the focus on mandate is relatively limited compared to the actual Bill.

There is nothing wrong with the idea of promoting development or with building the capacity of the broadcasting system to further development. Indeed, who could oppose that idea? But this is precisely the problem, since development is susceptible of an extremely wide range of meanings. The Bill makes no attempt to define development, thereby leaving the concept open to wide interpretation.

There are two problems with the use of “development” in the Bill. First, in some instances, it is not clear what the purpose of using this term is or, to put it differently,

what the consequences are of referring to it. What exactly will be done, for example, to align the broadcasting system to development goals, over and above the specifics in the Bill. Will it, for example, become a licensing criterion in addition to the criteria listed in the Electronic Communications Act? Will it be integrated into the code of conduct for broadcasting service licensees prescribed by section 54 of that Act? Will it be put to some other use?

Second, in some cases, it has clear operational impact, or relevance to implementation of the law. This is the case, for example, in terms of allocation of funds to any broadcaster pursuing public service broadcasting (section 6(1)(f)), which includes national goals relating to development. It is also the case in respect of licensing community broadcasters. There are, in turn, two problems with this. First, more generally, it is inappropriate to use undefined terms which have operational relevance for key broadcasting allocations, such as funds or licences. The international law requirement that restrictions on freedom of expression be provided by law imposes certain standards of clarity on regulatory rules, which vague terms do not meet.

Second, and more seriously, there is a risk that the term may be understood to refer, directly or indirectly, to the development goals or policies of the government in power. Indeed, the reference, in relation to the Fund, to national development goals, suggests a link to government policy. This is inappropriate. While it is appropriate for the government to set general policy in relation to broadcasting, it is not appropriate for it to subject individual licensing or funding decisions to its priorities. This would breach the rule of independence described above. For example, it might be a development priority of the government to allocate funds for housing. But this might be controversial and the media's oversight or fourth estate role would require it to highlight this debate, as part of its public interest role (including as defined in the Bill, in relation to democracy). Clearly a media outlet should not face a risk of having its funding cut because it carried critical voices regarding the housing support policy, on the basis that this ran against national development goals.

#### Public Service Broadcasting

The notion of "public service broadcasting" has even more direct operational relevance in the Bill. It is, as has been noted, defined as a broadcasting service, whether provided by a public, community or commercial broadcaster, broadcasting "in pursuance of national goals relating to democracy, culture and development" (definitions section). It may be noted that this is a slightly different definition than is employed in many countries, where public service broadcasting is synonymous with the main national public broadcaster (referred to in the Bill as the public broadcasting service, or PBS).

At several points, the Bill refers to various bodies taking action in pursuance of public service broadcasting. Article 3 is titled "Applications for licences in respect of Public Service Broadcasting", although it merely states that ICASA is responsible for issuing all licences, in accordance with the Electronic Communications Act, and so would not actually appear to have any operational relevance.

Section 31 states, in part: “The Authority [ICASA] must monitor and enforce strict compliance with the public service broadcasting in general”. Pursuant to section 38(1), subject to the provisions of the Constitution and the Electronic Communications Act, “the Minister may direct any of the entities specified in this Act to take any action pursuance [sic] to Public Service Broadcasting if the entity is unable to perform its actions as prescribed in this Act.”

Both of these provisions seem to imply that public service broadcasting is a form of direct obligation, which ICASA and the Minister must take action to enforce. But it is in fact simply a form of broadcasting. The Bill does not create any specific obligations to produce public service broadcasting. Not even SABC, even in its public service division, is required to do this, let alone community or commercial broadcasters. It might be that a broadcaster might engage some obligations in relation to the receipt of funds from the Fund on the basis that it was providing public service broadcasting. But this hardly warrants the references in sections 31 and 38(1) and would, in any case, presumably be addressed in a contract or other arrangement between that broadcaster and MDDA, which administers the Fund (although ICASA is also given a role in overseeing the use of monies allocated from the Fund).

As a result, these provisions are confusing may be understood as vesting general powers in ICASA and the Minister, and very wide powers in the latter, to take action to promote public service broadcasting. This is clearly inappropriate given the potential breadth of this notion. As noted above, laws restricting freedom of expression need to be defined narrowly and clearly, and in a manner that allows one to be able to understand in advance what is prohibited (or required).

Importantly, as noted above, broadcasters may claim funds from the Fund on the basis that they are pursuing public service broadcasting (see sections 6(1)(f) and 27(2)). This is potentially a positive development inasmuch as it opens up the scope of public support to public interest programming. At the same time, consideration should be given to whether it might be appropriate to elaborate more specific public interests which would warrant consideration for public funding. This would provide guidance to those responsible for allocating the funds (MDDA in the Bill), as well as confine their discretion in relation to what is likely to be a significant and highly competitive source of funding for broadcasters. Some inspiration might be drawn for this from the definition of the mandate of SABC, in section 10, the mandate of SABC’s public service division, in section 12, the objectives of community broadcasting, in section 20, and the objectives of the law and of the broadcasting system, respectively, in sections 1 and 2.

