



# Broadcasting Pluralism and Diversity

TRAINING MANUAL FOR AFRICAN REGULATORS

**XI**  
**ARTICLE 19**  
GLOBAL CAMPAIGN FOR FREE EXPRESSION

# Broadcasting Pluralism and Diversity

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# ACKNOWLEDGEMENTS

This manual was drafted by **Richard Carver**, an independent consultant, under the guidance of a reference group of academics and specialists from Europe and Africa. It was edited by **Alexandra Sicotte-Levesque** (ARTICLE 19, Africa Programme Officer) and **John Barker** (ARTICLE 19, Africa Programme Director)

This manual has been produced following a process of two reference group meetings (Oxford and Marrakech) and a pilot training held in Kampala, Uganda facilitated by **Alexandra Sicotte-Levesque** (ARTICLE 19, Africa Programme Officer), **Adolf Mbaine** (Makerere University, Uganda) and Professor **Tawana Kupe** (University of Witwatersrand, South Africa).

We wish to thank **Damian Tambini** (Programme in Comparative Media Law and Policy, Oxford University) for hosting the Oxford meeting and **Jamal Eddine Naji** (UNESCO Chair in Public and Community Communication, University of Rabat) for hosting the Marrakech meeting. Thanks to **Julieta Langa** and her team at the African Communication Regulatory Authorities Network for their encouragement and support throughout the process.

We are grateful for the following for their input and support in providing materials and/or reviewing the drafts: **David Goldberg**, **Katrin Nyman Metcalf**, **Tawana Kupe**, **Helge Rønning**, and **Jamal Eddine Naji**.

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**BROADCASTING PLURALISM AND DIVERSITY  
TRAINING MANUAL FOR AFRICAN REGULATORS**

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ARTICLE 19, the Global Campaign for Free Expression  
June 2006

ISBN 1-902598-82-2  
Index No. Africa/2006/06/\*\*

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# FOREWORD

**T**he Training Manual on Broadcasting for Pluralism and Diversity, an initiative of ARTICLE 19 – Global Campaign for Free Expression – is certainly a high value work in terms of content, methodology and its potential as a reference work for users interested in the regulation of broadcasting in Africa.

By gathering a reference group of academics and specialists to design this work, ARTICLE 19 has managed to bring together experiences on regulation that provide a manual that is both a tool for professional training and a reference for mainstream educational use.

Targeted at African broadcasting regulators, the way in which problems are explained clarifies the regulators role of ensuring a balance in terms of interests, most of the time conflicting ones, to achieve a equitable allocation of frequencies to the public, private and community operators, and in securing the peoples' right to receive, from the operators, information and quality programmes that are relevant to the interests of a socially and geographically diverse public.

Having the privilege of joining with the group of experts that designed this manual and the pilot course that tested its content, relevance and educational approach, I would like to make the following comment:

Regulation by and large and the regulation of communication, in particular, are new realities, and this is why there are legitimate and sometimes misleading understandings about it. Throughout the manual the dominant belief, that in Africa the regulatory institutions act under government jurisdiction and, for this reason, broadcasting regulation seen as an eminently political activity aimed at restricting individual freedom, namely freedom of expression and of media, is demystified. If this belief has taken root in some sectors, this is due to the difficulty of interpreting and executing the philosophy and principles underlying the regulation of communication as an asset to society as a whole.

This manual and the group that have designed it, reveals that the regulation of communication,

currently being consolidated in Africa, is a continuation of the democratisation movement, and that pluralism and diversity are crucial cornerstones of this process. This conviction also underlies the adoption of important regional tools such as the African Charter on Broadcasting (2001) and Declaration of Principles of Freedom of Expression in Africa (2002), amongst others. Consistent with these principles, many African countries have formally abolished the government control over Broadcasting and the management of frequencies, and created independent institutions, by definition, to regulate broadcasting and communications. However, concerns related to the genuine independence and overall capacity of Broadcasting regulators still exist. One of these concerns is the weakness or even lack of methodologies and methods for regulation based on international good practice and which are socially appropriate.

It was in seeking a better performance in regulation that the African Communication Regulatory Authorities Network (ACRAN) was established. It is made up of members from 36 countries and the

objectives of the network include the establishment of regulatory institutions, where there are none, promoting training and the exchange of experience, in favour of pluralism, diversity and African integration.

African regulators have in this manual, a working and training instrument which contributes to the harmonisation of its operational methods.

In the capacity of President of ACRAN I recognise and congratulate the initiative of ARTICLE 19 in view of the fact that the Training Manual on Broadcasting for Pluralism and Diversity contributes to a very significant objective for African regulators and I hope that strong partnerships can be established for holding debates towards an in-depth reflection on the role of the regulation of communications regulation throughout Africa's sub-regions.

**Julieta M. Langa**



# INTRODUCTION

## Purpose of this manual

The past 10 to 15 years have seen a dramatic growth in pluralism in broadcasting in Africa. From a broadcasting scene overwhelmingly dominated by government-controlled or state media, the landscape has evolved considerably with the licensing of many private commercial and community broadcasters. This process has happened, inevitably, in a haphazard and piecemeal fashion. Many of the old government broadcasters have survived these changes and most fall well short of the ideals of public service broadcasting.

The African Charter on Broadcasting, adopted in 2001 on the tenth anniversary of the Windhoek Declaration, alongside the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa establish a series of important principles that should guide the development of African broadcasting. These include:

- The crucial importance of independent broadcasting regulators.
- The transformation of state and government broadcasters into public broadcasters.
- The importance of encouraging pluralism and diversity in ownership of broadcasting.

The task of implementing these principles lies to a large extent with African broadcasting regulators. This manual is aimed at members and staff of African broadcasting regulatory bodies, along with others, such as journalists, broadcasters and civil society groups who are seeking to realize the ideals in these declarations.

## How to use this manual

This manual can be used in three basic ways:

- As a teaching guide for trainers running courses for broadcasting regulators.
- As a learning tool by such officials – in other words they can work through the manual on their own.
- As a reference tool by regulators who have already gone through a training course.

In practice, the same group of broadcasting regulators may use the manual in all three ways:

- They work through the manual on their own.
- Then they attend a workshop in which the learning points in the manual are elaborated and discussed.

- They keep a copy of the manual to refer to in their future work.

This would be the ideal way of using the manual. Workshops are usually much more effective if participants have had a chance to acquire most of the basic informational content on their own, at their own speed. The workshop can then focus on:

- Issues that participants have not fully understood.
- Points of controversy or disagreement.
- Developing the skills needed to complete their work on a day-to-day basis.

However, it is recognised that officials will often not have the chance to work through the manual individually before a workshop. The Notes for Trainers section offers advice on planning a workshop based on this manual that would be suitable for officials.

## Objectives of the training

The intention of this manual is that anyone who has worked through it, preferably also attending a workshop, will have a good grasp of the following issues:

- How and why broadcasting is regulated.
- Different approaches to broadcasting regulation and the structure and function of regulatory bodies.
- Why licensing of broadcasters is necessary, the role of the regulatory authority and the licensing process.
- The limited circumstances in which regulating content is necessary, including during election periods, and approaches to addressing complex issues such as “hate broadcasting.”
- The nature and importance of public service broadcasting.

- The potential role of the regulator in hearing complaints against broadcasters from members of the public.

## Contents of the manual

This manual is divided into five chapters, addressing the following topics:

- What is broadcasting regulation for? This covers general principles of freedom of expression and freedom of information, the importance of (and difference between) diversity and pluralism in the media, the issue of editorial independence, arguments for and against broadcasting regulation and current issues in regulatory policy.
- The nature of regulatory bodies. This covers the legal status of broadcasting regulators, the importance of independence and how this can be achieved through membership and appointment procedures, mandate, accountability and funding.
- The licensing process. This covers the question of why a broadcasting licence is required, who is eligible to receive a licence, foreign ownership in the broadcasting sector, public, private and community broadcasters. It also looks at the licensing process, including what happens if a licence is refused or revoked, and common conditions that are contained in licences.
- Regulation of content. This covers the desirability of voluntary self-regulation and agreed codes of conduct. It looks at the issues of advertising, local content quotas, hate speech, obscenity and protection of minors and broadcasting in election periods.
- Complaints procedure. This looks at the possible role that a broadcasting regulator may play in receiving and processing complaints from members of the public. It stresses the importance of proportionality in the imposition of sanctions and of a right of appeal.



1

What  
is  
Broadcasting  
Regulation  
For?

# 1

## WHAT IS BROADCASTING REGULATION FOR?

### 1.1. General principles of broadcasting regulation

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#### BRAINSTORM

Well, what is broadcasting regulation for?  
Can you answer the question in one or two sentences?

The original reason for regulating broadcasting was a simple one: the frequency spectrum was a limited resource. Only a certain number of broadcasters could have access to it, so someone had to decide who they would be and to allocate each broadcaster a frequency. That someone was the broadcasting regulator.

With the development of satellite, digital and Internet broadcasting, perhaps this justification no longer holds true. This is something that we shall consider later in this chapter.

However, regulation is about more than just allocating frequencies. What regulation should also do is to increase access to the media and make sure that a greater variety of voices are heard.

The word “regulation” is worrying to some people. There is an assumption that outside intervention of any sort will be an interference that reduces freedom of expression and consumer choice.

It is true, of course, that incompetent or malicious interventions by a regulator could have serious negative effects. But a completely unregulated broadcasting environment would be disastrous.

Why?

There are a number of possible situations where unregulated broadcasting could interfere with freedom of expression and popular access to the media:

- When there is a broadcasting monopoly under government control.
- When there is a broadcasting monopoly under private control.
- When all broadcasters are owned by foreign companies.
- When all broadcasters are large private companies.
- When rich broadcasters have large transmitters that interfere with the weaker signals from smaller poorer broadcasters, such as community stations.

- When broadcasters transmit messages of hate against ethnic minorities, foreigners, women or other social groups.
- When broadcasters transmit the messages of some political parties but not others.
- When a majority of the output of a broadcaster consists of paid advertisements.

These are just examples. It would not be difficult to make the list much longer. But it should make clear why regulating – when properly and professionally done – is a positive intervention that enhances media freedom.

From this list it should be clear that there are two distinct areas where regulators might intervene. Some interventions concern the broad conditions under which broadcasters operate. These would include:

- Who owns the broadcaster.
- What frequencies it uses.
- Broadly, the type of material that is broadcast.

The other type of regulatory intervention relates to the content of the broadcasts. This might include:

- Inflammatory or defamatory broadcasts.
- Political imbalance.
- Advertising.
- How members of the public can complain about broadcasts.

The two areas are clearly not unconnected. However, they present very different challenges to the regulator – an issue that we will return to in Chapter 4.

### 1.1.1.1. Freedom of expression

The right to freedom of expression is the most important principle underlying regulation of broadcasting. This right finds its clearest expression

in Article 19 of the Universal Declaration of Human Rights:

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

This definition of freedom of expression was echoed in the International Covenant on Civil and Political Rights.

Even a quick reading of Article 19 reveals a number of points of immediate practical relevance to broadcasting regulators:

- Everyone has the right to seek and receive information. This relates to the right of the public – the broadcasters’ audience – to have access to the sort of information that they need and desire.
- Everyone has the right to impart information and ideas. This relates to the right of broadcasters to communicate without interference, but also of the right of the broader public to have access to the broadcast media.
- These rights apply “through any media.” This enshrines the public right of access to broadcasting. Freedom of expression is not only exercised at the street corner, but also through modern media.
- And the rights apply across borders. This point is highly relevant in an age when the technical capacity to broadcast across frontiers is widely available.

The African Charter on Human and Peoples’ Rights, in Article 9, echoes the rights in Article 19 of the UDHR and ICCPR.

The African Commission on Human and Peoples’ Rights has elaborated this in its Declaration of Principles on Freedom of Expression in Africa. (This declaration is included as an appendix to the manual.) The declaration is important because it elaborates in considerable detail what is meant by

freedom of expression. This includes a number of points of particular relevance for broadcasting regulators:

- The need to encourage the development of private broadcasting.
- The need to transform state or government broadcasters into genuine public broadcasters.
- The need for independent broadcasting regulatory bodies.

Of course, nobody says that they are against freedom of expression in principle. But often doubts are expressed – something like this:

*“Freedom of expression is alright – but it can’t be used as a licence to insult people or tell lies about them.”*  
*“It’s wrong to use freedom of expression to attack people’s religion.”*

*“What if people use their freedom of expression to incite violence?”*

*“If freedom of expression is abused, it could lead to threats to national security.”*

It is important to acknowledge that all these are serious concerns (even if the arguments are not always advanced sincerely). A judge once famously remarked that the right to freedom of expression did not entitle someone to shout “Fire!” in a crowded theatre. Indeed, these concerns are taken seriously enough that they are actually included in Articles 19 and 20 of the International Covenant on Civil and Political Rights.

In a moment we shall return to the question of these potential limits to freedom of expression. But first it is important to underline what freedom of expression is, and why it is so important.

