

**WRITTEN REPRESENTATIONS BY THE CIVIL SOCIETY COALITION “SOS:
SUPPORTING PUBLIC BROADCASTING”, PREVIOUSLY “SAVE OUR SABC: RECLAIMING
OUR PUBLIC BROADCASTER” ON THE PUBLIC SERVICE BROADCASTING BILL [2009]**

1. INTRODUCTION

- 1.1. In Notice No. 1409 published in Government Gazette No. 32663 dated 28 October 2009 (“the Notice”), the Department of Communications (“DOC”) published a “Public Service Broadcasting Bill, the Charter of the Corporation and the Charter of Community Broadcasting Services” (collectively “the Proposed Bill”). Written comments were initially invited for submission by 7 December 2009. After a public appeal the date was then extended to 15 January 2010.
- 1.2. We, the Civil Society Coalition **SOS: Supporting Public Broadcasting** (“the Coalition”), thank the Ministry of Communications and the DOC for the opportunity to make these written representations. We would also welcome the opportunity to make oral representations.
- 1.3. The Coalition is a large grouping of organisations and individuals working together to address the crisis in public broadcasting in South Africa. It includes non-governmental and civil society organisations, trade unions, independent producers and academics. Please see Annexure A.

2. ORGANISATION OF OUR SUBMISSION

- 2.1. The submission is organised into a number of sections:
 - 2.1.1. First, we deal with the scope of our written representations,
 - 2.1.2. Second, we deal with the urgent need for a substantive policy review process. This is a theme we address throughout the submission and particularly again in Section 11.
 - 2.1.3. Third, we argue that the nature of the proposed Bill is unclear.
 - 2.1.4. Fourth, we look at Constitutionality concerns both in terms of procedural issues in the Bill and in terms of substantive issues.
 - 2.1.5. Fifth, we note some of the provisions in the Bill that are internally inconsistent and contradictory.
 - 2.1.6. Sixth, we highlight some issues pertaining to the Bill’s proposed SABC Charter.
 - 2.1.7. Seventh, we highlight some particular concerns we have as regards proposals around the organisation of the community media sector.
 - 2.1.8. Eighth, we make the case for a White Paper / substantive policy review process.
 - 2.1.9. Ninth, we include a number of annexures - annexure A includes a list of our members; annexure B includes a summary of the proposals from our submission on the Public Service Broadcasting Discussion Paper; Annexure C includes a legal opinion on the Proposed Bill by international freedom of expression expert, Mr. Toby Mendel; and annexure D includes substantive research done by researchers Ms. Libby Lloyd and Prof. Jane Duncan as part of a major international Afrimap research project focusing on public broadcasting in Africa.

3. SCOPE OF THE COALITIONS WRITTEN REPRESENTATIONS

- 3.1. At the outset the Coalition wishes to recognise and applaud the DOC and the Minister of Communications (“the Minister”) for trying to act swiftly in bringing about much-needed legislative reform. The Coalition welcomes the sense of urgency and energy behind the Proposed Bill. That said, the Coalition is also of the view that while there are a number of positive elements to the Proposed Bill which we support, there are unfortunately a number of problems with the Proposed Bill as currently drafted which, if not addressed,

will result in the Bill simply not being able to be passed by Parliament which will only cause further delays. Further, while the SOS has been calling for urgent action on legislative and policy reform for over a year now, this cannot mean negating a participative and transparent policy and legislative drafting process through giving the public insufficient time to comment.

- 3.2. The Coalition notes the extension of the deadline for comment from 7 December 2009 to 15 January 2010. We thank the Department for this reprieve. However, this extension has fallen over the Christmas period and has thus not made it much easier for us to consult with our members. The Coalition thus asked last year for a further extension till the end of February 2010. However, this further extension was denied.
- 3.3. In the absence of such an extension, and due to the tight time constraints, the Coalition has had no option but to focus its attention on what it considers to be the most fundamental legal and policy flaws of the Proposed Bill. These proposals are contained hereunder. The Coalition is keenly aware that the Minister has called for “constructive” comments and has decried detractors as “unpatriotic”. In pointing out the flaws with the Proposed Bill as it stands, the Coalition wishes to stress that it is trying to be as constructive as possible in its criticism and as supportive as possible of moves to put public broadcasting on a more sustainable footing. However, the Coalition respectfully submits that there are such a large number of significant constitutional, as well as other legal and policy problems with the Proposed Bill that it is unlikely to be able to be formally introduced in Parliament in its present form.
- 3.4. Further, the Coalition notes that a central proposal in the Bill for a specific ear-marked broadcasting tax has been rejected by National Treasury as running counter to present fiscal and financial policy. We believe that this will make it still more difficult for the Department to table the Bill in Parliament. In fact we seek clarity from the DOC as to how it wishes to proceed given that this central proponent of the Bill has now been rejected.

4. ABSENCE OF POLICY

- 4.1. In commenting on the Proposed Bill, the Coalition wishes to point out that the latter, should it be passed, would bring about significant changes to the entire broadcasting landscape and indeed would repeal the existing Broadcasting Act, 1999 (“the Broadcasting Act”).
- 4.2. Consequently, the Coalition submits that it is essential that a comprehensive policy review process be undertaken by the DOC prior to this Proposed Bill (or indeed any other similar Bill) is formally introduced in Parliament.
- 4.3. The Coalition reiterates that it is of the view that given:
 - 4.3.1. the myriad of deep-seated structural financial and governance problems facing the public service broadcaster, the South African Broadcasting Corporation (“the SABC”);
 - 4.3.2. the ongoing crises in the local television production sector largely occasioned by the financial and other crises at the SABC;
 - 4.3.3. the ongoing question of the sustainability of most of the country’s community broadcasting stations; and

4.3.4. the effects on broadcasting of paradigm-shattering technological changes brought about through convergence of media platforms

there is little option other than for the DOC to embark on a thorough, transparent and inclusive broadcasting policy review process. We believe that the present White Paper on Broadcasting (developed in the late 1990s) is outdated and simply cannot and indeed, does not, constitute current government policy on broadcasting. The existing White Paper must be replaced with a new White Paper setting out a clear, comprehensive and coherent statement on current government policy on broadcasting.

