

Save our SABC Coalition Submission to NCOP on Broadcasting Amendment Bill

1. INTRODUCTION

1.1. In Notice 831 published in Government Gazette 31215 dated 4 July 2008 (“the Notice”), the Portfolio Committee on Communications (“the Committee”) published the Draft Broadcasting Act Amendment Bill (“the Draft Bill”). The Committee has since approved the Broadcasting Amendment Bill [B 72 2008] (“the Bill”) which has been passed by the National Assembly and is now before the National Council of Provinces (“NCOP”) which has invited public comment on the Bill.

1.2. We, the Civil Society Coalition: Save our SABC – Reclaiming Our Public Broadcaster (“the Coalition”) thank the NCOP for the opportunity to make these written representations and request that we be allocated time to make oral representations as well.

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 and academics.

1.4. Organisations and individuals include:

- BEMAWU (The Broadcast, Electronic Media and Allied Workers Union)
- COSATU (Congress of South African Trade Unions)
- 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 MMP (Media Monitoring Project)
- 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)
- The SAHA (The South African History Archives)

- The TAC (Treatment Action Campaign)
- Workers World Media Productions
- 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 and academic at the University of Pretoria (in her private capacity)
- Ms. Jeanette Minnie of Zambezi FoX – international Freedom of Expression and Media Consultant
- Mr. Mark Weinberg – community media and freedom of expression activist

2. BACKGROUND TO THE BILL

2.1. The Bill arises out of Parliament's concern with the on-going crises at the SABC and we applaud Parliament's desire to find solutions to these crises.

2.2. The Coalition is of the view that the current crises plaguing the public broadcaster are deep rooted and arise as a result of a number of serious problems with:

2.2.1. the provisions of the Broadcasting Act, 1999, the Memorandum and Articles of Association of the SABC and the Shareholder Compact between the SABC and the Minister of Communications;

2.2.2. the unlawful and direct interference in Parliament's process of appointing the current Board;

2.2.3. the on-going politicization of the SABC Board and the failure by the SABC's leadership (including Board members and senior management) to represent the public interest effectively in the carrying out of their respective duties; and

2.2.4. the silence by the Independent Communications Authority of South Africa (ICASA) about the crises and its failure therefore to fulfil its legislative responsibility to monitor compliance by the SABC with its Charter and the Broadcasting Act, 1999.

2.3. The Coalition is pleased to note that the Parliamentary Committee on Communications has agreed that the crises at the SABC cannot be fully addressed by piecemeal amendments to the legislative framework and require a holistic review of the challenges facing public broadcasting in South Africa. In our view, this would include:

2.3.1. an assessment of the root causes of problems plaguing the SABC;

2.3.2. a review of the White Paper on Broadcasting (developed close to ten years ago) in order both to evaluate the effectiveness of the framework developed in the policy and to craft policies in the light of the changing broadcasting environment given, for example, convergence and digital migration; and

2.3.3. the promulgation of an SABC Act to replace the current Broadcasting Act, taking into account the problems identified above and the policy developed as a result of the proposed policy review process.

2.4. Some of the challenges impacting on public broadcasting which need review through this process include:

- the vague wording in the SABC Charter which has resulted in a lack of clarity about the public broadcaster's real mandate;
- the on-going funding crises at the SABC, resulting in an over-reliance on commercial activities, to the detriment of public interest programming;
- the structural dysfunction at the SABC between its public and commercial divisions. The stated motivation of such division was to relieve the public wing's reliance on commercial revenue. The separation, however, has not achieved this;
- a lack of clarity on the role of the Board;
- the appointment/ disqualification and removal criteria and processes for both executive and non-executive members of the Board;

- the lack of clarity around the role of the Minister with regard to the SABC;
- the fact that the Memorandum and Articles of Association of the SABC and the Shareholder Compact are in many respects, ultra vires the provisions of the Broadcasting Act;
- the fact that public stakeholders have no formal way of inputting their concerns to the Board; and
- the failure of the SABC to abide by its own editorial policies, particularly with regard to the recent “blacklisting crisis”.