Human rights law makes a distinction between freedom of conscience and freedom of expression. Freedom of conscience is what somebody believes – about religion, politics, morals, culture or anything else. (This, incidentally, can never be limited in any

circumstances.) Freedom of expression is the right of people to articulate these beliefs so that others can hear them – and perhaps be persuaded by them. It also involves conveying information – facts about any aspect of the world – for the interest or benefit of others.

## BRAINSTORM

Make a quick list of reasons why you think freedom of expression is important.

It is likely that you found many reasons. Probably you could divide these up into two categories:

- **Individual reasons:** why it is important for the each person to be able to say what they think. These reasons are closely related to their freedom of conscience.
- **Collective or social reasons:** why it is important for society that people are able to say what they think. These reasons are related to things like politics, economics and development, or governance. They would include the right of people to express political views as part of the process of freely choosing their government, expressing their views on economic and social issues, or blowing the whistle on corruption or mismanagement.

The mass media are important because they are one of the crucial means by which people exercise their right to freedom of expression. It has become increasingly recognized in recent years that it is not enough to allow people to say what they think if others cannot hear them. In other words, there is a right to *communication*. The Zimbabwean Supreme Court, considering a challenge to the government’s telephone monopoly, concluded that the protection of freedom of expression applied not only to the content of information, but also to the means of transmission and reception. If a restriction is imposed on the means of transmission or reception this will necessarily interfere with the right to receive and impart information<sup>1</sup>.



One reason why the Declaration of Principles on Freedom of Expression in Africa is so important is that it incorporates this idea that access to the means of communication is an important element of the right to freedom of expression.

We mentioned the objections that are often raised to freedom of expression. It is important to remember that while these arguments are occasionally valid, in 99 cases out of 100 they are greatly outweighed by the many benefits of freedom of expression. Usually the negative aspects of freedom of expression – such as the expression of hatred towards vulnerable groups – can best be dealt with by extending freedom of expression, allowing the arguments of hatred to be repudiated, rather than by limiting it. This is an issue that we shall return to.

In other instances, the imposition of limitations on freedom of expression must follow very strict principles:

- The restriction should be prescribed by law. In other words, no authority can arbitrarily decide to curtail freedom of expression. It must have a clear, unambiguous legal authority for doing so and this must be subject to review by an independent court.
- The restriction should be aimed at one of the legitimate aims set out in international law where limits to freedom of expression are permitted. In other words the authorities may not simply invent reasons for restricting freedom of expression.
- The restriction should be proportionate to the aim – the authorities may not impose blanket bans on freedom of expression but only those that relate to its aim.
- Restrictions should be non-discriminatory – the authorities may not use a restriction to silence one political or social group.

It is important to understand the correct procedures for applying these limitations – not

because they are frequent occurrences, but for precisely the opposite reason. There are very seldom justifiable grounds for limiting freedom of expression. Later in this manual we will look at some examples where a broadcasting regulator may, however, be required to exercise judgment on this issue.

### 1.1.2. Freedom of information

The right to freedom of expression contained in Article 19 of the Universal Declaration can be divided into two parts. One, obviously, is the right of everyone to express their opinions. The other is the right of everyone to seek and receive information.

Right from the very early days of the United Nations, the right to freedom of information was seen as particularly important. In 1946, the General Assembly described it thus:

Freedom of information is a fundamental human right and ... the touchstone of all freedoms to which the United Nations is consecrated.

What they meant by this was that freedom of information was a key that unlocked access to many other rights. If anything, the right is seen as even more important today. Modern constitutions often contain a separate right to freedom of information, apart from the right to freedom of expression. Many countries have introduced access to information laws:

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1 Retrofit (Pty) Ltd vs Posts and Telecommunications Corporation, Supreme Court, 1995(9) BCLR 1262 (2).

## National Freedom of Information Laws 2005



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An access to information law gives citizens and others the right to seek and receive information held by governments, public bodies and, sometimes, other powerful institutions in society. However, the right to information is somewhat broader than just this access to official information. One of the main ways in which people get information about the society in which they live, about politics, about many of the things that concern them, is through the media.

One of the purposes of broadcasting regulation is to facilitate that right to information. Regulation does not do this by interfering with the content of broadcasts. Rather it is concerned with making sure that the variety of broadcasting outlets available will provide people with the information that they need and want.

### 1.1.3. Diversity and pluralism

We have said that the broadcasting regulator will help to realize the public right of access to information by promoting diversity and pluralism in the broadcasters available.

What do we mean by these two words, diversity and pluralism?

#### BRAINSTORM

What do you think is the difference between **diversity** and **pluralism** in broadcasting?

**Pluralism** simply means that there is a variety of different types of media and different owners. It is perhaps easiest to explain this by looking at what pluralism is **not**.

Pluralism is **not** having a single state monopoly broadcaster.

Pluralism is **not** having a single private company owning all broadcasters.

Pluralism is also **not** having a single model of broadcasting ownership so that, for example, all broadcasters are owned by private companies.

So a pluralistic broadcasting system might look something like this:

- Publicly-owned and funded broadcaster.
- Community broadcasting stations.
- Variety of private commercial broadcasters, with different owners.

**Diversity** is something different. This is about a variety of different types of voices being given access to the media and a variety of different types of information and viewpoints being heard. Pluralism of the media is only part of the solution to the problem of how to obtain diversity.

For example, one very important way of securing diversity is through a proper system of public service broadcasting. Public service broadcasters are not driven by the profit motive and should have as a specific part of their remit to meet the information and entertainment needs of various minority or neglected groups: national or linguistic minorities, old and young people, people with disabilities and so on.

#### 1.1.4. Access to the media

An important aspect of promoting diversity is to ensure that everyone has access to the media.

Commercial broadcasting is driven by the need for advertising. Hence commercial broadcasters are overwhelmingly concerned to broadcast to audiences that are of interest to advertisers. This is why commercial stations in Africa almost inevitably have an urban focus. Yet the information needs and rights of others – the poor and people who live in rural or remote parts of the country – are as legitimate as anyone's. One of the tasks of the broadcasting regulator is to make sure that these needs are met.

The state has a responsibility here in the development of the infrastructure that will allow broadcasts to reach everyone – in particular transmission systems that can then be made available to all broadcasters – at reasonable rates and on a non-discriminatory basis.

Access to broadcasting services has other dimensions, as well as transmission systems.

- **Electricity:** Televisions cannot run without electricity (while batteries for transistor radios are expensive). Access to the broadcast media also includes having the power to run these sets.
- **Cost:** If batteries for radios are expensive, that is nothing compared with the cost of the set and, still worse, the cost of a television.

One way of addressing the issues of infrastructure and cost is through setting up communications centres that will allow communities collective access to the media.

Broadcasting regulators may also have responsibility for telecommunications. This will increasingly involve aspects of broadcasting, with the development of Internet broadcasting and podcasts that can be downloaded to cellular telephones. So access to telecommunications may in future become as significant an aspect of democratizing broadcasting as having a radio or television set.

#### DISCUSSION POINT

The responsibilities of broadcasting regulators differ from country to country. What do you think are some of the steps that a broadcasting regulator might take to ensure greater access to broadcasting services by the entire public?

### 1.1.5. Editorial independence

One of the most important aspects of freedom of expression in broadcasting is the right of journalists and broadcasters to be free from any sort of outside interference.

We have seen that a regulator – and a regulatory policy – will set down certain ground rules that a broadcasting licensee will be obliged to follow. Yet there must never be any intervention that violates the editorial independence of broadcasters.

Editorial independence refers both to general editorial policies and specific editorial decisions.

- An editorial policy is, for example, whether a broadcaster supports a certain economic model or foreign policy initiative.
- A specific editorial decision refers to how a particular story is covered.

There are certain circumstances where limits may be set to editorial independence. It may be, for example, that certain rules are set down for election coverage. Or that broadcasters are required to abide by a code of conduct that might, for example, limit hate speech.

However, in no circumstances will a regulator (or any government authority) have the right to intervene in advance to censor a broadcaster or tell the editor how to cover a story. If the terms of a broadcasting licence are breached, the regulator may need to take action. But prior censorship cannot be justified in any situation.

One common way in which the authorities try to interfere with editorial independence is by requiring broadcaster to carry certain types of material. This is something that should never happen (except in the very specific circumstances of elections).

This protection of editorial independence needs to be laid down in the law. Broadcasters must be able to go to court to protect their right to make editorial decisions free from outside interference.

## 1.2. Arguments for and against broadcasting

### EXERCISE

Here are some common arguments for and against regulation of broadcasting. Try to find reasons why you support or disagree with each of these propositions. (If this manual is being used to organise a workshop, it would be possible to organise a debate on these issues.)

#### For broadcasting regulation:

- It is necessary as a way of allocating use of a public resource – the frequency spectrum.
- It is necessary as a way of ensuring diversity and pluralism in broadcasting – of giving a voice to the weakest sections of society.
- It is necessary as a way of counteracting voices of hate across the air waves.
- It is necessary as a way of holding broadcasters to account – for example through complaints procedures.
- It is necessary as a way of protecting freedom of expression and editorial independence.

#### Against broadcasting regulation:

- It is outmoded in the age of digital and satellite broadcasting.
- It is unnecessary – diversity will be assured if commercial broadcasters are free to operate.
- It is a legacy of a paternalistic model of broadcasting.
- It is an interference with the freedom of expression of broadcasters and an interference with editorial independence.

### 1.3. Current challenges to regulatory policy

One of the underlying arguments in favour of broadcasting regulation has been that the frequency spectrum is a finite and limited resource. Some independent agency has been needed to distribute access to this resource in a fair and impartial manner.

But it is at least arguable that recent technological developments – and perhaps future ones too – have made this argument obsolete. Digital broadcasting and the convergence of broadcasting and telecommunications technologies have vastly expanded the range of frequencies available. Satellite broadcasting has similarly expanded the range of frequencies and created a whole new category of multinational broadcasters beyond the jurisdiction of traditional broadcasting regulators.

Meanwhile, Internet broadcasting has become a widespread phenomenon – closely followed by Podcasting, in which broadcasts can be downloaded to cellular telephones.

Do these technological innovations undermine the argument for regulation? Or do they simply pose new challenges for regulators?

#### 1.3.1. Digitalisation and convergence

Here it is necessary to introduce two related pieces of jargon that have potentially dramatic implications for the future of broadcasting (and broadcasting regulation).

- **Digitalisation** refers to the development of new formats for packaging information for transition (by contrast with the analogue signals with which broadcasting functioned universally). The concern here is not the technology itself but its implications. One is that the development of digital broadcasting creates a “frequency spectrum” that is, to all intents and purposes, infinite. This is far from being a reality in Africa, where most

broadcasting still uses old-fashioned analogue or “terrestrial” signals. But this is advancing rapidly. The other implication of Digitalisation is...

- **Convergence.** This refers to the way in which digital items can be communicated by any one of a variety of means. A digital radio programme can be broadcast in a conventional fashion, but it can also be streamed or downloaded over the Internet and perhaps played back over a personal MP3 player. The physical medium of transmission for the same programme will vary: radio waves, satellite, cable, cellular wireless transmissions....

These developments have a number of obvious implications for broadcasting regulators:

- As digital broadcasting advances, it will remove one of the traditional justifications for regulation – the limited frequency spectrum.
- The convergence of broadcasting and telecommunications technology suggests that the job of broadcasting and telecommunications regulation should be combined, or at least harmonised.
- The development of these communications technologies increases the power and range of multinational broadcasting. Is it desirable to regulate multinational broadcasters – and if so, how?
- Convergence massively expands the possibility of “interactivity” – where the individual audience member demands the specific item to be “broadcast.” To a large extent, this is a distinctive characteristic of the Internet. Is this broadcasting? And should it be regulated?

One of the arguments against broadcasting regulation in the twenty-first century is that these technological developments have rendered it obsolete and redundant. However, this is not so. There will be a need for practical and legal changes to take account of the convergence of broadcasting and telecommunications. But the new technologies actually raise several new justifications for regulation:

- To promote local content that can compete with the inevitable flood of foreign programming (often provided by satellite broadcasters to cash-strapped public broadcasters).
- To standardise technical standards to ensure the maximum benefits of the new technologies to everyone.
- To address the issues raised by purchase of broadcasting rights by pay channels.
- To address issues concerning advertising.

difficult to regulate the content of the Internet. The only real way of doing so is by methods that would be utterly counterproductive in their heavy-handedness. Those governments that have successfully censored the Internet have done so by one of a variety of means:

- Physical destruction of equipment.
- Intrusive software (including, for example, surveillance of email communications or web-browsing history).
- Strict legal regulation of Internet Service Providers.

### 1.3.2. The Internet and other new media

#### DISCUSSION POINT

But what about the Internet? We know that it is possible to broadcast radio programmes over the Internet, including Podcasts that can be downloaded onto mobile telephones or personal stereo players. Since this seems to be broadcasting, should it be subject to the same regulatory regime as terrestrial, cable or satellite?

