

香港人權監察

HONG KONG HUMAN RIGHTS MONITOR

香港上環文咸西街 44-46 號南北行商業中心 602 室
Room 602, Bonham Commercial Centre, 44-46 Bonham Strand West, Sheung Wan.

電話 Phone: (852) 2811-4488 傳真 Fax: (852) 2802-6012

《通訊事務管理局條例草案》意見書

2010 年 10 月

1. 政府當局於本年 6 月向立法會提交《通訊事務管理局條例草案》(《草案》)，建議成立單一規管機構，執行現時的《廣播條例》(第 562 章)、《電訊條例》(第 106 章)及《非應邀電子訊息條例》(第 593 章)，以規管電子通訊業。
2. 香港居民的通訊、資訊、新聞、言論、創作和文化活動等表達和相關的自由，理論上受到《基本法》¹及《香港人權法案》²所保障。香港人權監察理解，隨著科技日新月異，電訊與廣播之間的分界日漸模糊，世界各國趨向設立統一機構管理兩個界別。但是這種融合後的監管機構，一方可以令監管更為有效，但亦會令表達自由受到更大的威脅，尤其在民主政制並未建立的香港，威脅更為不容忽視。最近一年，多個政府部門(如食環署、康文署、海事處)聯同警隊，多次以不同的執法或行政藉口，打擊和阻撓言論表達等活動，令人不得不更小心防範，以免表達自由再首當其衝。立法會審議《草案》，要確保有足夠的保障措​​施，否則不應支持草案，以免危害香港的表達自由。
3. 人權監察強調，任何影響電訊及廣播行業的政策及立法，包括成立此通訊事務管理局(通訊局)，以及該局的決策和運作，都必須以保障表達等自由為首要原則，以促進電訊廣播行業的發展和消費者權益。人權監察促請政府能具體作出承諾，並在條例中明文訂明，成立後的單一管理機構需要遵守這項首要的原則。
4. 政府當局所謂循序漸進建立通訊局的方式，先將電訊管理局局長及廣播事務管理局的職能合併，成立通訊局，其後再檢討電訊及廣播的規管制度，更新和理順現行的《電訊條例》及《廣播條例》。政府的原意是盡早設立單一規管機構，處理市場日漸匯流的情況。人權監察擔憂，只有新成立的通訊局，沒有已理順的《電訊條例》及《廣播條例》，令通訊局仍要執行《廣播條例》、《電訊條例》及《非應邀電子訊息條例》來規管不同的市場，未必能真正處理市場日漸匯流的情況。

¹ 《基本法》就一些權利設立專門的保障條文，如第 27 條保障的言論、新聞、出版的自由，以及**第三十條**的通訊權利，亦透過第 39 條引入和保障了《公民權利和政治權利國際公約》和《經濟、社會與文化權利的國際公約》等公約確認的眾多權利。

² 《香港人權法案》第 16 條：「(一) 人人有保持意見不受干預之權利。(二) 人人有發表自由之權利；此種權利包括以語言、文字或出版物、藝術或自己選擇之其他方式，不分國界，尋求、接受及傳播各種消息及思想之自由。(三) 本條(二)項所載權利之行使，附有特別責任及義務，故得予以某種限制，但此種限制以經法律規定，且為下列各項所必要者為限 — (甲) 尊重他人權利或名譽；或(乙) 保障國家安全或公共秩序、或公共衛生或風化。」

