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Promoting human rights and democracy through the media since 1993

Submission to Department of
Communications (DOC) on the

Public Service Broadcasting: Bill

15 January 2010

Submission by Media Monitoring Africa

1. Introduction

- 1.1 Media Monitoring Africa (MMA, formerly the Media Monitoring Project) welcomes the opportunity to make a submission to the Department of Communications (DOC) on the Public Service Broadcasting Bill. We would also welcome the opportunity to make oral presentations to the Department.
- 1.2 We wish to register our concern over the relatively short time period for submissions. While we are grateful for the extension for submissions, it was a great pity that most of the extension took place over the festive season holidays.
- 1.3 Given the importance and scope of the Bill, not just in terms of the issues it seeks to change but also that if implemented it would impact every person in South Africa, and given that there has not yet been a policy review process we believe the short period has prevented:
- 1.3.1 Proper, broad-based meaningful consultation with members of the public. As can be seen from much of the media coverage attention has focused largely on the issue of the new funding model proposed and not on many of the other equally important aspects.
 - 1.3.2 In-depth debate and discussion on the various changes;
 - 1.3.3 Substantive and /or supplementary research on the different areas being carried out, in particular, those areas pertaining to fundamental policy shifts;
 - 1.3.4 The development of clear alternatives to some of the issues provided;
 - 1.3.5 Investigation and analysis of other research as stipulated in 1.3.3.
- 1.4 The move by the Department of Communications to ensure that Public Broadcasting can be more sustainable, efficient and meet the needs of all South Africans present and exciting and invigorating moment in broadcasting in South Africa and we should use the momentum that has been generated to ensure all South Africans participate in shaping our public broadcasting future.

2. MMA's Constitutional Assumptions

- 2.1 As an independent non-governmental organisation, MMA approaches all broadcasting within a human rights-based framework. MMA's point of departure therefore includes similar values to those originally contained in the Broadcasting Act, where in the preamble it noted that:
- 2.1.1. "[T]he South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the

maintenance of a South African identity, universal access, equality, unity and diversity”.

(Broadcasting Act No.4 1999)

2.2 Within this rights-based framework, MMA understands the institutional role of the SABC as fundamental, not only to fulfilling its role as a public service broadcaster, but also to realising citizen’s constitutional right to receive and impart information. Further, as a key public institution and core component of the media environment in South Africa, the SABC’s role in entrenching South Africa’s democracy cannot be underestimated.

2.3 Given its function and purpose as a public service broadcaster, when the SABC’s ability to fulfil its role as public service broadcaster is being discussed, South Africa’s democracy is also under the spotlight.

2.4 Therefore, MMA strongly believes that there are core concepts that need to be clearly and ambiguously enshrined in any new legislation developed that will impact the SABC. These are:

- 2.4.1 An appointment process that would appoint members that are dedicated to the concepts of democracy, human rights and in establishing a public service broadcaster that serves the public interest rather than self seeking interests.
- 2.4.2 Effective public accountability mechanisms including financially.
- 2.4.3 Transparency and clarity of structures.
- 2.4.4 Clear lines of powers for the board and management.
- 2.4.5 Independence from the powerful interests in society, i.e. government and commercial interests.
- 2.4.6 An effective oversight structure (i.e. Parliament, the regulator and government) that does not compromise the public service broadcaster’s independence, with no body dominating the oversight structure at the expense of a fellow oversight body.
- 2.4.7 Arms length independent funding of SABC that is largely publicly funded.
- 2.4.8 The importance of producing diverse quality local content.
- 2.4.9 Providing a diverse service that meets all the needs of South Africans, including the minority.

3. MMA and the SOS: Supporting Public Broadcasting Coalition

3.1 MMA is a founding member of the civil society coalition, **SOS Supporting Public Broadcasting Coalition (SOS Coalition)**. This submission is to be read in conjunction with the SOS Coalition Submission, and MMA fully supports the content and aims of the SOS Submission.

