



HONG KONG JOURNALISTS ASSOCIATION

香港記者協會

## **SUBMISSION ON THE TELECOMMUNICATIONS (AMENDMENT) BILL 2009**

**by**

**Hong Kong Journalists Association**

1. The Hong Kong Journalists Association (HKJA) notes the contents of the Telecommunications (Amendment) Bill 2009. While we welcome the move to provide some clarity to the application system for sound broadcasting licences, we consider that the changes fail to satisfy the requirement to protect freedom of expression enshrined in international human rights conventions.

### **The Problem with the Current Legislation**

2. As pointed out by magistrate Douglas Yau in the case involving Citizens Radio, "unfettered discretionary power" was given to the Executive Council under the Telecommunications Ordinance to grant sound broadcasting licences. He went on to say that a decision on radio licensing should be made by an independent body - and not by the Chief Executive in Council "alone and at his sole unfettered discretion".
3. He ruled that the "lack of independence" of the deciding (Executive Council) and recommending body (Broadcasting Authority) "is not in accordance with the requirement that any restrictions on the freedom of expression and speech must be prescribed by law and therefore in breach of both the Basic Law and the Bill of Rights." He also noted that there was no appeal mechanism for an aggrieved applicant.
4. At first glance, it appears that the government is now amending the ordinance according to the judgement by setting out a set of criteria for granting a sound broadcasting licence. However, the reality is that the amendment bill will maintain the unfettered discretion given to the deciding authorities and will therefore fall short of protecting freedom of expression.

### **Real Reform is Needed**

5. According to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), everyone has the right to freedom of expression. The article further states that this freedom shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. However, article 10(2) states that the exercise of this freedom may be subject to "restrictions or penalties as are prescribed by law and are necessary in a democratic society". We question whether the unfettered discretionary power given to the Executive Council and the lack of meaningful criteria are indeed necessary.

6. The HKJA strongly believes that the government should carry out a comprehensive review of broadcasting legislation, with top priority given to allowing the Hong Kong people to enjoy greater freedom of expression. This is doubly important in a far from democratic polity like Hong Kong.

### **Independent Body is Needed**

7. In our view, the government must set up an independent body to be responsible for the award of radio licences. Its primary responsibility must be to ensure media diversity in Hong Kong. Diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole in all its facets.
8. The Executive Council, as an advisory body to the government, is not the most independent organisation to decide who should and should not be awarded a broadcasting licence. An independent body should be protected against interference, particularly of a political or commercial nature. Its institutional autonomy and independence should be guaranteed by law, and it should operate in an open, transparent and impartial manner.
9. According to the Declaration of the European Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, which was adopted on 26th March 2008 at the 1022nd meeting of the Ministers' Deputies, most regulatory authorities are appointed by the member states' parliament or by the head of state following parliamentary recommendation. Some member states even stipulate that some or all of the members should be nominated by non-governmental groups which are considered to be representative of society. The Declaration further notes that in a number of countries, appointment solely by the head of state has sometimes been criticised because membership would represent or reproduce existing political power structures. In fact, in some member states, members of regulatory authorities are accused of acting on behalf of the state body that appointed them or the political powers behind the appointing authority.
10. The HKJA is disturbed that the current system, whereby the Executive Council gives final approval to licence applications, will perpetuate the latter trend. In other words, the Executive Council will act on behalf of the current political power structure. We would urge the government to follow the example of most democratic countries in the European Union by having the Chief Executive appoint members of an independent body on nomination by the Legislative Council, which in turn must act according to a set of open and objective criteria.
11. The government should also create an independent mechanism to hear appeals from applicants who are unhappy with a licensing decision. It is unacceptable that the amendment bill mentions nothing about such an important right. Without an independent appeal mechanism, failed applicants will be forced to seek relief

through judicial review. They may well be deterred from taking this step given the high costs involved. Their inability to argue their case in a court of law would in turn hamper freedom of expression. Alternatively, applicants with grievances may take the case to the street and put the whole system on public trial.