Each of these methods amounts to censorship that is quite disproportionate to the limited aims of broadcasting regulation.

They also constitute an interference with another important defining characteristic of the Internet – its interactivity. The Internet allows a far broader spectrum of ordinary citizens to communicate their own information and views than normally have access to traditional broadcasting. They can select information, react to it and create their own means of communication, through websites and web logs.

There is no doubt that material “broadcast” on the Internet sometimes fails to conform to the standards that might be applied to broadcasting. An obvious example of this is in the realm of obscenity. Another frequent bone of contention is the failure of the Internet to conform to regulations in force during elections. For example, web editions of newspapers often fail to follow regulations about publication of opinion polls, or news blackouts in the period before and around an election.

The approach that regulatory authorities have generally used has been to ignore these infractions as falling beyond their own competence.

The Internet, of its nature, is a very different medium to traditional broadcasting. Cable and satellite broadcasting, even when they are digital, simulate the mechanisms and procedures of ordinary broadcasting.

One of the defining characteristics of the Internet is its resistance to outside interference. The very technology – designed by the military to withstand nuclear attack – means that it is exceptionally



### **DISCUSSION POINT**

“Whatever the advances of technology, there will still be a role for the broadcasting regulator in protecting the voices of the weak and the poor.”

Do you agree with this justification for the continuing role of the broadcasting regulator? Give reasons for your opinion.



2

## Regulatory Bodies

# 2

## REGULATORY BODIES

### 2.1. Legal status

Let us suppose that you were starting from scratch setting up a body to regulate broadcasting in your country. What would be the first step you would take?

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The answer seems obvious: you would pass a law establishing the regulatory body.

Actually there is a very important step that you would probably want to take before that: consult all the stakeholders about what they expect from a broadcasting regulator.

It may seem obvious that a regulatory body should be established by law, but it is worth stating nevertheless. It is essential that the entire regulatory framework be established in advance so that the behaviour of the regulator can be consistent and foreseeable.

Laws establishing broadcasting regulators vary from country to country. A good law is likely to contain at least the following:

- The name, powers and responsibility of the regulatory body.
- A clear statement that the regulatory body is independent from the government of the day.
- A clear statement of overall broadcasting policy.
- The procedure for appointing members of the regulatory body.
- How the body is formally accountable to the public.
- How the regulatory body is to be funded.

#### BRAINSTORM

Make a list of all the things that you think should go in the law establishing the regulatory authority.

## 2.2. Independence

### BRAINSTORM

What does it mean when we say that a broadcasting regulator should be independent?

And why does it matter?

If we look up the dictionary definition of the word independent, we will find something like this:

Free from the influence, guidance, or control of another or others

That is a good definition, which will suit the purpose of a broadcasting regulator entirely.

Independence for a public body like a broadcasting regulator means that no other body is able to make its decisions for it, or to influence it.

A broadcasting regulator cannot be totally separate from all other institutions in society. Someone has to appoint its members. Someone has to decide to provide funds for its operations. But the law that establishes the regulator needs to set out clear guarantees to make sure that in its day-to-day work these other institutions have no influence over the decisions that it makes.

A broadcasting regulator needs to be independent from:

- **the government.** The regulator will work within the broad framework of broadcasting policy, but its function is not to make decisions for the government of the day. Governments, even democratic ones, are only too ready to interfere with the independence of the media. Control over a broadcasting regulator is an effective and dangerous way for them to do this. The regulator needs to be able to make professional decisions free from political interference.

- **political parties.** The ruling party will certainly try to exert an influence over the regulator, probably through the organs of state. But other political parties may also seek to influence the regulator's decisions. The regulator has to be seen clearly as being politically non-partisan.
- **media interests.** The regulator is required to make impartial decisions affecting the activities (and the financial interests) of media organisations. There will be enormous temptations, both financial and political, for media houses to apply pressure on the regulator to reach decisions that are favourable. It is vitally important that the regulator be protected from such pressure.

The interest that the regulator has to represent is that of the public.

### BRAINSTORM

What do you think is meant by the “public interest”?

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In English the word “interest” has two slightly different meanings, which can cause confusion.

“Interest” can mean something that the public is interested in – such as what a famous footballer has for breakfast or whom a celebrity singer is having a love affair with. These are no doubt things that the media will sometimes look into, but they are not what is meant by the public interest.

The other meaning of “interest” is that which is of benefit to the public. This may be a more difficult concept to define, because of course the public is not a single unified entity. It is made up of various different groups. The task of the broadcasting regulator will be to weigh up and balance these different sectional interests, while remaining independent of each of them.

The Scottish Information Commission defined it this way:

*The public interest test has been described as something which is of serious concern and benefit to the public, not merely something of individual interest. It is not something which is of interest to the public but something which is in the interest of the public.*

Here is how one journalists' organisation (the National Union of Journalists in Britain) defined the "public interest":

- Detecting or exposing crime or a serious misdemeanour
- Protecting public health or safety
- Preventing the public from being misled by some statement or action by an individual or organisation
- Exposing misuse of public funds or other forms of corruption by public bodies
- Revealing potential conflicts of interest by those in positions of power and influence
- Exposing corporate greed
- Exposing hypocritical behaviour by those holding high office.

So the challenge for the broadcasting regulator is to stand apart from all particular interests and to represent the public interest. How is this independence to be achieved?

### DISCUSSION POINT

What are the guarantees that a broadcasting regulator is independent?

There are several ways of making sure that a broadcasting regulator is independent. Most of this chapter will be spent examining them:

- **Appointment procedure:** members of the regulatory body should be appointed in a way that takes any direct power out of the hands of the government of the day. There should

be the maximum public involvement on this procedure.

- **Membership:** the quality of members of the regulatory body is perhaps the most important guarantee of its independence and effectiveness. They need to be individuals of proven expertise, independence and integrity.
- **Mandate and powers:** The regulatory body needs to be vested with all the powers it needs to do its job effectively. It is important that the regulator not be dependent on any other institution in carrying out its functions, since this could compromise its independence.
- **Accountability:** Independence does not mean that a regulatory body is unaccountable – indeed a process of public accountability is a way of making sure that the body is properly independent.
- **Funding:** Adequate funding – and control over funds – is absolutely key to independence. No matter how independent a regulator may appear, it will be unable to exercise this independence if it does not have a secure source of funding.

## 2.3. Membership and appointment

If the quality of members of a regulatory body is crucial to its effectiveness, then the procedure for appointing these members is clearly extremely important. This procedure should be set out in the law establishing the regulatory body.

### BRAINSTORM

What do you think would be the best procedure for appointing members of the regulatory body?

The appointment process should certainly include an element of public consultation. Preferably it would include the possibility that members of the regulatory authority could be nominated by the public. It might also include having public hearings in which candidates for the regulatory body are questioned by the public. If this seems a little cumbersome and expensive, then at the least the list of potential candidates should be open for public discussion.

But who makes the appointment?

In some countries there may already be independent mechanisms for making public appointments of figures who need to be independent of the government (such as judges). It might be possible to use these same procedures.

Often the most appropriate procedure will be for the legislature to make the appointment. This also establishes a line of accountability to a public body that is not the same as the executive.

### DISCUSSION POINT

Who do you think should be excluded from membership of a broadcasting regulatory body?

There are clearly a number of types of people who could not be relied upon to be independent members of a regulatory body because of a conflict of interests between that role and their other jobs or financial connections. Most obviously these would include:

- Employees of the government or public service. Since they are subject to the discipline of their employers they would be unable to fulfil their regulatory functions independently.
- People who hold elected office or are officials of political parties. Again, such individuals owe duties to other authorities – the people who elected them, their political party and so on. They could not function independently.

- Employees of broadcasting or telecommunications companies, or those who have direct or indirect financial interests in such companies. Here the conflict of interest will be a financial one. Members of the regulatory body with financial interests in media companies would be inclined to make decisions from which they themselves could benefit.

### DISCUSSION POINT

Should this exclusion also apply to people with interests in other types of media company (such as newspapers) or only those directly under the authority of the regulator?

- Those who have been convicted of a violent crime or a crime of dishonesty – provided, of course, that this has been done after a fair trial. This exclusion should not apply once a period of time has passed – say five years – after the sentence was discharged.

### BRAINSTORM

How can members of a broadcasting regulatory body be protected against outside interference with their independence and integrity?

We have seen already that a law establishing a broadcasting regulator should contain provisions expressly forbidding government from issuing orders to it. This same constraint should apply to individual members. It should be an offence for the government, including any minister or official, to try to influence a member of the regulatory authority.



The fees or salary payable to members of the broadcasting regulator should be set out clearly. These should be sufficient to remove any temptation to corruption (such as receiving bribes, or even just fees from other sources). They should be set out by law and apply the same to all members. Members should not be allowed to receive any other payments in connection with their functions with the regulatory body.

The job security of members of the regulatory body should be protected. They should be appointed for a fixed term – and protected against being dismissed before that term is finished. That way there is a guarantee that they cannot be influenced to make certain decisions.

But sometimes there will be reasons why a member of a regulatory authority should be removed from office. In what circumstances might this happen?

- It might be that a member has made themselves ineligible to be a member – for example by acquiring a financial interest in a broadcasting company, or taking office in a political party.
- Or it might be that a member has failed to discharge their responsibilities properly – or, worse, has committed misconduct.
- Or a member might for some other reason (such as illness or incapacity) be unable of carrying out their duties.

In any of these instances, it is important that there is an established procedure for dealing with these failures, so that it cannot be abused to remove a member who is carrying out their responsibilities properly – but perhaps offending someone in power.

## 2.4. Mandate and powers

In Chapters 3 and 4 we look in greater detail at the nature of the mandate that a broadcasting regulator might have and the powers that it might exercise.

It is desirable that the broad lines of broadcasting policy will have been set out in the law establishing the broadcasting regulator. Within this, the regulator is likely to have considerable discretion to make sure that the broadcasting sector functions in a pluralistic manner, fulfilling the rights to freedom of expression and freedom of information.

The regulator will almost certainly have the power to issue licences to broadcasters – this is, after all, one of its core functions. It is likely that it will carry out various consultations and reviews to elaborate the criteria by which licences are awarded and the conditions that are contained within the licences.

The regulator may also have functions that relate to the content of broadcasts. For the most part these powers are likely to be exercised through the licence itself. For example a licence may specify whether a licensee is to broadcast news or not, or what proportion of local content must be contained within its broadcasts.

But other content-based regulation may take place in different ways. For example, the regulator may be responsible for developing codes of conduct to guide coverage of particular issues – election coverage being a frequent example.

The regulator may have the responsibility for receiving and adjudicating on complaints. Again the broad procedure for doing this needs to be set out by law.

The law should provide the regulator with the powers that it needs in order to carry out these functions. Processes need to be clear, transparent and fair – and to be applied in the same way to all broadcasters. The regulator will make decisions in accordance with the principles of administrative justice and will give written reasons for all decisions. This is so that anyone who is refused a licence – or who is granted one – knows the exact reasons.

Ultimately, any decisions made by a regulatory body should be subject to review by the courts.

## 2.5. Accountability

Although it is important for a regulatory body to be independent – of the government, of political interests, of commercial broadcasting interests – it is also essential that it be accountable to the public that it represents.

### BRAINSTORM

What are the methods that you think could be employed to make a broadcasting regulator accountable to the public?

There are a number of possible aspects of an accountability mechanism:

- Most important is that the regulator should be accountable to a specific body. This should be a multi-party body – such as the legislature or, in most systems, a committee of the legislature. It should not be accountable to the executive.
- The regulator should be required to report on a regular basis (usually annually). An annual report should include a detailed account of what the regulatory body did in that year, including its budgets and audited financial records.
- The regulator should consult regularly with the public and stakeholders on policy issues. Although the regulatory body operates independently, it is vital that it be seen to take public opinion and the public interest into account in the decisions it makes.
- The accountability or supervision process is primarily a retrospective one. The regulator reports on what it has done, but it is not for the legislature, or the public or stakeholders to try to influence any individual decision that it is going to make.

## 2.6. Funding

Adequate funding is absolutely essential to the effective functioning of a broadcasting regulator. The opposite – inadequate funding – exposes a regulator to interference and improper pressure.

The framework for funding should be set out in the law establishing the regulator. Most likely this will entail a vote in the legislature, or whatever is the normal procedure for assigning funds to independent public entities.

### DISCUSSION POINT

Should broadcasting regulatory bodies be allowed to raise their own funds independently, for example through donors?

What would be the implications of their doing this?

If they were allowed to do so, what might be the limits that would be placed on such fund-raising?



3

# Licensing

# 3

## LICENSING

### 3.1. Why is a licence necessary?

#### REVISION POINT

Think back to Chapter 1. We looked at two main arguments for the role of the broadcasting regulator. These are, in essence, the arguments in favour of requiring broadcasters to be issued with a licence before they go on the air.

