



Submission

to the

Committee on the Review of Public
Service Broadcasting in Hong Kong

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SUMMARY OF RECOMMENDATIONS

RTHK's Guiding Principles and Mandate

Subject to some important exceptions, RTHK's current mandate is broadly in line with international best practice. However, we have serious concerns in some areas and strongly recommend the following:

- RTHK should not be required by regulation to provide airtime to the Government to comment on matters of public interest.
- RTHK's television services should not be required primarily to focus on market segments not served by commercial broadcasters.
- RTHK should be required to promote racial and gender equality, both in its internal practices and in its programming.
- RTHK should be required to provide programming for children and young people.
- Consideration should be given to imposing local content and in-house production requirements on RTHK.

RTHK's Funding

We consider RTHK's current funding mechanism to be unsatisfactory and strongly recommend it is reviewed with a view to establishing safeguards against political or other undue interference. As a matter of principle, the level of the State contribution should always be such as to continue sufficient funding. In the short term, we recommend that the following measures are implemented:

- Funding should be guaranteed over long-term multi-year cycles and be indexed against inflation.
- The level of the subsidy should be determined by the Legislative Council, on the recommendation of the RTHK Board of Governors.

In the longer term, other sources of funding should be explored, including from commercial income, sponsoring or advertising, a listeners' and viewers' fee or through a fee paid by commercial broadcasters. The overall aim of this exercise should be to identify (a) stable and long-term source(s) of income that will protect RTHK's institutional and editorial independence for the foreseeable future and guarantee high quality public service programming.

RTHK's Independence and Accountability

We are greatly concerned that RTHK's current status and governance and accountability structure may significantly undermine its independence as well as its ability to provide high quality public service programming. We strongly recommend that:

- RTHK should be re-established as an independent legal body. Ownership of all assets it currently uses should be transferred to the new legal body.

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- As a publicly-funded resource RTHK should be accountable to the public through an independent council or board of governors, qualified through expertise or education and committed to freedom of expression and public service broadcasting, and appointed by the Legislative Council in an open and transparent process that allows for significant civil society involvement.
- The independence of both the governing board as a whole and its members should be guaranteed.
- RTHK should be required to conduct periodic public meetings in order to review whether its programming meets the needs of the public.
- Consideration should be given to elaborating RTHK's internal complaints mechanism, both by developing the formal internal complaints mechanism and by developing a monthly programme that discusses listeners' and viewers' feedback.

1. INTRODUCTION

This Submission provides ARTICLE 19's comments to the Committee on the Review of Public Service Broadcasting in Hong Kong. ARTICLE 19 is an international human rights organisation that works with partner organisations around the world to protect and promote the right to freedom of expression. We are a non-governmental organisation who has campaigned for the realisation of the right to freedom of expression in a range of contexts for twenty years.

ARTICLE 19 regards public service broadcasting as a crucial component of a pluralistic media landscape, performing a vital and unique role in fulfilling the public's right to know. The right to freedom of expression is a multi-faceted right that protects not only the right of individuals to disseminate information, opinion and ideas, but also the right of the public as a whole to receive information from a large variety of sources. 'Public service broadcasting', understood as a form of broadcasting that is impartial, independent and has a mandate to serve all sections of the public with high quality entertainment, educational and news and current affairs programming, is a form of broadcasting that can play a significant role in fulfilling the public's right to receive information. If managed well, a public service broadcaster can provide reliable and impartial information and serve as an impartial source of information on all matters of public interest. By serving niche and minority needs in addition to its mainstream functions, public service broadcasting can also make an important contribution to pluralism in the media.

For these reasons, many countries around the world maintain publicly-funded public service broadcasters and numerous transitional democracies are in the process of establishing a public service broadcaster. A 2003 Communiqué adopted by Conference of the Ministers on Information and Broadcasting in Asia and the Pacific region expresses strong support for the principle of public service broadcasting, stating:

Mindful of the crucial role played by public service broadcasting in increasing the awareness of the people, promoting freedom of expression, ensuring free flow of information and ideas, maintaining diversity in the broadcasting sector and empowering the communities, public service broadcasting should provide programming that serves the public interest and facilitate people's participation in development programmes for the societies.¹

Radio Television Hong Kong (RTHK) has long been Hong Kong's public service broadcaster. RTHK has been broadcasting, under a range of different guises, since the 1920s. Originally a pure State broadcaster, in the 1970s the Government relinquished its editorial control and RTHK became an independent department. While it has formally remained a government department, in the years since then it has established itself as an editorially independent broadcaster with a good track record of delivering quality programming.

¹ Bangkok, 27-28 May 2003.

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The current review is aimed at investigating the continued provision of a publicly funded broadcasting service in Hong Kong. The terms of reference of the Review are to examine the continued role and justification of public service broadcasting in Hong Kong against the public financial and other resources required; to explore issues of RTHK's accountability; and to identify ways in which the administration can evaluate the effectiveness of public service broadcasting, and how the public can engage in such a process. The Review specifies a number of specific questions on which feedback is sought, and this submission will focus on the following:

- What are the purposes and values – or public service mandate of - a public service broadcaster in Hong Kong?
- Where should the resources for a public service broadcaster in Hong Kong come from?
- What should be the guiding principles for public service broadcasting programming in Hong Kong?
- Who should monitor the operation of a public service broadcaster in Hong Kong, and how?
- How should we assess the performance of a public service broadcaster in Hong Kong and its fulfilment of public service mandate?
- How should a public service broadcaster in Hong Kong be accountable to the public?
- What arrangements should be made to involve the public in ensuring the effective operation of the public service broadcaster in Hong Kong and fulfilment of its public service mandate?

This Submission seeks to provide input on all these issues. It takes as its starting point the right to freedom of expression. Our Recommendations are based on international and comparative legal standards regarding freedom of expression. We will also refer to ARTICLE 19's *Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles),² a set of guidelines developed on the basis of international practice, comparative constitutional law and best practice in countries around the world, and to standards from regional human rights systems from around the world. While these standards are not formally binding on Hong Kong, they provide good evidence of generally accepted understandings of the nature and scope of the right to freedom of expression.

The next section of this Submission discusses the importance of freedom of expression and outlines Hong Kong's international and constitutional obligations to ensure respect for this key right. Section 3 provides our recommendations to the Review. We have attached, as Appendix 1, a Model Law that provides an example of how the issues of mandate, funding, independence and accountability may be incorporated in line with best international practice.

² London, April 2002.

2. INTERNATIONAL STANDARDS ON FREEDOM OF EXPRESSION AND PUBLIC SERVICE BROADCASTING

2.1. The Importance of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, with some of its provisions, including Article 19, binding on all States as a matter of customary international law.³ Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR)⁴ is an international treaty, binding on the Hong Kong Special Administrative Region,⁵ which imposes legally binding obligations on States Parties to respect a number of the human rights set out in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found at Article 19 of the UDHR. Reflecting its global recognition, the right to freedom of expression is also guaranteed in all three major regional human rights systems, at Article 9 of the African Charter on Human and Peoples' Rights,⁶ Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷ and Article 13 of the American Convention on Human Rights.⁸

Hong Kong's Basic Law also guarantees freedom of expression, and specifies that restrictions on it shall not contravene the standards set out under the International Covenant on Civil and Political Rights.⁹

Freedom of expression is among the most important of the rights guaranteed by the ICCPR and other international human rights treaties, in particular because of its fundamental role in underpinning democracy. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms

³ For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain)* (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

⁴ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁵ See Article 39 of Hong Kong's Basic Law. Although China is not a State party to the International Covenant on Civil and Political Rights, the Government notified the Secretary-General of the United Nations of the continuing application of the Covenant in the Hong Kong Special Administrative Region by a letter dated 4 December 1997: see UN Doc. CCPR/C/HKSAR/99/1, 16 June 1999.

