The FW de Klerk Foundation

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

Dr Mashilo Boloka
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Department of Communications
Private Bag x860
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0001

Per email: miyelani@doc.gov.za

15 January 2010

Dear Sir

Re: Comments on the Public Service Broadcasting Bill 2009, Charter of the Corporation and Charter of Community Broadcasting Services.

1. The Centre for Constitutional Rights (the Centre) is a non-profit organization dedicated to upholding the Constitution[1]. To this end, the Centre seeks to promote the values, rights and principles in the Constitution; monitor developments, including draft legislation that might affect the Constitution; inform people and organizations of their constitutional rights; and, assist people and organizations claim their rights.

2. The Centre accordingly welcomes the opportunity to make submissions on the abovementioned draft legislation and charters as the Centre is concerned about the constitutionality of certain provisions. Firstly, the Centre is concerned about the constitutional competency of the Department to introduce a Bill that levies taxes, and as such constitutes a "money Bill". Section 73(2) of the Constitution expressly provides that only the Minister of Finance may introduce a money Bill in the National Assembly. Section 77(1)(*b*) in turn defines a money Bill as being one that, *inter alia,* "imposes national taxes, levies, duties or surcharges." Clause 4 (1) of the Bill creates a Public Service Broadcasting Fund which will be funded by, *inter alia,* personal income tax collected in terms income and annual turnover per annum for [sic] persons identified as determined by the Minister in consultation with the Minister

[1] Act 108 of 1996

Nichola de Havilland (Director)
Panel of Advisors:
Anthea Jeffery, Paul Hoffman, Johan Kruger, Penuell Maduna, Johann Marais, Francois Venter, David Welsh, Marinus Wiechers

of Finance...".[2] The Bill thus clearly falls within the definition of a 'money Bill'. As such, the Constitution mandates that the Minister of Finance should introduce the Bill. In addition section 77(2) of the Bill prescribes that:

> "A money bill may not deal with any other matter except
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> (a) a subordinate matter incidental to the appropriation of money;
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> (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
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> (c) the granting of exemption from national taxes, levies, duties or surcharges; or
>
> (d) the authorization of direct charges against the National Revenue Fund."

Should the imposition of taxes thus remain in the Bill, the remainder of the Bill, including the Charters, will be null and void.

3. Secondly, the Centre is concerned with the violations of the constitutionally guaranteed right to freedom of expression. The Centre believes that these violations are a consequence of the drafters of the Bill having misconstrued the function of a public broadcaster and the role that the Broadcaster plays in the dissemination of knowledge.

4. Foundational to our Constitutional democracy is an accountable, responsive and open multi-partied democratic government, premised on universal adult suffrage, a national common voters Roll and regular elections. In stating the purpose of the Bill, it is recorded that it is, *inter alia*, to "align the broadcasting system to the developmental goals of the Republic …". Although "broadcasting system" is not defined in the Act, it clearly alludes to a system which facilitates multidirectional electronic communications intended for the public.

5. Freedom of expression is central to democracy since it is the free flow of information and ideas which enables citizens to participate in public life. It is also the free flow of information which ensures that the government of the day is kept accountable. This pivotal function has long been recognized by the present Government. In its "Ready to Govern Document" drawn in 1992 in preparation for the transmission to democracy, the ANC stated:

> "At the core of democracy lies the recognition of the right of all citizens to take part in society's decision-making process. This requires that individuals are armed with the necessary information and have access to the contesting options they require to make informed choices."

6. The Constitution recognizes that the freedom of the print, broadcast and electronic media constitutes a pivotal part of freedom of expression. To this end freedom of expression is

[2] Clause 4(3)

expressly defined to include "freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research."

7. As the primary agents of the dissemination of information and ideas, the mass media have a critical role to play in fostering that freedom. As forcibly stated by our Constitutional Court:

> "In a democratic society … the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture."[3]

Foundational to the effective dissemination of information is an independent broadcaster. To this end, the Constitution also provides for:

> "an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.[4]"

8. Against this background, it is self evident that any politicization of the Broadcasting system is in direct conflict with the objective role which it should aim to play. The preamble identifies South Africa as a "developmental state" and in chapter 2 of the Bill, the Broadcasting Services are aligned with the "developmental goals of the Republic". The terms "developmental state" and "developmental goals" are not defined. However, in accordance with the basic tenets of interpretation, the terms should be given their ordinary meaning. Loriaux[5] defines a "developmental state" as:

> "The developmental state is an embodiment of a normative or moral ambition to use the interventionist power of the state to guide investment in a way that promotes a certain solidaristic vision of national economy."