What are these two arguments?

The first argument was that the frequency spectrum is a finite national resource. There is not enough of it to go round. Therefore an accountable, national public body is needed to share out the frequency spectrum fairly. The same body will make sure that those with expensive equipment and powerful signals do not drown out others who are equally entitled to access to the airwaves.

The second argument applies equally in the case of digital or satellite broadcasting – technologies that are not constrained by the frequency spectrum. It is that the broadcasting regulator has an essential role to play in assuring public access to the airwaves and public access to information. This is through

creating *pluralism* in the broadcasters licensed, as a means towards *diversity* in the messages and voices heard over the airwaves.

The important point is that the second argument stands as a sufficient reason for having a system of broadcasting licensing, even in a digital environment where there enough channels for every broadcaster to have access.

### 3.2. Who is eligible to receive a licence?

In this section we look at who is eligible to receive a broadcasting licence. Of course, anyone can apply for a licence to broadcast. But it might be easier to ask the question in reverse. Who might be excluded from a broadcasting licence?

Here are some of the categories of applicants who *may* be ineligible to receive a licence in some countries:

- Broadcasting companies owned by political parties. It is relatively common for broadcasting law to determine that, because of the limited nature of the frequency spectrum, broadcasters owned by parties will not be licensed. There is obviously an issue of fairness. If one political broadcaster is licensed, then all others should be too. This may crowd out the airwaves with political broadcasters, excluding other interests

(and failing to serve the information and entertainment needs of the population).

- Foreign owners. Sometimes there may be legitimate limits on foreign ownership of broadcasting licences. This cannot be a total ban on foreign ownership, but it may be permissible to help the development of indigenous broadcasters. (See below.)
- Owners of newspapers. In some countries there are restrictions on broadcasting licences being granted to companies that also have significant interests in the print media. The purpose of this is to prevent the emergence of media monopolies. People should have access to a variety of different sources of information. This choice is limited if the same companies own both newspapers and broadcasting stations.

So, we can see that the categories of people who are ineligible to receive broadcasting licences are likely to be very limited. These restrictions will have to be set out in the law, so that the criteria are clear and transparent to everyone who applies for a broadcasting licence.

What is clear, however, is that, with the possible exception of political parties, there should be no blanket ban on any category of applicant for a licence.

### DISCUSSION POINT

A small evangelical church applies for a broadcasting licence. It has a highly professional business plan, modern broadcasting equipment and all the necessary technical skills. Do you agree to give them a licence?

Remember, the first consideration is that there should be no *blanket* ban. It is not legitimate to decide in advance that all applications from religious broadcasters will be rejected (or, indeed, that all will be accepted). The consideration you will have to bear in mind, however, is what other applications you are likely to receive – from the Catholic Church, perhaps, or from Islamic broadcasters. Are there available slots on the frequency spectrum for all the religious broadcasters that might want to use them? What will you do if there are not?

The general approach to considering licence applications from anyone is that these are decided on a case-by-case basis. But equally, allocation of licences will have to be balanced within an overall approach that will be seen as fair by all applicants, and is a fair use of the frequency spectrum. The primary consideration should always be whether broadcasters meet a public need – not merely whether they have the money and equipment to broadcast effectively.

### 3.2.1. Foreign ownership

We have briefly mentioned the issue of licensing foreign companies to broadcast. Now let us consider this issue in more detail.

### BRAINSTORM

A broadcaster with majority foreign ownership applies for a licence. What are the considerations that you would take into account (both positive and negative) when deciding whether to grant the licence?

- **The right to receive and impart information regardless of frontiers**

In Chapter 1, we considered Article 19 of the Universal Declaration of Human Rights as one of the principles underlying the way in which broadcasting is regulated. This includes the right to seek, receive and impart information regardless of frontiers. This seems to state very clearly that broadcasters should be allowed to broadcast regardless of frontiers – and the public should have the right to receive information from foreign broadcasters.

- **The contribution that a foreign broadcaster makes to diversity**

It may often be that the local capacity to set up broadcasting stations is limited. There is a lack of capital and expertise, which means that an injection of each of these is needed from outside. While it may be legitimate to place some limits on foreign broadcasters in order to protect local broadcasters, foreign involvement should be allowed – indeed actively encouraged – in order to encourage the development of the independent broadcasting sector.

- **Protection of national culture and identity**

This is often cited as a reason for refusing licences to foreign broadcasters, or for limiting the foreign stake in local broadcasters. It is an entirely legitimate aim – but very often the argument is used in a bogus fashion. National culture and identity can be protected through rules on local content. A foreign owned broadcaster that plays local music is arguably making a more positive contribution than a locally owned broadcaster playing foreign music.

- **Protection of the national broadcasting sector**

Another argument for restricting foreign ownership in the broadcasting sector is that foreign companies can compete on unfair terms with indigenous broadcasters – and thereby hinder the growth of the national broadcasting sector. If this were indeed the case, then it would be a legitimate basis

for limiting foreign ownership. And it is certainly acceptable for the licensing body to work with an overall plan that ensures that national broadcasters are not squeezed out. However, it is important to bear in mind that if the national broadcasting sector is weak, foreign involvement may be the only way of ensuring diversity.

### 3.3. Public, private and community broadcasters

Broadcasters can be divided into three categories. Each of these will need to be fully represented when broadcasting licences are allocated. They are:

- Public broadcasters – established by law and funded at least in part out of public money. This remains the most important part of the broadcasting sector in the whole of Africa.
- Private broadcasters – usually run by commercial companies whose interest is in making a profit. The income of commercial broadcasters is largely made from advertising (the marginal exception being subscription satellite and cable channels).
- Community broadcasters – broadcasting to a specific community, usually though not necessarily, a geographical community, and controlled by it.

Publicly-owned broadcasters remain the cornerstone of the broadcasting system in most of Africa. Yet, for the most part, they do not truly function as public broadcasters – that is broadcasters that serve the public – but rather as government or state broadcasters.

## DISCUSSION POINT

There is often a confusion of terminology:

- state broadcaster
- government broadcaster
- public broadcaster
- public service broadcaster

These are all related terms but they do not mean the same thing. In some cases they are very different. Can you offer a definition of each of them?

- A state broadcaster is controlled by the state and represents state interests. It is funded (at least in part) out of public money.
- A government broadcaster is controlled by the government of the day and represents the viewpoint of the executive. It too is at least partly funded out of public funds.
- A public broadcaster is owned by the public and is accountable to it. It is also funded, at least partly, out of public money.
- A public service broadcaster has a specific remit to broadcast material in the public interest. A public service broadcaster need not be publicly owned – privately owned broadcasters may have such a role – but a public broadcaster should always have a public service remit.

### 3.3.1. State/government media

There is no useful place for state or government media in the modern media landscape.

Few governments try to cling to the argument that there should be a state broadcasting monopoly. However, many espouse the idea that now that private broadcasters are on the scene (often regarded as “opposition media”) it is perfectly legitimate for governments to use the national

broadcaster, publicly funded, to put across its own views.

This is how the African Commission on Human and Peoples’ Rights’ “Declaration of Principles on Freedom of Expression in Africa” puts it:

State and government controlled broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- *public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;*
- *the editorial independence of public service broadcasters should be guaranteed;*
- *public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;*
- *public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and*
- *the public service remit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.*

This process of transformation is primarily a political one – it will rest in the hands of the government and legislature to formulate a new broadcasting law that protects the public service character of the national broadcaster in the various ways that the African Commission outlines.

However, broadcasting regulators may be involved in this process in a variety of ways:

- Their advice may be sought in formulating the public service remit of the national broadcaster.
- The broadcasting regulatory body may be given a role in regulating the public broadcaster (and in protecting its independence).
- The broadcasting regulatory body will certainly



have responsibility for protecting the public service remit of any private broadcaster.

### 3.3.1.1. Independence

The most important defining characteristic of a public broadcaster – as opposed to a state or government broadcaster – is its independence. The issues in establishing the independence of a public broadcaster are rather similar to those that affect a regulatory body.

#### REVISION POINT

What were the main ways in which the independence of a broadcasting regulator was guaranteed?

In Chapter 2, we identified the following guarantees of the independence of a regulatory body:

- **Protection in law:** independence is guaranteed in its founding legislation.
- **Appointment procedure:** no direct government involvement and maximum public participation.
- **Membership:** individuals of expertise, independence and integrity.
- **Mandate and powers:** all the powers it needs to do its job effectively.
- **Accountability:** a process of public accountability usually through the legislature.
- **Funding:** Adequate funding – and control over funds.

All these same guarantees apply to public broadcasters – indeed they are what distinguish public broadcasters from government and state ones.

It is essential that there be guarantees of the independence of a public broadcaster in the law that establishes it. This allows the broadcaster to seek protection from the courts if there are attempts to interfere with its independence.

The specific mechanism that guarantees the independence of a public broadcaster is the independent body that oversees it. Often this is called a Board of Governors, or something similar. Appointment of the board of a public broadcaster should be done in a similar fashion to the appointment of an independent regulatory body: there should be no direct government involvement. Rather it should be done through a body such as the legislature, with the maximum public involvement in the process.

The role of the governing board is to ensure, in general terms, that the broadcaster fulfils its public service mandate and to protect its independence against outside interference. It acts as a buffer, protecting the broadcaster. As with a broadcasting regulator, the membership of the board should be people of high integrity with no financial interest in broadcasting. Since they represent the public, they should be representative of the broad spectrum of interests in society.

However, the governing board is not responsible for the day-to-day running of the public broadcaster. This is done by a senior management appointed by it, which in turn appoints the staff of the broadcaster. Hence the broadcasters themselves are protected from interference by various levels of remove;

- **Broadcasters:** appointed by and directly answerable to senior management. Generally answerable to the governing board.
- **Senior management:** appointed by and answerable to the governing board. Responsible for the broadcasting output.
- **Governing board:** appointed by and answerable to the legislature – and through it to the public.

### 3.3.1.2. Funding

#### DISCUSSION POINT

There are generally thought to be three main sources of funding for public broadcasters. Can you think what these might be?

The three potential sources of funding for public broadcasters are the following:

- Public funding by a vote of Parliament.
- Public funding by the payment of a licence fee.
- Revenue from advertising.

Some public broadcasters, especially long established ones, do not take advertising and rely largely on one of the first two sources of funding. (Although some successful public broadcasters, such as the British Broadcasting Corporation, supplement this from sale of programmes and a lucrative publishing business.)

There is no reason in principle why either of the first two methods of funding should not be combined with advertising. However, the two different methods of public funding are in effect alternatives.

There is an obvious political advantage to the payment of a licence fee by each household. It stresses the link between the broadcaster and the public. It says, in effect, that the public owns the broadcaster and establishes ultimate accountability.

However, the obvious drawback to the use of a licence fee is a practical one: the difficulty of collecting the money. In practice there are few public broadcasters that rely mainly on a licence fee, but many more that use it as part of their funding in order to maintain that link with the public.

In practice, many public broadcasters have had to rely on commercial advertising for a substantial

part of their income. The problem here is that they will be competing with commercial broadcasters for the same advertising income. This potentially damages the private broadcasting sector – at the same time as creating commercial pressures on the public broadcaster that may tempt it away from its public service mandate.

While, for practical reasons, a mix of advertising and public funding is likely to be necessary, the long-term prospects of public broadcasters probably depend on them keeping the advertising element at a relatively low level.

In addition to these three main sources of funding, there are some others, which may be important in some instances. A couple of them have already been mentioned:

- Sale of programmes – either through export to overseas broadcasters or sale of DVDs or videos to the public.
- Spin-off marketing. The BBC has pioneered this, with many books and other products based upon its programmes. Many broadcasters also have websites, which may also be used to increase income-generating opportunities.
- Provision of infrastructure. Many public broadcasters have a monopoly of the national broadcasting infrastructure. They can offer these services to other broadcasters, private or community.

### 3.3.2. Public service remit

#### BRAINSTORM

We have defined “public broadcasting” – by its independence and its accountability to the public. But we said that public service broadcasting was something rather different. Think of a checklist of issues that might be used to define public service broadcasting.

Here is a definition of public service broadcasting made by the Council of Europe’s Independent Television Commission in 2004. How many of these coincided with your list?

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- Wide range of programmes that caters to a variety of tastes and interests, and takes scheduling into account;
- High quality technical and production standards, with evidence of being well resourced and of innovation and distinctiveness, making full use of new media to support television’s educational role;
- Cultural, linguistic, and social consideration for minority populations and other special needs and interests, particularly education including programmes for schools and provisions for disabled people;
- Catering for regional interests and communities of interest, and reflecting the regions to each other;
- National identity, being a “voice of the nation”, the place where people go on national occasions;
- Large amount of original productions made especially for first showing;

- Demonstrated willingness to take creative risks, challenging viewers, complementing other public service broadcasting channels and those that are purely market driven;
- Strong sense of independence and impartiality, authoritative news, a forum for public debate, ensuring a plurality of opinions and an informed electorate;
- Universal coverage;
- Limited amounts of advertising (a maximum of seven minutes per hour across the day);
- Affordability—either free at the point of delivery or at a cost that makes it accessible to the vast majority of the people.