⁶ Adopted 26 June 1981, in force 21 October 1986.

⁷ Adopted 4 November 1950, in force 3 September 1953.

⁸ Adopted 22 November 1969, in force 18 July 1978.

⁹ Basic Law, Articles 39 and 26, respectively.

to which the United Nations is consecrated.”¹⁰ The European Court of Human Rights has stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.¹¹

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The Inter-American Court of Human Rights, for example, has stated: “It is the mass media that make the exercise of freedom of expression a reality.”¹² The UN Human Rights Committee has stressed that a free media is essential in the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.¹³

2.2. Freedom of Expression and Public Service Broadcasting

2.2.1. Pluralism and Public Service Broadcasting

Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights are respected and can be fully enjoyed.

In relation to the right to freedom of expression and the media, this means that governments must take steps to protect and promote both the right to freedom of expression of the media as well as the right to the public to receive information from a variety of sources. This implies that an important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media.¹⁴ In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

¹⁰ 14 December 1946.

¹¹ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

¹³ UN Human Rights Committee General Comment 25, issued 12 July 1996.

¹⁴ For elaboration and justification of this principle, see the European Court of Human Rights’ judgment in *Informationsverein Lentia and others v. Austria*, 28 October 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.

Public service broadcasting – a form of broadcasting that serves the entire public, including minorities, and is accountable to it for providing high quality and editorially independent news, information and other output – can make a significant contribution to media pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.¹⁵

2.2.2. Independence of Public Service Broadcasters

In order to be able to fulfil their mandate to broadcast ‘in the public interest’, it is of paramount importance that public service broadcasters are fully independent from political or commercial interests.

An important implication of this requirement is that bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments, both global and regional in nature. The UN Special Rapporteur on Freedom of Expression, for example, has adopted a Declaration stating that,

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.¹⁶

The Special Rapporteur has also stressed the importance of independence in relation to public service broadcasters in several of his annual reports.¹⁷

Several declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 *Declaration of Sana’a*¹⁸ calls on the international community to provide assistance to publicly-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia* notes the need for State-owned broadcasters to be transformed into proper public service broadcasters with guaranteed editorial independence and independent supervisory bodies.¹⁹ The 1992 *Declaration of Alma Ata* also calls on States to, “encourage the development of journalistically independent public service broadcasting in place of existing State-controlled broadcasting structures”.²⁰

¹⁵ See, in particular, the 2003 Bangkok Communiqué by the Asia Pacific Ministers of Broadcasting and Information, note 1; UNESCO’s Declaration of Alma Ata on Promoting Independent and Pluralistic Asian Media, endorsed by UNESCO’s General Conference in 1995; UNESCO’s Declaration of Sana’a, 11 January 1996, endorsed by UNESCO’s General Conference in 1997.

¹⁶ Joint Declaration by the UN Special Rapporteur on freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, 18 December 2003.

¹⁷ E.g. in his 1998 Annual Report, UN Doc. E/CN.4/1999/64, par. 5; 1997 Annual Report, UN Doc. E/CN.4/1998/40, par. 22.

¹⁸ 11 January 1996, endorsed by the General Conference at its 29th Session, 12 November 1997, Resolution 34..

¹⁹ Adopted 13 September 1997. Endorsed by the General Conference at its 29th session, 12 November 1997, Resolution 35. Clause 7.

²⁰ Note 15.

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In Europe, Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, adopted by the Committee of Ministers of the Council of Europe, states that the independence of public service broadcasters' governing bodies is paramount to their success.²¹ The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and that these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.²²

Principle 34 of the ARTICLE 19 Principles notes the need to transform government or state broadcasters into public service broadcasters, while Principle 35 notes the need to protect the independence of these organisations. Article 35.1 specifies a number of ways of ensuring that public service broadcasters are independent including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of goals, powers and responsibilities;
3. through the rules relating to appointment of members;
4. through formal accountability to the public through a multi-party body;
5. by respect for editorial independence; and
6. in funding arrangements.²³

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."²⁴

Many of the standards set out above reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. This is reflected, for example, in Principle 35.3 of the ARTICLE 19 Principles, which states: "The independent governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose prior censorship." The governing body may set direction and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

²¹ 11 September 1996.

²² Articles 9-13.

²³ Note 2, Principle 35.1.

²⁴ *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

2.2.3. Funding of Public Service Broadcasters

Adequate funding of public service broadcasters is crucial not only to keep them running, but also to secure their independence. True independence is only possible if funding is secure from arbitrary government interference or commercial pressure. In addition, public service broadcasters can only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of Recommendation (1996) 10 of the Council of Europe note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public service broadcasters susceptible to interference, for example with their editorial independence or institutional autonomy.

ARTICLE 19's Principle 36 deals with funding, stating: "Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets". In some countries, this has been enshrined as a constitutional principle. In Italy, for example, the Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to ensure that sufficient resources are available to enable the public service broadcaster to discharge its functions.²⁵

²⁵ Decision 826/1998 [1998] Guir. cost. 3893.

3. RECOMMENDATIONS FOR PUBLIC SERVICE BROADCASTING IN HONG KONG

3.1. Introduction

The following paragraphs provide our recommendations for the review of public service broadcasting in Hong Kong, grouped in four sections: RTHK's guiding principles and mandate; its funding; and its independence and accountability.

3.2. RTHK's guiding principles and mandate

The Committee on Review of Public Service Broadcasting has asked for input on the following two questions:

- What are the purposes and values – or public service mandate of - a public service broadcaster in Hong Kong?
- What should be the guiding principles for public service broadcasting programming in Hong Kong?

Recommendations:

Subject to some important exceptions, RTHK's current mandate is broadly in line with international best practice. However, we have serious concerns in some areas and we strongly recommend the following:

- RTHK should not be required by regulation to provide airtime to the Government to comment on matters of public interest.
- RTHK's television services should not be required primarily to focus on market segments not served by commercial broadcasters.
- RTHK should be required to promote racial and gender equality, both in its internal practices and in its programming.
- RTHK should be required to provide programming for children and young people.
- Consideration should be given to imposing local content and in-house production requirements on RTHK.

Analysis and background

According to RTHK's current Agreement, its overall aim is "to provide to the people of Hong Kong high-quality radio, television and new media services which inform, educate and entertain. The Department will strive to reflect the views of all sectors of the community of Hong Kong."²⁶ Within that overall aim, the Agreement specifies RTHK's mission as follows:

²⁶ Agreement, par. 4.1.

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- (i) to inform, educate and entertain audiences through multi-media programming;
- (ii) to provide timely, impartial coverage of local and global events and issues;
- (iii) to deliver programming which contributes to the openness and cultural diversity of Hong Kong;
- (iv) to provide a platform for free and unfettered expression of views; and
- (v) to serve a broad spectrum of audiences and cater to the needs of minority interest groups.²⁷

The Agreement also sets out specific, separate objectives for RTHK's radio, television and new media services.²⁸ For example, RTHK's radio services are required to encourage audience participation and community involvement, provide programming that serves minority needs and provide balanced and objective news and current affairs programming; its television services should provide balanced and objective current affairs programming and programming that caters to the needs of minority groups; and its new media services should maintain a balanced mix of high quality radio and television programming on the Internet and give emphasis to the provision of e-Learning projects.