- 4.4. As a result, in our view, the Proposed Bill is premature and while the Coalition welcomes the DOC's obvious vigour in wanting to meet the myriad challenges in broadcasting, we caution, as mentioned above, that proceeding to Parliament on a Proposed Bill in advance of the careful development of appropriate policy is unlikely to result in legislation that does, indeed, meet the developmental and other needs of the broadcasting sector or of the country more broadly.

5. NATURE OF THE PROPOSED BILL UNLCEAR

- 5.1. A further general concern about the Proposed Bill is that it is not clear what exactly it is and what its full ambit is. The Notice describes the Proposed Bill as a "Bill". However a "Bill" must be introduced in Parliament. To the best of the Coalition's knowledge the Proposed Bill has not in fact been introduced in Parliament and therefore it ought, more correctly, to have been called a Draft Bill.
- 5.2. Further, it is customary for Draft Bills to be discussed in Cabinet before being published for public notice and comment in the Government Gazette and yet the Proposed Bill is silent on whether or not the National Executive, acting through the Cabinet, has indeed endorsed this Bill as reflecting national policy. Given the number of apparent significant breaks with existing broadcasting and national fiscal policy, the Coalition would have expected that Cabinet approval ought to have preceded the publication of the Proposed Bill. The Coalition respectfully requests the DOC to clarify exactly what the nature of the Proposed Bill is.
- 5.3. The Proposed Bill also clearly envisages significant changes to the entire broadcasting sector: public, commercial and community broadcasters as well as in respect of signal distribution, the role of the Regulator etc. However the Bill makes no proposals for necessary consequential amendments to be made to, *inter alia*, the Independent Broadcasting Authority of South Africa Act, 2000 ("the ICASA Act"), or the Media Development and Diversity Agency Act, 2002 ("the MDDA Act"). Without these necessary consequential amendments it is likely that there will be inconsistent and indeed clashing provisions in the various pieces of legislation that regulate broadcasting – clearly not a desirable outcome.
- 5.4. Finally the Proposed Bill is made up of the Bill itself and three attached Schedules, namely the legislative amendments schedule and The Charter of the Corporation ("the Proposed SABC Charter") and A Charter Community Broadcasting Services [sic] ("the Proposed Community Charter"). The Coalition is anxious to understand the nature of the two Charter schedules. In its view the proposed Charters form part of the Proposed Bill such that any amendments thereto must be effected by Parliament through a legislative amendment process. The Coalition respectfully requests clarity on this issue.

6. CONSTITUTIONALITY CONCERNS – PROCEDURAL

6.1. Another area of critical concern to the Coalition is that it appears from sections in, *inter alia*, Chapters 4 and 5 of, and the Schedule (what ought to be Schedule 1) to the Proposed Bill, that the Proposed Bill is in fact a “money Bill” as defined in section 77(1) of the Constitution of the Republic of South Africa, 2006 (“the Constitution”) that is, a Bill which *inter alia*: “(a) appropriates money or (b) imposes national taxes, levies, duties or surcharges”. If this is indeed the case then the Proposed Bill is, on its face, unconstitutional. The grounds of unconstitutionality include the following:

6.1.1. section 73(2) of the Constitution provides, *inter alia*, that “only the Cabinet Member responsible for national financial matters may introduce the following Bills in the Assembly: (a) a money Bill...” However, it appears that the Proposed Bill is intended to be introduced by the Minister of Communications (“the Minister”) and not the Minister of Finance. This does not accord with the requirements of the Constitution on the National Legislative Process set out in Chapter 4 of the Constitution; and

6.1.2. section 77(1) of the Constitution specifically provides that a money Bill “may not deal with any other matter except:

- (a) a subordinate matter incidental to the appropriation of money;
- (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges
- (c) the granting of exemption from national taxes, levies, duties or surcharges; or
- (d) the authorisation of direct charges against the National Revenue Fund.”

Clearly the Proposed Bill deals with a number of other non-tax related issues and this again does not accord with the requirements of the Constitution on the National Legislative Process set out in Chapter 4 of the Constitution.

6.2. The Coalition wishes to place on record its overwhelming support for the concept of public funding of public and community broadcasting that is, of funding being made available for the public broadcaster and for other forms of public service broadcasting (whether provided by the community or commercial broadcasting sectors) out of the National Revenue Fund. Such public funding is essential for the SABC and community media to be able to deliver on their public mandates. However, the Coalition believes, naturally, that this must be done in accordance with correct Constitutional procedures.

6.3. To further complicate issues the Coalition notes, as mentioned above, that the Minister of Finance has now in fact rejected the tax proposal contained within the Bill. In light of the above the Minister now needs to clarify the status of these funding proposals.

7. CONSTITUTIONAL CONCERNS – SUBSTANTIVE

The Coalition has a number of concerns about the substantive constitutionality of the Proposed Bill. Broadly these are grouped under three distinct headings – the SABC’s freedom of expression rights; community media’s freedom of association rights; and the Proposed Bill’s contraventions of the Constitution’s requirement to ensure independent regulation of broadcasting by a single Regulator. The issues are set out below.

7.1. The SABC’s Freedom of Expression Rights:

7.1.1. The Proposed Bill contains what appear to be a number of Schedules. One of these is headed “the Charter of the Corporation” (“the Proposed SABC Charter”). As such it forms part of the Proposed Bill and, should the Proposed Bill be passed into law, would constitute legislative provisions. One of the provisions

appearing in the Proposed SABC Charter is section 1.5 which is headed “The Independence of the Corporation”. This section provides, *inter alia*, that the SABC enjoys “freedom to express **[sic]** and journalistic, creative and programming independence as enshrined in the Constitution”. The SABC, like all other persons (both natural and juristic) does indeed enjoy the right to freedom of expression as enshrined in section 16(1) of the Constitution and indeed does not require section 1.5 of the Proposed SABC Charter in order to enjoy such right. However, notwithstanding the provisions of section 1.5 of the Proposed SABC Charter, the Proposed Bill contains a number of provisions which directly and in our view, unconstitutionally limits the SABC’s right to freedom of expression, by subjecting the SABC to National Executive control in a number of important respects, these include but are not limited to:

7.1.1.1. section 15(2)(a) of the Proposed Bill which specifies that the International Services to be provided by the SABC must be subject to the “Republic’s foreign policy”;

7.1.1.2. section 15(4) which specifies that the SABC may only establish any international broadcasting service channel with the approval of the Minister after consultation with the Minister of International Relations and Cooperation; and

7.1.1.3. section 3.11.1 (8) of the Proposed SABC Charter of the Corporation which appears to suggest (although the section is confusing and contradictory in this regard) that the Minister must approve various revised editorial policies of the SABC.