This list may not apply to every broadcaster that has a public service remit. For example, a community broadcaster will not have universal coverage or be the “voice of the nation,” but it may have many of the other attributes on this list.

One of the important considerations is a commitment to creativity and quality broadcasting. Public service broadcasting is premised on the assumption that the market and commercial considerations cannot provide all the nation’s broadcasting needs. The reasons for this are self-evident, although often ignored by fervent advocates of the commercial broadcasting model. Since pure commercial broadcasting is driven by the quest for advertising, there is no financial reason for it to try to attract an audience that is not of interest to advertisers. This may mean poorer sections of the population, or simply audiences that live in whole areas of the country. Public service broadcasting is universal in its scope and aspires to appeal to all audiences.

### 3.3.3. Private broadcasting

#### BRAINSTORM

How many different categories of private broadcaster can you think of?

The number of different categories you arrive at will depend on how you divide up private broadcasters. There is, obviously, no right or wrong answer to this question. Consider, for example, the following possible classifications of private broadcasters:

- Commercial
- Political
- Religious
- Non-governmental organisation

Private broadcasters vary enormously in their nature, funding and purpose. Most obviously private broadcasters are likely to be commercial broadcasters, whose aim is to make money. But they may also be organisations that have other purposes: to communicate a religious message, or promote knowledge about development, or reconciliation.

Private broadcasters may be overtly political – they may be owned by a political party, or they may explicitly support a particular political position. Broadcasting companies may be owned by prominent political individuals in their private capacity – or they may be a vehicle for the political aspirations of the very rich. In Italy, Silvio Berlusconi became prime minister on the back of his extensive private media empire. In many other countries, there are media owners who would like to emulate his achievement. In some countries there may be legitimate restrictions on the licensing of explicitly political broadcasters, but in many others there will not be.

Even among private broadcasters whose aim is simply to make money, there will be an enormous

variety of approaches. Private broadcasters will vary from the small FM radio station whose aim is to broadcast popular music, to a large television station that aims to broadcast the whole spectrum of news and entertainment: bulletins, documentaries, drama, music, sports, game shows and so on.

For practical purposes, therefore, a regulator will need to make a much more detailed map of the different types of private broadcasters and how to create balance among and between them. For example:

- How to balance the various different political standpoints of private broadcasters in order to create a fair variety of views.
- How to balance the different religious viewpoints of different broadcasters.
- How to give adequate access to the airwaves to non-governmental organisations or other bodies whose aim is social welfare rather than profit.
- How to make sure that small broadcasting organisations receive a fair opportunity alongside large, well-financed ones.
- How to balance the overall output of private broadcasters so that it meets the needs of the public.

This is obviously a task that is never going to be completed and it is one that will be constantly shifting, as new broadcasters emerge and disappear from the scene – rather like doing a jigsaw puzzle where the pieces keep changing shape and colour. However, the fact that the balance between and within private broadcasters is an ideal that can never really be achieved should not stop regulators from constantly seeking such a balance.

#### BRAINSTORM

Compose a definition of community broadcasting.

This exercise is easier said than done. Here are some definitions offered by practitioners in the community broadcasting field.

*Community radio, rural radio, cooperative radio, participatory radio, free radio, alternative, popular, educational radio. If the radio stations, networks and production groups that make up the World Association of Community Radio Broadcasters refer to themselves by a variety of names, then their practices and profiles are even more varied. Some are musical, some militant and some mix music and militancy. They are located in isolated rural villages and in the heart of the largest cities in the world. Their signals may reach only a kilometre, cover a whole country or be carried via shortwave to other parts of the world.*

*Some stations are owned by not-for-profit groups or by cooperatives whose members are the listeners themselves. Others are owned by students, universities, municipalities, churches or trade unions. There are stations financed by donations from listeners, by international development agencies, by advertising and by governments.*

*(“Waves for Freedom”. Report on the Sixth World Conference of Community Radio Broadcasters. Dakar, Senegal, January 23-39, 1995)*

*The historical philosophy of community radio is to use this medium as the voice of the voiceless, the mouthpiece of oppressed people (be it on racial, gender, or class grounds) and generally as a tool for development.*

(...)

*Community radio is defined as having three aspects: non-profit making, community ownership and control, community participation.*

(...)

*It should be made clear that community radio is not about doing something for the community but about the community doing something for itself, ie. owning and controlling its own means of communication.*

*(“What is Community Radio? A resource guide”. AMARC Africa and Panos Southern Africa. 1998)*

*Radio stations that practice radio broadcasting as a community service and see communication as a universal right.*

*That seek to build a common path to support one another and strengthen our people’s communication.*

*Radio stations that see themselves as an integral part of the community in which they participate. As media, they develop pluralistic and participatory communication that is open to the need for expression of the social and cultural sectors with less access to exclusively commercial media.*

*That exercise the right to communication and, particularly, the right to information.*

*That exercise radio broadcasting as a service, and not simply as a commercially profitable activity.*

*(Federación Argentina de Radios Comunitarias, FARCO. Argentina.)*

These definitions are different and, in some respects, even contradictory. What they have in common is the idea that community broadcasting is:

- Not for profit.
- Aimed at particular communities.
- Intended to communicate socially useful messages of benefit to the community.

In addition, community broadcasting activists also usually stress that community media are defined not only by being directed at the community as an audience but also in being controlled by and speaking for the community. So community broadcasting stations are typically located within the community. Their management board is composed of community members. And the broadcasters themselves are also mainly members of the community – with programmes to provide training so that community members can actively participate in running the station.

But what, then, is a community?

Usually a community is presumed to be defined by its location – the local community or all the people who live in a particular place. Most community

broadcasting stations serve a particular place. (This involves certain assumptions about there being a community of interest between all the people living in the same place – assumptions that are not necessarily correct.)

But a community can be something else – it can be groups of people who have something else in common rather than the place where they live. There could be a community of shared belief, a community of national origin or a community of people with disabilities. There may be a community of gender. Usually such communities are defined by the fact that they suffer a shared oppression. This need not necessarily be so, but it is a very common unifying factor defining these “non-geographical communities.”

Community broadcasting stations are commonly financed out of donor funds, although those that aim to make themselves sustainable will try to raise support in money and kind from the community that they serve. This is important evidence of how well rooted community media are within their own community and therefore will be an important factor for the regulator to evaluate in the licensing process.

### 3.4. The licensing process

The actual process of applying for a licence – and having it granted or refused – will need to be set out clearly in law. Every applicant, and the public, needs to know exactly how the procedure will work – and that it works the same way for all applications.

The licensing authority should be required to make its decisions within clear time limits – otherwise indefinitely delayed decisions become in effect decisions to deny a licence that cannot be appealed.

This period of consideration should include the opportunity for public input on any licence application.

Licence applications may occur in one of two ways:

- The broadcasting regulator may issue a call for tenders – an invitation for applications to deliver a certain type of broadcasting service that it envisages.
- Would-be broadcasters may apply on an ad hoc basis, explaining the sort of service that they would offer.

When the available frequencies are limited, with the likelihood that there will be many more applicants than licences to be granted, the fairest and most transparent process will be for the regulator to issue a call for tenders.

The criteria whereby licence applications will be assessed should be set out clearly in advance.

#### BRAINSTORM

What are the criteria that might apply to licence applications?

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There are several criteria that might be applied to all applications for a broadcasting licence:

- Would granting this licence help to promote the objective of making sure that there is a wide variety of viewpoints reflecting the diversity and needs of the population?
- Would granting this licence help to promote pluralism of ownership – making sure that control of broadcasting is not concentrated into a few hands, or into the hands of similar types of owner?
- Does the applicant have a realistic business plan and finance that will allow it to run the broadcasting service as required and without interruption?

- Does the applicant have the technical skills and capacity to run the broadcasting service? (But successful applicants need not be responsible for transmission themselves – they should have the option of contracting transmission services from others.)

The broadcasting licence that is granted should come with the frequency required for broadcasting – there should be no separate procedure of applying for a frequency after a licence has been granted.

There should be no fee payable for lodging an application for a licence – except possibly an administrative fee to cover the cost processing the application. Payment for the licence should only come when the licence is granted.

The terms of the licence granted will be clearly set out in writing – as we shall see in a moment. If a licence is refused, that too should be set out in writing, with the opportunity for an unsuccessful applicant to have the decision reviewed by the courts.

### 3.5. Licence conditions

Broadcasting licences will contain various conditions. The most important of these will correspond to the application that has been successful and – if appropriate – to the wording of any tender that was issued to invite applications.

Other terms and conditions should be standard ones relating specifically to the broadcasting process. The conditions should not include instructions or directives about what should be broadcast (except by generally setting out the types of broadcasting that the station will carry – news, music, drama etc).

The time period that the licence is issued for should be long enough to be financially viable for the licensee. In other words, there should be a reasonable chance that the broadcaster's owner will be able to recoup its investment during the licence period.

There should also be a presumption that a licence

will be renewed at the end of the time period, provided that the licensee has complied with the terms and conditions in the licence. The only other reason for failing to renew a licence would be one of overwhelming public interest. Usually, these considerations of public interest – such as increasing diversity in the broadcasting field – could be best served by increasing the number of licensees, rather than taking a licence away from an existing broadcaster.

The point when the licence is open for renewal is an opportunity for both the regulator and the licensee to review the conditions of the licence and to renegotiate this if necessary. However, licensees should have the right to apply to amend their licence conditions at any time. If the licensing body needs to establish new conditions at any point during the life of the licence, these should conform to the principles of administrative justice, as well as the general conditions under which the licence is issued.

So what does a broadcasting licence actually look like?

Here is a good example of a broadcasting licence that conforms to the principles that have been outlined:



## LICENCE FOR TERRESTRIAL BROADCAST OF RADIO/TV PROGRAMME

Pursuant to the Article \*\*\*\*\* of the Law on Communications of \*\*\*\*\* (Official Gazette, No. \*\*/\*\*), Communications Regulatory Agency , ...../ ...../ 200\_ hereby issues:

[Licensee]

Licence for Terrestrial Broadcast of Radio/Television Programme

This Licence consists of General and Special Terms and Conditions, as presented thereafter.

This Licence shall be issued to /name of the Licensee/ as a public/private station, for a period of xx years, starting from xxx

\*\*\*\*\*

Director of Broadcast Division

\*\*\*\*\*

Legal Department

\*\*\*\*\*

Director General

### I. DEFINITIONS

All terms here stated will have the following meaning:

Agency means the Communications Regulatory Agency of \*\*\*\*\*;

Licence means rights and obligations of RTV broadcasters whose content is defined and assigned by the Agency;

Licensee means legal person which is registered, in accordance with law, for provision of services in the area of RTV broadcasting and which has accepted the Terms and Conditions of this Licence;

Station: Employees and equipment used for the purpose of programme broadcast;

RTV programme (hereinafter: programme) is audio-visual presentation of a certain character which is legally produced and broadcast or distributed by radio or TV station under its sign, by terrestrial, cable or satellite means, and which is, as such, protected by copyrights and other related rights;

Programme segment: Programme which in audio-visual sense presents one whole unit clearly separated from other segments and content with its beginning and end;

Domestic programme: Programme of station which is comprised of segments of programme of domestic production, co-production and bought/acquired programmes

Programme of domestic production: Programme segments which the Licensee has in full produced by itself, with the aid of all of its material and human resources or which are produced by an independent production house by the request and for the payment of the Licensee;

Co-produced programme: Programme in whose production the Licensee participated with its material and human resources;

Bought/acquired programme: Programme for which the Licensee has acquired broadcasting rights;

Re-broadcast programme: Programme, including advertisement programme, which one station is broadcasting or has broadcast, and the other takes it in full for the purpose of broadcasting;

Exchange of programme: Programme segments which are exchanged by two or more providers of broadcast services;

Programme schedule means the hours of broadcasting of programme of an individual licensee;

Official address: Official address in the request for issuance of licence, or corrected in a written form in accordance with the Terms and Conditions of this Licence;

Terms and Conditions of Licence: Terms and Conditions of Licence encompass general and special terms and conditions for terrestrial programme broadcast. General terms and conditions are equal for all stations, while the special terms and conditions include the type of programmes that each individual station is broadcasting, as well as technical operations of each individual Licensee;

Rules: For the purpose of interpreting the Terms and Conditions of Licence, the Rules connote all Codes, Rules, guidelines, decisions and other acts that the Agency issues within its mandate and which are binding for radio and/or TV stations.

Licence validity period means the period between the date of issuance of the Licence and the expiration date of Licence.