Many of the guiding principles and programme objectives set in the Agreement accord with international best practice on public service broadcasting. ARTICLE 19's Principles recommend that public service broadcasters should provide a service that:

- provides quality, independent programming that contributes to a plurality of opinions and an informed public;
- includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
- provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
- is universally accessible and serves all the people and regions of the country, including minority groups;
- provides educational programmes and programmes directed towards children; and
- promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.²⁹

However, in a number of key areas RTHK's mandate departs from international best practice.

First, the Agreement requires RTHK's radio and television services to "provide a channel of communication for ... the Government to put forward their views on matters of public interest."³⁰ This may be interpreted as requiring RTHK to provide airtime to the government whenever the government wishes to comment on a matter it deems to be of public interest. 'Must carry' requirements of this sort are easily abused and are therefore generally disapproved of. The Council of Europe Recommendation on public service broadcasting warns that "[t]he cases in which public service

²⁷ Agreement, par. 4.2.

²⁸ Agreement, par. 4.3.

²⁹ Note 2, Principle 37.

³⁰ Agreement, paras. 4.3(i)(d) and 4.3(ii)(d).

broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances...”³¹ There is generally no need to compel public service broadcasters to carry such messages: practice around the world shows that broadcasters will generally report on government messages whenever they are of sufficient interest to the public. The editorial decision whether or not a matter is of interest to the public should be left to the broadcaster, not the government. The best way to ensure coverage of all matters of public interest is by promoting a diverse, independent broadcast media; not by imposing obligations on public service media.

Second, the first two objectives set for RTHK’s television services are to “provide high-quality television productions principally for market segments not adequately served by commercial television broadcasters” and to “continue the prime time transmission arrangements with the commercial stations”.³² While it is right that RTHK should provide programming that serves all sectors of society, and that it should strive to provide programming that is ignored by commercial broadcasters, we are concerned that requiring it to primarily provide such programming may very well marginalise RTHK’s television services. This might result in RTHK television becoming a niche broadcaster and would deprive the public of a potential source of high quality independent programming, including in the area of news and current affairs. Experience in other countries has shown that the public’s right to receive information from a wide variety of sources is best served by promoting a media environment that includes a public service broadcaster that provides a wide range of programming.

Third, we note that while the Agreement sets RTHK a very broad mandate to “educate” and provide programming that serves all sectors of society, it does not require RTHK to promote racial and gender equality, both in its internal practices and through its programming, or to provide children’s programming. These are all matters that ought to be required of a public service broadcaster.³³ The Agreement also fails to require RTHK to promote local programme production, for example by setting minimum quotas for original productions and material produced by independent producers based in Hong Kong. Imposing such requirements could provide an important stimulus and help to continue to sustain and promote local radio and television production.

3.3. RTHK’s funding

The Committee on Review of Public Service Broadcasting has asked for input on the following question:

³¹ Note 21, Principle VI.

³² Agreement, paras. 4.3(ii)(a) and (b).

³³ See, for example, para. 3.1.d of the Communiqué of the Asia Pacific Ministers for Information and Broadcasting, note 1; and the Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001. See also, for example, par. 3.2 of the BBC Agreement, requiring it to provide programming for children and young people.

- Where should the resources for a public service broadcaster in Hong Kong come from?

Recommendations:

We consider RTHK's current funding mechanism unsatisfactor and strongly recommend it is reviewed with an eye to establishing safeguards against political or other undue interference. As a matter of principle, the level of the State contribution should always be such as to continue sufficient funding. In the short term, we recommend that the following measures are implemented:

- Funding should be guaranteed over long-term multi-year cycles and be indexed against inflation.
- The level of the subsidy should be determined by the Legislative Council, on the recommendation of the RTHK Board of Governors.

In the longer term, other sources of funding should be explored, including from commercial income, sponsoring or advertising, a listeners and viewers fee or through a fee paid by commercial broadcasters. The overall aim of this exercise should be to identify (a) stable and long-term source(s) of income that will protect RTHK's institutional and editorial independence for the foreseeable future and guarantee high quality public service programming.

Analysis and background

The adequate funding of public service broadcasters is crucial to their functioning as well as to their independence. It goes without saying that without funds, public service broadcasters will not be able to produce the kind of quality broadcasting needed to satisfy the public's needs. A steady supply of funding, with no political strings attached, goes a long way to guaranteeing the independence of public service broadcasters.³⁴ In some European countries, this has even been enshrined as a constitutional principle.³⁵

In practice, adequate funding may be provided in different ways, including through a direct public subsidy, income from commercial activities, advertising income, a concession fee paid by commercial broadcasters and through a licence fee. Public service broadcasters in different countries are funded through several of these models, and often through a mix of several of them. In order to inform the debate around the funding of RTHK, we briefly discuss the benefits and disadvantages of the main different funding methods.

Broadcasting fee

In many countries, public service broadcasting is financed through a fee collected from all owners of a radio or television set. In some countries, this is collected

³⁴ See also Guideline V. of the Council of Europe Recommendation on public service broadcasting, note 21.

³⁵ The Italian Constitutional Court, for example, has held that the constitutional guarantee of freedom of expression obliges the government to provide sufficient resources to the public broadcaster to enable it to discharge its functions: Decision 826/1998 [1998] Guir. cost. 3893.

separately, while in others, it may be added to the electricity bill. The broadcasting fee has several advantages over other methods of funding of public service broadcasting: it is a stable and secure source of funding; it reduces dependency on other sources of income and in some cases it can be sufficient to finance most of the public service broadcaster's activities; and it creates a bond between a public service broadcaster and its viewers and listeners. In many countries, public acceptance of the fee is surprisingly high.

However, this is not to say that a broadcasting fee is the ideal funding source in all circumstances. The income derived from the fee is stable but also static, leaving little room for growth; if more income is needed, raising the level of the fee may be unpopular and therefore difficult to achieve politically. Furthermore, it is by no means a given that public acceptance of the fee, where it exists, will remain at a high level. At a time of multi-channel digital and satellite TV, detractors of public service broadcasting will label the fee as an anachronism.

Direct public subsidy

Traditionally, many public service broadcasters also have been funded through a direct public subsidy. Direct State funding has several advantages: there isn't the problem of collecting a fee, the burden of paying for public service broadcasting is the same for everyone, and the level of funding can be easily and quickly adapted to the needs of public service broadcasters. However, there are also several disadvantages. Most importantly, direct State funding raises the spectre of political interference. Funding can easily be used as a lever to influence content or editorial direction – particularly when funding has to be negotiated at yearly or even two-yearly intervals.

In Europe, the Council of Ministers of the Council of Europe have recognised this danger and stated the following as guiding principles for PSBOs that are wholly or in part State funded:

- the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;

...

- payment of the contribution ... should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;

- the use of the contribution ... by the public service broadcasting organisation should respect the principle of independence and autonomy mentioned in guideline No. 1;

- where the contribution ... has to be shared among several public service broadcasting organisations, this should be done in a way which satisfies in an equitable manner the needs of each organisation.

The rules on the financial supervision of public service broadcasting organisations should not prejudice their independence in programming matters as stated in guideline No. 1.