7.1.2. The Coalition respectfully submits that it would be entirely unconstitutional for any of the SABC’s programming or services to be subject to National Executive policy and for its editorial policies, which directly influence its broadcasting content, to be approved by anyone, save for the Constitutionally-mandated regulator of broadcasting services, namely ICASA.

7.2. Community Broadcasters’ Freedom of Association Rights

7.2.1. The Bill of Rights, in section 18, grants everyone the right to freedom of association. The rights to freedom of expression and freedom of association are linked. Indeed the Constitutional Court, in *SA National Defence Force Union v Minister of Defence* 1999 (6) BCLR 615 (CC) unanimously held, at paragraph [8] of the judgment that the right to freedom of expression is “one of a “web of mutually supporting rights” in the Constitution. It is closely related to... the right to freedom of association...”.

7.2.2. The Coalition notes the provisions of sections 20(2)(d) and 25(1) of the Proposed Bill and section 5.4(2) of A Charter Community Broadcasting Services **[sic]** which appears as a schedule to the Proposed Bill (“the Proposed Community Charter”), all of which sections peremptorily require, as a matter of law, that community broadcasters form partnerships with municipalities.

7.2.3. The Coalition respectfully submits the sections of the Proposed Bill and Proposed Community Charter referred to immediately above are almost certain to be found to be contrary to the provisions of section 18 of the Bill of Rights because they unjustifiably violate community broadcasters’ right to freedom of association. Further, the Coalition is of the view that the editorial independence proviso contained in section 1.5 of the Proposed Community Charter does not fix the inherent unconstitutionality of the above provisions.

- 7.2.4. The Coalition wishes to point out that many community broadcasters have, as a matter of course, forged close relationships with local government and other relevant institutions. The Coalition supports community structures such as local government and community broadcasters working together to improve the lives of local people, however it is critical that community broadcasters be free to forge such links and relationships voluntarily.
- 7.2.5. Further, the Coalition notes that the way the Bill is drafted it compels community broadcasters to forge relationships with municipalities. The SOS respectfully submits that the onus is placed on the wrong institutions as community media groups have no power to force local government structures to sign agreements with them. The proposals thus do not in any way remedy the current challenges faced by some community media structures in garnering support from municipalities.
- 7.2.6. The Coalition notes that it would unfortunately not help to re-phrase these clauses of the Bill to place the onus on municipalities to develop structured relationships with community media without extensive discussion through the relevant government forums (including the Department of Cooperative Governance and Traditional Affairs). Broadcasting Legislation cannot impose an additional requirement with possible budgetary implications on municipalities without extensive discussion about the impact of such and the appropriate means of addressing the challenges the Coalition presumes the Minister and Department of Communications are trying to address in this regard. Note that we have proposed some solutions in Section 11 of this submission.
- 7.3. Repeated Proposed Contravention's of the Constitution's Requirement of Independent Regulation of Broadcasting by a Single Regulator
- 7.3.1. The Constitution, at section 192, is very clear that all broadcasting is to be regulated in the public interest by an independent broadcasting authority established by national legislation. Such national legislation has been enacted, namely the ICASA Act. Consequently, all matters that constitute broadcasting regulatory matters fall within the jurisdiction of ICASA, the constitutionally mandated broadcasting regulator.
- 7.3.2. The Proposed Bill falls foul of the substantive provisions of section 192 by requiring bodies other than ICASA (including various Ministers and the Media Diversity and Development Agency ("the MDDA")) to play roles that unambiguously amount to "regulating" broadcasting within the meaning of section 192 of the Constitution. Sections of the Proposed Bill which fall foul of section 192 of the Constitution's mandate to ICASA include but are not limited to:
- 7.3.2.1. sections 5, 8, and 9 - that the proposed public service broadcasting fund ("PSBF") be managed and distributed by the MDDA;
- 7.3.2.2. section 6(1)(g) - that the Minister determine other public broadcasting services uses that the proposed PSBF may be used for;
- 7.3.2.3. section 7 - which requires the MDDA with the approval of the Minister in consultation with the Minister of Finance to develop criteria for the allocation of the funds in the proposed PSBF;

- 7.3.2.4. section 13(3) – which authorises the Minister to make regulations setting percentages for advertising and limiting advertising revenue on public broadcasting services;
 - 7.3.2.5. section 14(3) – which, although poorly drafted, empowers the Minister to determine amounts that are to be paid over to the Government by the SABC as opposed to being used to fund public broadcasting services;
 - 7.3.2.6. section 36(1), (2) and (3) – which provide that the Minister is ultimately responsible for the effective monitoring and implementation of the Proposed Bill and authorises the Minister to establish an advisory body to assist;
 - 7.3.2.7. sections 37 and 47(2) and (3) – which authorise the Minister to make regulations regarding contributions, uses and exemptions in relation to the PSBF and regulations on public broadcasting;
 - 7.3.2.8. section 38 – which empowers the Minister to direct any of the entities specified in the Proposed Bill to take any action “pursuance [sic] to Public Service Broadcasting if the entity is unable to perform its functions” and to recommend that penalties and fines be imposed;
 - 7.3.2.9. section 39 – which empowers the Minister to instruct the Board of the SABC to take action specified by the Minister in certain circumstances.
- 7.3.3. The Coalition wishes to acknowledge that the MDDA has played an important role in regard to encouraging the broadcasting sector, particularly the community broadcasting sector. However, to date it has allocated funds which are provided by the broadcasting sector on a voluntary basis. That is an entirely different mandate to the one envisaged in the Proposed Bill. If the PSBF is indeed to be established along the lines proposed, the MDDA would unconstitutionally impinge upon ICASA’s constitutional terrain of being the broadcasting regulator given: its proposed role in all three categories of broadcasting services (community, commercial and public), its massive financial muscle, and the scope of its powers.