#### Recommendations:

- The term development should be defined, particularly if it is to be used in a way which has operational relevance in terms of implementation. The definition should make it clear that, at least inasmuch as the term affects implementation, it does not relate to or flow from the national development priorities of the government of the day.

- The law should make it clear, where this is not the case, what the relevance of its general references to development are, for example in relation to the code of conduct for broadcasters or licensing of broadcasters.
- The powers vested in ICASA and the Minister to enforce compliance with or direct broadcasters to take action pursuant to public service broadcasting, set out in sections 31 and 38(1), should be removed.
- Consideration should be given to elaborating in more detail the important notion of public service broadcasting, at least in relation to eligibility to apply for support from the Fund.

#### **IV.c Obligations on the Broadcasting System**

Section 2 sets out a number of content and other rules for the South Africa broadcasting system, presumably as a whole (although this is only specified in section 2(3)). This is in addition to the objectives of the law, as set out in section 1. These include such vague and aspirational goals as operating in the public interest, strengthening the spiritual and moral fibre of society, meeting the needs of the entire South African population, and contributing to a better Africa. These are an amended version of similar provisions found at section 3 of the current Broadcasting Act.

It is understood, in line with current practice, that these are aspirations, rather than obligations which apply to individual broadcasters, and that broadcasters may not be subject to any sanction for failing to meet or make a sufficient contribution to them (although their licences, the code of conduct or other rules may well spell out more specific obligations for individual broadcasters).

However, there is still some uncertainty as to what specific relevance these provisions have since the broadcasting system as a whole has no personality as such. It would, therefore, be preferable to cast these as objectives or policy goals for the broadcasting system, and then to place an obligation on regulators, such as ICASA (and also MDDA if it is to administer the Fund), and policy makers, such as the Minister, to take these into account when taking action in relation to broadcasting. This would give them operational relevance while also making it clear that they are not rules which may be applied to individual broadcasters or even groups of broadcasters.

#### Recommendations:

- The items listed in section 2 should be cast as objectives or policy goals for broadcasting, and any body with a regulatory or policy role in relation to broadcasting should be required to take them into account when taking action.

#### **IV.d Funding**

##### Funding for Different Broadcasters

The Bill proposes major changes to the funding model for SABC and others providing or supporting public service broadcasting. SABC would be divided into three separately

administered divisions, focusing on public service, commercial and international broadcasting. The licence fee currently provided for in section 27 of the Broadcasting Act would be abolished and, instead, the public service division of SABC would derive funding from the Fund, cross-subsidisation from its commercial division, grants and donations, advertising and commercial sponsorship. The latter two shall not, together, exceed the total amount derived from the Fund and cross-subsidisation (section 13). The regional services of SABC, which are part of the public service division, are yet to become operational, despite licences having been granted as far back as June 2005. The Bill envisages these regional services receiving monies from the Fund, appropriations from the provincial legislatures, donations, sponsorship and limited advertisements (section 12(3)(b) and (c)). SABC is also expected to apply to ICASA for additional licences to provide public service television channels, to be funded from the Fund, grants, donations, sponsorship and limited advertising revenues (section 12(4)).

The international division would be funded from the Fund, grants from the State and limited advertising, sponsorship, grants and donations (section 15(3)). The commercial division would be operated on a commercial basis and is expected to maximise revenues for purposes of cross-subsidising the public service division (section 14(2)(d)).

Community broadcasters are expected to draw their revenues from the Fund, grants, donations and advertisements, although where community broadcasters are supported from the Fund, regulations will impose limits on their ability to derive advertising revenues. In this case, they will also be expected to comply strictly with the Public Finance Management Act 1999 (PMFA) (section 24).

Commercial broadcasters will continue to raise funding on a commercial basis but they may, to the extent that they carry public service broadcasting, benefit from support from the Fund (section 27).

#### Operation of the Public Service Broadcasting Fund

The Fund, for its part, may receive funds from a levy on personal income tax, money appropriated by Parliament, a cross-subsidy from licence fees, business contributions and other sources (section 4). The Bill provides, somewhat confusingly, that the total contributions from sources other than funds appropriated by Parliament, “must not exceed 1 percent of the total income and annual turnover per annum for persons identified” (section 4(3)). This is widely being interpreted as a one percent income tax, although in fact it closely resembles the language in section 89(2) of the Electronic Communications Act, which deals with contributions by licensed services to the Universal Service and Access Fund. It seems likely that section 4(3) is a clumsy way of saying that the levy on personal income tax will not exceed one percent of contributors’ total income, while the cross-subsidy from licensed services will not exceed one percent of the annual turnover of licensees. The cross-subsidy is based on section 89(3) of the Electronic Communications Act, which provides for some broadcasters to support the MDDA. The extent of the contribution from businesses which are not licensed broadcasting services remains to be clarified. The Minister has the power to make regulations concerning contributions to the Fund (sections 37(1)(a) and (b) and 47(2)).