The first of these principles is clear: funding should never be used as a way to pressure public service broadcasters or interfere with their editorial independence or institutional autonomy. The second principle emphasises that State funding should be stable and allow for long-term planning on the part of the broadcaster. It should not fluctuate from year to year; there must be a certain continuity. Ways of achieving this

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include defining the level of the subsidy as a percentage of the overall State budget or other forms of indexation, and providing for funding cycles that are longer than one year. For example, once a funding formula has been agreed upon, this could be set for a period of several years with a built-in annual rise for inflation. In order to provide for some flexibility, provision could be made for additional funding requests by the public service broadcaster to top-up the regular contribution if needed, or to break open the agreement when it becomes clear the level of funding agreed is not sufficient to guarantee a high quality of service.

Advertising and sponsorship

In many countries, public service broadcasters have historically been (part)funded through advertising. Advertising income is a dynamic source of funding and provides a form of funding that is fully independent of government. It can have many advantages, including the creation of an incentive to respect public tastes and preferences, the facilitation of the production and acquisition of popular programmes, including large sports events, and helping ensure that the public service broadcaster does not get marginalized.

The main disadvantage, however, is that there is a real danger that advertising brings the public service broadcasters into competition with commercial broadcasters, leading to programme choices being based on popularity rather than quality. This can have the effect of lowering the quality and diversity of public service broadcasting, undermining the rationale for it.

Sponsorship, whereby commercial actors pay to ‘sponsor’ a particular programme, has made particularly headway in film and sports broadcasting. The advantages and disadvantages of programme sponsorship are similar to those associated with advertising, with the added disadvantage that sponsorship may lead to commercial pressure by the ‘sponsor’ to interfere with the content of the sponsored programme.

Concession fees from commercial broadcasters

In some countries, public service broadcasting is funded through fees paid by commercial broadcasters. The advantage of this is that it allows for a stable source of funding that can grow together with income of commercial broadcasters. To the extent that it is usually combined with a ban on advertising on public service broadcasters, it also removes the competition for advertising revenue that is often blamed for the ‘dumbing down’ of public service broadcasting.

Mixed funding

Given the disadvantages associated with most of the sources of income, and the reality that it is practically impossible to wholly fund a public service broadcaster through a single funding source, most European public service broadcasters operate on a mix of different sources of funding, often combining commercial revenue with income from a State subsidy or broadcasting fee. This has numerous advantages. First, as already noted, there mixing different sources of funding means that many of the disadvantages listed above can to some extent be neutralised. For example, the scope for political governmental interference with the independence of the public service broadcaster is greatly reduced if the broadcaster also derives income from commercial revenue, decreasing its dependency on income from the State.

Analysis of RTHK's current funding

Currently, RTHK's funding is determined annually through a 'resource allocation process' between the Secretary for Commerce, Industry and Technology and RTHK's Director, based on the Secretary's "annual estimates exercise".³⁶

We are extremely concerned that this process appears to be led by the Secretary for Commerce, Industry and Technology – so far as the estimates are produced by him or her – that there are no guarantees to ensure that the process is not used to exert undue influence on the content of RTHK programming, and that the negotiating process takes place in annual cycles.

If a direct State subsidy is to be maintained, the process for determining the level of the subsidy should be changed in several important respects. At the absolute minimum, the budget allocation process ought to be conducted between the Secretary for Commerce, Industry and Technology and a Governing Board of RTHK (which we recommend should be established³⁷) rather than the RTHK Director. The process should also be based on budget estimates produced by RTHK, rather than by the Department. RTHK is the best judge of its own needs and this should be recognised. We also recommend that the Legislative Council, representing the public, should be the final arbiter, rather than the Secretary for Commerce, Industry and Technology, who is a representative of the executive arm of government. Finally, the funding process should take place over a five or even a ten year cycle, rather than in annual cycles, and be indexed against inflation. This would provide RTHK with more stability and allow it to develop longer-term plans. Importantly, this would also reduce to a minimum the occasions on which funding may be used – even indirectly – as a lever to influence RTHK content and programming.

Ideally, other avenues of funding for RTHK should also be explored, along the lines outlined above. The overall aim of this exercise should be to identify (a) stable and long-term source(s) of income that will protect RTHK's institutional and editorial independence for the foreseeable future and guarantee high quality public service programming.

3.4. RTHK's Independence and Accountability

The Committee on Review of Public Service Broadcasting has asked for input on the following questions:

- Who should monitor the operation of a public service broadcaster in Hong Kong, and how?
- How should we assess the performance of a public service broadcaster in Hong Kong and its fulfilment of public service mandate?
- How should a public service broadcaster in Hong Kong be accountable to the public?

³⁶ Agreement, par. 5.1.

³⁷ See our Recommendations in Section 3.4.

- What arrangements should be made to involve the public in ensuring the effective operation of the public service broadcaster in Hong Kong and fulfilment of its public service mandate?

Recommendations:

We are greatly concerned that RTHK's current status and governance and accountability structure may significantly undermine its independence as well as its ability to provide high quality public service programming. We strongly recommend that:

- RTHK should be re-established as an independent legal body. Ownership of all assets it currently uses should be transferred to the new legal body.
- As a publicly-funded resource RTHK should be accountable to the public through an independent council or board of governors, qualified through expertise or education and committed to freedom of expression and public service broadcasting, and appointed by the Legislative Council in an open and transparent process that allows for significant civil society involvement.
- The independence of both the governing board as a whole and its members should be guaranteed.
- RTHK should be required to conduct periodic public meetings in order to review whether its programming meets the needs of the public.
- Consideration should be given to elaborating RTHK's internal complaints mechanism, both by developing the formal internal complaints mechanism and by developing a monthly programme that discusses listeners' and viewers' feedback.

Analysis and background

We will join the four questions asked and answer them as broadly concerning RTHK's independence and its accountability to the public.

Currently, RTHK's status is that of a government department. The Director of RTHK is the editor-in-chief and he or she bears responsibility for ensuring that a system of editorial control exists to provide fair, balanced and objective news, public affairs and general programming that informs, educates and entertains the public. The Director reports to the Secretary for Commerce, Industry and Technology who has ultimate responsibility for RTHK. The Secretary may issue "policy guidance" to the Director on matters such as "defining the programmes", setting RTHK's policy aims, establishing priorities for the allocation of resources and setting performance targets – the latter in consultation with the Director.³⁸ The performance targets are reviewed quarterly as well as at the end of each year, when targets are set for the next 12 months.

ARTICLE 19 is very concerned that RTHK's status as a government department and its relationship with the Secretary for Commerce, Industry and Technology may fatally undermine its editorial independence and its capacity to deliver high quality

³⁸ Agreement, paras. 2.1-2.

public service programming. The affirmation of its editorial independence in the Framework Agreement alone is not sufficient: experience in countries around the world has shown that institutional independence is an absolute prerequisite for public service broadcasters and must be properly effectively guaranteed.

Strengthening RTHK's institutional independence and accountability

As outlined in Section 2.2 of this Submission, it is of the utmost importance that the independence of public service broadcasters is guaranteed, including through institutional arrangements. In many countries, this is achieved in two key ways: *a.* by establishing the public service broadcaster as an independent legal body, such as a public corporation; and *b.* by establishing a governing system for the public service broadcaster that both guards its independence and ensures accountability to the public. The latter is usually achieved by the establishment of an independent governing council or board with responsibility for ensuring that the broadcaster adheres to its overall public service mandate, including by protecting its independence. These boards are comprised of a small group of individuals who are recognised for their expertise, independence and the respect in which they are held by other members of society.