8. PROVISIONS WHICH ARE INTERNALLY INCONSISTENT AND CONTRADICTORY

8.1. The Coalition believes that one of the most problematic aspects of the Proposed Bill is that it does not appear to have been edited for consistency. There are numerous places where the provisions of the Proposed Bill and/or of the Proposed SABC Charter and/or of the Proposed Community Charter are simply contradictory or otherwise inconsistent. The Coalition notes that many of the inconsistencies relate to critical issues such as appointments process, regulatory oversight matters, *quora* etc. These include but are not limited to:

- 8.1.1. Removal of the Whole Board and Appointment of the Interim SABC Board:
The Proposed Bill makes no provision for the removal of the whole of the SABC Board at any one time or for the appointment of an Interim Board. However, the Proposed SABC Charter at section 3.6(3)(b) allows for such a wholesale removal and, at section 3.6(5), the appointment of an Interim Board.
- 8.1.2. Quora for SABC Board Operations
The Proposed Bill provides at section 18(6) that the quorum for the SABC Board is nine. However, the Proposed SABC Charter at section 3.11.1(4) sets the

quorum at seven and at a mis-numbered section which is styled 3.5(5) but which appears after section 3.6(8), as six for the Interim Board. This last quorum is particularly odd given that the Proposed SABC Charter provides at correctly-numbered section 3.6(5) that the Interim Board is made up of only five members. The Coalition suggests that clarity be sought on the issue of the appropriate Quorum for the Board.

8.1.3. Appointment Provisions regarding the SABC Board

The Proposed Bill at section 17 and 18 makes it clear that the SABC Board is to consist of twelve non-executive members appointed by the President on the advice of Parliament according to a transparent process that allows for public nominations. However, the Proposed SABC Charter at section 3.2(1)(b) appears to suggest that only ten of the twelve non-executive members are to be “appointed by the President on the advice of the National Assembly in accordance with the process outlined in section 19 [*sic*, this ought to be a reference to section 18] of the Act.” The Proposed SABC Charter is silent on who appoints, and the process of appointing, the Chairperson and Deputy Chairperson of the Board, that is, the other two non-executive members of the Board. The Coalition believes it imperative that every Board member be appointed by the President on the advice of Parliament. Further, the Coalition has made detailed suggestions before on how to improve public participation in such an appointment process. Please see annexure B (SOS Submission PSB Discussion Paper)

8.1.4. Appointment provisions regarding SABC Executive Management

The Proposed Bill is silent on who appoints the executive management of the SABC. This is a significant omission that only exacerbates the current unworkable *lacuna* in this regard in the Broadcasting Act. The fact of this legal *lacuna* has embroiled the previous and Late-Minister in embarrassing court battles and the Coalition has repeatedly called for this matter to be resolved. The Proposed SABC Charter is also contradictory in this regard in at least three places. In the definitions section to the Proposed SABC Charter, an executive member is defined as “refers to the GCEO, CFO, COO or their equivalents appointed by the Board”. This is backed up by section 3.12(1)(a) which states that the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer and their equivalents are “appointed by the Board”. However, in section 3.11.1(2) the Proposed SABC Charter states that the Board is to appoint the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer of the Corporation and their equivalents “in consultation with the Minister”. The legal effect of this formulation is to give the Minister veto powers over the Board’s appointment of the SABC’s executive management. The Coalition respectfully submits that the Board must have unfettered executive appointment powers if the SABC is genuinely to be a public broadcaster and if it is to oversee and be accountable for the functioning of the executive management. Please see annexure B (SOS Submission PSB Discussion Paper).

8.1.5. Provisions Regarding Community Broadcasting Governing Councils

The provisions of section 22 of the Proposed Bill envisage that the affairs of a community station “shall be controlled by a Governing Council Governing Council [*sic*] comprising a minimum of 5, but not exceeding 7 members...”. However, section 3.3(1) of the Proposed Community Charter contradicts this stating that the Governing Council of a community broadcasting station “consists of not more than five non-executive members”. Further the provisions of section 3.4(1) of the Proposed Community Charter which are headed “Chairperson of the Governing

Council”, in fact deal entirely with responsibilities of the Chairperson of the SABC Board.

8.2. The Coalition notes that there are numerous other inconsistencies in the Proposed Bill and in its various schedules. However the five identified above are particularly critical and unless these contradictions are removed in the next iteration of the Bill, Parliament would be unlikely to pass it. Again the Coalition respectfully requests that the DOC refers to the SOS submission on the PSB Discussion Paper (Annexure B). We have dealt with a number of these issues in some depth.

9. THE COALITION’S CONCERNS RE: THE NATURE OF THE PROPOSED SABC CHARTER

9.1. SABC’s Public Mandate Unclear:

9.1.1. There can be little doubt that one of the critical policy decisions that must be taken by Government and enacted into law by Parliament is what the public mandate of the SABC ought to be. In previous submissions, particularly with regard to the Discussion Paper, the Coalition has pointed out that it is impossible to identify from the existing provisions of the Broadcasting Act precisely what the public mandate of the SABC in fact is. Unfortunately, the Proposed Bill does very little to clarify this and provisions that ought to be part of the Charter i.e. that deal with public mandate issues are scattered in at least 10 different sections throughout the Proposed Bill in both the body of the Proposed Bill and in the proposed SABC Charter. The provisions are in many places repetitious or contradictory. They can be found *inter alia* in:

9.1.1.1. section 1 of the Proposed Bill – Objects;

9.1.1.2. section 2 of the Proposed Bill – the South African Broadcasting System;

9.1.1.3. section 10 of the Proposed Bill – Public Broadcasting Services;

9.1.1.4. section 12 of the Proposed Bill – Public Service Division;

9.1.1.5. section 14 of the Proposed Bill – Commercial Service Division;

9.1.1.6. section 15 of the Proposed Bill – Establishment of International Broadcasting Services;

9.1.1.7. un-numbered section headed “Guiding Principles” at the beginning of the Proposed SABC Charter;

9.1.1.8. section 1.3 of the Proposed SABC Charter – the Corporation’s public nature and its objects;

9.1.1.9. section 1.4 of the Proposed SABC Charter – How the Corporation promotes its public mandate; and

9.1.1.10. section 1.5 of the Proposed SABC Charter – the Independence of the Corporation.