The Fund shall be used to support the public service division of SABC (which for this purpose includes the international division), content development, community broadcasters, signal distribution services by a common carrier (i.e. Sentech) to promote universal access, the Broadcasting and Signal-distribution Museum (which is also to be funded by parliament, grants, donations, subsidies and entrance fees) (section 40(2)), other broadcasters pursuing public service broadcasting, and such other public service broadcasting uses as the Minister may determine, in consultation with the Minister of Finance (section 6). The first four of these uses are to be prioritised (section 8).

The Fund is to be managed by the MDDA (section 5), which shall develop criteria for the allocation of these funds, to be approved by the Minister, after consultation with the Minister of Finance and a period of public consultation, and the criteria, once finalised, shall be valid for three years (section 7). Various financial obligations are imposed on MDDA in respect of the Fund, including separate auditing of its income and expenditure by the Attorney-General (section 9).

#### Comment

In principle, providing funding for public interest broadcasting from income tax instead of the television licence fee is a good idea. Income tax-based funding is a progressive form of taxation, which charges more to those with more capacity to pay. It also does away with the expensive and apparently inefficient system for collecting the current licence fee, which, according to the Discussion Paper, costs approximately 27% of the total fee.

At the same time, these proposals are open to a number of criticisms of both a practical and a principled nature. As noted above, international standards require public broadcasters to be adequately funded, including from public sources, so that they can discharge their public service mandates.

There are, in particular, concerns about whether the funding scheme proposed in the Bill will realistically cover SABC's running costs, as well as whether it will provide stable funding for SABC. Indeed, under the scheme proposed in the Bill, it is somewhat difficult to see how SABC could approach the ZAR4.7 billion in revenues it reported in its 2008 Annual Report, of which about ZAR3.6 billion, or 76%, came from advertising and sponsorship, and about ZAR822 million, or 17%, from the licence fee.

The Bill proposes a massive reduction in advertising revenue for SABC by stipulating that advertising and commercial sponsorship together may not exceed the revenues derived from the Fund and the commercial division cross-subsidy (i.e. basically that advertising cannot exceed 50% of the total non-grant funding for the public services division). Using the 2008 figures as a rough working basis,<sup>41</sup> cutting advertising from 76% to 50% would leave SABC with a ZAR936 million shortfall, in addition to the loss of income from the licence fee.

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<sup>41</sup> It is not immediately apparent from the 2008 Report what the division of the advertising is between the public service and commercial divisions, or even whether the Report covers the commercial division.

The Estimates of National Revenue prepared by the National Treasury on 20 February 2008<sup>42</sup> project, for 2008/09, total revenues of SAR191 billion from personal income tax, 1% of which (the maximum figure mooted in the Bill) would be SAR1.9 billion. This is not the only source of revenue for the Fund, but it is clear that a very important part of the Fund indeed would need to go to SABC just to replace lost advertising and licence fee income.

Furthermore, as noted above, SABC has still not managed to operationalise its regional channels, due mainly to funding constraints, and the Bill proposes yet more channels for SABC. These would also need to be supported, mainly from the Fund, although the Bill does also envisage some support from provincial governments for regional channels.

There is also an underlying lack of clarity regarding both contributions to and allocations from the Fund. The Bill does not specify how the Fund would actually be paid up. Instead, it provides a list of possible sources of funding, some of which are quite undefined.

One source of funding listed is personal income tax, up to a maximum of one percent. Although this is clear as a source, the level is not set. The Bill also provides for “contributions from business”, presumably to match the contributions from individuals. The Bill fails to give any indication of how this contribution might be assessed. The Fund is also to benefit from contributions from licensed broadcast services, in accordance with section 89(3) of the Electronic Communications Act. This provision actually establishes an offset for those licensees which contribute to the MDDA in respect of their contributions to the Universal Service and Access Fund. However, it is understood in the Bill as intending to refer to the funds which those licensees presently contribute to the MDDA. The MDDA had total revenues of ZAR22.5 million for the year ending 31 March 2007, so these contributions are negligible in relation to the total expected revenue for the Fund.