3.2 In presenting this submission MMA seeks to highlight the following points in addition to those raised in the SOS Coalition submission:

- 3.2.1 The Bill present a number of potentially very positive and exciting ideas;
- 3.2.2 All of the ideas however require extensive debate, discussion and research;
- 3.2.3 The existing structures and systems of the SABC need to be urgently addressed in line with the recommendations in the Auditor Generals report;
- 3.2.4 Existing funding structures need to be analysed and assessed before new models are implemented;
- 3.2.5 Crucially as a means of restoring credibility, trust and a sense of public ownership of the SABC, a comprehensive policy review process needs to take place, and;
- 3.2.6 MMA recommends that a crucial element of the policy review process that can be initiated almost immediately would be full public participation in the development of a true South African Public broadcasting Charter, both for the SABC as well as for the fund if it comes to fruition.

4. Positive Elements of the Bill

4.1 MMA welcomes some key elements in the Bill each of which we believe may, with further discussion, and if brought into line with a comprehensive policy review, have a positive impact on public broadcasting. These include:

4.2 Public service Broadcasting: Not sole responsibility of the SABC

- 4.2.1 MMA welcomes the Bill's assertion in the preamble that "public service broadcasting is not the sole responsibility of public broadcasting services". The result of expanding the responsibility to other broadcasters is that the public will benefit from a greater diversity and quantity of public service broadcasting.
- 4.2.2 In the age of digitalisation public service broadcasting occupies a fundamental space in providing South Africans with quality and diverse

programming that will provide programming for citizens rather than consumers, amongst other benefits.

4.3 The Public service broadcasting fund

- 4.3.1 MMA welcomes the establishment of a public service broadcasting fund, which could encourage the production of diverse and quality public service programming by more broadcasters.

4.4 Focus on community broadcasters

- 4.4.1 The Bill's attempts to address important issues and governing frameworks regarding community broadcasters are welcomed by MMA. Many community broadcasters in South Africa have been struggling with issues of funding, Board conflict, internal conflict etc.

4.5 Establishing the importance of Local Content

- 4.5.1 MMA believes that a positive element of the Bill includes it enshrining the promotion of local content as well as its importance to the South African Broadcasting System.
- 4.5.2 The Bill attempts to promote the local content industry, by establishing that one of the objects of the Bill is to "promote the local content industry" (Chapter 2, (e)). In addition, the Bill upholds the importance of local content in the South African Broadcasting System through stipulating that "the programming provided by the South African broadcasting system must: (amongst others) be predominantly local ..." (Chapter 3, (4c)).
- 4.5.3 In addition, MMA welcomes Chapter 11 of the Bill and its attention to local content and its attempts to "increase production and heighten demand of local content in the Republic" (Chapter 11, (41a)), as well as the establishment of a local content Advisory Body.
- 4.5.4 However, although the Bill recognises the importance of local content as well as the attention afforded to it, MMA notes with concern that the independence of the Local Content Advisory Board is questionable as the Board is to be appointed by the Minister (Chapter 11, (42, 2)).

5. Areas of concern relating to the Bill

5.1 Despite the potential for significant positive change the Bill also includes a number of concerning elements, as highlighted in the SOS Coalition Submission. These include:

5.2 “2.1.3. The that the nature of the proposed Bill is unclear.

2.1.4 Constitutionality concerns both in terms of procedural issues in the Bill and in terms of substantive issues.

2.1.5 That some of the provisions in the Bill that are internally inconsistent and contradictory.

2.1.6 Concerns pertaining to the Bill’s proposed SABC Charter.

2.1.7 Particular concerns as regards proposals around the organisation of the community media sector.”

(SOS Coalition Submission Section 2.1)

5.3 In addition to these MMA submits that the Bill in its current form is inappropriate to the existing context. There are simply too many variables and unanswered questions to have the requisite level of certainty that the shifts proposed in the Bill would require. For example the establishment of the fund, how it will operate, the regulations surrounding, it how the MDDA will have to change to meet the needs, if there is sufficient funding to support the model etc etc.