9.1.2. The Coalition has repeatedly requested both Parliament and the DOC to ensure that there is a single coherent statement of the SABC’s public mandate. The Coalition has suggested the wording for such a public mandate on previous

occasions. It is contained in Annexure B hereunder. We believe however that our principles as regards the Charter (or any other principles put forward) should be extensively publically debated. We believe that this is one of the critical ways of ensuring public ownership of the SABC.

9.2. Confusion over what provisions ought to be in the Proposed Bill and what ought to be in the Proposed SABC Charter

- 9.2.1. As discussed above in the Coalition's view, the Proposed SABC Charter ought to be solely a statement of the SABC's public mandate. This would greatly assist in ensuring accountability and effective monitoring by both ICASA and Parliament. In our view therefore the Proposed SABC Charter ought to be made up of a synthesis of its public mandate provisions. However, the Charter in the Proposed Bill contains a number of clauses that ordinarily would not be found in a Charter.
- 9.2.2. Provisions regarding the appointment of Board members, senior management, audience advisory councils and the like ought properly to be in the Proposed Bill itself and not in the Charter. Unfortunately in many instances such provisions are found in both the Proposed Bill and the Proposed SABC Charter or else only in the Proposed SABC Charter. In this regard:
- 9.2.2.1. SABC Board appointments are provided for in sections 17 and 18 of the Proposed Bill but also, repetitively, in sections 2 and 3 of the Proposed SABC Charter;
- 9.2.2.2. any performance management system for the Board and senior management system ought to be provided for in the Proposed Bill. However, it is dealt with in terms of section 3.10 of the Proposed SABC Charter;
- 9.2.2.3. the issue of public accountability ought to be provided for in the Proposed Bill. However, it is dealt with in terms of section 4 of the Proposed SABC Charter;
- 9.2.2.4. the role of Management of the SABC ought to be provided for in the Proposed Bill. However, there are no provisions regarding the role of Management in the Bill, this is entirely dealt with in the proposed SABC Charter in sections 2, 3, and 5.
- 9.2.3. General provisions regulating the operations of the SABC such as reporting and accounting requirements, licensing issues, compliance matters, financial year end, general powers and legal nature of the SABC as well as transitional matters ought to be contained in the Proposed Bill. However, these matters are provided for *inter alia*, in section 11 of the Proposed Bill as well as in sections 1, 2, and 5 to 11 of the Proposed SABC Charter.

10. THE COALITION'S CONCERNS RE: THE RECONCEPTUALISATION OF THE ROLE OF AND ORGANISATION OF THE COMMUNITY MEDIA SECTOR

- 10.1. Historically, in line with international best practice, South Africa has adopted a light touch approach to regulatory issues in the community media sector. (See international legal opinion annexure C.) However, it appears that the Bill seeks to fundamentally re-organise the sector and adopt a much stronger regulatory approach. The Coalition is concerned that this will not adequately deal with the problems that presently exist in the sector - which are largely capacity problems both at station level and with the Regulator - but may indeed create a new set of problems. But further to this

the Proposed Bill is problematic for a number of other reasons. These include but are not limited to the following:

- 10.1.1. The Bill seeks to align the sector with the development goals of government. And while the Coalition strongly supports the community media sector's active role in development, we do not feel that it is appropriate that community media is directly aligned with the developmental goals of the government of the day. In fact community media needs to maintain a critical yet constructive distance to be able to comprehensively address development issues on behalf of the community.
- 10.1.2. Although the proposed Bill recognises that there are two different types of community broadcasters, namely geographic and community-of-interest many of the substantive provisions in the Bill, in fact, take cognisance of only one type, namely geographic community broadcasters. But the distinction between these two types of community broadcasters is an important one to maintain in order to allow sectors of the public to have their specific common interests catered for by the community broadcasting sector.
- 10.1.3. Further, the Coalition notes the provisions of section 22 and 23 of the proposed Bill and numerous provisions of the proposed Community Charter which appear to require a "one size fits all" governing structure for all community broadcasters, irrespective of whether or not the broadcaster is serving the needs of a geographic community or community of interest. Further, the proposed governing structures do not comply with legislation governing a range of non-for-profit legal entities, such as companies-not-for-gain or Trusts. These pieces of legislation contain specific provisions governing the establishment of such entities, including the governance thereof, which are at odds with the Governing Council provisions of the Proposed Bill.
- 10.1.4. Also, the Coalition is concerned at the provisions of section 3.2(2) of the Proposed Community Charter which provides that officials of local municipalities may be co-opted to the Governing Council as ex-officio members. The Coalition provides that these provisions are inappropriate as they undermine the necessary separation between party political officials and community broadcasters. The provisions raise inherent and intractable conflicts of interests between the needs of the particular community broadcasting station and party discipline within local municipalities.
- 10.1.5. Further, the Coalition respectfully submits that the funding provisions of section 24(1) of the proposed Bill do not comport with the provisions of the Electronic Communications Act (ECA), as they make no reference to the Universal Service and Access Fund ("USAF") which also allows for the funding of broadcasting services, including community broadcasting services "for the purpose of financing the construction or extension of electronic communications networks in underserved areas as prescribed" and the MDDA which specifically allows for the funding of community media and which is not amended in any way by the Proposed Bill.
- 10.1.6. Also, in terms of finances, the Coalition respectfully submits that the provisions of the Public Finance Management Act, 2006 ("the PFMA") cannot simply be legislated to apply to community broadcasters as is purportedly done in terms of section 24(2)(a) of the Proposed Community Charter) as the PFMA on its own terms does not apply to such entities and section 3(3) of the PFMA provides that its provisions prevail in the event of any inconsistency between it and any other legislation.