The manner in which appointments are made to the governing boards of broadcast regulatory bodies is one of the most important ways of guaranteeing the independence of these bodies from political and commercial interests. One way of ensuring independence in practice is to have such boards appointed by and reporting to a representative multiparty body, such as the legislature or a committee thereof, rather than a government body, such as a ministry or the Cabinet.

At the same time it is important that civil society is given an opportunity to be involved in the appointments process for a number of reasons. Civil society organisations can provide a wealth of information which the appointing body would not otherwise be able to access. Involvement of civil society can also help ensure that the members are respected individuals and prevent partisan influences from dominating the appointments process. Civil society can be given a role in at least two key ways, by being allowed to nominate members and by being allowed to make representations concerning individuals shortlisted for membership.

Most broadcasting laws set a number of conditions on the members of broadcast regulators, as well as protecting members, once appointed, from arbitrary removal. This helps ensure that membership decisions are made on a merit basis rather than for political or patronage reasons, and that membership reflects the whole society. It also guards against inappropriate appointments (it would clearly be unacceptable for an elected official, for example, to be a member). Common examples of such conditions and protections, which should apply to the chief executive officer as well as the governing board, are as follows:

- membership, viewed collectively, must be representative of society as a whole;
- members are required to have some relevant expertise;
- certain individuals may not be appointed, for example if they are civil servants, elected government officials, hold office in a political party, have significant interests in telecommunications or broadcasting, or have been convicted of a crime involving violence or dishonesty; and

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- members' tenure is guaranteed and they are subject to removal only in very limited circumstances – such as a breach of the appointment conditions just noted, a serious violation or failure regarding their duties as members, or incapacity – and after a process which allows them to present their side of the picture.

ARTICLE 19 has published a 'Model Law' on how these institutional matters can be addressed, which is attached as Appendix 1 and which can also be found on our website: <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>.

To enable governing boards to fulfil their dual role, as guarantors of both independence and accountability, many broadcasting laws ensure that they have a somewhat arms length relationship with the day-to-day operations of the broadcaster. Frequently, the governing board is responsible for appointing the chief executive officer, protecting the broadcaster from interference, ensuring that it respects the law and promoting accountability and responsiveness to public needs and interests. At the same time, it is prohibited from interfering in day-to-day management or with the editorial independence of the chief executive officer and his or her staff. The combination of overall responsibility with a hands-off approach to management means that the board, instead of political bodies, can play the key role in ensuring that the PSBO is accountable.

Strengthening RTHK's relationship with the public

It is important that public service broadcasters have strong bonds with their public, beyond through their institutional arrangements. A range of measures may be implemented to ensure audience input. For example, the existing internal complaints mechanism, mentioned in RTHK's Producers' Guidelines,³⁹ could be strengthened and more widely publicised among the public. This would allow the public a direct route to complain about RTHK programming, parallel to the Broadcasting Authority's complaints mechanism. In addition, monthly radio and television programmes could be scheduled dedicated to discussing audience feedback – both positive and negative.

RTHK could also be required to undertake a form of audience research. As part of this, it could hold regular meetings throughout the HKSAR to meet with members of the public and get feedback and suggestions for its programming. This would further contribute to strengthening ties between RTHK and the public, and, importantly, give the public a real sense that RTHK is 'its' public service broadcaster.

³⁹ Producers' Guidelines, Section 8: <http://www.rthk.org.hk/about/guide/index.htm>.

APPENDIX: MODEL PUBLIC SERVICE BROADCASTING LAW

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INTRODUCTION

Most countries around the world, with a few notable exceptions, have a national publicly funded broadcaster. These broadcasting organisations can make an important contribution to the public's right to a diversity of information and viewpoints, and the free flow of information and ideas. However, the extent to which they in fact make this contribution depends on a number of factors, including the legal environment in which they exist. *A Model Public Service Broadcasting Law* seeks to provide guidance as to how the law may be used to help promote genuine public service broadcasting.

A Model Public Service Broadcasting Law envisages an independent national public service broadcaster, although other models for providing public interest broadcasting exist. It is based on best international practice, as reflected in the ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,⁴⁰ as well as in the decisions of both international and national courts, treaties and other authoritative statements of international law,⁴¹ and a number of public broadcasting laws from around the world.

These international standards have important implications for public broadcasters of which the most important, without a doubt, is that public broadcasters must be protected against political or commercial interference, that is to say that they must be independent and that their editorial independence must be respected. Furthermore, their programming should serve the public interest and, in particular, be balanced and impartial. Broadcasters which meet these conditions of independence and impartiality are often referred to as "public service broadcasters".

⁴⁰ (London: ARTICLE 19, 2002). Available at: www.article19.org/docimages/1289.htm

⁴¹ For example, Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996 and the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

A key purpose of the Model Law is to give legal form to some leading principles relating to public service broadcasting. Four central themes, each in tension with the other, define the key challenges for a public service broadcasting law: the types of programming to be provided; the means by which independence is guaranteed; the sources of funding; and promoting accountability to the public. These are addressed briefly in turn below.

Detailed guidelines are provided in the Model Law as to the type of programming that is expected from the public service broadcaster and provision is made for the purchase of material from independent producers to ensure that programming overall reflects a wide variety of views and perspectives. The precise number of public television and radio channels to be broadcast is left open, given that this is highly context dependent, although it is envisaged that these would be specified. At least one national free-to-air channel is envisaged for each of television and radio, and other regional and/or local channels may also be specified.

In terms of structure, the public service broadcaster is governed by a Board of Directors, appointed by the lower house of parliament (or its equivalent), upon nomination by civil society and professional organisations, in a process that is transparent and that allows for public participation. There is a specific guarantee of the independence of members of the Board and their tenure is protected, although narrow grounds for dismissal are provided for. Furthermore, individuals with strong political connections or with vested interests in broadcasting are prohibited from being appointed to the Board. The Board appoints, by a two-thirds majority vote, the Managing Director, and sets all of its own rules of procedure, other than those specified directly in the Model Law.

The primary source of funding for the public service broadcaster comes from public sources, primarily the Public Broadcasting Fee, levied on the electricity bill.⁴² The Model Law also envisages other sources of funding, including advertising, sponsorship

⁴² This is simply one option for a direct public broadcasting levy and reliance on it herein is not intended to suggest that this approach is necessarily superior to any other one.

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and direct public subsidies, although the uses that may be made of the latter are restricted, to reduce the risk of this subsidy being abused to influence programming.

Accountability to the public is ensured primarily through the governing board. A key accountability mechanism is the provision of a public Annual Report, along with audited accounts, to the lower house of parliament, and some detail is provided as to what should be included in this Annual Report. The Model Law also, however, envisages direct public oversight through both ongoing public review and an internal complaints mechanism (in addition, of course, to any external complaints mechanisms that may be in place).

The Model Law does not address certain issues. For example, it does not address issues which are properly dealt with in laws of general application, such as copyright, the right of journalists to protect their confidential sources of information and broadcasting during elections. Certain issues - such as whether public service broadcasters should have privileged access to certain sporting events or whether they are covered by any code of conduct binding on other broadcasters - are also not included because, although they do directly affect public service broadcasting, they are more properly addressed in a general broadcasting law. The Model Law does not address the question of whether the new broadcaster establishes, replaces, or transforms an existing State broadcaster. Often, the establishment of a public service broadcaster does represent an attempt at transformation but the main goal of the Model Law, as noted, is to elaborate the principles which should guide public broadcasting, not to address technical details relating to transformation which, furthermore, may vary considerably from one context to another.