It may be noted that the Ministry of Communications has stated that the funding model is not settled and that the Bill aims to solicit public feedback on this. However, the Bill fails to provide stakeholders with any information with which to assess different options. Furthermore, it appears to be designed to work with the ambiguities it incorporates, by providing a mechanism for resolving them. Pursuant to section 47, the Minister is given wide powers to set contributions to the fund through a future regulation addressing, among other things, the “contributions by different sectors” and the “contribution levels by the different income groups”. It seems doubtful that the Minister responsible for this law, presumably the Minister of Communications, although this is not actually specified in the Bill, could be given the power to set by regulation the level of an additional income tax. There have even been some suggestions that the Bill is even unconstitutional in as much as the tax measures make it a money bill, which only the minister responsible for the budget can introduce. Similarly, it is unclear how the Minister of Communications could set contributions for businesses that fall outside of his or her area of regulatory

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<sup>42</sup> Available at: <http://www.treasury.gov.za/documents/national%20budget/2008/enr/enr.pdf>.

competence. In any case, given the impact of funding decisions on SABC and other broadcasters, this is not something that should be left to the Minister. Instead, the key policy decisions on funding should be reflected in the primary legislation.

The Bill is also ambiguous as regards how the Fund will be allocated. The four priority uses are for the public service division of SABC (including its international services), content development, community broadcasting and signal distribution to ensure universal services. It may be noted that “content development” is undefined. It is significant that the Bill proposes the creation of two bodies with a mandate to advise the Minister on “local content”, the advisory body referred to in section 36(2) (see, in this regard, section 36(3)(e)) and the Local Content Advisory Body established by section 42(1), in addition to giving the Minister wide powers in relation to overall implementation of the Act.

MDDA is tasked with developing criteria for allocating the Fund, to be approved by the Minister, after giving the public 30 days to make comments. Once adopted, these criteria are presumptively valid for a period of three years, although MDDA may, after informing the Minister, make changes. No guidance as to these criteria is provided in the Bill and no protection is afforded regarding the level of contribution to SABC. It is a matter of particular concern that the Minister is allocated specific functions regarding both allocations from the Fund and the most undefined use to be supported from the Fund, namely content development, thereby having a role as both player and referee.

Given the centrality of the Fund to SABC, the lack of clarity in relation to contributions to it and allocations from it, coupled with the extensive control over it vested in a minister, means that the Bill fails to conform to international standards in this area which require funding for public service broadcasters like SABC to be clear, stable and protected against political interference. Whatever its drawbacks, the licence fee system is stable and relatively insulated from political interference. The proposed Fund lacks these advantages. This could potentially seriously undermine SABC’s funding stability and render it more vulnerable to political pressure.

There are various models for funding public service broadcasters in other countries. The classical licence fee approach is the dominant source of funding for many of the best and most well-established public service broadcasters, like those of North Europe, Japan and the UK. In Canada, CBC is funded through a direct government grant, not a model for other countries, although it has worked well enough in Canada. Many countries in Eastern Europe, which have sought to transform communist-era State broadcasters into public service broadcasters, benefit from an additional tax on electricity. The newly established Thai Public Broadcasting Service is supported through an additional ‘sin’ tax on liquor and tobacco. In each case, with the exception of Canada, the funding is ring-fenced in the sense that it goes exclusively to the public broadcaster.

The approach taken in the Bill, whereby the main national public broadcaster has to compete with other users for funding from a fund, is rarely, if ever, employed in other democracies. Many countries have funds to support community broadcasting (along the lines of the current approach in South Africa through MDDA) and/or public interest

broadcasting defined more broadly. But these are separate from the primary funding provided to the public broadcaster.

The allocation of administrative oversight over the Fund to MDDA also raises some questions. The MDDA, as a public body, is required to comply with the Public Finance Management Act and other accountability rules, and the Bill also subjects it to oversight by ICASA, and so in principle it has the framework to handle the allocation of public funds. At the same time, there are inevitably questions about a body which current manages around SAR55 million annually could handle a fund of some billions of Rand, and how that would affect its operation. There might also be a concern about whether a body which is rooted in providing support to community media is the right institutional framework for allocating support on a much wider basis.

#### Recommendations:

- The law should guarantee SABC adequate and stable funding to discharge its public service obligations, in a manner which is protected against political interference, regardless of the source of that funding.
- The law should provide greater clarity regarding how the Fund will be supported, rather than leaving important ambiguities in this area to be decided by the Minister through future regulation.
- The law should provide more guidance on what is to be included in the user category ‘content development’, and also make it clear that the Minister will not have implementation powers (as opposed to policy powers) in relation to this user category. Similarly, the law should not grant the Minister the discretion to add new uses that may benefit from the Fund, in addition to those already listed.
- The law should also provide more guidance on the criteria for allocating monies from the Fund among different users, including with a view to ensuring that the first recommendation above is met and to limiting the possibility of this being affected by political considerations.

### **IV.e SABC - Independence**

The most serious problem with the Bill from the perspective of international law is that it fails to promote the independence of SABC in a manner that breaches international guarantees of freedom of expression. A particular problem is the extensive powers it grants to the Minister over SABC. While government legitimately retains a policy remit in the area of broadcasting, as noted above, international law requires the power to implement policy to be vested in independent bodies.

