



Attention: Ms Pat Jayiya
Constitutional Review Committee
Parliament

Email: pjayiya@parliament.gov.za

29 May 2015

Dear Ms Jayiya

SUBMISSION TO THE JOINT CONSTITUTIONAL REVIEW COMMITTEE IN TERMS OF SECTION 45(1)(C) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (ACT 108 OF 1996) – RECOMMENDED REVIEW AND AMENDMENTS OF CERTAIN PROVISIONS OF CHAPTER 9 OF THE CONSTITUTION.

1. INTRODUCTION

- 1.1. These submissions are made by the SOS Coalition, in Support of Public Broadcasting (“the Coalition” or SOS).

- 1.2. The SOS Coalition represents a broad spectrum of civil society stakeholders committed to the broadcasting of quality, diverse, citizen-orientated public-interest programming aligned to the goals of the SA Constitution. The Coalition includes a number of trade union federations including COSATU and FEDUSA, a number of independent unions including BEMAWU and MWASA; independent film and TV production sector

organisations including the South African Screen Federation (SASFED); a host of NGOs and CBOs including the Freedom of Expression Institute (FXI) and Media Monitoring Africa (MMA), and a number of academics and freedom of expression activists.

- 1.3. SOS has long campaigned for Constitutional protection of the South African Broadcasting Corporation (“the SABC”) and for a strengthening of the Constitutional guarantee of independence for the Independent Communications Authority of South Africa (“ICASA”).
- 1.4. SOS welcomes this opportunity to make suggestions for the review and amendment of certain sections of Chapter 9 of the Constitution of Republic of South Africa, 1996 (“the Constitution”, which chapter deals with State Institutions Supporting Constitutional Democracy. We note the closing date for submissions 31 May 2015 . We request the opportunity to participate in the public hearings which Parliament’s Constitutional Review Committee (“the Review Committee”) will doubtless hold.

2. BACKGROUND TO THE SOS’S PROPOSED AMENDMENTS TO CHAPTER 9

2.1. Amendments Relating to the SABC:

2.1.1. South Africa is a developing country with developing country challenges. These include high levels of poverty and illiteracy. Consequently, the SABC is, for many of South Africa’s people, the only source of news and information. The SABC’s reach amongst the population is huge – over 83% for SABC radio and over 90% for SABC television according to the December 2014 AMPS figures. It therefore plays a critical public information role. A democracy cannot function effectively without an informed citizenry. The SABC is therefore crucial to the proper functioning of our democracy and, when it fails to function effectively, our democracy can be said to be under threat. As a young democracy, South Africa has yet to develop a national political culture which respects the genuine independence of the SABC, as is clear from the widespread reports of Ministerial interference in internal SABC operational matters. Such interference is not a recent development and indeed has been a long-standing problem since 2007. Legal changes alone will not change this but can play an important role in helping to develop such a culture.

2.1.2. It is clear the current statutory regime is insufficient to protect the interests of the South African public. Consequently the SOS Coalition calls for the transformation of the SABC into a Chapter 9 institution as a way of protecting the SABC’s

independence. Chapter 9 of the Constitution provides for a number of state institutions that support Constitutional democracy, including, the Public Protector and the South African Human Rights Commission. These institutions are directly answerable to Parliament, and the Constitution specifically protects the appointments and removals of Chapter 9 institutions' governing bodies from political and other interference.

2.1.3. The SOS Coalition is acutely aware that being a Chapter 9 body does not insulate an institution from:

- 2.1.3.1. suffering from ineffectual leadership and from institutional ineffectiveness; and
- 2.1.3.2. institutional weaknesses arising out of, for example, a flawed corporate structure.

2.1.4. However, the Coalition believes that the more active Parliamentary oversight role that is thrust upon Chapter 9 bodies would improve the SABC's responsiveness and accountability to the public.

2.1.5. The SOS Coalition believes including the SABC as a Chapter 9 body is critical if South Africa is serious about:

- 2.1.5.1. transforming the public broadcaster into a genuine means of empowering citizens; and
- 2.1.5.2. wanting a public broadcaster that is committed to the broader public interest.

2.2. Amendments Relating to ICASA:

2.2.1. In 2000, ICASA was created out of two former regulators, the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority, in terms of the ICASA Act, 2000. In 2005 the increasing technological breakdown of traditional distinctions between telecommunications and broadcasting was recognised by the passage of the Electronic Communications Act, ("the ECA"). One of its key objects was to facilitate the convergence of infrastructure and services which digital technology made possible, that is, the ability to receive a range of content and services over a number of platforms.

2.2.2. Currently, the ICASA Act provides that ICASA is the regulator of broadcasting, electronic communications networks and services and postal services. Thus it is already a communications regulatory authority. It thus makes no sense to have its independence constitutionally protected only in respect of certain of its activities and functions. Indeed the reality of convergence for the country's entire ICT sector has been recognised not only in the ICT Policy Review Process Discussion Document but also in the Report of the ICT Policy Review Panel.