(Note this is not an exhaustive list)

2.5. The Coalition strongly believes that the current crises can in no way be addressed by a piecemeal approach to one of the problems identified above, namely by only addressing limitations to the Broadcasting Act.

2.6. In this regard, the Coalition had a number of serious concerns and reservations about the Draft Bill. The Coalition is pleased to report that certain of its concerns were addressed by the Portfolio Committee and that the Bill is a substantial improvement, in a number of important respects, over the Draft Bill.

2.7. Nevertheless, the Coalition continues to have certain concerns with the Bill that it believes require to be addressed by the NCOP through additional amendments to the Bill which ought then to be referred back to the National Assembly for final adoption. In these submissions, we focus only on those aspects of the Bill which the Coalition believes require further amendment by the NCOP.

3. CONSTITUTIONAL IMPERATIVES INVOLVED IN THE BROADCASTING AMENDMENT BILL

3.1. It is true that the Constitution makes no specific reference to the SABC or to a public broadcaster. However, this does not mean that the SABC does not warrant constitutional protection. It clearly does.

3.2. The right to freedom of expression contained in section 16 of the Constitution has been identified by the Constitutional Court as a critical right to enhancing democracy in South Africa. Given high

illiteracy rates in our country, many people, are entirely dependent on broadcasting, particularly, radio, for all of their news and current affairs information. The SABC, given its coverage, size and diversity of operations, is the single most important source of news and information for the South African population. Consequently people's right to "receive and impart information or ideas", specifically protected in section 16(1)(b) of the Constitution, will be undeniably damaged if the SABC is not in a position to guarantee the independence of its broadcasting content and operations.

3.3. Section 7 of the Constitution specifically requires the State (including, obviously, both the Executive and Parliament) to "respect, protect, promote and fulfil the rights in the Bill of Rights". Thus we are of the view that there is a specific constitutional obligation upon Parliament (namely both the National Assembly and the NCOP) to ensure that it does its utmost to give effect to section 16(1)(b) of the Constitution by ensuring that the SABC is able to guarantee the independence of its broadcasting content and operations.

3.4. Further, section 192 of the Constitution makes it clear that the appropriate and independent regulation of broadcasting is critical to the maintenance of constitutional democracy in South Africa in order to ensure "fairness and a diversity of views broadly representing South African society". Again, the SABC, given its size and reach is critical to ensuring that citizens are indeed able to enjoy a diversity of views broadly representing South African society. If the SABC fails to do this, then the majority of South Africans will be unable to have access to differing points of view.

3.5. Further, the right to "receive information" guaranteed by section 16(1)(b) in the Constitution has little meaning if the public broadcaster's news and information services are compromised. This right is critical to the fulfilment and enjoyment of all other rights in the Bill of Rights, including basic civil rights such as the right to vote as well as important socio-economic rights such as the right to housing, the right to education, the right to health care and so forth.

3.6. The Coalition is of the respectful view that the SABC will not be able to keep the public's confidence in the independence of its broadcasting content unless the Board of Directors is seen as being beyond reproach and independent of political or commercial influence. Thus Parliament, including the NCOP, has a specific constitutional duty to ensure that the SABC Board is able to carry out its mandate in terms of the Charter (flawed as it currently is) and in so doing to protect the rights of all South Africans to receive information and ideas and to enjoy a diversity of views broadly representing South African society.

4. INCORRECT FOCUS ON REMOVAL PROCEDURE ONLY

4.1. The Coalition understands the National Assembly's recognition that the appointment process of the current Board was defective and that this has negatively affected the latter's credibility.

4.2. The Coalition further notes concerns raised by members of the Portfolio Committee regarding the effectiveness of the Board's fulfilment of its responsibilities expressed in a vote of no confidence adopted by the Committee.

