



SASFED

The South African Screen Federation

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**Submission on the
Department of Communication's
Public Service Broadcasting Bill (2009)**

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1. Bona Fides

The South African Screen Federation (SASFED) is a federation of independent film, television and audiovisual content industry organisations, and was constituted in March 2006.

Its current full membership includes:

- * Documentary Filmmakers Association (DFA)
- * Personal Managers Association (PMA)
- * Southern African Communications for Development (SACOD)
- * South African Guild of Editors (SAGE)
- * Writers Guild of South Africa (WGSA)
- * Women in Film and Television, SA (WIFTSA)
- * Women of the Sun (WOS)

SASFED is also the official country representative to FEPACI, the Pan-African Federation of Filmmakers.

2. Scope of submission

SASFED's submission is based on a position of support for public broadcasting services, in fulfilment of a social and cultural role of television to the public good and interest.

Given its bona fides, SASFED's comments on the Bill are focused on the core interest of television in public broadcasting services.

SASFED welcomes discussion of a renewed vision for public service broadcasting, particularly with reference to the South African Broadcasting Corporation (SABC). However we reiterate the concern that the nature of the process and the time frame to comment on the Bill is seriously lacking, and impacts on the quality of our response.

We believe the wide ranging and substantive matters raised in the Bill, more so in a fast changing multi-channel digital broadcast environment, require a proper policy review process within more conducive time frames than has been afforded, for thorough consideration of the complex matters concerning the public broadcaster.

SASFED is concerned that if the provisions of the Bill are rushed into legislation without such due process it will render the public broadcaster to continued conflict and instability.

3. General

As a member of the civil society coalition, "Save Our SABC: Supporting Public Broadcasting" (SOS), SASFED supports the submission of SOS that *inter alia* questions the Bill in respect of its:

- procedural validity;

- legal status;
- legal scope;
- lack of consideration for legislative alignment;
- constitutionality;
- substantive and technical inconsistencies.

SASFED's submission should in general be seen to be qualified by these submissions by SOS.

Notwithstanding these fundamental concerns, SASFED offers this submission in response to select matters.

The Bill explicitly aligns the broadcasting system to the developmental goals of the state. SASFED submits that the public broadcasting service cannot be uncritically aligned to the developmental goals of the country under charge of the state and government.

We contend that "development" should be appreciated as a dynamic process and a highly contested terrain. "Development" is not linear, and involves a multitude of challenges from competing interests. The public broadcasting service, including any envisaged developmental channels, is required to faithfully represent these interests in all their challenging complexity.

While SASFED believes that the state and government may legitimately make use of the broadcasting system and its services for bona fide communication and information purposes, both in terms of digital migration policy and programming content, the latter should be appropriately capped given the power and resources of the state.

Further, SASFED is concerned about the potential to obviate the role of the public broadcaster in fostering challenging and diverse opinion by unqualified value pronouncements such as "contribute to moral regeneration". Our membership has been long aggrieved with subjective SABC policy that disallows bona fide challenging content. Likewise we fear the implication for the watchdog role of the media by abusive injunction of such as "the right to privacy, unless a compelling public interest demands".

Of further concern to SASFED is the lack of inclusion of industry representation in any of the suggested advisory bodies to be formed, especially where these are envisaged to address concern matters of direct relevance to the production industry, including such as content and audience complaints.

SASFED recommends the establishment of an industry ombudsman/editor's office. This office would function much like the Press Ombudsman, a central, accountable and independent office that would mediate complaints by the public, and industry related bodies towards the Public Broadcaster.

We cannot adequately express the importance of the "independence" of this body to be able to make unbiased and fair rulings in order to maintain the

credibility of the SABC to meet its legislated mandate, and to be able to be used without fear by the public, independent production sector and all related affiliates. The process and all judgements would need to be made public and accessible to anyone who wants access to the rulings.