11. THE CASE FOR A SUBSTANTIVE POLICY REVIEW PROCESS

- 11.1. We have argued above that we have a number of fundamental problems with the Proposed Bill. We have argued that we have Constitutionality concerns both in terms of procedural issues and in terms of substantive issues. We have noted that many of the provisions of the Bill are internally inconsistent and contradictory. We have highlighted some of the problems of the Bill as regards its proposed SABC Charter. Finally, we have highlighted some of our particular concerns as regards the Bill's proposals for the re-organisation of the community media sector.
- 11.2. Given these problems, and given the fact that the Proposed Bill seeks to radically alter the broadcasting landscape, we believe the Department has no alternative but to step back. A policy review process needs to be initiated first. The Coalition has consistently argued that legislation can only be drafted once there is clarity at the policy level.
- 11.3. There are number of strong reasons for initiating a policy review process these include the following:
- 11.3.1. **First**, the Broadcasting White Paper, 1998 was drafted more than a decade ago. A number of its proposals have proved unworkable e.g. its splitting of the SABC into public and public commercial divisions with the public commercial divisions supposedly cross-subsidising the public divisions. Also, a number of significant technological changes have taken place since its drafting. Further new legislation (e.g. the Electronic Communications Act, 2005), new policies (e.g. the broadband policy) and new regulations (e.g. the DTT regulations) have been tabled. All these impact on public broadcasting - but often seem to have been developed separately. There needs to be a comprehensive policy, legislative and regulatory review process to ensure clarity and consistency of policy across all broadcasting sectors – public, commercial and community.
- 11.3.2. **Second**, at the macro-level we need to acknowledge that broadcasting impacts on society and is impacted on by society. The SOS Coalition has called at various points for a powerful, democratic, development-orientated public broadcasting system committed to a genuine participatory democracy - as outlined in documents such as the Reconstruction and Development Programme – but these issues need to be debated and clarified. Are we in agreement with this conception of society – and of broadcasting?
- 11.3.3. Linked to this, the Proposed Bill talks about aligning the goals of broadcasting to the “developmental state” but we need to debate the meaning of “developmental state”. Theory and practice in development studies broadly identifies two models of a developmental state and broadly two distinctive roles for broadcasting. The first model existed in practice in the former Soviet Union and former socialist countries in Eastern Europe, and in one party states and military dictatorships in Africa, Asia and South America. It also existed in the so-called “Asian Tigers”. To some extent it exists in China today. In this model a strong state (and single or dominant party) drives a development agenda. In terms of this model communication especially broadcasting is seen as a tool for driving development. In this model civil and political rights are traded off to ensure the advancement of socio-economic rights. Such trade-offs often include suppression of freedom of expression and freedom of the media.
- 11.3.4. The alternative model is one that has not actually been fully realised in practice anywhere in the world. It endorses participatory models of development in which popular forces rooted among progressive grassroots organisations and representative organisations including political formations/ parties are part of policy making processes. In this development paradigm the media in particular

autonomous public and community or alternative media is an agent for change endorsing and critiquing developments in society. It calls for the unhindered circulation of a diversity of views in the public domain. This model of the media to some extent has been typical of the social democracies of Scandinavia and to a lesser extent of the liberal representative democracies of Europe.

- 11.3.5. The South African Constitution entrenches the importance of civil and political rights as well as social, economic and cultural rights including strong protections for freedom of expression and the media. We believe that any Bill or policy framework therefore cannot seek to nail broadcasting to any set of rights to the exclusion of other rights i.e. broadcasting in South Africa should not promote democracy to the exclusion of development. It should promote both because they are interrelated.
- 11.3.6. It is the Coalition's view that it is important that there be a substantive discussion - through a substantive policy review process - about the implications of these various development models for broadcasting policy and regulation and the organisation of broadcasting services as a whole. We need a full and proper debate on the role of broadcasting in creating the society that we want and the society we believe is envisioned in the Constitution.
- 11.3.7. A **third** important issue that requires substantive debate is our vision for public service broadcasting. The Coalition has discussed, in various submissions including our submission on the PSB Discussion Paper the critical importance of creating a public broadcaster that is independent of major vested interests yet accountable to the public. We have also stressed the importance of content and programming that is not only pluralistic but is diverse in relation to *purpose* (information, education and entertainment), *issues* (politics, development, economics, health, education, gender, sport, music etc.), *genres* (drama, magazine, comedies, soap operas, documentaries etc.) and political perspectives. But these issues obviously need to be debated further.
- 11.3.8. Also in terms of content, a policy review process needs to raise the critical issue of how to harness new technologies to ensure greater citizen participation through bottom-up communication flows and greater interactivity with audiences.
- 11.3.9. Finally, the issue of local content production is critical here. Here we need to raise issues around the appropriate balance in production of locally produced versus foreign content and issues of building a vibrant local content industry.
- 11.3.10. **Fourth**, a policy review process would also need to address the overall architecture of the three-tier broadcasting system – where tiers are meant to be distinct but complimentary. Current policy allows for three tiers of broadcasting – public, commercial and community. This framework should be maintained but also needs to be developed since due to a number of issues including an over-reliance on advertising in all tiers, all tiers have started to produce similar commercially-orientated content. How do we mitigate against this?
- 11.3.11. Also, in terms of the overall architecture of the system, media ownership and control issues need to be addressed. So for instance a policy debate needs to be opened up in terms of the issue of whether we should have a second national commercial broadcaster to introduce competition to the public broadcaster, e.TV, multi-choice and the new subscription services. Should we have other public broadcasters? Also, the dominance of DSTV and its implications needs to be debated. Again the proper place for addressing these issues is a substantive policy review process.
- 11.3.12. A **fifth** critical issue to debate is the role of the Minister. As argued above alarm bells have been ringing due to the inappropriate role and powers that have been given to the Minister in particular in relation to operational matters and matters of content. The fundamental principles of public broadcasting as opposed to state broadcasting and/or government controlled national broadcasting are institutional autonomy, editorial and programming independence and independent regulation. The Proposed Bill simply in our view crosses the line and raises the spectre of state and government control. Yet state and government control of broadcasting have

never delivered on quality development-rich content as experiences on the continent, in the pre-democratic East and Central Europe, the Soviet Union and present day China and North Korea have shown.