## II. GENERAL TERMS AND CONDITIONS OF LICENCE

### 1. GENERAL PRINCIPLES

1.1 General principles of issuance of Licence for broadcasting of radio and/or TV programme are set as follows:

- (a) Every legal person which is registered, in accordance with law, for provision of services in the area of RTV broadcasting must have this Licence before the start of programme broadcasting.
- (b) Licence is issued in a way as stipulated by the Agency's Rules and regulations in relation to application for issuance of Licence.

(c) The Agency reserves the right to change, adjust and interprets the terms for issuance of Licence, as well as to issue additional Rules for the sake of better implementation of its general conditions, the Agency shall consult users on any change via public consultation process. Changes will be enforced minimally 30 days from the day of adoption.

(d) All rules of the Agency will be enforced to this Licence. Every third person is obliged to respect the rights of Licensee in accordance with their scope.

(e) Nothing in this Licence reveals the obligation of user to fulfil all other legal or contracted obligations necessary for provision of services of programme broadcast. Any call upon rights from this Licence without the fulfilment of such obligatory terms will be treated as unfounded.

1.2 During the validity of Licence, station must ensure at least the qualitative minimum requirements for which it has received the Licence. These requirements refer to, but are not limited to programme, finances and technical operations. The agency retains the right to assess the quality of work of station, in each moment of validity of Licence, based on the criteria under which the Licence has been issued.

1.3 Non-compliance with conditions set in point 1.2 can result in revocation of Licence.

## **2. SCOPE OF LICENCE**

2.1 Acceptance of this licence constitutes a binding contract on the part of the Licensee to comply with all its Terms and Conditions. The validity of this licence is contingent on compliance with these terms.

2.2 This Licence entirely replaces Long-Term Broadcast Licence issued to Licensee during the Merit-Based Competition Process, if applicable, or represents Long-Term Licence for Licensee.

## **3. LICENCE FEE**

3.1 The Licensee is obliged, upon the grant of this Licence, to pay a Licence fee in accordance with Rule \*\*/200\_ (revised text) Broadcast Licence Fees (Official Gazette \*\*/\*\*).

## **4. PROGRAMME**

4.1 Licensee is issued the Licence for broadcast of programme segments which are specified in Section III, Special Terms and Conditions.

4.2 Each significant change of programme requires written permission from the Agency. Significant change of programme in this sense is interpreted as every alternation which presents change more than 20% of the Licensee's programme in accordance with definitions in Section III, Special Terms.

The Agency reserves the right not to issue the permission for change of programme, if it determines that in the area that the station covers with its signal, there is a lack of types of programme for

which the station received the Licence. Further, the Agency may require from the station that applies for the change of programmes to submit the results of public polling in relation to this.

4.3. Programme from domestic production are broadcast under the following conditions:

a) TV station – Licensee is obliged to broadcast programme from its own production in the minimal amount of 75 minutes out of the total daily programme broadcast, in primetime terms between 17:00 and 23:00 o'clock.

b) Radio station – Licensee is obliged to broadcast programme from its own production in the minimal amount of 30% of the total daily programme broadcast.

4.4 Two or more Licensees can exchange programme, via different agreements and/or contracts in relation to this type of cooperation, which shall be subject to approval by the Agency.

4.5 Programme segments which are not defined as domestic programme may not be broadcast continuously from the same source.

4.6 In cases that broadcast of the same programme segments is made between stations which, under Terms and Conditions of the Licence, are covering same population in the same signal coverage zone, the Agency preserves the right to review Special Terms and Conditions of Licence for those Licensees, for the purpose of optimal usage of frequency spectrum.

4.7 Licensee can rebroadcast programme. Licensee is obliged to clearly and consistently indicate the source of rebroadcast programme. Every rebroadcast of programme must be based on written agreement between stations.

4.8 Licensee is fully responsible for programme broadcast, regardless of its origin, in accordance with the rules of the Agency.

4.9 Public RTV broadcasters have an additional obligation for the broadcast programmes to be in accordance with the Rule \*\*/\*\*\_ “Definition and obligation of public RTV broadcasting.”

4.10 In case of war time, natural disasters or other situation that can be of threat to health and lives of general public, the Licensee is obliged to broadcast free of charge, upon request by authorised state body, the announcements, as well as the official statements by authorised state bodies when exists the danger for life and health of people, security of the country or public order and peace. Request for the aforementioned is submitted in a written form and it must include information proving its authenticity and legal ground.

## **5. COPYRIGHT OBLIGATIONS**

5.1 Licensee shall be responsible for all obligations and liabilities to any third party associated with copyright or other rights that may arise from the broadcast of copyright programme.

5.2 The Licensee must close legal contracts with copyright licensing bodies or authorised legal vendors before broadcasting copyrighted material. The Licensee is obliged to have valid contracts

for broadcast of copyrighted material and it must, upon request, submit such contract to the Agency for reviewing. The Agency shall treat such contracts as confidential.

## **6. ADVERTISING AND SPONSORSHIP STANDARDS AND CRITERIA**

6.1 The Licensee shall ensure that advertising and sponsorship services are in accordance with the Agency's Rule Advertising and Sponsorship Code of Practice for radio and television and any other additional rules that enter into force.

## **7. HEALTH AND SAFETY MEASURES AND TECHNICAL OPERATIONS**

7.1 The Licensee shall operate all broadcast systems and facilities with due regard to the health and safety of employees and the general public, and in accordance with any applicable laws of \*\*\*\*\*.

7.2 Antenna structures shall conform to generally accepted International standards of safe construction and maintenance, including appropriate aircraft warning lights.

7.3 The Licensee will implement all necessary work on maintenance and adjustments of its radio equipment, in order to ensure that the broadcast of the Licensee is in accordance with the technical Rules of the International Telecommunications Union (ITU).

7.4 The Licensee will abide by and work in accordance with all applicable Rules and Regulations of the Agency, in relation to technical operations for all radio and TV stations, as well as in accordance with all enforced Rules in \*\*\*\*\*.

7.5 In case of technical break-down or damage to the equipment that could lead to damaging effects to safety, health or lives of people, Licensee is obliged to immediately put such equipment out of use and notify the Agency. If the Agency comes to the knowledge that due to damage there could be damaging effects to safety, health or lives of people, the Agency will immediately issue a request for close-down of such equipment until repairation.

7.6 The Licensee must begin the scheduled broadcast operations as specified in the licence application within 45 days from the date when Agency issues a broadcast licence, unless Agency specifically grants a written extension of this period. Failure to comply with this requirement may result in forfeiture of the licence.

## **8. PROVISION OF INFORMATION TO AGENCY BY THE LICENSEE**

8.1 The Licensee shall provide information to Agency in such manner and at such times as Agency shall reasonably request, for purposes of ensuring compliance with this Licence.

8.2 Licensee will:

8.2.1 Make and retain for 14 days recordings of all broadcast programme, including advertising and trailers; or for a period as Agency may direct in individual cases;

8.2.2 Provide copies of such recordings to Agency promptly upon request, in accordance with provided deadlines;

8.2.3 Regardless of obligation of Licensee to get from the Agency in advance the permission for certain changes, as envisaged by the Terms and Conditions of this Licence, Licensee is also obliged to notify the Agency in written form on all changes in relation to following information, which have been submitted in the original licence application.

(a) Station's address, telephone, fax and other contact information;

(b) Management structure or personnel listed in the licence application;

(c) Significant changes in operating hours, programme schedule or programme content;

(d) New or expired agreements for programme rebroadcast and/or exchange;

(e) Interruptions in broadcasting greater than one-half day's programme schedule;

(f) Changes to any technical, engineering or studio specifications, as indicated in Special Terms and Conditions of this Licence.

8.3 Licensee is obliged to submit the requested information to Agency headquarters or its regional offices, via mail, or fax or e-mail.

## **9. TRANSFERABILITY OF LICENCE AND OWNERSHIP**

9.1 Licensee may not transfer or assign this licence, by sale of special agreement, partly or in whole, to other owners or organisations. In case of termination of Licensee as the organisation or if relevant authorities declare the bankruptcy the Licence cease to be valid. The Licence may not be considered neither as property or ownership that may be transferred financially or inherited.

In cases of termination of licence, the Agency shall issue broadcasting licences for free frequencies in accordance with regular procedure and applicable rules.

9.2 Any change in the original ownership in the period of issuance of Licence, affecting share more than a 10% shall constitute a partial transfer of ownership, and thus shall require beforehand written approval by the Agency. The Agency will examine each request in accordance with internal procedures and all relevant Rules. Agency can give its approval only if it is certain that proposed new owner shall continue with fulfilling qualification standards of the Agency for Broadcasting Licence, and can demonstrate the ability to comply with all Terms and Conditions of the Licence throughout the remainder of the Licence Period. If Agency allows transfer of ownership, carrier of the Licence shall inform the Agency on made changes upon recording in the court register.

## **10. PUBLIC RECORDS**

10.1 The Licensee shall conform to guidelines or instructions from Agency or other applicable rules for making available to the public the terms and conditions of licence, ownership or such other operating documents as Agency may deem to be in the public interest.

## **11. NOTICES AND ORDERS**

11.1 The Agency makes all official correspondence with Licensee in written form. No relying on reception of information received by phone or in personal contact will be considered, except if there is an official note to the file in relation to that made by the staff of the Agency in the archive of the Agency.

11.2 In principle, the Agency will deliver all correspondence with Licensee by fax.

If there are, during such transmission, any technical problems occurring, the Agency will send the correspondence by express mail with a receipt and will consider it delivered by signing of receipt. If there is no one at the address of Licensee to sign the receipt, the Agency will post the correspondence at the central board in headquarters of the Agency and its regional offices, and with that, will consider it delivered. The Agency can also, if it is possible and justified, name one of its staff to deliver the correspondence to the address registered by the Agency, and, with it, will consider it delivered.

11.3 Any decisions on sanctions against the Licensee will always be delivered by express mail with receipt and will be considered delivered with signing of receipt. If there is no one at the address of Licensee to sign the receipt, the aforementioned provisions in relation to delivery of correspondence will apply.

11.4 Nothing of the aforementioned will excuse the Licensee from responsibility if it has not notified the Agency in relation to change of contact details in accordance with Terms and Conditions of this Licence.

## **12. COMPLAINTS RECEIVED FROM THE PUBLIC**

12.1 The Licensee shall adopt procedures acceptable for the Agency for handling complaints received from the public in respect of all programming which is included in the Licensee's broadcast schedule and shall ensure that such procedures are duly observed.

12.2 Such procedures shall, inter alia, include a requirement that members of the public who complain to the Licensee about programs included in the Licensee's schedule are informed that they have a right to refer the matter complained of to Agency.

12.3 The Licensee shall for a period of one year keep a written record of such complaints received from the general public and make such records available to Agency in writing at such times Agency may require.

## **13. STATION IDENTIFICATION**

13.1 The Licensee shall, in case of a radio station, identify itself clearly and consistently by its authorised name at least once in every 30 minutes of broadcasting.



13.2 The Licensee shall, in case of TV station, put clearly a logo on the programme it broadcasts.

13.3 If the station rebroadcasts programme produced by another radio or TV station, it will clearly and consistently identify the source of rebroadcast programme.

#### **14. COMPLIANCE WITH RULES AND REGULATIONS OF THE AGENCY**

14.1 The Agency can, from time to time, review the activities of the Licensee in order to ensure abidance by all Rules of the Agency. Licensee will, timely, respect all orders and requests issued by the Agency. Licensee will also enable direct implementation of all urgent requests that the Agency can issue.

14.2 In case that the Agency finds that the Licensee does not work in accordance with Terms and Conditions, including the provisions from the preceding paragraph, or in accordance with information from application request based on which the current Licence is issued, the Agency reserves the right to revoke the Licence. This includes, but is not limited, to financial situation of the station.

14.3 The Licensee will make possible the access to all premises used for broadcasting, to any person that the Agency authorises in written form, for the purpose of inspection or review of any documentation or equipment, or for the purpose of verification of abidance by legal orders, requests and/or Rules and Regulations of the Agency.

#### **15. SANCTIONS FOR BREACHES OF LICENCE TERMS AND CONDITIONS**

15.1 In cases of apparent deviation from Terms and Conditions of Licence, the Agency can enforce sanctions, as provided by the Law on Communications. Sanctions shall, at all times, be equal to gravity and nature of offence, after the procedure as set in the Procedure for handling cases.

15.2 If agency is convinced that the Licensee has provided information which is false or withheld information with the intention of causing Agency to be misled, it will lead to appropriate and proportionate sanctions, which can result on revocation of Licence.

15.3 In accordance with the Law on Communications, Council of the Agency decided on appeals submitted against the decisions by which the sanctions are enforced. Judicial review of Council's decisions can be made before the State Court of \*\*\*\*\*.

15.4 Frequent or prolonged interruptions in the Licensee's broadcast operations will result in a review of circumstances by Agency and may result in forfeiture of the licence.

#### **16. FORCE MAJEURE**

16.1 Licensee shall not be held responsible for any failure to comply with the terms and conditions of this licence that is directly or indirectly caused by circumstances beyond the control of the

Licensee, including but not limited to accidental damaging of equipment (other than that caused by the wrongful act, neglect or default of the Licensee or its employees or agents) interruption of electric power, force majeure, war damage, civil disturbance, or interference by labour dispute.