It may be noted that the Charters are intended to be legally binding instruments, and any failure to comply strictly with them may lead to “fines and or penalties” being imposed by ICASA (sections 31, 32(1)(a) and 33(a)(i) of the Bill). The Charters shall be “determined, amended and reviewed by Parliament by notice in the *Gazette*” and shall be valid for between five and ten years. They thus appear to be a kind of special time-limited

schedule to the primary legislation. For purposes of this analysis, it is assumed that they are legally binding but that the main Bill would take precedence in case of inconsistency.

### General

Clause 1.5 of the Charter does provide formal protection for the editorial and programming independence of the SABC, in accordance with the Constitution. At the same time, general protection for the independence of SABC in the Charter could be improved in two key ways. First, clause 3.5 of the Charter provides that members of the Board shall be appointed for “such period as the President may determine”, not to exceed five years. The same provision is currently found in section 13(5) of the 1999 Broadcasting Act. Although this has not been a problem so far, it would be preferable for the length of tenure to be fixed in the primary legislation.

Second, the disqualifications for being appointed as a member of the Board, set out in clause 3.8 of the Charter, do not include political connections. The same is true of section 16 of the 1999 Broadcasting Act, which clause 3.8 closely parallels. However, better practice laws preclude individuals with strong political connections from being appointed to the boards of public broadcasters. Interestingly, clauses 3.8(1)(b) and (c) of the Community Broadcasting Charter exclude office bearers or officials of political parties, and members of Parliament, provincial legislatures and municipal councils from being appointed to the Governing Councils of community broadcasters. The same prohibitions should be applied to members of the SABC Board.

### The Minister

Far more serious are the powers of the Minister in relation to SABC, both in terms of approvals and direct powers. In most cases, these powers would be better allocated to ICASA, while in some cases they are simply not necessary.

The Charter allocates the power to the Minister, in some cases in consultation with other ministers, to approve a number of regulations and other matters proposed by SABC:

- the establishment of commercial subsidiaries (clause 1.3(2));
- financial regulations (clause 3.10.3(2));
- a set of seven policies on programming matters (clause 3.11.1(8); it should be noted that there is a typo in this provision and it is not clear whether approval is by the Minister or ICASA); and
- a Public Complaints Handling Framework (clause 4.3(2)).

All of these could be approved by ICASA, and all but the financial regulations relate to matters which are susceptible of political interference. It may be noted that the obligation on SABC to establish the seven programming policies – including on news, local content, educational programming, language and religion – is probably excessive in any case. It would be enough to require it to have one comprehensive programming policy covering all of these and other issues.

In terms of financial powers, the Minister has the power to determine the extent of the cross-subsidy from SABC’s commercial to its public operations (section 14(3) of the

Bill) and to require SABC to prepare annual statements in any form he or she might determine (clause 6(1)(b) of the Charter). It is problematical to vest direct operational powers over SABC's operations in the Minister; any oversight that is necessary could be carried out by ICASA. The requirement to present statements in the prescribed form is less problematical.

Probably the most intrusive provision grants the Minister the power to monitor general implementation of the law, including in relation to fulfilment by public and community broadcasters of their mandates (section 36 of the Bill). This is backed up by very specific order powers. The Minister has the general power, pursuant to section 38, and subject only to the Constitution and the Electronic Communications Act, to direct any of the entities "specified" in the law to take any action pursuant to public service broadcasting if that entity is unable to perform any of its functions. The Minister also has the power to recommend that ICASA impose fines or other penalties (which, however, are to be determined by ICASA). The Minister has even wider direct powers in relation to SABC, which he or she may instruct to "take any action" on the basis of wide criteria, including that it is in financial difficulty (a state it has arguably been in for many years), is unable to perform its functions effectively, or has acted unfairly or inequitably, neither of which is defined (section 39).

It is not clear what "any action" might include in relation to SABC, but it would presumably include orders to remedy the problems which are claimed to justify the measure in the first place. It would, if this is the case, include measures designed to redress its financial problems or perform its functions, in other words practically anything relating to the running of the organisation. Furthermore, the thresholds for engaging them – financial problems, a failure to perform any function effectively, acting unfairly – are very low. There is no requirement, for example, that the failure be serious or beyond the control of SABC.

In other countries, ministers do not have such powers. In the United Kingdom, for example, one of the few powers vested in the Minister is the power to order broadcasters not to broadcast any matter. The only time this was invoked, to prevent the direct broadcasting of the voice of members of the IRA, it was subject to widespread criticism and indeed ridicule, as broadcasters simply dubbed over the actual voices. These powers also breach international standards regarding the independence of regulatory bodies.