- 11.3.13. Our Constitution protects freedom of expression and freedom of the media. We struggled hard to win these. We thus submit that there is no good cause to depart from the Constitutional guarantee of freedom of expression and freedom of the media. Nor is there any good cause to depart from the principles of a public broadcaster which operates in the public interest and is regulated by an independent regulator. As we have debated in our submissions on the Public Service Broadcasting Discussion Paper (annexure B) the issue that needs to be addressed rather is the strengthening of ICASA's and Parliament's oversight capabilities and their ability to defend the public broadcaster's institutional autonomy and editorial and programming independence. More specifically we need to deal with the Regulator's ability to ensure that the public broadcaster as well as commercial and community broadcasters adhere to their license conditions and actually produce innovative and diverse programming that addresses the communication, information, cultural and entertainment needs and wants of all South Africans.
- 11.3.14. Ministerial and state oversight are not appropriate and history shows that despite good intentions the temptation to direct broadcasters towards limited political aims is not easy to resist. But the consequences of political control are not only detrimental to society in general but also often backfire on those who succumb to this temptation. So for instance the growing partisanship of the SABC during the previous administration was a consequence of creeping political subordination to the government and weak oversight structures. The result among other things, was the blacklisting of commentators critical of government, the pulling of documentaries deemed to show the then President in bad light and the failure to give a voice to a section of the ANC that supported a candidate (Mr Zuma) who was considered an alternative. All these actions clearly did not benefit former President Mr. Mbeki in the long term. However, what they did do is undermine public information needs. Also, the credibility and good-standing of the SABC was significantly dented.
- 11.3.15. *Sixth*, as discussed above the Proposed Bill has a rather narrow and unimaginative vision of community broadcasting. It seeks to impose a community charter on community media and one-size-fits-all set of governance structures and programming objectives. It fails to recognise the need for community media to develop their own structures and ways of operating and that communities each have distinctive programming and education needs which might change. This approach seems to contrary to general government principles for sustainable development.
- 11.3.16. Further, it sadly does not deal effectively with the critical issue of public funding for the community media sector. The Public Service Broadcasting Fund has a number of obligations one of which is community media. The potential for community media to be marginalised in this arrangement is very high.
- 11.3.17. The Coalition thus strongly supports the need for debate on more sustainable public funding options for community media taking into account critical issues such as transmission costs.
- 11.3.18. Further, the Bill calls for compulsory partnerships with municipalities with an understanding that municipalities would potentially provide office space etc. As discussed above however the Bill wrongly places the onus on community media to forge these relationships and it is unclear to the Coalition whether there has been the requisite discussion about these requirements with, for example, the Ministry of Cooperative Governance and Traditional Leadership.
- 11.3.19. The Coalition believes that a new vision for community broadcasting needs to be debated. The framework for such discussion must be a vision of community broadcasting that is as an alternative to mainstream media (which are

generally centrally operated and located in urban metropolises) and what policy and legislative amendments are necessary to enable communities to define and establish broadcasting services that speak to local peculiarities, needs and wants.

- 11.3.20. Linked to the above, we need a policy debate about how community broadcasting could harness the potential of interactive communication tools including emerging digital technologies and the potential of mobiles phones (which have a high penetration in underdeveloped and rural communities) for this purpose. Such an approach would ensure that just like the emergence of social media (facebook, twitter, blogging) for middle class audiences, community media could be equally innovative and play a potentially developmental role for poorer working class audiences.
- 11.3.21. **Seventh**, a policy review process would need to deal with the various options available for funding. The Proposed Bill offered only one solution - an up to one percent tax on personal income - but as discussed this was summarily dismissed by National Treasury in fact placing the whole Proposed Bill in jeopardy. What we need going forward is research and careful economic modelling. A number of options then need to be presented for discussion and debate – and one of these options could very well be the option of a tax. Armed with research we could then powerfully argue for its efficacy.
- 11.3.22. In terms of the Coalition's own research a number of options have been thrown up including the need for a mixed funding model for the SABC which includes a dedicated grant from the public fiscus (not an earmarked tax) with no strings attached which is assured and long term (i.e. not yearly grants) and covers core needs like broadcasting infrastructure, assessed core personnel and running costs, staff development, and development of local content. Further, advertising revenue should be maintained as long as it does not determine programming and is excluded from news, current affairs and children's programmes. In programmes where advertising is allowed including sport there should be limitations on the amount. In this model a well managed SABC could in fact leverage more advertising than public funding based on the fact that given its large number of platforms which reach all LSM groups and in all languages across the whole of South Africa it is a very attractive medium to advertisers. This model would protect the SABC from the vagaries of the market.
- 11.3.23. A further component of this mixed model could be the license fee. Of course better collection methods would need to be devised and the regressive nature of this tax would need to be dealt with. So for instance the new Set Top Boxes could be used to monitor compliance – although it would be essential that this technology was not used to cut people off. Further, to ensure the license fee is tax exempt – the SABC could create a wholly owned not-for-profit entity that could collect license fees for public service broadcasting. Further, to deal with regressive tax issues everyone on a social grant could be exempted and government could potentially make up the shortfall. The advantage of this model is that the SABC could then have access to three sources of funding and could potentially get more funding by using its other funding streams as a means of leverage. These are just some of the issues that need to be debated in depth.
- 11.3.24. Significant debate needs to be held as regards the funding of community broadcasting. The issue of local government support is important – although compulsory partnerships should not be legislated. Specific relationships need to be negotiated with Sentech to ensure reduced transmission costs. Further, discussions should be held with GCIS to ensure that as a possible option higher percentages of government adspend is channelled to community media. Community media should forge relationships and find ways to involve a range of community organisations and structures, including civic organisations, youth organisations and municipalities in order to strengthen their sustainability, programming and further to facilitate accountability and participation.