"Developmental goals" thus clearly allude to the macro-economic policy of the Government of the day. To align the public broadcaster with this policy would impact on the independence and impartiality of the Broadcaster and *a fortiori* its ability "to ensure fairness and a diversity of views". If however, what is intended is to align the broadcaster, as opposed to the broadcasting system, with the developing status of the Republic, this should be stated.

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[3] Khumalo and Othres v Holomisa 2002 (5) SA 401 (CC) at para 22

[4] Section 192

[5] Lariaux in: Woo-Cumings 1999: 24). Andrzej Bolesta: *China as a Developmental State,* Associate Researcher Department of Government
London School at p106*www.mnje.com/V/105-112%20MNE%20br5.pdf*

9. Further politicization of the Broadcaster is to be found in article 15(1)(c) of the Bill which requires that the International Broadcasting Services must "promote south Africa's foreign policy"; article 15(2)(a) which requires that the "International [sic] services provided by the corporation must be subject to the Republic' foreign policy relating to *inter alia* Africa's development, reconstruction, peace and stability …" and article 15(4) which requires the approval of the Minister, after consultation with the Minister of international Relations and Cooperation, for the establishment of an international broadcasting service channel. Any Executive control is irreconcilable with freedom of expression.

10. Executive control also falls foul of the requirements of section 192, which mandates that regulation of broadcasting in the public interest must be undertaken by ICASA, the independent authority established by National legislation. Of particular concern in this regard are the following powers conferred upon the Minister, which are listed sequentially:

10.1 The power to determine other uses of the PSB Fund's money[6];

10.2 The power to determine the percentage of revenue which advertising and commercial sponsorship can generate and to limit or prohibit certain advertising revenue.[7]

10.3 The power to determine the amount of revenue generated by commercial services which need not be used to subsidise the public broadcasting services.[8]

10.4 The power to monitor the implementation of the Bill,[9] the power to appoint an advisory board[10] and to determine the terms, conditions and composition of the board.[11]

10.5 The power to make regulations governing:

10.5.1 Contributions to the PSB Fund, the usage of the fund, exemptions from making such contributions and any matter connected to Public service broadcasting;[12] and

10.5.2 contributions to the PSB Fund.[13]

10.6 The power to intervene and direct any of the entities specified in the Bill to take action if the entity is unable to perform its function.[14] In addition the Minister is granted the power to recommend that fines be imposed on the entity.[15]

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[6] Clause 6(1)(*g*)
[7] Clause 13(3)
[8] Clause 14(3)
[9] Clause 36(1)
[10] Clause 36(2)
[11] Clause 36(3)
[12] Clause 37
[13] Clause 47(2) & (3)
[14] Clause38(1)
[15] Clause 38(3)

10.7 The power under specified circumstances, to instruct the Board of the SABC to take specified action.[16]

10.8 The power to instruct the Authority to take certain action, including recommending removal of the board to Parliament.[17]

11. The third concern which the Centre has, and which is a related concern, arises regarding the overall role of the Media Development and Diversity Agency (MDDA). This body is charged with managing, distributing[18] and accounting for the PSB Fund.[19] In addition the MDDA is required, with the approval of the Minister in consultation with the Minister of Finance, to develop criteria for the allocation of the funds.[20] All the functions of the MDDA amount to regulation of the Broadcaster and thus in terms of the Constitution clearly fall within the remit of ICASA.[21]

12. The fourth general issue which is cause for concern relates to the subject matter of both Charters. Apart from the contradictions already itemized, the Centre is of the view that much of the subject matter would be better dealt with in the Bill, particularly since the Charters have finite lives ((a maximum of 10 years and a minimum of 5 years) after which their provisions are null and void. A description of the full extent of the organization's functions or mandates would correctly be placed in a charter. However, the Centre submits that governance (Board, Executive Management, and Advisory Councils), organizational, management, financial and operational provisions should be contained in the Bill whilst the Charters should deal with the organisation's functions. In any event, it is not clear as to what will happen to governance on the expiration of the Charters.