We refer to the following Canadian model as the one our public broadcaster should emulate: *The Canadian Broadcasting Corporation (Canada's public service broadcasting organisation) retains as a matter of company policy, an internal Ombudsman, fully independent of the Corporation's management, to review serious unresolved public complaints related to the discharge of its mandate. Although the Ombudsman reports directly to the President, he or she does not possess any statutory or otherwise binding authority.*

In terms of the Public Access to Information Act all complaints should be available to the public, for public scrutiny. As should all financial records according to the Public Finance Management Act.

4. SPECIFIC COMMENTS

4.1 Funding for Public Broadcasting

SASFED agrees that funding of the public broadcast service (and public service broadcasting) requires review and possible new models. However we are concerned about the funding models proposed, including in terms of revenue sources and its administration.

The lack of success of the license fee model in South Africa may be attributed to a combination of factors including:

- The prohibitive cost of the license fee;
- Public dissatisfaction with schedules;
- Reports of wasteful expenditure, poor governance, corruption and the like at the SABC.

SASFED also agrees with submissions that contend license fees constitute an indiscriminate tax that have proven non-viable in terms of collection and cost of enforcement.

The proposal however for a 1% ring-fenced tax across the tax base is laden with implications. To unravel and truly understand this requires sound empirical motivation and at least a public hearings process. It appears treasury has also rejected the proposal of a 1% tax increase.

SASFED is deeply concerned about the ongoing commitment to the idea of commercial subsidisation of the public service.

The commercial priorities of the SABC conflict with the objectives of a public broadcaster. This "hybrid-funding model" interferes with the value of content and cheats audiences by conceiving of them as advertising fodder.

The expectation that the SABC would have a stronger focus and capacity to deliver on its public broadcasting obligations as a result of one channel operating on a commercialised basis has in reality failed. SABC3 has failed to subsidise SABC1 and SABC2 since it has made less profits than the other channels.

SASFED believes that it defeats the objectives of public broadcasting to rely predominantly on advertising. Public broadcasting services have been significantly undermined by the power of commercial financing. Public service broadcasting goals have been lost in a drive for profitability for its own sake.

However the question of funding a public broadcaster is a global debate and international broadcasters have faced many obstacles recently. Even the BBC, one of the most successful and renowned public broadcasters, faced challenges when its license fee finance model stopped providing enough revenue, despite the UK public's willingness to pay their license fees.

SASFED is not totally opposed to a mixed funding model for the public broadcaster, but believes it should be significantly majority funded from public funds, with strict limitations on advertising and other forms of commercial revenue so as not to compromise quality content and substantive air time.

SASFED calls for much increased direct, meaningful state funding of the SABC. We contend this does not in principle equate to state control of the public broadcaster.

SASFED is concerned too about the potential abuse of public funds for ostensible "public service content" by adequately resourced commercial broadcasters. Allowing commercial broadcasters to source these funds has an implication for the distinction of a public broadcaster in a competitive environment.

Indeed the resource demands on the public broadcaster needs to be viewed in the context of insufficient commissioning and platform opportunity provided by commercial broadcasters, including for emergent and small producers. This has impacted also on the distinct role of the public broadcaster and the nature of its programming.

We strongly believe the question of the public broadcasters viability, in a multi-channel and competitive environment, is dependent on its distinctness and innovative role in the broadcast market. This is predominantly made for by the quality of its operations, including the factor of a dynamic, effective, innovative, strategically astute and far-sighted management accountable to a progressive concept of public broadcasting. To date the public broadcaster has yet to creatively exploit its capital even at the most basic of levels such as marketing its locally commissioned and licensed product.

SASFED reasserts too that any consideration of the funding fortunes of the public broadcaster must recognize the significant extent to which the independent production sector, based on an absolute commitment to

production values, has to date subsidised public broadcaster programming – to boot under a regime of exclusion of due Intellectual Property.

4.2 The Public Service Broadcasting Fund

SASFED is not opposed to the establishment of a fund for public service programming within a matrix of funding mechanisms to support public service broadcasting, independently managed even by the Media Development and Diversity Agency (MDDA). However SASFED is opposed to the establishment of a centralized fund managed by a secondary entity such as the MDDA as the means for the Sac's principal operations.