More specific powers over SABC programming are found in section 47(1) of the Bill, which tasks the Minister with developing a regulatory framework for SABC's international broadcasting services. Furthermore, these services are required to "promote South Africa's foreign policy" and to be "subject to the Republic's foreign policy" (sections 15(1)(c) and 15(2)(a)). This constitutes blatant subjection of content on the international services to foreign policy-based censorship, which breaches the principle of independence under international law. Furthermore, it is not practised in other countries. In the United Kingdom, for example, the BBC's foreign services are formally subject to direction from the Foreign and Commonwealth Office. In practice, however, this power is never engaged, even in the most sensitive circumstances (such as the war in Iraq).

The Charter invests the Minister, in consultation with the National Assembly, with the power to establish a performance management system for the members of the Board of SABC, and to appoint a panel to apply this system to evaluate performance (clause 3.10). This is a very considerable power since it effectively gives the Minister the power to set key directions of the Board. Most countries do not have performance management systems for members of the boards of public broadcasters. The Minister also has the power to set the level of remuneration for members of the Board, although in accordance with National Treasury Regulations (clause 3.9). It would be preferable for remuneration to be completely insulated from political control, for example by linking it to other similar roles.

The Minister also exercises some control over the appointment of the executive management of SABC, through the requirement that the Board consult with him or her when appointing the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer (clause 3.11.1(2)). In other countries, this power is vested exclusively in the Board. The opportunity for political interference through this power is obvious.

### ICASA

ICASA is allocated important powers over SABC under the Bill. As already noted, it is generally responsible for monitoring and enforcing compliance with public service broadcasting, even though this is not actually an obligation (section 31). It is given more specific powers in relation to SABC, including to conduct public hearings regarding compliance with the Charter, to investigate public complaints and to take action on any matter relevant to SABC's functions. It may also impose fines and penalties, presumably for breach of the rules although this is not specified (section 32).

These are very general powers. They appear to grant ICASA the power to fine SABC in relation to any matter relevant to its functions. This fails to respect international standards, which require restrictions on freedom of expression to be clear and unambiguous. This principle is particularly important in relation to powers of sanction.

In other countries, the powers of oversight regulators are carefully circumscribed. In most cases, regulators have very limited powers in relation to public broadcasters, often only to promote compliance with an established code of conduct.

### Recommendations:

- The primary legislation or the Charter should establish the tenure of members of the SABC Board.
- Prohibitions on close political ties should be added to the disqualifications for members of the Board.
- The various powers of approval of the Minister in relation to SABC should be allocated to ICASA, with the possible exception of the power to approve financial regulations.

- The power of the Minister to determine the extent of the SABC cross-subsidy should be removed. This power should either be given to ICASA or left to the discretion of the SABC itself.
- The powers of the Minister to direct SABC and “other entities” to take any action should be removed.
- The power of the Minister to develop a regulatory framework for SABC’s international services, as well as the requirement that these services promote foreign policy, should be removed.
- The powers of the Minister in relation to performance management of members of the Board should be removed. If such a system is retained, these powers should be allocated to ICASA.
- The Minister should play no role in the appointments of members of the executive management of SABC.
- The powers granted to ICASA under the Bill, in particular to sanction SABC, should be carefully reviewed to render them clear, unambiguous and fair.

#### **IV.f Community Broadcasting**

The Bill and Charter seek to impose extensive and onerous new obligations on community broadcasters in terms of mandate, governance structure and relations with municipalities. This is in stark contrast to the current legal framework, which is very light-touch, only requiring community broadcasters to be not-for-profit, to serve the community and to comply with rules of general application for broadcasters. Taken together, these obligations undermine both the independence and viability of community broadcasting in South Africa.

Community broadcasters – at least in South Africa, which is recognised as having a good community broadcasting framework – receive important public benefits in the form of equitable access to frequencies at low-cost, both in terms of processing applications and licence fees, and direct public funding, for example through MDDA. In return, it is not inappropriate to impose some public obligations on them. The obligations in the Bill, although no doubt well-intentioned, are quite excessive.

##### The Need for a Community Broadcasting Charter

There is currently no Charter for community broadcasters and the need for this may be questioned. Many of the specific obligations in the Charter are excessively onerous and unnecessary, as described below.

Furthermore, little serious thought seems to have been given to what needs to be in the Charter. It is striking that the main categories set out for the Community Broadcasting Charter are identical to those for SABC, despite the radical differences between these types of broadcasters. It may be noted that the proposed categories for the Charter for community broadcasters in the Discussion Paper were quite different. It is not clear why these were not incorporated into the Bill. Furthermore, large parts of the substance of the Community Broadcasting Charter are identical or very similar to their counterparts in the SABC Charter. Indeed, the sense that this was largely a cut and paste job is highlighted

by the fact that in many instances references which are specific to SABC and do not have relevance to community broadcasting – such as “the Corporation” and even the different divisions of SABC, namely public, commercial and international – were left in the Community Broadcasting Charter. If such radical and intrusive changes are to be introduced into the framework for community broadcasting, they should at least be properly thought through.