13. A last general concern which the Centre has is technical in nature and relates to the quality of the draftsmanship and the extent of public participation in the legislative process, particularly in the policy review process.

14. A founding value of our constitutional democracy is the Rule of Law (Sect 1(*c*)). It requires that the law must, on its face, be clear and ascertainable.[22] This requires precise and careful drafting. The quality of the draftsmanship of the Bill under discussion leaves much to be

[16] Clause 39
[17] Clause 39(3) & (4)
[18] Clauses 5 & 8
[19] Clause 9
[20] Clause 7
[21] Section 192 of the Constitution
[22] *Abahlali Basemjondolo Movement SA and another v Premier of the Province of KwaZulu-Natal and others* CCT12/09 [2009]ZACC 31

desired. The Bill is not the product of careful consideration or careful drafting, as behooves the state Law advisors and the responsible Department introducing the legislation. Firstly, there are no less than 213 errors in the Bill alone (excluding the Charters). Some of these are simply typographical errors which are easily detectable, but in many instances the meaning and purpose of clauses are unclear or rendered ambiguous by their syntax structure. By way of illustration the Centre refers the Committee to the following 5 clauses in the Bill (For ease of reference the Centre has reflected proposed amendments in Capital letters and omissions in bracketed capitals):

14.1 Clause 10(3)(*b*)

The meaning of the clause is vague and unclear. The Centre submits that the plain intended meaning is to require that the PBS ensure they are properly licensed? If this is the case, the Centre suggests that the clause reads as follows:

> " [TO] acquire, from time to time, ANY license or licenses THAT MAY BE NECESSARY IN ORDER TO COMPLY WITH THE MANDATE OF THE PUBLIC BROADCASTING SERVICES IN s10(2) ABOVE. SUCH LICENCING IS TO BE ACQUIRED for such period and subject to such regulations, provisions and licencING conditions as may, FROM TIME TO TIME, be LAWFULLY prescribed BY THE EMPOWERED AUTHORITY OR AUTHORITIES."

14.2 Clause 10(3)(*c*):

The meaning and purpose of this clause is rendered ambiguous by its syntax structure. The Centre submits that the purpose of the clause is to provide for the power of the PSB to provide other ancillary services and that these ancillary services should not be limited to 'broadcasting or programming supply services'? If this is the case, the Centre suggests that it read: ' [TO] provide for ANCILLIARY SERVICES. THESE SERVICES SHALL NOT BE LIMITED TO broadcasting or programming supply services.'

14.3 Clause 10(3)(*h*):

The meaning and purpose of this clause is rendered ambiguous by its syntax structure. It is submitted that the clause should read:

'[TO]organise, present, produce, provide FOR or subsidise ANY concerts, shows, variety performances, revues, musical PERFORMANCES and other productions and performances and ANY other entertainment, whether live or recorded, THAT ARE connectED WITH THE broadcasting and programme supply services of the Corporation or for any LAWFUL purpose incidental thereto.'

14.4 Clause 10(3)(*j*):

The meaning and purpose of this clause is rendered ambiguous by its syntax structure. It is submitted that there are two purposes to the clause and as such, each purpose should comprise a separate, sub-sub clause so that it reads as follows:

'(j) [TO] carry out research and development work in relation to any technology relevant to the objects of the Corporation'.

There should then be another sub-sub clause added at the end of the subsection:

'(p) acquire EITHER by operation of law, OR BY registration, OR BY purchase AGREEMENT, OR BY assignment, OR BY licence OR BY ANY OTHER MEANS REQUIRED BY THE LAW, THE INTELLECTUAL PROPERTY RIGHTS OF THE CORPORATION.THESE INTELLECTUAL PROPERT RIGHTS INCLUDE, BUT ARE NOT LIMITED TO, ANY copyright, design, trade mark, trade name, industrial intellectual property and commercial intellectual property'.