SASFED asserts that this model:-

- institutionally guts the public broadcaster;
- is fraught with implication for the independence of the broadcaster;
- is an unnecessary additional administrative cost burden;
- and for all practical intents and purposes is operationally non-viable for the functioning of the public broadcaster.

SASFED believes this model will exacerbate the already problematic trade relations of the independent production sector with the public broadcaster, including in relation to efficient and dynamic financing, commissioning and production cycles.

SASFED is concerned too that government has representation on the board of the MDDA, mitigating against the independence of the public broadcaster.

SASFED is glad to see that content is listed as the second most important area for the PSB funds to be spent in, as outlined in chapter 4, point 6 b of the broadcast Bill. We would however like a more accurately definition of "content" in "content development", to include the terms "South African" and "independently produced", as this will ensure a sustainable local television production industry.

Additionally, the language of the Bill is unclear as to whether the list of priorities for funding of a public broadcaster is in order of priority. In Chapters 3 and 4 creation and maintenance of a "public service division of the SABC including regional television and international broadcasting services" takes precedence over "content development."

It is unclear what exactly this means. Will the bureaucracy, real estate, high overheads and the like take precedence over actual programming? It is precisely such an imbalance in funding management that has contributed to the crises and deficiencies of the SABC.

Quality content created and shaped to address the real needs and desires of the South African people should be the central concern of the SABC.

4.3 Structure of the SABC

SASFED restates the production industry's historical concern that the division of the SABC into public service and commercial entities has had the effect of ghettoising programming along lines of commercial viability and social relevance, race, class and language.

SASFED does not subscribe to a notion of absolute mutual exclusivity between commercial viability and social relevance, or of audience programming interest on grounds of race, class and language. In fact we believe such ghettoisation goes fundamentally against the grain of the nature and role of public service broadcasting to help forge an integrated South African identity.

The expectation that the SABC would have a stronger focus and capacity to deliver on its public broadcaster obligations as a result of one channel operating on a commercial basis has not borne fruit. Indeed the "public service" channels have subsidised the "commercial" channel.

SASFED proposes an informed review of the current "three national channel" organization of the SABC. SASFED is tentatively inclined to the public broadcaster being streamlined and narrowing its national channel offerings to two. This may contribute to a more effective, distinct and integrated public service role by the SABC on a more viable basis.

Programming by the public broadcaster should be across a full spectrum, with a rich a mix of programming genres including dramas, talk shows, documentaries, short film, experimental works, etc. Programming should be overwhelmingly sourced from the independent production sector as per regulatory requirements. This is an essential requisite of an open and democratic society, ensuring independent and diverse representation.

In so far as the language obligations of the public broadcaster are concerned, SASFED believes these may be significantly supported by regional services or windows. In SASFED's concept of a public broadcaster this should not, for example, preclude a Venda programme, deemed important, from being aired on a national platform.

The generally positive experience in the innovation of a creative and integrated language and subtitle mix in national programming should continue to be developed in meeting the public broadcaster's language challenges.

However it must be questioned whether enough resources and capacity are available to support such a diversity of channels.

For resource priority reasons and in the interests of an independent public broadcaster, SASFED is opposed to public broadcast funds being used for an international broadcast division that is subject to and/or reflexively promotes South Africa's foreign policy.

4.4 Archives

Regarding Chapter 5 point 10. 3) (g) "To establish and maintain libraries and archives containing material relevant to the objects of the corporation and to make available to the public such libraries or archives with or without charge"

We strongly support the conservation and accessible use of archives, which are a public asset. These archives should be available on and off line without charge, and be easily accessible to all South Africans.

The Bill in chapter 5 point 10. 3) (g) regarding libraries and archives is in fact no different from the current theoretical state of archival and library material at the SABC, but in practice the material is inaccessible to the general public and very difficult to access for even the most experienced television producers. We would like to see the Bill be far more specific and stipulate that any and all material collected and filmed by the SABC be catalogued and made available nationwide so that any member of the public can view it and have copies made free of charge for research purposes, either on via internet or by other digital means. Only this way will independent production companies in the provinces outside Gauteng have equal opportunity to produce content for the public broadcaster by having equal access to archival material, especially in the genre of documentary. It should also be the archival departments responsibility to educate every person that wishes to access the archives about copyright and the fair use exceptions to copyright in order to allow low-budget documentaries and other productions to use archival material when it is legally allowed to do so free of charge. Currently even viewing the archive material in the first place is prohibitively costly, much less actually using it for anything.