Instead of a statutory Community Broadcasting Charter, consideration should be given to providing the necessary support to enable this sector to develop its own Charter. In this case, the focus would probably be more on programming mandate and standards than on governance, but this should be up to community broadcasters.

### The Role of ICASA

ICASA has important and rather intrusive powers in relation to community broadcasters, as it does for SABC. It has the power to ensure strict compliance with the Charter, to conduct hearings on compliance by the sector with the prescribed objectives, and to undertake dispute resolution at individual stations. It also has the power to suspend and even revoke licences in case of “instability” at a station due to non-compliance with the law in relation to governance, community participation, programming mandate and financial accountability, although it may only do this where the broadcaster has failed on numerous occasions to remedy the problem (section 33).

It is appropriate for ICASA to have the power to ensure that community broadcasters respect and meet their legal obligations. However, these powers go beyond that and include dispute resolution and addressing problems of instability. While the motivation for these provisions is legitimate, the underlying problems require a less regulatory solution and, in particular, one that does not involve the regulator and sanctions but, instead, relies on more of a mediation approach.

### Communities of Interest

The definitions section of the Bill includes communities of interest in the definition of a community, in line with current practice. At the same time, the text seems to be designed to fit geographic, rather than interest-based communities and some of the obligations do not work for communities of interest. It is hard, for example, to see how a broadcaster serving a community of interest could promote the development of that community, or how it could be required to partner with a municipality.

### Programming Mandate

The Bill seeks to impose a detailed set of objectives, or programming mandate, on community broadcasters. This includes a set of community-linked obligations (providing access to the community, promoting community development), as well as more general obligations (promoting social cohesion and a sense of common purpose within a democracy) (section 20). The Bill also suggests that ICASA should only licence community broadcasters to foster development (section 21).

The obligations in terms of programming mandate go far beyond the more general obligations that currently apply, as well as beyond the obligations that are found in countries around the world. The excessive focus on development, including that licensing shall be based on fostering development, has already been noted. Other obligations are also both excessive and unnecessary. If, as the law already requires, community broadcasters are well-rooted in the community, it is not necessary to impose such obligations on them as reflecting the culture and language of the community, dealing with community issues and using local content. On the other hand, such obligations could be used to undermine the independence of community broadcasters. Furthermore, these obligations straight-jacket community broadcasters into a particular development mandate and role, rather than letting them respond in a dynamic and creative way to community needs.

### Governance Requirements

The Bill is very prescriptive in terms of governance, requiring all community broadcasters to be controlled by a Governing Council, in accordance with detailed rules regarding the composition of the Council (sections 22-23). Each Council must have between five and seven members, who are appointed at an “Annual General Meeting or appropriate forum”. Vacancies must be advertised for at least thirty days in a local medium, including the relevant station. Members are required to have relevant skills and experience, to represent, collectively, a broad cross-section of society, to reside in the area full-time, and to be committed to development and the principles set out in the Charter (although in fact the Charter is essentially a governance rather than a principles document).

The Community Broadcasting Charter, which, as noted, is in many areas similar or identical to the SABC Charter, elaborates in great detail on the provisions in the Bill, and also extends them in significant ways. It addresses in some depth relations between the Governing Council and the Station Management (see clauses 2, 3.12, 4.1 and 4.3), in a way which is very prescriptive, often completely inappropriate for community broadcasters and simply unnecessary, unlike for SABC where there is a need to clarify these roles.

The Charter also includes very detailed rules on the membership of the Council, including as to numbers (a maximum of five, which is actually inconsistent with the Bill), the role of the Chair, tenure, removal, disqualification, conflicting interests, remuneration, meetings and committees (clause 3). Similarly, in relation to the Station Manager, the Charter sets out in great detail the role and systems of accountability (clause 4). Clause 5 addresses editorial policies, requiring community broadcasters to adopt five of the seven policies prescribed for SABC, as well as a similar code of practice. Pursuant to clause 5.2, detailed rules are set out regarding the obligation of community broadcasters to establish Community Audience Advisory Councils, along the lines of SABC’s Public Broadcasting Audience Advisory Council. The provisions regarding staff – for example in relation to housing, associations, support aid funds, insurance and arrangements for consultation – found in the SABC Charter are repeated in the Community Broadcasting Charter (clause 6). Even some of the onerous financial

obligations on SABC – such as to conduct an annual audit, to conform to the standards of the Public Finance Management Act and to prepare annual reports – are imposed on community broadcasters (see clauses 3.2(1) and 7).