5.4 MMA’s areas of concern, in addition to those raised in the SOS Coalition submission, focus on the imperative to address existing structures, specifically the need for clarity, accountability and transparency, finance matters, and credibility, trust and a sense of public ownership.

5.5 SABC ‘s existing structures:

5.6 One of the core reasons for the crises at the SABC has been the lack of clarity in terms of accountability, roles and responsibilities, not only within the SABC but also in terms of parliament, the board, the Department of Communication and ICASA.

5.7 In order to ensure accountability as well as transparency and clarity, there is an urgent need to systematically review SABC’s existing structures. They need to be clarified and clear organo-grams drawn up, with lines of accountability and responsibility as well as financial systems and models and monitoring systems outlined. It is after all only when we can all see what we are dealing with that we can then seek to find the best method of addressing challenges as well as finding the most effective models and structures. Previous research carried out by MMA revealed the absence of an organo-gram of SABC news. Efforts to find overall structures and documents outlining levels of accountability also proved fruitless.

5.8 The Auditor General's report on the SABC also served to highlight the importance not only of addressing short term instances of corruption and mismanagement and lack of adherence to procedures and or absence of process, but also the importance of addressing the problems on a long term basis. It states:

5.9. **“1.2 Findings**

1.2.1 The findings in this report should be addressed decisively by the interim SABC board with the support of the executive management of the SABC and the Department of Communications. However, corrective action limited to the specific individual findings alone would likely address symptoms but not the underlying causes. This approach carries the risk of deficiencies recurring in future. It is therefore imperative that the underlying causes contributing to the deficiencies be properly understood and addressed as part of the corrective actions to be taken in response to this report..

1.2.2 The underlying causes that affect sound financial management can be summarised under three interrelated key areas, namely:

1.2.2.1 **Quality of reporting:** This area includes the entity's ability to retain records appropriately and to use these as a basis to provide relevant, accurate and complete management information to the leadership, to those charged with governance and to the oversight authorities. Quality information management enables quality monitoring, proper decision-making and oversight.

1.2.2.2 **Effective governance arrangements:** This focus area covers the effectiveness of functions and tools such as audit committees, internal audit, enterprise risk management (including fraud risk management), internal control frameworks and policy frameworks.

1.2.2.3 **Adequate leadership oversight:** This category underscores the importance of leadership creating the correct environment in the organisation. It includes the manner in which leadership monitors performance and compliance and the way in which they promote ethical behaviour. Leadership oversight is also about preventing an organisational culture of impunity and acting decisively to correct deficiencies.”

(Report of the Auditor-General on an investigation at the South African Broadcasting Corporation, 2009, p:3)

5.10. While there can be little doubt as to the positive impact and hard work of the interim board aimed at addressing some of these problems, it is the long term that we need to focus on for any new legislation. It would seem foolhardy at best and simply inviting further crises at worst if these challenges highlighted by the Auditor General were not addressed as part of a systematic and concerted process of analysing and addressing the structures of the SABC.

5.11. Difficult questions must be asked and answered before any new systems or structure can be implemented or old systems or structures retained. Some of these questions might be:

- 5.11.1. Who should be the editor-in-chief of the SABC? MMA notes that this responsibility was absent from the advert that appeared for the GCEO.
- 5.11.2. How has or will the SABC fundamentally address issue of quality of reporting, effective governance and leadership oversight? Currently it would appear the Bill's proposed solution to many of these is to vest power in the Minister. Not only does this seem to be an extreme response it is also unlikely to solve many of these challenges. For example one of the causes of numerous legal battles between the board and the GCEO arose precisely because there was lack of clarity as to who actually appointed the GCEO and who had the right to fire him. MMA notes with concern that a similar occurrence would not be prevented in the future as the GCEO and other senior executives are to be appointed by the board in consultation with the Minister.
 - 5.11.2.1. "In consultation with the Minister, appoint the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer of the corporation and their equivalents" (SABC Charter 3.11.1 (2))
- 5.11.3. The moment lines of accountability are no longer clear governance is made all the more difficult and effective leadership is undermined.
- 5.11.4. Has the future transition to DTT been costed? IF so how will the plans be effected by the SABC's economic challenges?
- 5.11.5. How will the SABC structures change with DTT? At present there are three channel managements, how will these change, or is it proposed that there will be ten?
- 5.11.6. How much money is actually spent by the SABC on local content? (These figures may be known but cannot be found in the Annual Reports)
- 5.11.7. How is it that despite the SABC's reported concerns about their onerous licence conditions that SABC 1 can be their most commercially successful channel, despite its having the greatest public service requirements yet SABC 3 which has the least public service obligations is losing money?