16.2 The exemption of force majeure shall not be held to permit suspension of licence fee payments.

## **17. RENEWAL OF LICENCE**

17.1 The Licence may be renewed as of the Licence expiration date.

17.2 The Licensee is obliged to apply to the Agency for renewal of the Licence at earliest six months before its expiration, but not before the expiration of nine and half years/year and half period from the date of issuance of Licence.

# **III SPECIAL TERMS AND CONDITIONS OF LICENCE**

## **1. CHANGES INTERMS AND CONDITIONS**

1.1 The Licensee may apply to change the Special and Additional Terms and Conditions of this Licence only by requesting such changes in writing to Agency. Such changes may be made only upon written approval of Agency.

1.2 Agency reserves the right to change Special Terms and Conditions of the Licence as long as the changes are demonstrably necessary to ensure orderly management of the frequency spectrum. In any of such cases, the Agency shall firstly notify the Licensee and allow it to address its opinion in regard to proposed change or possible counter-proposal.

## **2. PROGRAMME**

2.1 Licensee is issued Licence for broadcast of following programme segments:

- News programme
- Educational
- Music – Entertainment

### 3.6. What happens when a licence application is refused?

In any situation where there are many broadcasters applying for a limited number of broadcasting licences some of these will be refused.

When a licence is refused, clear reasons for this decision should be given to the applicant in writing. Clear criteria should have been established against which the application will have been evaluated. These criteria will have been set out in general terms in the law, or more specifically if a tender was issued.

The purpose of this is to allow an applicant to know why an application has failed. There are two main reasons for this:

- Understanding why a licence application has failed will help a broadcaster to formulate a better application next time – with greater chance of success. The application process does not involve tricks – it is in the public interest for the regulator to help applicants develop the best possible applications.
- If the applicant feels that the refusal was unfair in any respect – either because the procedure was not properly formulated or because the regulator made a wrong decision on the substance of the application – then there should be a possibility to appeal against the decision. The appeal process is helped if the reasons for refusal are spelt out clearly.

#### 3.6.1. Appeals process

There are two levels to which an unsuccessful licence applicant may have the right to lodge an appeal. There may be an appeal to an administrative body or to a judicial body.

An administrative appeal will normally be to a higher level within the regulatory body itself, if such a level exists. It is essentially a request for

the licence-issuing authority to think again, to reconsider its decision. It is not, properly speaking, an appeal process, since the body considering the appeal is not independent of the body that made the decision in the first place. Nevertheless, this sort of administrative process is not to be derided – it provides an extra level of safeguard of the fairness of the licence process.

The other level of appeal is a judicial one. This appeal would go to a court with all the normal guarantees of judicial independence. (Exactly which court would hear the appeal depends on the judicial system of the country.)

In most systems, the court's power would be one of judicial review. That means that it is not precisely the decision itself that is being considered, but whether the regulatory body conducted itself properly in making the decision. These are some of the things that the court would take into account in reaching its decision:

- Did the applicant have all the information needed to make a successful application – including clear criteria against which the decision would be made?
- Were all applicants treated in the same way, or was priority of any sort given to certain applicants?
- Were decisions made in a timely fashion?
- Was the applicant given a full opportunity to present its case?
- Were all laws, regulations and internal procedures strictly adhered to in the decision-making process?
- Was the refusal of a licence a reasonable decision for the regulatory body to make, given the information that was available to it?

This is an important list of considerations for regulators to bear in mind. These are precisely the questions that regulators and staff must ask themselves whenever they make a decision on a

licence application. If they cannot answer these questions satisfactorily, then it is quite possible that they are making the wrong decision and that this could be overturned by the courts.

In the unlikely event that a broadcaster has a licence revoked before its term has expired, there will also be the right to take this decision to judicial review. The court will reach its conclusion on the basis of a similar set of questions. Once again, the regulators must make sure that their decision-making process is unimpeachable.



4

# Regulation of Content

# 4

## REGULATION OF CONTENT

### BRAINSTORM

In Chapter 1 we said that broadcasting regulation had two purposes:

- to manage access to the frequency spectrum;
- to ensure diversity and pluralism in broadcasting.

Given these two objectives, is there any justification for a broadcasting regulator having any say in the content of broadcasting?

The most important underlying principle here is that the broadcasting regulator must respect the right to freedom of expression. Media freedom is an important aspect of that right to freedom of expression. And broadcasters, in principle, should not be treated any differently from other media.

But the fact remains that broadcasting authorities do, in many cases, develop rules that affect the content of broadcasts. They might do this in relation to a number of areas. Here are some of the most common ones:

- Promoting diversity, for example by encouraging the use of minority languages.
- Obliging broadcasters to be politically impartial.
- Setting limits on the amount of advertising (and sometimes its content as well).
- Encouraging the inclusion of locally produced programmes.
- Restricting “hate speech” or other inflammatory broadcasting.
- Limiting obscenity and protecting children.
- Promoting fair access by political parties in election periods.

These are all common areas where a broadcasting regulator might set general rules or conditions attached to a licence. Each is a legitimate aim – but equally each one has various problems attached. We will look at each of these in turn.

Of course the content of broadcasting matters – but it is the broadcasters’ job to decide upon that content, not the regulator’s. All the issues on the list above are best resolved by having a voluntary set of standards agreed among broadcasters.

In principle, the ethical standards governing broadcasting are exactly as those covering the media generally. There is no shortage of experience worldwide in developing these ethical and professional norms.

Below is an example from the Broadcasting Complaints Commission of South Africa:

## **CODE OF THE BCCSA**

Applicable from 7 March 2003

### **Foreword**

1. Section 2 of the Independent Broadcasting Authority Act No. 153 of 1993 (“the Act”) enjoins the Independent Broadcasting Authority (“the Authority”) to ensure that broadcasting licensees adhere to a Code of Conduct acceptable to the Authority.
2. In terms of section 56(1) of the Act, “all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting Services as set out in Schedule 1”. The provisions of that sub-section do not, however, apply to any broadcasting licensee “if he or she is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a Code of Conduct enforced by that body by means of its own disciplinary mechanism, and provided that such Code of Conduct and disciplinary mechanisms are acceptable to the Authority”.

### **Definitions**

3. “audience” as referred to in this Code means a visual and an aural audience i.e. both television and radio audiences.  
“broadcasts intended for adult audiences” as referred to in this Code means broadcasts depicting excessive violence and explicit sexual conduct and shall exclude broadcasts intended for children.  
“children” as referred to in this Code means those persons below 16 years.  
“watershed period” as referred to in this Code means the period between 21h00 and 05h00. Such restriction applies only to television services.

### **Preamble**

4. Freedom of expression lies at the foundation of a democratic South Africa and is one of the basic pre-requisites for this country’s progress and the development in liberty of every person. Freedom of expression is a condition indispensable to the attainment of all other freedoms. The premium our Constitution attaches to freedom of expression is not novel, it is an article of faith, in the democracies of the kind we are venturing to create.



5. Constitutional protection is afforded to freedom of expression in section 16 of the Constitution which provides:

“(1) Everyone has the right to freedom of expression which includes -

- (a) Freedom of the press and other media
- (b) Freedom to receive or impart information or ideas.
- (c) Freedom of artistic creativity; and
- (d) Academic freedom and freedom of scientific research.

(2) The right in sub-section (1) does not extend to -

- (a) Propaganda for war;
- (b) Incitement of imminent violence; or
- (c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.

6. Whilst in most democratic societies freedom of expression is recognised as being absolutely central to democracy, in no country is freedom of expression absolute. Like all rights freedom of expression is subject to limitation under section 36 of the Constitution.

7. The outcome of disputes turning on the guarantee of freedom of expression will depend upon the value the courts are prepared to place on that freedom and the extent to which they will be inclined to subordinate other rights and interests to free expression. Rights of free expression will have to be weighed up against many other rights, including the rights to equality, dignity, privacy, political campaigning, fair trial, economic activity, workplace democracy, property and most significantly the rights of children and women.

8. In the period prior to the transition to democracy, governmental processes neither required nor welcomed the adjuncts of free expression and critical discussion and our country did not treasure at its core a democratic ideal. The right to freedom of expression was regularly violated with impunity by the legislature and the executive. Therefore the protection of this right is of paramount importance now that South Africa is grappling with the process of purging itself of those laws and practices from our past which do not accord with the values which underpin the Constitution.

### **Application of the Code**

9. All licensees are required to ensure that all broadcasts comply with this Code and are further required to satisfy the Authority that they have adequate procedures to fulfil this requirement. All licensees should ensure that relevant employees and programme-makers, including those from whom they commission programmes, understand the Code’s contents and significance. All licensees should also have in place procedures for ensuring that programme-makers can seek guidance on the Code within the licensee’s organisation at a senior level.

10. While the Authority is responsible for drafting this Code of Conduct and for monitoring compliance therewith, independent producers or others supplying programme material should seek guidance on specific proposals from the relevant licensee.

11. Under the Act, the Authority has the power to impose sanctions, including fines, on licensees who do not comply with this Code of Conduct.
12. This Code does not attempt to cover the full range of programme matters with which the Authority and licensees are concerned. This is not because such matters are insignificant, but because they have not given rise to the need for Authority guidance. The Code is therefore not a complete guide to good practice in every situation. Nor is it necessarily the last word on the matters to which it refers. Views and attitudes change, and any prescription for what is required of those who make and provide programmes may be incomplete and may sooner or later become outdated. The Code is subject to interpretation in the light of changing circumstances, and in some matters it may be necessary, from time to time, to introduce fresh requirements.
13. In drawing up this Code the Authority has taken into account the objectives of the Act and the urgent need in South Africa for the fundamental values which underlie our legal system to accommodate to the norms and principles which are embraced by our Constitution.

### **Violence**

14. Licensees shall not broadcast any material which judged within context:-

- (i) contains gratuitous violence in any form i.e. violence which does not play an integral role in developing the plot, character or theme of the material as a whole.
- (ii) sanctions, promotes or glamorizes violence.

Violence against women

15. Broadcasters shall:-

- (i) not broadcast material which, judged within context, sanctions, promotes or glamorizes any aspect of violence against women;
- (ii) ensure that women are not depicted as victims of violence unless the violence is integral to the story being told;
- (iii) be particularly sensitive not to perpetuate the link between women in a sexual context and women as victims of violence.

### **Violence and Hate Speech against specific groups**

- 16.1 Licensees shall not broadcast material which, judged within context sanctions, promotes or glamorizes violence based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age, or mental or physical disability.
- 16.2 Licensees are reminded generally of the possible dangers of some people imitating violence details of which they see, hear or read about.
- 16.3 Licensees shall not broadcast

- (a) Propaganda for war;
- (b) Incitement of imminent violence; or
- (c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17. The abovementioned prohibitions shall not apply to -

- (i) a bona fide scientific, documentary, dramatic, artistic, or religious broadcast, which judged within context, is of such nature;
- (ii) broadcasts which amount to discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or
- (iii) broadcasts which amounts to a bona fide discussion, argument or opinion on a matter of public interest.

#### Children

18. Broadcasters are reminded that children as defined in paragraph 3 above embraces a wide range of maturity and sophistication, and in interpreting this Code it is legitimate for licensees to distinguish, if appropriate, those approaching adulthood from a much younger, pre-teenage audience.

- 18.1 Broadcasters shall not broadcast material unsuitable for children at times when large numbers of children may be expected to be part of the audience.
- 18.2 Broadcasters shall exercise particular caution. As provided below, in the depiction of violence in children's programming.
- 18.3 In children's programming portrayed by real-life characters, violence shall, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.
- 18.4 Animated programming for children, while accepted as a stylised form of story-telling which can contain non-realistic violence, shall not have violence as its central theme, and shall not invite dangerous imitation.
- 18.5 Programming for children shall with due care deal with themes which could threaten their sense of security, when portraying, for example, domestic conflict, death, crime or the use of drugs.
- 18.6 Programming for children shall with due care deal with themes which could invite children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, use of matches, the use of dangerous household products as playthings, or other dangerous physical acts.
- 18.7 Programming for children shall not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve conflict between individuals.

- 18.8 Programming for children shall not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depictions of violence shall portray, in human terms, the consequences of that violence to its victims and its perpetrators.
- 18.9 Programming for children shall not contain frightening or otherwise excessive special effects not required by the story line.