4.5 Governance of the SABC

SASFED resubmits its dissatisfaction with the Board of the SABC being appointed through a process that only involves party political representatives.

It is imperative that procedures for the appointment of the Board include non-party political role players, constituted as an independent statutory panel, and a public interview process. This is vital for the appointment of Board members who would be accountable to a shared vision of the role of the public broadcaster.

SASFED supports the proposal for appointed Board members to subscribe to an oath or affirmation of commitment. SASFED submits the following as the basis for the affirmations against which Board members would both be judged for appointment and sworn to:

- appreciation of the dynamic, full spectrum role of public television in society and an overriding commitment to public service and the public interest
- impeccable governance competencies

- commitment to a co-determining and collaborative role by relevant role players and interests
- commitment and accountability to a renewed, optimally-shared vision of public broadcasting services
- resolute independence from untoward state, party-political and civil constituency interests
- a dynamic appreciation of the concepts of public service obligations and development
- a bold commitment to free and diverse expression
- unquestioned commitment to local content and independent commissioning regulations
- commitment to conducive terms of trade with the independent production sector, including money for value and just property rights recognition
- commitment to a bold, dynamic and visionary commissioning structure
- ability to effect a credible, competent and responsive management and operational structure
- SASFED also submits that these criteria should be used for the selection and commitment of the advisory boards.

4.6 Community Broadcasting Services

SASFED submits to the leadership of the community broadcasting sector in comment on this aspect of the Bill and Charter.

We do however disagree with any statist notion of development that impacts on the independence and critical role of community broadcasters. We disagree too that community broadcaster partnerships with municipalities should be an absolute obligation.

4.7 Ensuring universal access to broadcasting services

While allowing for "competition" in the broadcast market, and attempting to open even "public broadcasting" to other players, the Bill still clearly defines Sentech as the "common carrier". Since ICASA regulates licences available, and since Sentech has so dismally failed in meeting its own mandates (i.e.: Internet access for rural communities etc.), we question why Sentech is the only carrier of broadcast content.

In the digital domain it is possible for ICASA to allocate multiplexes or frequencies, and regionally specific broadcasters might then be able to broadcast their own content, with their own transmitters. Community broadcasters have long argued that the cost of broadcasting charged by Sentech is too high for their economic viability. With the declining costs of broadcast transmitters they should have opportunity to broadcast using their own transmitters.

4.8 The Functions of ICASA

SASFED believes a bold and effective independent regulator is required, to offset power imbalances in the broadcast environment.

The independent production sector's historical experience in seeking requisite local content and independent commissioning regulations has, for example, proved a consistent attempt by both public and commercial broadcasters to escape their obligations in respect of this. Industry and broadcast beneficial outcomes in respect of this was historically secured only by the role of an effective independent regulator.

SASFED is however concerned about the monitoring and enforcement capacities of the independent regulator including in relation to the revised policies it is to receive from the public broadcaster.

SASFED is of the view that delegation of compliance with ICASA's Code of Conduct to a broadcast industry body is symptomatic of the regulator's capacity deficits and amounts to an abrogation of the role of the regulator. Part of the reason the SABC failed was because ICASA was grid locked as a regulator - divided by major commercial interests. We submit that ICASA should fulfill its function and be far stronger in its role as regulator. SASFED resubmits that the role of the regulator, particularly as an instrument to offset power imbalances in the broadcast industry, should be extended to include adjudication over such matters as Intellectual Property rights that are currently wholly skewed in favour of broadcasters, including the public broadcaster, to the detriment of the industry and the public interest as a whole.

4.9 The Powers of the Minister

SASFED is deeply concerned about the wide-ranging, unilateral and ill-prescribed powers of the Minister of Communications over the Board of an independent SABC.