5.12. Cross subsidization a failed model?.

- 5.13. At present the Bill relies on instructive language;
 - 5.13.1. "... must maximise the revenues provided to its shareholders" (See 14. (2) (d))
 - 5.13.2. "The Revenues maximised by the commercial services, ... shall predominantly be used to subsidise the public broadcasting services."(See 14(2))
- 5.14. The section clearly states that the commercial services of the SABC will make money and cross subsidise the public service ones. This system has been characterised by failure with the public service cross-subsidising the, "public commercial"¹ ones; does not appear to have worked. If this system is to be retained it stands to reason that there needs at the very least to be sufficient and clear evidence that it can and will function properly. Again the short period for submissions prohibits this.

¹ It is also noted that the Bill has also proposed a significant but subtle shift in the commercial services of the SABC in that they appear to no longer have public service responsibilities. This combined with the virtual absence of the role commercial broadcaster can, should and do play in terms of public service broadcasting also requires further analysis, research and debate.

6. The need for credibility, trust and a sense of public ownership of the public broadcaster – the need for due process

- 6.1 In addition to MMA's areas for concern we would like to stress the fundamental need for public broadcasting, and the public broadcaster to be credible, trusted and for ordinary citizens to feel a deep sense of ownership of the public broadcaster.
- 6.2 Another significant area of concern in relation to the Bill, raised not so much through the content but rather as a result of the process followed is the importance of ensuring credibility and public ownership. The imperative to help rebuild and restore credibility of the SABC as well as ensure future buy in and public support for public broadcasting is yet another reason why there needs to be a full policy review process with an extensive consultation and discussion.
- 6.3 One of the negative effects of the recent crises at the SABC has been the damage to the morale of those at the SABC. In addition levels of public support as well as the credibility of the SABC have been significantly damaged.
- 6.4 While such damage is difficult to quantify it is arguably more damaging to public broadcasting than the financial crises, because rebuilding trust and credibility takes a long time. In addition however, credibility and trust can only be rebuilt if there is transparency, accountability and professional practice.
- 6.5 The question that arises is how public trust, credibility and a sense of public ownership of the SABC can be restored. Part of the solution lies in ensuring that a credible board is appointed, and that credible executive managers are then appointed by the board. The high levels of public participation in the board nomination process and the resulting board nominees have gone some way in building the foundations to restoring the credibility of the SABC. Certainly the interim board and parliament deserve some credit for the effective, efficient and fair manner in which they have operated in the last few months. Further, the role of the Department of Communication in seeking to move swiftly to address crises at the SABC must also be applauded.²
- 6.6 Rebuilding trust, credibility and a sense of ownership will take a great deal more than restoring some of the basics. Indeed too much activity from Parliament and the Department of Communications may be perceived as interference and may then work to undermine the efforts of rebuilding trust.³

² It must be emphasized that there is a danger that in seeking to address crises in a hurry new crises are created, as would be the case if the Bill were to go through in its present form.

³ ICASA is the one notable exception in this regard, where more activity around monitoring taking positions on crises at the SABC and publicizing the SABC's reports to ICASA would assist not only in restoring credibility to ICASA, but also to the SABC.

6.7 Restoring credibility, trust and a sense of ownership requires the involvement and participation of ordinary citizens, civil society groups, NGO's and others. It is critical to the success of such efforts that all these people can have their voices heard and feel that their voices are being heard.