14.5 Clause 12(1)(*j*):

The meaning and purpose of this clause is rendered ambiguous by its syntax structure. The Centre suggests it should read: ' include national sports programming as well as PROGRAMMING ON developmental and minority sports.'

15. More importantly, in addition to the abovementioned errors, there are substantial inconsistencies, both within Chapters 1 – 12 of the Bill and particularly between the Bill and the proposed charters regarding critical areas, thus rendering key issues unclear. The inconsistencies include, but are not limited to, the appointment procedure for the Board, the quorum of the board and the size of the Community Broadcasting governing Council. The inescapable inference to be drawn from the shoddy draughtmanship is that the legislation was prepared with undue haste. This inference is reinforced by the background preceding the introduction of this Bill. In July this year the public were invited to comment on the Public Service Broadcasting Discussion Paper containing some 67 questions. Within 2 months of the closing period, this draft Bill is produced, without either a green paper or white paper, notwithstanding that a fundamental change is envisioned by the legislation, namely a shift from an independent broadcaster to a broadcaster charged with promoting the political policies of the government for the time being. In view of all these inconsistencies, contradictions and poor language the Centre the Centre questions whether the Bill was certified by the State Law advisers as is required?

16. The Centre is pleased to note the extended period for making submissions, as the Centre was concerned that the earlier deadline of 7 December for making decisions did not afford the public sufficient time and thus fell fowl of the extent of public participation in the legislative

process contemplated in section 59(1) of the Constitution. As alluded to earlier, the Centre is however still concerned about the thoroughness of the preceding policy review process.

17. Apart from the aforementioned general concerns, the Centre also has concerns with specific provisions, which will be dealt with *in seriatim*.

18. Ad Chapter 4:

18.1 Clause 7 Criteria for Allocation of Public Service Broadcasting (PSB) Funds:

This clause deals with the criteria for the allocation of the PSB Fund, which is to be managed by the Media Development and diversity Agency (MDDA). Clause 7(6) specifically deals with the accountability of the beneficiaries of the funds so administered. As the greater portion of the fund will consist of public funds, either in the form of taxes or Parliamentary appropriations the Centre submits that the clause should be peremptory.

19. Ad Chapter 5:

19.1 Ad Clause 10 Public Broadcasting Services (PBS):

19.1.1 Ad Clause 10(2)(i):

The Centre submits that since the determination of what is informative, educational or entertaining is a subjective one (that is that it will differ from person to person) it is nonsensical to frame a mandate that depends on a subjective determination in the imperative. The Centre suggests the mandate should read: ' The mandate of the public broadcasting services shall be to: (i) provide quality broadcasting services that AIM TO inform, educate and entertain.'

19.1.2 Ad Clause 10(3) *(a)* (i):

The same reasoning explained *supra* re the subjective determination of the objectives to inform, educate and entertain applies here. The Centre suggests a qualifier is added ' (i)AIMS to inform, educate and entertain'.

19.1.3 Ad Clause 10(3) *(f)*:

The phrase 'as may be conducive to any of the objects of the Corporation' is potentially overly broad in that the word 'any' makes room for objects of the Corporation that may not be lawful. The Centre suggests it read: '[TO] commission... as may be conducive to any of the LAWFUL objects of the Corporation'.

19.1.4 Ad 10(3) *(g)*:

the same reasoning in 10(3) *(f)* applies, albeit to a lesser degree, to 'the objects'. For the sake of consistency the Centre suggests that it read 'the LAWFUL objects of the Corporation...'.

19.1.5 Ad Clause 10(3)(*i)*:

An organ of state operating within South Africa's democratic democracy where the rule of law and the principle of legality plays a foundational role, cannot be authorised to 'collect news and information in any part of the world and **in any manner that may be thought fit.**..' (emphasis added). The Centre suggests that the clause should read: '...and in any LAWFUL manner that may be DEEMED APPROPRIATE BY ANY EMPOWERED AUTHORITY...news agencies'.

19.1.6 Ad Clause 10(3) (*k)*:

The Centre queries what the duties of the PSB are in terms of the reconstruction of Africa? It is not clear what constitutes the reconstruction of Africa?