The term 'model' is not used here to suggest that all countries should take this as a fixed template for their own legislation, or even that the approach taken here is necessarily the best way to approach this issue in every country. Many issues concerning public service broadcasting, notably the appointment of the governing board and the funding structure, are quintessentially pragmatic in nature and admit of different approaches. What will work best in any particular country will depend on its history, political structures, development of civil society, the overall

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broadcasting and media environment and so on. Furthermore, it may be noted that formal legal implementation – for example, as regards the system by which laws come into force – will vary from country-to-country. Rather, the term ‘model’ signifies that this Law incorporates provisions that are designed to protect the principles noted above, namely by safeguarding the independence of the public broadcaster within a framework of accountability, and by encouraging programming that serves the public interest and promotes the free flow of information and ideas.

As noted above, a key issue for public service broadcasting is how to ensure independence and, in turn, how members of the governing board should be appointed. There are different models for this, the two key ones being a parliamentary appointments process with safeguards for independence and direct appointments or nominations by different sectors of civil society. The Model Law adopts a hybrid approach whereby parliament is responsible for appointments but civil society nominates members.

Both systems have their strengths and weaknesses; two points bear on the question of the choice of system in any particular context. First, laws do not work in a vacuum and even the finest public service broadcasting law will fail to achieve the desired objective of quality, impartial programming in the context of an undemocratic setting or where civil society is unable to hold government to account. On the other hand, there are examples of laws which do little to protect independence or promote quality programming but, due to other supportive conditions, there is an excellent public broadcaster. Second, while safeguarding independence is key, this must not be done at the expense of ensuring accountability to the public; a challenge for even leading public service broadcasters.

A MODEL PUBLIC SERVICE BROADCASTING LAW

An Act to promote quality public service broadcasting and the free flow of information in the public interest.

Be it enacted by [insert relevant body, such as the parliament] as follows:

PART I: DEFINITIONS AND PURPOSE

Definitions

1. In this Act, unless the context otherwise requires: -
 - (a) “advertisement” is any public announcement intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea or to bring about some other effect desired by the advertiser, for which broadcasting time has been given up to the advertiser for remuneration or similar consideration;
 - (b) “broadcasting service” is a defined service which consists in the broadcasting of television or sound material to the public, sections of the public or subscribers to such service;
 - (c) “code of broadcasting practice” is a set of standards relating to programme content and broadcast practices;
 - (d) “independent producer” is an individual or company who produces programmes for radio or television and who is independent of any particular broadcaster;
 - (e) “ethnic/minority programming service” is a unit within a broadcaster devoted to a certain language or ethnic group and which provides news services and other programming by and for that group, in its language, and reflecting its culture and interests;

- (f) “programme schedule” is a plan indicating the general types of programmes proposed to be broadcast, along with the percentage of broadcasting time to be devoted to such programmes and to advertising, and the target audience;
- (g) “public broadcasting fee” is a levy on the electricity bill for purposes of providing financial support to public broadcasting; and
- (h) “sponsorship” is the participation of a natural or legal person, who is not engaged in broadcasting activities or the production of audiovisual works, in the direct or indirect financing of a programme with a view to promoting the name, trademark or image of that person.

Purpose

2. The purposes of this Act are: -
- (a) to promote the provision of high-quality broadcast programming to the public at large;
 - (b) to promote and guarantee the independence of the public service broadcaster from political or commercial interference within a framework of accountability to the public; and
 - (c) to ensure stable financial provision for the public service broadcaster.

PART II: ESTABLISHMENT AND GUIDING PRINCIPLES

Establishment

3. (1) The Broadcasting Corporation of [insert name of State] (hereinafter called “ [insert initial of State followed by BC; for purposes of this law, SBC will be used]”) is hereby established as a non-profit public service broadcasting organisation with its seat in [insert city, normally the capital city] and serving the whole of [insert name of State]. SBC is a public institution which is accountable to the public through [insert name of (lower chamber of) parliament].

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(2) SBC shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies, and no person or entity shall seek to influence the members or staff of SBC in the discharge of their duties, or to interfere with the activities of SBC, except as specifically provided for by law. This autonomy shall be respected at all times.

(3) SBC shall have all powers, direct or incidental, as are necessary to undertake its functions as provided for in this law. In particular, it shall have full legal personality, including the power to acquire, hold and dispose of property.

Guiding Principles

4. (1) SBC has an overall mandate to provide a wide range of programming for the whole territory of [insert name of State] that informs, enlightens and entertains, and that serves all the people of [insert name of State], taking into account ethnic, cultural and religious diversity.

(2) SBC shall provide innovative and high quality broadcasting, which reflects the range of views and perspectives held in society, satisfies the needs and interests of the general public in relation to informative broadcasting, and complements programming provided by private broadcasters.

(3) To fulfil its public service broadcasting role, SBC shall strive to provide a broadcasting service that: -

- (a) is independent of governmental, political or economic control, reflects editorial integrity and does not present the views or opinions of SBC;
- (b) includes comprehensive, impartial and balanced news and current affairs programming, including during prime time, covering national and international events of general public interest;
- (c) contributes to a sense of national identity, while reflecting and recognising the cultural diversity of [insert name of State];
- (d) gives a voice to all ethnic groups and minorities, including through the establishment of Ethnic/Minority Programming Services and the provision of programming in ethnic/minority languages;

- (e) strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
 - (f) provides appropriate coverage of the proceedings of key decision-making bodies, including the [insert name(s) of the house(s) of parliament];
 - (g) includes programmes that are of interest to different regions;
 - (h) ensures the diffusion of important public announcements;
 - (i) provides a reasonable proportion of educational programmes and programmes oriented towards children;
 - (j) promotes programme production within [insert name of State]; and
 - (k) contributes to informed debate and critical thought.
- (4) To encourage and promote programme production within [insert name of State], and to ensure that its programmes reflect a wide variety of views and perspectives, SBC shall work towards the goal of obtaining 20% of its total broadcasting from independent producers based in [insert name of State].⁴³

PART III: STRUCTURE

Board of Directors

5. (1) SBC shall be governed by a Board of Directors (hereinafter called “the Board”) with overall responsibility for SBC’s accountability, through the [insert name of (lower chamber of) parliament], to the people of [insert name of State].
- (2) The Board shall be composed of nine (9) members who shall have some relevant expertise, by virtue of their education or experience, including in the fields of broadcasting, policy, law, technology, journalism and/or business.

Appointment of the Board

⁴³ The figure of 20% is simply indicative and is not presented as a best practice figure. What is appropriate will depend on a number of factors, including the development of the independent production sector and the number of other available channels.

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6. (1) Members of the Board shall be appointed by the [insert name of (lower chamber of) parliament], in accordance with the following: -
- (a) the process shall be open and transparent;
 - (b) only candidates nominated by civil society and professional organisations shall be considered for appointment;⁴⁴
 - (c) a shortlist of candidates shall be published in advance and the public shall be given an opportunity to make representations concerning these candidates;
 - (d) a candidate shall be appointed only if he or she receives two-thirds of the votes cast;
 - (e) membership of the Board as a whole shall, to the extent that this is reasonably possible, represent a broad cross-section of [insert name of State] society;
- (2) No one shall be appointed to the Board if he or she: -
- (a) is employed in the civil service or any other branch of government;
 - (b) holds an official office in, or is an employee of, a political party;
 - (c) holds an elected position at any level of government;
 - (d) holds a position in, receives payment from or has, directly or indirectly, significant financial interests in broadcasting or telecommunications; or
 - (e) has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime and/or a crime of dishonesty or theft, for which he or she has not been pardoned, unless five years have passed since the sentence was discharged;

provided that individuals who have been shortlisted pursuant to sub-section (1)(c) shall be given an adequate opportunity to take any necessary steps to remove a barrier to their appointment under this sub-section.