2.2.3. The Constitution was drafted prior to the era of technological convergence and thus section 192 focuses too narrowly on protecting the independence of the *broadcasting* regulatory authority only. In the converged environment, what is needed is the independent regulation of all communications services because the easily-made distinctions between broadcasting, telecommunications and other forms of electronic communication no longer hold and indeed, in practise, often no longer exist.

2.2.4. Further we think it imperative that the Chapter 9 provisions relating to appointments and removals of members of Commissions and general statements on independence must apply to the communications regulatory authority precisely because of its importance in promoting diversity and in shaping the nature of the communications environment upon which citizens depend to meet their information needs.

3. **SOS'S PROPOSED AMENDMENTS TO CHAPTER 9**

3.1. Introduction:

For the Review Committee's ease of reference we set out below the proposed amendments to or insertions in respect of sections: 181(1), 192, 192A, 193 and 194 of the Constitution, all of which are contained within Chapter 9 of the Constitution, in the manner of a Bill, that is:

Words in **bold type** in square brackets [] indicate omissions from existing provisions

Words underlined with a solid line indicate insertions in existing enactments

3.2. SOS's Proposed Amendments to Section 181(1) of the Constitution:

"Establishment and Governing Principles

181. Establishment and governing principles. - (1) The following state institutions strengthen constitutional democracy in the Republic:

- (a) The Public Protector.
- (b) The South African Human Rights Commission.
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- (d) The Commission for Gender Equality.
- (e) The Auditor-General.
- (f) The Electoral Commission.
- (g) The Independent Authority to Regulate Communications.
- (h) The Public Broadcaster.

3.3. SOS's Proposed Amendments to Section 192 of the Constitution:

"Independent Authority to Regulate [Broadcasting] Communications

192. [Broadcasting] Communications Authority. - National legislation must establish an independent authority to regulate [broadcasting] communications in the public interest, and in particular:

- (1) to ensure fairness and a diversity of views broadly representing South African society with regard to broadcasting services; and
- (2) to promote convergence and the efficient use of communications infrastructure and services.

3.4. SOS's Proposed Insertion of Section 192A of the Constitution:

"Public Broadcaster

192A. Public Broadcaster. – National legislation must establish an independent national public broadcaster to provide broadcasting services in the public interest and in accordance with its national public broadcasting mandate set out in such legislation."

3.5. SOS's Proposed Amendments to Section 193 of the Constitution:

"193 Appointments.-(1) The Public Protector, **[and]** the members of any Commission and of the Communications Authority and the Non-Executive Board members of the Public Broadcaster established by this Chapter must be women and men who-

- (a) are South African citizens;
- (b) and proper persons to hold the particular office; and
- (c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission and the Communications Authority and the Public Broadcaster established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint:

(a) the Public Protector, the Auditor-General and the members of-

(i) the South African Human Rights Commission;

(ii) the Commission for Gender Equality; [and]

(iii) the Electoral Commission[.]; and

(iv) the Communications Authority; and

(b) the Non-executive members of the Board of the Public Broadcaster.

(5) The National Assembly must recommend persons-

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote -

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission or of the Communications Authority or of a Non-executive Board member of the Public Broadcaster.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)."

3.6. SOS's Proposed Amendments to Section 194 of the Constitution:

"194. Removal from office.- (1) The Public Protector, the Auditor-General, **[or]** a member of a Commission or of the Communications Authority, or a Non-executive Board member of the Public Broadcaster established by this Chapter may be removed from office only on-

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of -

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission or of the Communications Authority, or a Non-executive Board member of the Public Broadcaster must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President-

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal."

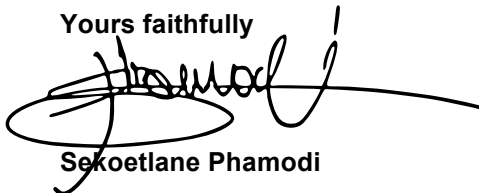
4. CONCLUSION

4.1. SOS thanks the Review Committee for the opportunity to make these representations and stresses that the recommendations made above are made in the spirit of contributing to the strengthening of our democracy by strengthening the independence of two state institutions which must and do play crucial roles in supporting constitutional democracy, namely ICASA and the SABC.

4.2. SOS reiterates its desire to make oral representation at any hearings held. Please do not hesitate to contact the writer should SOS be able to be of any further assistance to Parliament.

Kind regards

Yours faithfully

A handwritten signature in black ink, appearing to read 'Sekoetlane Phamodi', with a large flourish extending to the right.

Sekoetlane Phamodi
Coordinator SOS Coalition