19.1.7 Ad Clause 10(3)(*k),(l)* and *(m)*:

The Centre submits that there exists a systemic discrepancy throughout this Bill in reference to the international objectives of the PBS in relation to Africa, Southern Africa and regional integration, as evidenced, inter alia, in the contradiction in the mandate created in these three sub-sub clauses. The Centre suggests that the discrepancies be clarified. For example, in fulfillment of the mandate in clause 10(2)(vi) it would appear that the international objectives seem to focus on Africa, the continent as a whole. However, clause 10(3)(*m)* talks about 'regional integration' which has an accepted ordinary meaning in political discourse as being explicit of the regional integration agreements between countries to advance regional cooperation in certain areas. Examples of regional integration include the European Union and, as the Bill seems to indicate, the Southern African Development Community (SADC) countries. This is confirmed in the same sub-sub clause by the later reference to 'Southern African region' which is the part of the African continent where the member states of SADC are located.

If the objective of the PBS is to have a mandate that develops Africa then it cannot commit itself in parts of the Bill to the development of Africa, and in other parts of the Bill only to those African countries that are party to the SADC's regional integration agreement.

20. Ad Clause 12 Public Service Division:

20.1 Ad Clause 12(1)*(a):*

The Centre welcomes the initiative of the PSB to 'make services available in all official languages'.

20.2 Ad Clause12(1)(*c):*

The Centre submits that it should read: 'strive to be of A high quality in all the PROVIDED OFFICIAL languages '.

20.3 Ad Clause 12(1)(*d):*

The Centre submits that it should read: 'provide significant amounts of educational programming COMPRISING both curriculum-based and informal educative topics DEALING WITH A wide range of social, political and economic issues, including, but not limited to, human rights, healthcare, early childhood development, agriculture, culture, religion, ACCESS TO justice, commerce, THAT contributE to a shared South African consciousness and identity.

20.4 Ad Clause 12(3) 'Regional television services' (RTS). There is no definition of RTS. There is, however, a definition of 'regional broadcasting service' (RBS).

However, the definition of RBS does not clear up the ambiguity arising from the already alluded to problem of the political concept of 'regional integration' as used elsewhere in this Bill. That is to say that, in parts of this Bill, the word 'regional ' has come to take on a meaning that is accepted as referring to regions that constitute members states (particularly those of SADC) other than the Republic of South Africa.

In accordance with the rules of statutory interpretation, a word used in a specific piece of legislation, carries the same meaning throughout that piece of legislation, unless it is specifically given another meaning, or unless it is clear from the context that another meaning has been given. In this Bill, though regional is not defined separately in clause 12, the context is indicative of, though not clearly explicit of another meaning other than that proposed, *supra,* that is that a region in this instance refers to a region within the Republic of South Africa.

The Centre suggests that this definitional discrepancy be explicitly remedied. This would be in line with the principle of legality which entails that all law must be clear and unambiguous in order to allow those subject to it to be able to ascertain its ambit.

20.5 Ad Clauses 12(3)*(c), 1*2(4)*(c),*13(3) and 14(3): The Centre notes that there is an incongruence between the fact that clauses 12(3)*(c)* and 12(4)*(c)* places the Authority (ICASA) in charge of determining the percentage of revenue to be drawn from advertising, whereas clauses 13(3) and 14(3) place this determination, with added powers of regulation, upon the Minister. As previously stated, in terms of section 192 of

the Constitution, "broadcasting in the public interest "is to be regulated by an "independent authority" established by National legislation. Since ICASA is that authority, the Centre believes that clauses 13(3) and 13(4) will not pass Constitutional muster.

21. Ad Clause 15: Establishment of International Broadcasting Services

21.1 Ad Clauses 15(1*) (a), (b)* and *(c)*, as read collectively, there is, again, a problem of a potentially conflicting and/or ambiguous mandate between what constitutes 'South Africa's foreign policy', the promotion of regional integration (as stated supra, it is not clear, in this context, whether this pertains to SADC or internal regions of South Africa) and the contribution to a diverse view and content on the African continent.