Independence of Members

⁴⁴ In practice, the law should provide more detail as to the process by which this is done. However, this will depend on the specific civil society and professional structures that exist in society and, in the absence of a specific societal context, it is not possible to provide this detail in the Model Law.

7. (1) All members of the Board shall be independent and impartial in the exercise of their functions and shall, at all times, seek to promote the Guiding Principles set out in section 4.
- (2) Board members shall neither seek nor accept instruction in the performance of their duties from any authority, except as provided by law.
- (3) Board members shall act at all times in the overall public interest and shall not use their appointment to advance their personal interests, or the personal interests of any other party or entity.

Tenure

8. (1) Members shall serve on the Board for six (6) years and may be re-elected to serve a maximum of two (2) terms.
- (2) Notwithstanding sub-section (1), from among the first group of appointees to the Board three (3) individuals shall be identified by lot whose initial term of office shall be just two (2) years and another three (3) individuals whose initial term of office shall be just four (4) years and, for these individuals, their first term shall count as a full term.
- (3) The [insert name of (lower chamber of) parliament] may remove a member from the Board only after a hearing and where that individual: -
- (a) becomes, by virtue of section 6(2), ineligible for appointment to the Board;
 - (b) is no longer able to perform his or her duties effectively; or
 - (c) fails, without valid excuse, to attend meetings of the Board for a period of more than six (6) months.
- (4) Where a Board member has been removed pursuant to sub-section (3), he or she shall have the right to appeal such removal to the courts.

Remuneration of the Board

9. (1) Members of the Board shall not receive remuneration for their work.
- (2) Members of the Board shall be compensated for actual expenses, including travel, accommodation and subsistence, incurred as a result of their duties as members of the Board.

Role of the Board

10. (1) The Board has overall responsibility for the determination of internal policy, for ensuring compliance with all policies and the Guiding Principles set out in section 4, for ensuring that SBC meets the highest standards of probity and value for money, for appointment of senior staff, including the Managing Director, and for setting the overall strategy of SBC.

(2) The Board shall not interfere with the day-to-day management of SBC or with the editorial independence of the Managing Director and his or her staff, although it does have responsibility for ensuring that, overall, editorial policy respects the Guiding Principles set out in section 4.

(3) The Board shall, after consultation with the Managing Director, approve the Statutes of SBC, which shall, in accordance with this law and other relevant legislation, establish policies, operational guidelines and procedures.

(4) The Board shall, after consultation with the Managing Director, prepare an Annual Report and budget for SBC, which shall be presented to the [insert name of (lower chamber of) parliament] for its approval.

Rules of Procedure

11. (1) The Board shall appoint its own Chairperson and Vice-Chairperson, and shall adopt such rules, in relation to meetings and other matters, as it considers necessary and appropriate to enable it to perform its functions.

(2) The Board shall meet as often as it deems necessary and shall, in any case, meet at least once in every month. Meetings of the Board shall be convened by the Chairperson, provided that the Chairperson shall be required to convene a meeting at the request of not less than three (3) members. The quorum for meetings of the Board shall be five (5).

(3) The Managing Director shall attend Board meetings as a non-voting member, except where the Board has specifically ruled otherwise.

(4) Except as otherwise provided, the Board shall take decisions on the basis of a majority vote of those members present, provided that in case of an equal vote, the Chairman shall have a deciding vote.

Appointment of Senior Staff

12. (1) The Board shall, as soon as is practical after its establishment and by a vote of at least two-thirds of its members present and voting, appoint a Managing Director for SBC and may, by a similar vote, remove the Managing Director from office, provided that it agrees at the same time on a replacement.

(2) The provisions of section 6(2) and section 7 shall apply, *mutatis mutandis*, to the Managing Director.

(3) The Board shall not exercise its power to remove the Managing Director from office under sub-section (1) unless the Managing Director has breached the provisions of section 6(2) or he or she has committed a serious violation of his or her responsibilities under this law, including by failing to respect the Guiding Principles set out in section 4 or to advance the interests of SBC.

(4) A Managing Director shall have the right to appeal any removal from office under this section to the courts.

(5) The Managing Director shall be appointed for a five (5) year period and may be reappointed. If no successor has been appointed at the end of the tenure of a Managing Director, that person shall remain in office for up to an additional three (3) months until a new Managing Director has been appointed.

(6) The Managing Director shall, subject to section 10, be responsible for day-to-day management and, along with his or her editorial staff, editorial policy.

(7) The Board shall appoint other senior staff, in accordance with a list set out in the Statutes, upon nomination by the Managing Director.

Staffing

13. (1) The Managing Director shall, in accordance with the approved budget, appoint staff as required.

(2) The Managing Director and staff shall neither seek nor accept instruction in the performance of their duties from any authority other than the Board, except as provided by law.

(3) The Managing Director and staff shall not use their appointments for personal benefit, or for the benefit of any party or entity other than SBC.

PART IV: SERVICES

Public Service Channels

14. (1) SBC shall, at a minimum, broadcast [insert appropriate number and specify reach - e.g. national, regional or local] free-to-air terrestrial public service television channels and [insert appropriate number and specify reach - e.g. national, regional or local] free-to-air terrestrial public service radio channels.
- (2) SBC shall be guaranteed frequencies appropriate to its broadcasting obligations as provided for in sub-section (1).

Additional Channels

15. SBC shall be entitled to broadcast channels additional to those specified in section 14, whether this be via terrestrial broadcasting, satellite, cable or any other technical means, whether or not these channels are public service in nature, provided that where such broadcasting is otherwise licensed, SBC shall also be required to obtain a license in the prescribed manner.

Other Services

16. SBC may engage in other activities, such as publishing, producing videos or providing teletext services, or otherwise disseminating content, including over the Internet, that are related to its general mandate, as long as these activities are consistent with the Guiding Principles set out in section 4.

Competitive Rules

17. SBC may not use its public funding to subsidise any commercial services it provides, although it may subsidize its public service operations with profits from its commercial services.

PART V: FUNDING

Funding Mechanisms

18. (1) SBC may obtain funding from the Public Broadcasting Fee, from direct public subsidies, from advertisements, from sponsorship and other commercial activities, and from donations.

(2) The Board shall formally present a proposed budget for SBC for the coming year, along with the Annual Report and externally audited accounts, to the [insert name of (lower chamber of) parliament] for approval.

The Public Broadcasting Fee⁴⁵

19. (1) Every household, business and other establishment in [insert name of State] receiving electricity shall pay a supplementary fee, to be known as the Public Broadcasting Fee, as part of their electricity bill.

(2) The level of the Public Broadcasting Fee shall be proposed by the Board to the [insert name of (lower chamber of) parliament], which shall in turn approve a specific fee tariff. The [insert name of electricity corporation] shall collect this fee and provide it to SBC under an agreement to be concluded between these two bodies, provided that where they cannot reach agreement, the [insert the name of the independent broadcast regulator] shall have the power to set terms.

(3) The Fee may either be a flat rate per household/business or be levied as a percentage of the electricity bill.

Direct Public Subsidies

20. (1) Where the approved budget for SBC includes a direct public subsidy, this shall be paid for out of general public funds.