- 11.3.25. The issue of whether commercial broadcasters should be subsidised if they produce public content needs to be debated.
- 11.3.26. Funding discussions also need to address the critically important issue of local content or locally produced programmes and the development of the creative and cultural industries which are at the heart of identity formation, democracy and development, language, job creation, skills development and countering negative globalization in the new South Africa. We need a deep introspective look into the challenges of developing local content that is uniquely South African and can compete with imported foreign content.
- 11.3.27. The issue of funding the cultural and creative industries is something we can not avoid - and our discussions need to go beyond the Department of Communications. These issues fall within the domain of the National Planning Commission, the Department of Finance, Trade and Industry, Arts and Culture, Economic Planning, Basic Education, Higher Education and Training and even Science and Technology. A more holistic approach would address the whole value chain from the production skills to the education needed for television producers, cameraman, broadcasting managers, performing arts practitioners, script writers who are multilingual, language experts including translators and interpreters, broadcast engineers and technicians.
- 11.3.28. **Eighth**, and finally, the policy review needs to squarely address the issues of good corporate governance and oversight of the SABC and of community media. Essential to this issue is accountability and institutional autonomy.
- 11.3.29. As we complete this submission a new “row” is playing out over the appointment of the new SABC CEO. This is a symptom of unresolved governance and accountability issues at the SABC. It points to the failure to align the institutional status of the corporation as a public broadcaster with appropriate governance and accountability mechanisms. The Coalition again submits as we did in our submission on the PBS Discussion Paper (Annexure B) that the current governance arrangements and the Shareholder compact which inserts an operational role for the Minister are a source and contributor to the institutional instability of the SABC and potentially threaten its long term ability to deliver on its mandate. In turn these governance problems impact negatively and severely on management causing further instability and periods of dysfunctionality at the operational level. There is a need to go back to the basics of governance and appropriateness of governance structures. This needs to be debated in some depth.
- 11.3.30. The Coalition thus submits that a public broadcaster is not a private commercial organization. It does not need a shareholder including a nominal one. Citizens are not shareholders in a government. The analogy is not only inappropriate it devalues citizenship and democracy. A public institution in particular a public broadcaster is not a government department or sub entity of a government entity in the same way that a transport, water or electricity utility is or can be. While information is vital like the delivery of water it cannot be delivered by the government as a public service like water because it relates to freedom of expression issues i.e. it relates to how government delivers water so government cannot control it because then not only might we not get water (think of lack of service delivery) but we might not even be able to say we are not getting the water that we need! It has often been pointed out that in countries where there is freedom of expression and media freedom people do not die of famine. Therefore those in charge of the entity that delivers information (in the broad sense of that word) and those who manage it must not be appointed nor controlled by the government. This is the reason why an SABC board is appointed in a process that involves a public process. A policy debate would focus on these issues and recommend appropriate governance models which reinforce institutional autonomy and editorial and programming independence of the SABC. Of course similar discussions need to be held as regards the community media.

12. CONCLUSION

The Coalition thanks the DOC for the opportunity to make these written representations and looks forward to discussing these issues further.

In conclusion the Coalition would like to make one final point. We believe that it might be possible to make a few small amendments to the Broadcasting Act, 1999 if the DOC sees these issues as important. However, these amendments would need to be confined to present policy. These amendments could be made while a substantive policy review process unfolds.

We note for instance the submission made by the SABC as regards the Public Service Broadcasting Discussion Paper. The SABC makes a number of proposals as regards the strengthening of the license fee in terms of more effective collection of fees and government subsidies.¹

We also note for instance our own suggestions re: amendments to the Broadcasting Act, 1999. These included a number of suggestions as regards appointments to the SABC Board including the appointment of executive management.²

Please do not hesitate to contact Ms Kate Skinner, the Coalition's campaign coordinator, (contact details provided below) should the Department have any queries or require any further information with regard to the Coalition's submission.

Cell: 082.926.6404.

Email: kate.skinner@mweb.co.za

¹ "Public Service Broadcasting Discussion Paper, SABC Submission, 4 September 2009

² "Written representations by the civil society coalition, 'Save our SABC: Reclaiming our Public Broadcaster' on the Draft Broadcasting Act Amendment Bill"

Annexure A

Members of the Civil Society Coalition SOS: Supporting Public Broadcasting

- AIDC (Alternative Information Development Centre)
- BEMAWU (The Broadcast, Electronic Media and Allied Workers Union)
- COSATU (Congress of South African Trade Unions)
- Communication Workers Union (CWU)
- Creative Workers Union of South Africa (CWUSA)
- Documentary Filmmakers Association
- Ecumenical Services for Social and Economic Transformation (ESSET)
- Federation of South African Unions (FEDUSA)
- IDASA, an African Democracy Institute
- The FXI (Freedom of Expression Institute)
- The FXN (Freedom of Expression Network)
- The IPO (Independent Producers Organisation)
- The IAJ (Institute for the Advancement of Journalism)
- The MMA (Media Monitoring Africa)
- The South African Screen Federation (SASFED)
- MISA South Africa (The South African National Chapter of the Media Institute of Southern Africa)
- The NCRF (National Community Radio Forum)
- The National Consumer Forum
- SANGONET (The South African Non-Governmental Organisation Network)
- SAHA (The South African History Archives)
- The TAC (Treatment Action Campaign)
- Workers World Media Productions
- Writers Guild South Africa
- Ms. Ingrid Bruynse – Bright Media
- Mr. Raymond Louw – South African National Editors Forum (in his private capacity)
- Prof. Anton Harber – Caxton Professor of Journalism, University of the Witwatersrand (in his private capacity)
- Prof. Devan Pillay – Head of Sociology Department, University of the Witwatersrand
- Prof. Tawana Kupe – Associate Professor of Media Studies and Dean of the Faculty of Humanities, University of the Witwatersrand (in his private capacity)
- Ms. Justine Limpitlaw – broadcasting lawyer (in her private capacity)
- Ms. Jeanette Minnie of Zambezi FoX – international Freedom of Expression and Media Consultant

Annexure B

Summary of SOS's submission on the Public Service Broadcasting Discussion Paper

Annexure C

Toby Mendel's international opinion

Annexure D

Afrimap reserach