The determination of what constitutes grounds for the Minister's interventions in the affairs of the SABC is solely at his discretion and is wide open to political abuse. We are concerned too that an individual can make binding decisions on behalf of the public and the industry without even a mechanism for appeal.

SASFED submits, as but one counter measure to the unilateral powers of the Minister, that s/he be empowered to intervene in the affairs of the SABC only under the considered, clearly-defined and soundly-motivated advice of the

institutions to which the SABC is directly accountable, such as ICASA and Parliament.

4.10 Establishment of Broadcasting and Signal Distribution Museum

The Bill proposes the set-up of a Broadcasting and Signal Distribution Museum, run jointly by Sentech and the SABC. While finance for the Museum is lowest on the scale of priorities, the Bill also indicates the Museum must be set up within 18 months of the start of this Act. The latter appears to place a much higher priority in terms of timing than other otherwise suggested in the Bill.

Given the other priorities on actual local content development, improving the public service offering, and stabilising the entire public broadcast model, we would argue that the Museum at this point is a "nice to have" but not a priority for establishment at this time.

4.11 Local Content Industry and the Advisory Body to Minister

SASFED supports in principle the concept that the SABC Board must establish a Public Broadcasting Advisory Council to serve as link with the public, and the principle of representation of the different provinces. However we caution against any notion that an appointed committee, including individual provincial representatives, be taken to conclusively represent our diverse public.

Notwithstanding our concern of there being too many structures in an already cluttered organogram, SASFED urges that all such bodies be obliged to commit to the affirmations herewith proposed for the SABC Board.

4.12 Specialist Channels

The Bill makes reference to what it terms "Specialist Channels" within 9 months of "the digital switch-over", prioritising "children, ethno-documentaries and wildlife".

Note should be taken of the Digital Terrestrial Television regulations currently being finalised by ICASA, which suggest the dual Illumination Period would extend till at earliest 30 March 2012. Indications are it will take at least 10 years till the analogue service can be completely phased out, given the slow uptake of digital decoder technology, and based on global standards for this conversion (South Africa's may take much longer).

The DTT regulations in their current draft further state that "Digital Incentive Channels" will only be granted to existing license holders while dual illumination continues.

Clarity is therefore required in terms of the Bill's provision "within 9 months of 'digital switch-over'". Is this:

a) 9 months after digital is activated, or

b) 9 months after analogue is completely phased out?

If the answer is a), this would be in clear conflict of the "Digital Incentives Channels" proposed by the ICASA DTT regulations, and additionally ICASA have indicated there is not enough frequency available till after the migration is complete to open up frequencies for other players.

If the answer is b), then it appears such channels will be within 9 months of the estimated minimum 10 year "dual illumination" period. This clearly falls outside of the life span of the Bill itself, and so appears meaningless.

SASFED also cautions against limiting and ghettoising documentaries as "ethno-documentaries".

The Bill further proposes that the "Specialist Channels" will "Ensure significant space for programmes produced by the independent productions sector."

SASFED believes this should set at 70 to 75 percent in line with best practise globally for local content public broadcasting.

SASFED further propose that any future licences granted, for example for "Specialist Channels", should include the best global practice on rights ownership with rights belonging to the producers and creators of content

4.13 The SABC Charter

The provision of the Charter that the SABC Board is required to submit revised policies to ICASA within 12 months of the Act coming into effect is welcomed.

We are cynical however of a lofty charter that has no practical effect for the everyday operations of the public broadcaster and its screen product, including in relation to a dynamic commissioning relationship with the independent production sector.

Given the independent production industry's status as a broadcast stakeholder and its endemic experience of being a public broadcaster beset by instability and crisis, including of operational management, SASFED calls for the Board to be specifically obliged to host an Indaba with the independent production sector in its policy revision process.

Such an Indaba would also consider the independent production sector's day-to-day operational experience of the public broadcaster, including in relation to:

- commissioning structures,
- budgets,
- trade relationship systems,
- terms of trade including intellectual property and copyright issues,
- editorial management,

- and the creative and business integrity of independent producers.

This provision of the Charter is further required to spell out the accountability, enforcement and other obligations of the Regulator upon receipt of the SABC's public and stakeholder informed revised policies.