5. 人權監察認為，理順後的《電訊條例》及《廣播條例》規管措施，是成立通訊局保障表達等自由、消費者權益，以及促進電訊廣播行業發展的關鍵因素，故此將成立通訊局與理順《電訊條例》及《廣播條例》一併處理，是較為可取的做法。人權監察要求政府當局交代理順不同條例的時間表，並承諾任何在規管及發牌制度上的改變，必須經過妥善的公眾諮詢及立法程序，以免損害任何表達和相關的自由。
6. 《草案》建議通訊局的成員應包括 5 至 10 名由特首委任的非公職人員、1 名特首委員委任的公職人員及通訊事務總監。有業界人士早前就曾指出，近年電訊局總監改變以往從內部晉升的傳統，改由行政經驗豐富，但對業界、相關法例和技術都不太了解的政務主任。³人權監察認為，政府應仿效外國的通訊監管機構，從外界招聘具業界經驗，或提升局內有監管經驗的人士出任通訊局的總監。另外，政府委任公營機構成員的機制與準則一直為人所詬病。通訊局成員應包括業界、資訊科技及廣播事務的專業人士、消費者權益的代表及有相當數量在捍衛表達和相關自由有清楚承擔及往績的人士出任。這些考慮，以及其他準則、遴選過程和任命機制，應在條例中列明。有關的遴選機制，要有相當的透明度，確保公眾能適當地知情，充分參與，以便令獲委任的每個人士能向公眾問責。
7. 政府一再強調，通訊局會推動通訊市場的長遠發展，保障言論自由。人權監察注意到，現時無論是《草案》，抑或《電訊條例》及《廣播條例》，都無任何保障表達等相關自由的條文。過往廣管局就曾有糾枉過正，不乏過分干預言論和表達自由的例子，當中 2006 年香港電台《鏗鏘集》播出《同志·戀人》節目，被廣管局指違反《電視通用業務守則》中的持平原則而發出「強烈勸喻」就是一例。人權監察亦擔憂，在統一規管時，有部分相對較嚴苛的規管要求會被加諸到過往規管較寬鬆的媒體上，令規管隨之而加強，令言論表達自由因規管機構及法例的統一而收緊。
8. 參考英國的 **Communication Act 2003**，英國通訊辦公廳 (**Office of Communications**) 必須保障一系列有助推廣表達自由、節目多元化的原則，包括存在廣泛的電子通訊服務，維持充足數量的電視及廣播服務提供者，而提供的服務必須高質素及迎合不同觀眾的愛好及興趣等；⁴通訊辦公廳在執行其職能時，亦需要考慮對表達自由提供有恰當程度保護（詳見附件一）。⁵人權監察認為，政府當局應該在《草案》中加入條文，加強對表達自由的保障。
9. 政府當局代表曾於本年 1 月出席立法會資訊科技及廣播事務委員會會議，向議員簡述成立通訊局的內容及進展，並接受議員的提問。當時政府代表明確指出，互聯網廣播未被界定為廣播服務，故不須遵守發牌規定，而政府當局考慮到社會對保障表達自由及推動資訊自由流通的期望，「現階段」無意規管互聯網。人權監察要求政府作出明確承諾，成立通訊局後，尤其在統一有關的條例時，不會對互聯網作出規管。同時，人權監察亦認為政府應盡可能避免對其他新興媒體，例如網上下載的電子書、或流動電視等的規管，我們希望政府可以同時交代這方面的立場。

³莫乃光：「成立通訊局的魔鬼細節」，<http://www.technow.com.hk/communication>。

⁴英國 **Communication Act 2003** 第 3(2)條。

⁵ **Communication Act 2003** 第 3(4)(g)條。

10. 人權監察認為政府和通訊局在規管上應採取寬鬆和重視自由的態度，只能在有清楚證據證明有逼切的社會需要，已達到規管必不可少的情況下，訂立最低度的、合乎言論表達等有關的權利和自由的規管，而有關的措施是民主社會所必需的，並必須在訂立任何措施前充分諮詢公眾；這項原則，應訂明在條例中，令通訊局和公眾都清楚明白，以便遵從。2006年3月政府推出的「成立通訊事務管理局」諮詢文件曾建議當遇上新科技所帶來的嶄新服務時，應採納「只要公眾利益獲得保障，在規管方面應先採取寬容的態度，然後才作出干預」的原則，⁶人權監察促請政府釐清這項原則，與人權監察上述的原則有否區別，以及政府是否願意將人權監察上述原則，納入法律條文之中。
11. 現時《廣播條例》及《電訊條例》下有各自對電視廣播、電台廣播及電訊服務等的發牌制度，但兩者都較傾向在服務提供者的技術及資金流量方面要求甚高，令規模較小，或非牟利的社區電台等往往未能滿足發牌當局的要求而被拒諸門外。《電訊條例》中有關電台廣播的發牌制度部分，更曾被法庭裁定違憲。⁷人權監察強調，日後理順的發牌制度，必須以保障言論及表達自由為原則，並充分容納社會各大大小小有意提供廣播服務的機構，務求為社會提供多元化的節目。人權監察建議，政府在日後理順發牌制度時，應開放一些頻道與時段，充分容納社會規模不一而有意提供廣播服務的機構，播出自行製作的節目，務求為社會提供多元化的資訊、意見和娛樂節目，以及創作和播出途徑。
12. 政府亦建議將管理淫褻及不雅物品的事宜，轉移給由電訊管理局與影視處廣播事務管理科合併而成的通訊辦。現時處理淫褻及不雅物品的機制一向弊病叢生，備受批評。政府應在充分維護表達自由的前提下，盡快改善《淫褻及不雅物品管制條例》的弊病。