⁴⁵ In this Model Law, the public broadcasting fee is levied on the electricity bill. There are a range of other options for this, including a levy on television and/or radio sets, and a levy on other services, such as water or mobile phones. Which option is most appropriate will depend on all of the circumstances. One advantage of a levy on an existing service, such as electricity, is that it minimizes additional collection costs.

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(2) Any direct public subsidy shall not be used to fund programme production but shall instead be used to defray infrastructure and other technical costs.

Advertisements

21. (1) SBC may carry advertisements, provided that it shall not: -
- (a) broadcast advertisements which exceed 7½% of the total broadcast time during any given day or 10% of any given hour or programme;⁴⁶
 - (b) obtain more than 25% of its total revenues from advertising and other commercial activities;⁴⁷ or
 - (c) rely on the Public Broadcasting Fee or any other public financing to directly subsidise or unfairly promote its advertising.
- (2) All advertisements shall be clearly identifiable as such.
- (3) Advertisements shall be fair and honest, and shall not be misleading or prejudice the interests of consumers.
- (4) Advertisers shall not seek to influence programming.

Sponsorship

22. (1) Sponsored programmes shall be clearly identified as such by credits at the beginning and end of the programme.
- (2) Sponsorship shall in no way affect the content or scheduling of a programme.
- (3) News and current affairs programmes shall not be sponsored.

PART VI: ACCOUNTABILITY

Annual Report

23. (1) The Board shall publish and distribute widely an Annual Report, along with externally audited accounts, for SBC. Each Annual Report shall include the following information: -

⁴⁶ The figures in this sub-section are indicative only. What is appropriate will depend on a number of factors including the size of the advertising market, the competition for advertisers, the size of the public broadcasting fee and so on. The idea, however, is to ensure that the public broadcaster has less access to advertising than commercial broadcasters for a number of reasons including that excessive advertising directly undermines public interest programming, as a quid pro quo for receiving public funding and to be fair to commercial broadcasters, and to limit the extent to which it is dependent on advertising revenues.

⁴⁷ The figure of 25% is, as with other numbers, indicative. The idea is to limit the overall influence of advertising revenue as a way of ensuring that markets do not exert a dominant influence over programming.

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- (a) a summary of the externally audited accounts, along with an overview of income and expenditure for the previous year;
 - (b) information on any company or enterprise that is wholly or partly owned, whether directly or indirectly, by SBC;
 - (c) the budget for the following year;
 - (d) information relating to finance and administration;
 - (e) the objectives of SBC for the previous year, the extent to which they have been met and its objectives for the upcoming year;
 - (f) editorial policy of SBC;
 - (g) a description of the activities undertaken by SBC during the previous year;
 - (h) the Programme Schedule and any planned changes to it;
 - (i) a list of programmes broadcast by SBC that were prepared by independent producers, including the names of the producers or production companies responsible for each independent production;
 - (j) recommendations concerning public broadcasting; and
 - (k) information on complaints by viewers.
- (2) The Board shall formally place the Annual Report and externally audited accounts before the [insert name of (lower chamber of) parliament] for their consideration.

Annual Review of Managing Director

24. (1) The Board shall conduct an annual review of the Managing Director with a view to assessing his or her performance and to providing feedback on it.
- (2) The annual review referred to in sub-section (1) shall be published and widely disseminated.

Public Review

25. In order to ensure transparency and to improve its service in the public interest, SBC shall make an effort to ensure that it remains under constant review by the public, including by holding public meetings and seminars to look at ways it might better serve the public interest.

Complaints Procedure

26. (1) SBC shall develop a Code of Broadcasting Practice in consultation with interested stakeholders which shall govern its broadcasting practices and programme content.
- (2) The Code referred to in sub-section (1) shall, among other things, address the following issues: -
- (a) accuracy, balance and fairness;
 - (b) privacy, harassment and subterfuge;
 - (c) protection of children and scheduling;
 - (d) portrayal of sexual conduct and violence, and the use of strong language;
 - (e) treatment of victims and those in grief;
 - (f) portrayal of criminal or anti-social behaviour;
 - (g) advertising;
 - (h) financial issues such as payment for information and conflicts of interest;
 - (i) discrimination; and
 - (j) leaked material and the protection of sources.
- (3) Individuals may lodge a complaint against SBC for breach of the Code referred to in sub-section (1) and such complaints shall be dealt with by SBC in a fair and balanced manner.
- (4) To give effect to sub-section (3), SBC shall establish an internal procedure for processing complaints.
- (5) The procedure provided for in sub-section (4) shall provide for a range of remedies appropriate to any breach including rectification of any false statements of fact, a right of reply and apologies.
- (6) Lodging an internal complaint shall not preclude an individual from pursuing any other remedies which may be available.

PART VII: MISCELLANEOUS PROVISIONS

Archives

27. (1) SBC shall to keep a master recording of all programmes broadcast for at least twenty-eight (28) days after they have been broadcast.

(2) Where specific broadcast material is the subject of a dispute or complaint, SBC shall keep a master recording of that broadcast material until the matter has been fully resolved.

(3) SBC shall establish a broadcasting archive, maintaining a store of material that is likely to be of historical interest to the people of [insert name of State].

(4) SBC shall, within its resources, endeavour to make as much of this archival material as possible available over the Internet.

Political Advertisements

28. Except in accordance with [insert name of law governing elections and/or any rules promulgated by the body responsible for overseeing elections], SBC shall not carry any advertisement for or on behalf of any political party or candidate for election to political office.

Enforcement by Broadcast Regulator

29. (1) The [insert name of independent general broadcast regulator] shall monitor whether or not SBC has complied with its obligations under the following provisions:-

- (a) section 4(4), dealing with programming from independent producers;
- (b) section 17, dealing with anti-competitive behaviour;
- (c) section 21, dealing with advertising;
- (d) section 22, dealing with sponsorship;
- (e) section 25, dealing with public review of SBC;
- (f) section 26, dealing with complaints;
- (g) section 27, dealing with archives; and
- (h) section 28, dealing with political advertising.

(2) Where [insert name of independent general broadcast regulator] has reasonable grounds to believe that SBC is in breach of one of the obligations

specified in sub-section (1), it shall refer the matter to the Board, along with any views it may have as to the manner in which the breach should be addressed.

(3) Where a period of more than three months has passed since [insert name of independent general broadcast regulator] has referred a matter to the Board pursuant to sub-section (2), and steps have not been put in place with a view to addressing the breach, the [insert name of independent general broadcast regulator] shall have the power to refer the matter to the courts.

PART VIII: TRANSITIONAL AND FINAL PROVISIONS

Existing Laws and Regulations

30. Any laws or regulations which affect, or institutions with responsibility over, broadcasting shall not be affected by the coming into force of this Law, provided that any such laws, regulations or institutions are, at that time, deemed to be amended, repealed or terminated to the extent that they have been superseded, supplanted or contradict provisions in this Law.

Institutional Arrangements

31. (1) The Board shall be appointed in accordance with the provisions of this Law within six (6) months of its coming into force.

(2) All other institutional arrangements specified in this law shall be made within six (6) months of its coming into force.

Short Title and Commencement

32. (1) This Act may be cited as the Public Service Broadcasting Act [insert relevant year].

(2) This Act shall come into effect on a date proclaimed by [insert relevant individual, such as president, prime minister or minister] provided that it shall

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automatically come into effect six months after its passage into law if no such proclamation is forthcoming.⁴⁸

⁴⁸ The precise way in which an act comes into force will differ from country to country.