21.2 Ad Clause 15(2) *(d):* The Centre submits that there exists a possibility for a conflict between what will 'promote the interests of the Republic' and what will 'promote the regional integration' (if, by regional integration in this context, it is meant to allude to the SADC?). The Centre suggests that the policies in respect of each of these geographical areas, Africa, SADC member states and South Africa are clearly and unequivocally ascertainable and that they are not in conflict with each other. Any conflict between these three sets of objectives could create a statutory nonsense of the mandate of the International Broadcasting Services.

21.3 Ad clause 15(4):

In order to meet the requirements of section 192 of the Constitution, the Centre submits that it should be left to the determination of ICASA (the Authority) and not the Minister, to determine the limited revenue that may be drawn from advertising by the International Broadcasting Services. This would be in line with clauses 12(3) *(c)* and 12(4) *(c)* of this Bill, as indicated previously, *supra.*

22. Ad Clause 17 Governance:

22.1 Ad 17(3) *(a)*: The Centre submits that the qualifications of the members of the board, even if qualified by the phrase 'when viewed collectively', as articulated in the Bill at present, are too numerous and onerous to reasonably and feasibly be present in one person and much less so in every one of the members of the board. The Centre suggests that the clause read:

> 'The members of the Board, must, when viewed collectively- *(a)* be persons who are suited to serve on the Board by virtue of their qualifications, expertise and experience in ANY ONE OF OR COMBINATION OF THE FOLLOWING fields: broadcasting policy, technology, broadcasting regulation, media law, business

practice and finance, marketing, journalism, entertainment and education, social and labour issues' .

22.2 Ad Clause 17(4):

'accounting Authority' should read: 'accounting authority' so as not to confuse 'authority' with the already defined 'Authority' (ICASA).

23. Ad CHAPTER 6: COMMUNITY BROADCASTING SERVICES (CBS):

23.1 Clause 20: Community Broadcasting Services:

23.1.1 Ad Clause 20(1*) (a)* to (*c):*

The Centre welcomes the initiative and mandate of the CBS in these respects. However, while these objectives may be laudable, the Centre holds reservations as to whether CBSs should be subject to a statutory mandate regarding principles of governance, particularly since the proposed mandate runs contrary to existing legal constraints on governance.

23.1.2 Ad the Definition of 'community broadcasting service' read with Clauses 20(2) *(d)* and 25(1):

The Centre submits that an incongruity is created by the definitional requirement that the CBS be both a 'non-profit entity' and operates as a **partnership** with the local government (municipality). This is so because the business entity of a partnership has an established legal meaning. A partnership entails, as one of its *essentialia* (essential features/prerequisites) that it is an entity with the purpose of making a **profit**. As Graham Bradfield states in Wille's 'Principles of South African Law' (9 ed):

'[o]ur courts have generally accepted Pothier's formulation of the essential elements for a contract of partnership...these elements are (a) that each of the partners brings something of commercial value to the partnership...(b) that the partners carry on business in common; and **(c) that their object is to make and share a profit'** (emphasis added).

Furthermore, the requirement that a partnership is a business entity entered into by way of a contract (that is, an agreement entered into by mutual and **voluntary consent** of the contracting parties) runs contrary to the statutory mandate in sections 20(2) (*d)* and 25(1) that a partnership **must** be entered in to. In other words, it runs contrary to the common law principles of contract that a statute places an imperative on two parties to contract; such contract taking the form of a

partnership, a business entity created by way of a contract (the partnership agreement).

The Centre submits that the purpose of the Bill was to establish some form of collaboration on a non-profit basis between the CBS and the local government having jurisdiction over that community. If however, the purpose of this clause is to establish a collaboration between the CBS and the local government in each community, then the Centre submits that this is unconstitutional in so far as it would infringe on the CBS's constitutionally guaranteed right of freedom of association as afforded to the CBS and to the constitutional imperative that the SABC and all entities under its wing be independent.

Furthermore, the definition of 'community' is not limited to a geographical area comprising a community, but is also extended to 'any group of persons or sector of the public having a specific ascertainable common interest'. By way of example, therefore, if the community is the Islamic community of South Africa, as a whole, then the geographical ambit of that community would reach further than one or many ascertainable geographical jurisdictions of local government. This would result in the impossible task of trying to decide which municipality (ies) would form a collaboration with each CBS. This would be particularly problematic in local government/municipality jurisdictions where different political parties, operating under different political mandates and objectives would be statutorily able to form such a collaborative effort.