4.3. However, the Coalition is of the view that the Bill will unfortunately NOT address the current crisis because it does not amend the Broadcasting Act to fill existing lacunae and to remove inherent contradictory provisions. The Coalition believes that these defects in the Bill are critical and need to be addressed urgently to prevent the Bill itself from being as unworkable as the current Broadcasting Act.

4.4. The Coalition is of the view that the Bill must immediately correct current contradictions and lacunae in the Broadcasting Act through making key amendments to the appointment as well as to the removal provisions of the Act. We set these out in order below.

4.5. One final point is important the Coalition has real concerns with the criteria for appointment in the Broadcasting Act as it is of the view that the criteria privileges the elite of society instead of genuinely ensuring a Board that is broadly representative of South African society, particularly, communities, labour etc. The Coalition intends to campaign in the medium to long term for improved criteria to be included in the proposed SABC Act.

5. PROPOSED AMENDMENTS TO IMPROVE THE PROCESS FOR APPOINTMENT OF NON-EXECUTIVE DIRECTORS

5.1. The Coalition respectfully submits that there is wide-spread recognition that the process of appointing the current SABC Board was deeply flawed. The Coalition respectfully submits that the SABC Board must be above reproach and that Parliament must ensure public confidence in the process of appointment. Public confidence in the SABC Board is currently at an all time low and needs to be boosted through improving the transparency and levels of public participation in the process.

5.2. The Coalition believes that the process of appointment of non-executive directors in section 13(2) ought to be augmented by providing for:

- shortlists of candidates to be published, including electronically
- the names of nominees to be published, including electronically

- making interviews of short-listed candidates open to the public; and
- a written evaluation of short-listed candidates to be published, including electronically;

5.3. The NCOP is respectfully requested to make the following proposed amendments to the Broadcasting Act in regard to the process of appointment of non-executive Board members to re-instil public confidence in the non-executive members of the Board:

5.3.1. replacing subsection 13(2)(c) with the following:

“that a shortlist of candidates for appointment is published (including electronically), which shortlist is to include the names of the person(s) nominating such candidates and detailed curricula vitae of such candidates;”

5.3.2. inserting new subsections (d) and (e) after subsection (c) in section 13(2) as follows:

“(d) that interviews of persons on the shortlist are open to the public; and

(e) that a written evaluation of short-listed nominees is published (including electronically) by the relevant Portfolio Committee, taking into account the objects and principles of this Act.”

5.3.3. The above amendments will be required to be made in section 2 of the Bill.

6. PROPOSED AMENDMENTS TO REMOVE THE EXISTING LACUNAE IN THE BROADCASTING ACT REGARDING THE APPOINTMENT OF EXECUTIVE DIRECTORS

6.1. The Coalition is of the view that many of the current battles between the non-executive and executive members of the Board are based on the fact that the Broadcasting Act is entirely silent on who in fact appoints the executive members of the Board. It is an important tenet of corporate governance that no company can function effectively unless the process for appointment of Board members, both non-executive and executive, is clear. The SABC has been operating with this lacuna with devastating consequences for the organisation for far too long and the Bill will not meet its objectives of solving the current crises unless this critical issue is properly and fully addressed in the Bill. It is standard corporate governance practise for the Board of a company to make key executive appointments and in our view, the three executive Board members ought to be appointed by the non-executive members, to avoid the impression or suspicion of undue government interference in the operations of the SABC.

6.2. The NCOP is respectfully requested to make the following proposed amendments to the Broadcasting Act in regard to the process of appointment of executive Board members in line with best corporate governance practices.

6.3. The Coalition respectfully suggests that the following amendments to the Broadcasting Act in regard to the proper distinction between executive and non-executive Board members, be made:

6.3.1. amend section 13(7) by inserting “non-executive” between the words “a” and “member”;

6.3.2. amend section 13(8) by inserting “non-executive” between the words “a” and “member”; and

6.3.3. insert a new subsection after section 18(8) “13(8A) The executive members of the Board are appointed by the non-executive members of the Board.”