These obligations are largely a repeat of the same obligations for the SABC, and they are very prescriptive, often completely inappropriate for community broadcasters and simply unnecessary. Collectively, they are impossibly onerous and completely at odds with the reality of community broadcasters. It is to be doubted that many, if any, community broadcasters in South Africa could meet all of these standards. It goes without saying that other democratic countries do not impose these sorts of obligations on community broadcasters.

The 1999 Broadcasting Act originally imposed a general obligation on community broadcasters to be governed by a democratically elected boards comprised of community members, although this provision appears to have been repealed by the Electronic Communications Act. This is a reasonable requirement, and consideration should be given to reflecting it in the new law.

#### Relations with Municipalities

To further their development mandate, community broadcasters are required to partner with municipalities (section 25 of the Bill; see also clause 5.4 of the Charter). The partnership includes some clear benefits for community broadcasters – including access to municipal spaces, facilities and infrastructure, and provision by municipalities of general support, including funding – as well as some aspects that are less clear in terms of the flow of benefits – such as facility sharing and a comprehensive approach to development. There is a typo for one benefit – regarding a flow of information about development “to by” local municipalities – that makes it unclear who the intended beneficiary might be. To help protect the independence of community broadcasters, ICASA is tasked with developing a Standard Terms of Agreement Framework.

It would seem that the primary purpose of requiring community broadcasters to enter into partnerships with municipalities is to provide a source of support to them. Furthermore, the Bill seeks to protect their independence in some ways. At the same time, imposing an obligation of partnership with municipalities on them cannot be justified. The media, even media benefitting from public support, must be free to decide how to operate, particularly as regards the difficult question of maintaining appropriate relationships with public actors. Vague provisions in the Bill regarding this relationship, noted above, could be abused by certain municipalities. A municipality could, for example, claim that “facility sharing” meant that the community broadcaster had to give it an opportunity to broadcast its views over the station, compromising independence and balance.

It may be noted that the Charter protects the editorial independence of community broadcasters and specifically provides that this should be respected notwithstanding the provision of physical space to them (clause 1.5). This is helpful but will not be enough to prevent the risks noted above from being realised in practice.

Instead of positing this as an obligation of community broadcasters, the Bill should require municipalities to offer the benefits listed to community broadcasters. This would provide support to community broadcasters without compromising their independence. At a minimum, the Bill should not include vague obligations which could be interpreted as requiring community broadcasters to provide benefits to municipalities.

Recommendations:

- The whole idea of prescribing a Community Broadcasting Charter should be reconsidered. Instead, thought should be given to the idea of supporting the development by community broadcasters of their own Charter.
- ICASA's role in relation to community broadcasters should be restricted to ensuring that they meet their legal obligations, including those contained in their licences.
- The text should be reviewed to make sure that it works for a community of interest. It should at least be made clear that broadcasters serving communities of interest do not need to promote development or partner with municipalities.
- Consideration should be given to removing the detailed programming mandate obligations for community broadcasters altogether from the Bill. At a minimum, these obligations should be narrowed down and simplified to focus on the core mandate of community broadcasters.
- The whole system of governance obligations for community broadcasters set out in the Bill and Charter should be thoroughly revised. Consideration should be given to including only general provisions on this, along the lines of the 1999 Broadcasting Act. If the law goes beyond this, any measures should not be unduly onerous and should be carefully tailored to the particular circumstances and needs of community broadcasters.
- Instead of requiring community broadcasters to enter into partnerships with municipalities, the law should require municipalities to provide certain benefits to community broadcasters.

#### **IV.g The Role of the Minister – Additional Issues**

The powers of the Minister in relation to the Fund and the SABC have already been noted. The powers of the Minister pursuant to section 38 to direct any of the entities "specified" in the law to take any action pursuant to public service broadcasting if that entity is unable to perform any of its functions have also been noted, specifically in relation to SABC.

The Minister has the power to create two advisory bodies, one to assist generally in monitoring implementation (section 36(2)) and the Local Content Advisory Body, to advise on the development of local content (section 42). The need to create two new bodies, with relatively similar mandates, must be questioned. A more sensible approach might be for the Minister simply to create an ad hoc advisory body to provide him with input on the matter of local content.

More serious, however, is that the Bill appears to envisage the Minister exercising important direct operational powers in relation to local content, in addition to the operational powers in relation to broadcasters, which are also very problematical, as noted above. The Bill is unclear on exactly what the Minister might be empowered to do, but the Local Content Advisory Body is required to make recommendations to him or her concerning such specific matters as financing strategies for local content and supply-side measures for local content (section 42(4)). These appear to be highly operational as opposed to policy actions.

Recommendations:

- The idea of creating two new bodies should be reconsidered and the possibility of simply appointing an ad hoc advisory body instead should be considered.
- It should be clear that the Minister will not have operational powers in relation to the development of local content.