### **Flaws in the Amendment Bill**

12. We now turn to the specific proposals made in the Telecommunications (Amendment) Bill 2009.
13. We feel the criteria set out in section 13C (4) are too vague and subjective to satisfy the criteria set out in the European Convention and the stipulation cited by magistrate Douglas Yau that "restrictions on the freedom of expression and speech must be prescribed by law". The vagueness of the government's proposed criteria will still mean that the granting of a licence will be subject to the discretion of the licensing authority and will therefore be open to abuse. This reflects a mindset of control which goes beyond the need to regulate the airwaves. This is especially so when one looks at criterion (d), namely the quality of programming. How can one judge the quality of programmes before they are even produced? The criterion will either be abused or cannot be implemented.
14. We are also concerned that the amendment bill will fail to prevent the implementation of the licensing system in an arbitrary manner. In 2008, the European Court of Human Rights handed down two separate judgements, in which the licence-granting authorities in Bulgaria and Armenia were held to have violated Article 10 of the European Convention because of the arbitrary manner in which the authorities rejected licence applications.
15. Special attention should be drawn to the case of Glas Nadezhda EOOD and Elenkov v. Bulgaria (application no. 14134/02). In this case, Glas Nadezhda EOOD complained that the Bulgarian authorities refused to grant it a radio licence. The Court found that most of the criteria set out by the licence-granting authority, the National Radio and Television Committee (NRTC), lacked clarity (even though a point scoring system was used) and could therefore be subject to a highly subjective assessment. The Court also held that the fact that there was no public hearing and that the committee's deliberations were kept secret amounted to keeping the applicants and the public uninformed about how the authority had exercised its discretion to deny a broadcasting licence.
16. The proposed criteria set out by the Hong Kong government are far less clear than those in Bulgaria. The HKJA therefore urges the government to set out clear and objective criteria for granting licences so as to meet international standards. The Bulgarian system - which grants points for such criteria as experience, population coverage and programming - can be used as a reference for Hong Kong.

17. Another flaw of the proposed criteria is that they may preclude small radio licence applicants, who may be targeting a narrower audience than the existing broadcasters, which offer a full range of territory-wide services. Inclusion of smaller operators would benefit media diversity and freedom of expression in Hong Kong. We are concerned that sub-sections (d) and (h) in particular could be used to preclude broadcasters targeting a narrower audience than that served by existing licensees.
18. This concern relates to an issue which the HKJA has advocated for many years - community broadcasting. This is related - in our view - to the controlling mindset of the government, which goes against the world trend of allowing greater freedom of expression. We believe that freedom of expression should always outweigh the requirements of government control.
19. With the vast spectrum to be released by digitalization, the government has no reason to use the excuse of scarcity to reserve the airwaves only for big players. It must create a legal environment for small operators to offer their services to the public. Any further delays in this respect would deprive minority and small community stakeholders of their right to freedom of expression.
20. Further, media diversity should be included as a criterion in consideration of a licence application. Such a criterion is vital to encouraging a vibrant and diverse media scene and free expression in Hong Kong. This section could be worded in the following way, "Whether the applicant is able to contribute to media diversity and the propagation of different points of view in its programming".
21. The HKJA would also urge the government to make similar changes to Part IV of the Broadcasting Ordinance, which covers the licensing of television stations. Such changes could be made when the government sets up a Communications Authority, which would require the consolidation of the Broadcasting and Telecommunications ordinances.
22. In short, the government's proposals in the Telecommunications (Amendment) Bill 2009 fall short of catching up with the world trend in sound broadcasting. We are deeply disappointed that the government has neither tackled the flaws highlighted by magistrate Douglas Yau, nor made reference to international standards, including those set out by UNESCO and the European Union. We strongly urge the government to reconsider its proposals and carry out a proper review of the licensing system, to ensure that it complies fully with international freedom of expression requirements and meets the need for community radio.