7. PROPOSED AMENDMENTS TO THE QUORUM PROVISIONS OF THE BROADCASTING ACT TO AVOID CONTRADICTIONS IN THE EVENT OF AN INTERIM BOARD BEING APPOINTED

7.1. The Coalition is of the respectful view that the existing quorum provisions in section 13(10) of the Broadcasting Act need to be amended given the Bill’s provisions on the appointment of a smaller interim Board. If the Coalition’s suggested amendments are not made then the Interim Board will be entirely hamstrung as even at full strength it will not have a quorum in terms of section 13(10) of the Broadcasting Act.

7.2. Consequently, the Coalition suggests that the existing clause 13(10) be replaced with the following:

“The quorum at any meeting of the Board is:

(a) in the event that an ordinary Board appointed in terms of this clause 13 is in place, nine members of the Board, which must include the chairperson or the deputy chairperson; or

(b) in the event that an interim Board appointed in terms of clause 15A(3) is in place, six members of the Interim Board, which must include the chairperson or the deputy chairperson”.

8. PROPOSED AMENDMENTS TO THE EXECUTIVE COMMITTEE PROVISIONS OF THE BROADCASTING ACT TO DO AWAY WITH LACUNA REGARDING THE APPOINTMENT THEREOF

8.1. The Coalition is of the respectful view that many of the current crises at the SABC revolve around the issue of executive committee appointments and in particular, around the lacuna that currently exists in the Broadcasting Act regarding who is responsible for the appointment of the members of the executive committee. The Bill must address this issue if it hopes to resolve the existing crises.

8.2. The Coalition respectfully submits that best corporate governance practices require that executive committee appointments be made by the Group Chief Executive Officer after consultation with the Board. Consequently, the Coalition suggests that section 14(1) of the Broadcasting Act be amended by inserting the following before “.”:

“appointed by the Group Chief Executive Officer after consultation with the Board”

9. PROPOSED AMENDMENTS TO REMOVAL FROM OFFICE PROVISIONS OF THE BROADCASTING ACT

9.1. First, the Coalition believes that the existing provisions of section 15 of the Broadcasting Act which are essentially replicated in section 15(1) of the Bill are not appropriate because they essentially allow for the Board to recommend the removal of a non-executive director. We think that this is not acceptable as it ought to be the appointing body, upon a resolution by the National Assembly, which removes a non-executive director to avoid implications of political and other undue interference.

9.2. Consequently, the Coalition respectfully submits that the processes provided for in proposed section 15A(1)(a) be the only applicable processes for removing an individual non-executive member of the Board. Therefore, the Coalition respectfully suggests that proposed section 15(1)(a) of the Bill, together with the word “or” that follows it, be deleted such that proposed section 15(1)(b) of the Bill (with appropriate cross referencing to section 15A(1)(a)) becomes section 15(1) of the Bill and reads as follows:

“15(1) The appointing body must remove a non-executive member from office after a finding to that effect by a committee of the National Assembly and the adoption by the national assembly of a resolution calling for that non-executive member’s removal from office in terms of section 15A(1)(a).”.

9.3. Second, the Coalition believes that the existing provisions of section 15 contain a critical lacuna which is not addressed in the Bill, namely, regarding the removal of executive directors of the Board. This lacuna has been the basis of many of the on-going conflicts between the Group Chief Executive Officer and the Board of Directors of the SABC and must be addressed by the Bill if it is indeed to resolve the current crises. In line with best corporate governance practices, the power to remove of executive members of the Board ought to vest in the non-executive members of the Board, again in order to avoid implications of political and other undue interference.

9.4. Consequently, the Coalition respectfully submits that a new section 15(3) of the Broadcasting Act be inserted into the Bill to provide as follows:

“(3) The executive members of the Board may be removed by the non-executive members of the Board on the grounds set out in section 15A(1)(a).”