⁶ 工商及科技局通訊及科技科：「成立通訊事務管理局諮詢文件」第43段，2006年3月。

⁷ 2008年1月8日裁判官游德康裁定《電訊條例》違憲：現時《電訊條例》並無為取得廣播牌照定下法定條件讓人跟循，批出牌照的廣管局全部成員由行政長官委任，有欠獨立性，未能確保不會因為政治因素而拒絕批出牌照，行政長官和行政會議對是否發牌擁有酌情權。不過在過去十六年並無成功申請個案，亦沒有解釋原因，顯示特首並無運用酌情權，行政機關無限制的權力，令人憂心。雖然政府剛修訂《電訊條例》，就聲音廣播服務公布一套批發牌照的準則，但無助改善政府藉《電訊條例》操控發出聲音廣播牌照機制，打壓香港表達自由的情況。

3 General duties of OFCOM

- (1) It shall be the principal duty of OFCOM, in carrying out their functions—
- (a) to further the interests of citizens in relation to communications matters; and
 - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- (2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—
- (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
 - (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
 - (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
 - (d) the maintenance of a sufficient plurality of providers of different television and radio services;
 - (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
 - (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.
- (3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—
- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - (b) any other principles appearing to OFCOM to represent the best regulatory practice.
- (4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—
- (a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
 - (b) the desirability of promoting competition in relevant markets;
 - (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
 - (d) the desirability of encouraging investment and innovation in relevant markets;
 - (e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
 - (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
 - (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;
 - (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
 - (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
 - (j) the desirability of preventing crime and disorder;

- (k) the opinions of consumers in relevant markets and of members of the public generally;
- (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

(5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

(6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections.

(7) Where it appears to OFCOM that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances.

(8) Where OFCOM resolve a conflict in an important case between their duties under paragraphs (a) and (b) of subsection (1), they must publish a statement setting out—

- (a) the nature of the conflict;
- (b) the manner in which they have decided to resolve it; and
- (c) the reasons for their decision to resolve it in that manner.

(9) Where OFCOM are required to publish a statement under subsection (8), they must—

- (a) publish it as soon as possible after making their decision but not while they would (apart from a statutory requirement to publish) be subject to an obligation not to publish a matter that needs to be included in the statement; and
- (b) so publish it in such manner as they consider appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the matters to which the decision relates.

(10) Every report under paragraph 12 of the Schedule to the Office of Communications Act 2002 (c. 11)(OF COM's annual report) for a financial year must contain a summary of the manner in which, in that year, OFCOM resolved conflicts arising in important cases between their general duties.

(11) A case is an important case for the purposes of subsection (8) or (10) only if—

- (a) it involved one or more of the matters mentioned in subsection (12); or
- (b) it otherwise appears to OFCOM to have been of unusual importance.

(12) Those matters are—

- (a) a major change in the activities carried on by OFCOM;
- (b) matters likely to have a significant impact on persons carrying on businesses in any of the relevant markets; or
- (c) matters likely to have a significant impact on the general public in the United Kingdom or in a part of the United Kingdom.

(13) This section is subject to sections 370(11) and 371(11) of this Act and to section 119A(4) of the Enterprise Act 2002 (c. 40)(which applies to functions conferred on OFCOM by Chapter 2 of Part 5 of this Act).

(14) In this section—

“citizens” means all members of the public in the United Kingdom;

“communications matters” means the matters in relation to which OFCOM have functions;

“general duties”, in relation to OFCOM, means—

(a) their duties under subsections (1) to (5); and

(b) the duty which, under section 107(5), is to rank equally for the purposes of subsections (6) and (7) with their duties under this section;

“relevant markets” means markets for any of the services, facilities, apparatus or directories in relation to which OFCOM have functions.