6.8 Precedence for building credibility: How it has been done by the SABC before:

6.9 It is worth considering the SABC's approach to developing its editorial policies as required by Section 6 of the Broadcasting Act as Amended in 2003. Instead of developing a set of policies and trying to push them through and adopt them, SABC went on an extensive public campaign to seek public input into the editorial policies.

6.10 After releasing and widely publicising a set of draft policies that outlined the areas that needed to be covered, SABC called for written submissions. In addition, SABC also hosted a series of public hearings in all nine provinces where interested citizens had the opportunity to make oral presentations and submissions on the policies. Further several media gave considerable space to analysis and critique of the policies.

6.11 While some elements, especially the issue of the SABC CEO as the Editor in Chief remain hotly contested, the result of the participation was a set of high quality editorial policies – and equally importantly – a sense of ownership, of public trust was built in the process. Regrettably the SABC has subsequently failed to build on the trust and ownership generated by this process by not further publicising the policies or making them widely available on an ongoing basis.

6.12 The development of the policies does however point to a simple and effective method of building trust and a sense of ownership – by allowing people the opportunity to have their say on issues that effect them and for them to feel that their voices were heard in the process.

6.13 One of the key elements of the SABC editorial process was that they took the time to consult, over six months for that phase alone. While time is precious and while we should seek to be as efficient and speedy as possible, it is vital that we take the time necessary to engage, research consult and discuss, as not only will this result in ensuring that all people will have an opportunity to have their voices heard but it will also be more likely to result in a better, more well considered end product. These lessons are true of the current issues relating to the Bill.

6.14 MMA supports the need for change in the broadcasting sector and core changes in relation to public broadcasting. We believe however, that the apparent hurry to pass such a significant piece of legislation means that not only has a great opportunity for different ideas been missed, but also that it is unlikely that all citizens will feel

they had an opportunity to make their voices heard. It is vital if the public broadcaster is to continue to play a key role in South Africa's democracy that women, people with disabilities, young people, children, people in rural areas and the poor are informed about the different issues at stake and how they are going to impact them.

6.15 Simply going through a Bill and submission phase (even if the current Bill is changed it is unlikely there would be many other opportunities for submission and discussion before it went to the NCOP) with limited time to engage and limited dissemination of the Bill will silence the very people the Bill on some level seeks to give voice to and hear.

6.16 MMA submits that it is in the best interests of public broadcasting, of the SABC, of the Department of Communications, the development of our democracy, and most importantly the citizens of South Africa that we take the time to fully engage with the issues the Bill raises.

6.17 We need to:

- conduct research;
- model the different options;
- debate and discuss results and share research;
- plan and integrate public broadcasting with the Broadband policy, and digital terrestrial television;
- And strengthen and review key institutions like ICASA

6.18 MMA submits that one of the most effective means of achieving the ends set out above would be through a full and comprehensive policy review process.

7. Recommendations

7.1 In the short term MMA submits the following recommendations:

- 7.1.1 Based on the immediate needs at the SABC, amend the law if necessary. For example ensuring that there is clarity as to appointments of executive management at the SABC by making these the exclusive prerogative of the board of the SABC;
- 7.1.2 Ensure the Board of the SABC is fully empowered to implement and address the issues raised in the Auditor General's report, and that the actions taken are well publicised;
- 7.1.3 Initiate a full policy review process;
- 7.1.4 As part of the policy review process, embark with equal urgency on the development of an SABC charter. Engage ordinary citizens in the development of a charter for the SABC. Through widespread consultation, establish what people really want from their public

broadcaster this will help ensure buy in, a level of ownership and will contribute positively to the other elements of the policy review.

8. Conclusion

8.1 MMA thanks the Department of Communications (DOC) for the opportunity to make this submission.

8.2 Please do not hesitate to contact me at the numbers below should there be any queries over our submission, or if we can be of assistance in developing any of the recommendations further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W Bird', written over a horizontal line. The signature is stylized and cursive.

William Bird

Director

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