9.5. Third, the Coalition is of the view that the provisions regarding the removal of the entire Board contained in proposed section 15A(1)(b) and 15A(2)(c) of the Bill must:

9.5.1. make reference to due process and an appropriate finding by a committee of the National Assembly in order to meet the Constitutionally required standard of administrative justice; and

9.5.2. must relate only to the non-executive members of the Board to avoid the ongoing confusion between the roles of the executive and non-executive members of the Board and to avoid the appointment of an Interim Board being unworkable given that the three executive members are to be part of the Interim Board.

9.6. Consequently, the Coalition respectfully submits that:

9.6.1. the first clause of the proposed section 15A(1)(b) of the Bill be amended to read as follows:

“The National Assembly may, by the adoption of a resolution, after due process including an enquiry by a committee of the National Assembly, recommend that the non-executive members of the Board, collectively, be removed if –”

9.6.2. the provisions of proposed clause 15A(2)(c) be amended to read as follows:

“must remove all the non-executive Board members if the resolution recommends the removal of all of the non-executive members of the Board.”

9.7. Fourth, the Coalition is of the view that the proposed provisions regarding the appointment of the five non-executive members of the Interim Board contain in the Bill’s proposed section 15A(3)(a) must :

9.7.1. clarify the distinction between executive and non-executive interim appointments to avoid a continuation of the ongoing confusion of these roles and appointments;

9.7.2. contain qualification criteria for such non-executive members. This is critical to avoid widespread suspicion of political appointments, particularly, if the Interim Board is to be in place during an election period. Unless objective legislated qualification criteria are applied by the National Assembly in making recommendations for candidates to the appointing body, such non-executive Interim Board members will lack legitimacy in the eyes of the South African public and will be seen as purely political appointees; and

9.7.3. contain time limits upon the National Assembly's recommendation process to guard against the SABC being left essentially rudderless after the removal of the non-executive Board members, collectively.

9.8. Consequently, the Coalition respectfully suggests that proposed clause 15A(3)(a) be amended to read as follows:

"Upon the removal, collectively, of the non-executive Board members contemplated in section 15A(2)(c), the appointing body must establish an Interim Board consisting of the executive Board members referred to in section 12(b) and five non-executive members of the Board to be appointed by the appointing body as follows:

- (i) such non-executive Interim Board members, collectively, must meet the qualification criteria provided for in section 13(4);
- (ii) such non-executive Interim Board members must be recommended by the National Assembly; and
- (iii) the National Assembly's recommendations on Interim non-executive Board members must be made within 30 days of the National Assembly resolution calling for the removal of the non-executive members of the Board contemplated in section 15A(1)(b)".

10. THE WAY FORWARD

10.1. The Coalition respectfully submits that the Bill is still problematic in a number of respects which will prevent it from solving the immediate crises facing the SABC and proposes that its suggested amendments be adopted in order for the Bill to do so.

10.2. The Coalition recognises that the Bill will play a helpful role at this time if it is seen as being only one immediate step as part of a much longer and in-depth process to identify and rectify the myriad problems facing the public broadcaster.

10.3. The Coalition reiterates the need for a comprehensive, transparent, inclusive and thorough process to identify all problems at the root of the current SABC crises, some of which have been identified above.

10.4. The Coalition calls upon Parliament, including the NCOP, to ensure that Government, particularly the Department of Communications, undertakes a thorough Green and White Paper policy review process to develop lasting and in-depth solutions to the SABC's problems; and

10.5. The Coalition calls upon Parliament, including the NCOP, to institute legislative processes to enact an SABC Act to replace the current Broadcasting Act, taking into account the problems identified above and the policy developed as a result of the proposed policy review process.

11. CONCLUSION

11.1. The Coalition welcomes many of the changes made to the Draft Bill as reflected in the Bill and believes that the National Assembly has passed a vastly improved Bill. However, as is set out in full above, the Coalition is of the view that in a number of respects the Bill requires to be further amended by the NCOP to ensure that it in fact is workable and will resolve the immediate crises facing the SABC.

11.2. The Coalition thanks the Committee for the opportunity to make these written representations and trusts that its proposed amendments to the Bill will prove useful to the members of the NCOP in assisting them in their deliberations.

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

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