The Centre submits that the collaboration of any local government (municipality) with a CBS would, therefore, be both unconstitutional and practically impossible to define.

23.2 Ad 20(2)(ii):

In addition to the appropriateness of a statutory mandate for a CBS alluded to above, the mandatory requirement that a CBS be 'informational, educational and entertaining' is another paradoxical example of placing a mandatory requirement on a subjective determination. This purports to create an imperative which is, therefore, nonsensical and impossible. The Centre suggests it read: 'AIM TO BE informational, educational and entertaining'

23.3 Ad 20(2*) (a) (*iii):

In line with what has been said, *supra,* the Centre submits that it runs contrary to the right of the CBS to freedom of expression to prescribe in any manner that their mandate and purpose be to 'focus on the provision of programmes that highlight, but ARE not limited to, developmental issues, health care, basic information and general education, environmental affairs, local and international affairs, and the reflection of local culture'. It is the submission of the Centre that the mandate of a CBS is whatever that non profit entity itself may determine, subject, as always, to the Constitution and the law.

23.4 Ad 20(2)(iv):

This clause is another clause rendered ambiguous and nonsensical by its syntax structure. The Centre submits that the clause contains no subject to whom the duty is owed to 'promote the development of a sense of common purpose within a democracy and improve the quality of life'. The Centre suggests that the subject of the right be included in the clause as being the community to which the CBS is a provider. This community should be as per the definition of 'community' in the Bill. However, the Centre also submits that, again, this clause is a potentially inappropriate statutory mandate as already outlined, *supra*.

23.6 Ad 24(2) *(b):*

The Centre submits that reference must be made to the authority on which the duty is being placed to make the regulations. The Centre further submits, for the sake of consistency with the rest of this Bill, and to further the constitutional imperatives of accountability and independence of the SABC, that the regulations are made by the Authority (ICASA).

24. Ad 27:

The concept of 'contribute' is not clear from the context and is not defined in the Bill. If the Bill purports to entail that the Commercial Broadcasting Services should contribute financially to the PBS, then, the Centre submits that this is problematic for two reasons:

24.1 It would be contrary to the principle of free enterprise and/or the constitutional requirements which would then render this provision subject to those provisions of the Constitution pertaining to Money Bills, and

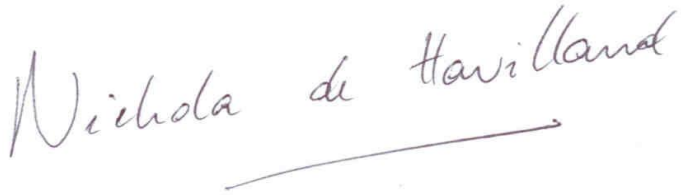
24.2 It would create a nonsensical contradiction by allowing a commercial broadcasting service to be funded by the **same** fund to which it is expected to contribute.

If, however, by 'contribute', the Bill intends to entail a contribution to the objectives espoused by the Act, the Centre would have no objection to such an entity applying for funding from the PBS Fund.

25. The Centre has highlighted certain of the inconsistencies between the provisions of the Charter's and the Bill. The Centre has also indicated that it is of the opinion that provisions governing powers and obligations, questions of governance, financial and operational questions should only be contained in the Bill. Accordingly once the contextual contradictions have been resolved, the correct provisions should be contained in a revised Bill. It follows from the Centre's attitude certain provisions governing these issues that are currently only contained in the Charters should be transferred to the Bill. These include clauses in the SABC Charter dealing with the appointment of an interim board, the appointment of the Executive Management, performance management systems, issues of public accountability and the role of management. Should the Committee however wish for detailed comment, the Centre would be more than willing to oblige.

26. The Centre is acutely aware of the need for and urgency of legislative and policy reform concerning the Public Broadcasting system. However the bill in its current poor form does not in our view pass constitutional muster for the reasons stated. The Centre would however like to make a positive contribution to that process. Should the Commission thus require oral submissions to supplement or clarify points in these submissions, please do not hesitate to call upon us. The write can be contacted electronically at ndehavilland@cfcr.org.za or telephonically on 0823333548 or (021) 930 3622.

Yours faithfully



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