### **WATERSHED PERIOD**

19. Programming on television which contains scenes of violence, sexually explicit conduct and/or offensive language intended for adult audiences shall not be broadcast before the watershed period.
20. On the basis that there is a likelihood of older children forming part of the audience during the watershed period, licensees shall adhere to the provisions of Article 32 below (audience advisories) enabling parents to make an informed decision as to the suitability of the programming for their family members.
21. Promotional material and music videos which contain scenes of violence, sexually explicit conduct and/or offensive language intended for adult audiences shall not be broadcast before the watershed period.
22. Some programmes broadcast outside the watershed period will not be suitable for very young children. Licensees should provide sufficient information, in terms of regular scheduling patterns or on-air advice, to assist parents to make appropriate viewing choices.
23. Licensees shall be aware that with the advance of the watershed period progressively less suitable (i.e. more adult) material may be shown and it may be that a programme will be acceptable for example at 23h00 that would not be suitable at 21h00.
24. Broadcasters must be particularly sensitive to the likelihood that programmes which start during the watershed period and which run beyond it may then be viewed by children.

#### Subscription services

- 25 Where a programme service is only available to viewers on subscription and offers a parental control mechanism, its availability to children may be more restricted and the watershed period may begin at 20h00.

### **LANGUAGE**

26. Offensive language, including profanity, blasphemy and other religiously insensitive material shall not be used in programmes specially designed for children.
27. No excessively and grossly offensive language should be used before the watershed period on television or at times when large numbers of children are likely to be part of the audience on

television or radio. Its use during the periods referred to above should, where practicable, be approved in advance by the licensee's most senior programme executive or the designated alternate.

## **SEXUAL CONDUCT**

28. Licensees shall not broadcast material, which judged within context, contains a scene or scenes, simulated or real of any of the following:

- (i) A person who, or is depicted as being under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity;
- (ii) Explicit violent sexual conduct;
- (iii) Bestiality;
- (iv) Explicit sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender and which constitutes incitement to cause harm.

29. Save for 28.(i) above, the prohibition in 28. (ii) to 28 (iv) shall not be applicable to bona fide scientific, documentary, dramatic material, which judged within context, is of such nature. The prohibition in 28.(i) shall however be applicable to artistic material which judged within context, is of such a nature.

30. Scenes depicting sexual conduct, as defined in the Films and Publication Act 65 of 1996, should be broadcast only during the watershed period. Exceptions to this may be allowed in programmes with a serious educational purpose or where the representation is non-explicit and should be approved in advance by the most senior programme executive or a delegated alternate.

31. Explicit portrayal of violent sexual behaviour is justifiable only exceptionally and the same approval process as referred to in 30 above must be followed.

## **AUDIENCE ADVISORIES**

32. To assist audiences in choosing programmes, licensees shall provide advisory assistance, which when applicable shall include guidelines as to age, at the beginning of broadcasts and wherever necessary, where such broadcasts contains violence, sexual conduct and/or offensive language.

## **Classification**

33.1 Where a Film and Publications Board classification exists in terms of the Films and Publication Act No. 65 of 1996 ("Films and Publications Act") for the version of a film or programme intended to be broadcast, such classification certification may be used as a guide for broadcasting.

33.2 No version which has been refused a Film and Publication Board classification certification should be broadcast at any time.

33.3 In all other instances, the provisions of this Code will apply.

### **News**

34.1 Licensees shall be obliged to report news truthfully, accurately and fairly.

34.2 News shall be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:-

- (a) Distortion, exaggeration or misrepresentation.
- (b) Material omissions; or
- (c) Summarisation

34.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact shall be broadcast fairly with due regard to context and importance. Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it shall be presented in such manner as to indicate clearly that such is the case.

34.4 Where there is reason to doubt the correctness of the report and it is practicable to verify the correctness thereof, it shall be verified. Where such verification is not practicable, that fact shall be mentioned in the report.

34.5 Where it subsequently appears that a broadcast report was incorrect in a material respect, it shall be rectified forthwith, without reservation or delay. The rectification shall be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.

34.6 The identity of rape victims and other victims of sexual violence shall not be divulged in any broadcast without the prior consent of the victim concerned.

34.7 Licensees shall advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject-matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates when children would probably be in the audience.

34.8 Licensees shall employ discretion in the use of explicit or graphic language related to stories of destruction, accidents or sexual violence which could disturb children and sensitive audiences.

### **Comment**

35.1 Licensees shall be entitled to broadcast comment on and criticism of any actions or events of public importance.

35.2 Comment shall be an honest expression of opinion and shall be presented in such manner that it appears clearly to be comment, and shall be made on facts truly stated or fairly indicated and referred to.

### **Controversial issues of public importance**

36.1 In presenting a programme in which controversial issues of public importance are discussed, a licensee shall make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

36.2 A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance shall be given a right to reply to such criticism on the same programme. If this is impracticable however, opportunity for response to the programme should be provided where appropriate, for example in a right to reply programme or in a pre-arranged discussion programme with the prior consent of the person concerned.

### **Elections**

37. During any election period, the provisions of sections 58, 59, 60 and 61 of the Act shall apply, and all broadcasting services shall in terms of those sections be subject to the jurisdiction of the Authority.

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### **Privacy**

38. Insofar as both news and comment are concerned, broadcasting licensees shall exercise exceptional care and consideration in matters involving the dignity or private lives and private concerns of individuals, bearing in mind that the rights to dignity and privacy may be overridden by a legitimate public interest.

### **Paying a criminal for information**

39. No payment shall be made to persons involved in crime or other notorious behaviour, or to persons who have been engaged in crime or other notorious behaviour, in order to obtain information concerning any such behaviour, unless compelling societal interests indicate the contrary.

## 4.1. Administrative content rules

If at all possible, the best of way of addressing the whole list of issues about broadcasting content is through voluntary self-regulation by the broadcasters (or, better still, by the media as a whole).

A voluntary system of self-regulation would work something like this:

1. Broadcasters would agree among themselves on all the contentious issues about content-regulation: advertising, obscenity, hate speech, political impartiality, local content and so on.
2. As far as possible they would develop these positions through a process of public consultation.
3. A code of practice would be published that all broadcasters would be obliged to comply with.
4. If a broadcaster were alleged to have breached the code of practice, then a complaints body would investigate the issue.
5. If a broadcaster were found to have breached the code of practice, the complaints body would be able to impose a sanction – broadcasters having agreed in advance that they would accept its authority to do so.

The advantage of a voluntary system of self-regulation like this is that broadcasters have themselves agreed on it and cannot complain that it has been imposed on them from outside.

The difficulty always is getting agreement among broadcasters on the standards they must adhere to. Then it is essential that they comply with the complaints system, which will have no means of compelling them to do so. This frequent lack of the necessary will to make a voluntary system work is a pity, since the almost inevitable consequence is some form of administrative system, usually under the authority of the statutory broadcasting regulator.

If a broadcasting regulator does have responsibility for administrative rules relating to content, it is especially important that it meets the criteria for independence discussed in Chapter 2 of this manual.

It is also absolutely essential that, as with voluntary self-regulation, any rules be developed in close consultation with the broadcasters themselves. The public should also be consulted.

Rules on content are likely to fall into two categories: positive and negative.

Positive obligations are requirements that broadcasters carry certain types of material: public service announcements, a certain proportion of local music, or whatever.

Negative obligations are limitations on what may be broadcast. This might include “hate speech” or obscenity. It is important to understand that such limitations on freedom of expression can be no different for broadcasters than they are for the population as a whole. It is also vital that broadcasting regulators (and everyone else) understand that content regulations do not give anyone the right to censor broadcast material before it goes on air. Pre-publication censorship in any form is a serious breach of the right to freedom of expression. If a broadcaster breaches the law and human right standards in their broadcasts, then the law should take its course after the broadcast has taken place.

## 4.2. Positive/public service obligations

It is not unusual – nor is it illegitimate – for public service broadcasters to have as part of their licence condition certain obligations to broadcast some types of material. This obligation may also apply to private or community broadcasters where there is a public service element to their licence, as discussed in Chapter 3.

What are the sorts of “positive content” that broadcasters may be required to transmit?



- Use of the full variety of indigenous languages.
- Announcements of matters of national importance – this might include, for example, information about how to register and vote in elections.
- Public service announcements – for example on issues such as public health, road safety and so on.
- Weather or emergency announcements of relevance to farmers or mariners.
- Quotas for the amount of local content (see below).

This is not an exhaustive list, but it should be clear that the obligations that can be imposed are rather limited. They should not be such that they would be difficult for a broadcaster to fulfil without disrupting its schedule seriously and losing audience or advertisers. Local content requirements, as we shall discuss, are legitimate and positive, but they must also be realistically attainable.

Any requirements of this sort should be applied even-handedly – they cannot be imposed on one station, but not on another similar one.

And these requirements must be politically neutral. There cannot be requirements that make broadcasters transmit material that favours the government, for example, or any political party.

### 4.3. Advertising

A broadcasting regulator may set a different type of obligation – negative rather than positive – in relation to advertising. The regulator may protect the audience by setting an overall limit on the amount of advertising that may be broadcast as a proportion of overall output.

This is fair, but rules should not be so stringent that they undermine the capacity of broadcaster to function, make money and develop the sector.

Many public broadcasters do not carry advertising – they are wholly funded by other means. But increasingly public broadcasters do solicit advertising. If they do so, this should be in line with the practice of the rest of the broadcasting sector. There may need to be fair competition rules to make sure that public broadcasters do not use their public funding to offer advertising at below market rates.

There are also a variety of ways in which the regulator may seek to influence the content of advertising (although in many countries this is done by a separate advertising standards regulator and there may be separate legislation addressing advertising across all media):

- Requiring a clear separation between advertising and other broadcast content.
- Imposing strict guidelines for advertising directed at children.
- Limiting, or prohibiting, advertising of tobacco or alcohol.
- If tobacco or alcohol advertising is permitted, there may be rules about how it is presented (for example glamorizing lifestyles or showing people drinking and driving).
- There may be a requirement that certain legal information is broadcast in advertisements for financial products (such as pensions or insurance policies).
- There may be a total ban on certain advertising techniques such as subliminal advertising (when a product or image is shown only for a split second so that the viewer is unaware that the advertisement has been seen).
- There may be monitoring of the accuracy of claims made in advertising (“This vitamin supplement will make you live 10 years longer...”) with the aim of promoting truthfulness.

An advertising regulation system will need a monitoring and complaints system so that members

of the public can register their concerns about advertisements they have seen. Advertisers, as well as broadcasters, will need to comply with this.

## 4.4. Local content

Another area of content regulation where broadcasting regulators will almost inevitably become involved is the promotion of local content.

Broadcasting, especially television broadcasting, has been traditionally underdeveloped in Africa, compared with the situation in Europe or North America – or even in other developing countries. There are several arguments in favour of establishing rules that promote the broadcast of local content:

- The ideological argument: local content promotes national identity and cohesion and can foster values of tolerance and democracy.
- The economic argument: local production of programmes and music promotes development, generating income and employment.
- The moral argument: local content is less likely to offend public values or to inflame cultural or ethnic sentiments.

There is a contrary view, however. This says that in the age of globalization there should not be restrictions on the trade in broadcasting any more than there should be other restrictions. It could also be argued that restricting the import of foreign programmes is an interference with the right to transmit information regardless of frontiers.

### DISCUSSION POINT

What do you think of these arguments? Should there be rules requiring broadcasters to use a certain proportion of local content? Are you persuaded by all the arguments in favour? What about the arguments against?

Some of the arguments in favour of local content are more persuasive than others. The “ideological” and “moral” arguments rather depend upon what local content is being referred to. Despite political rhetoric against foreign influences, governments generally tend to be more sensitive to home-grown criticism.

However, the economic argument is indisputable. And there is also a convincing argument to do with quality. African broadcasters can make better programmes for their audience than cheap imports from Europe and North America.

How do local content requirements work?

Usually a local content requirement will be one of the conditions contained in a broadcasting licence. The requirement should be the same for all broadcasters of a similar type – all commercial music radio stations, for example – but it may be different for different types of station.

Local content is defined in two ways. The first way is qualitative – a certain proportion of what is broadcast must be local. This will be measured over a particular broadcasting period. This period of measurement differs from country to country – hour, day, week, month, or year.

Here, for example, is what the minimum local content requirements of the Independent Communications Authority of South Africa looked like in 2002:

Public television 55%  
Commercial free-to-air television 30%  
Commercial subscription channels 8%  
Public and community radio 40%  
Private commercial stations 25%

The other aspect of local content requirements is the qualitative one. How is local content defined? Here again is the South African model:

Directors and writers should be citizens or permanent residents

50% of leading actors, 75% of supporting cast and 50% of crew should be citizens or permanent residents.

Post-production should be wholly done in South Africa.

50% of financing should come from within South Africa.

The aim of these two sets of requirements is clear and laudable. What are the practical drawbacks?

The obvious one is that local content requirements may be too expensive and onerous for broadcasters to meet. Quotas will become self-defeating if they are set so high that a broadcaster would go out of business trying to meet them. The South African quotas are high. Those in Zimbabwe are even higher – 75% - and are in practice unrealizable. Unrealistic quotas simply bring the system into disrepute and mean that the standards are enforced selectively.

There is a further problem as well as cost. The definition of local content in South Africa (for example) assumes the existence of a pool of skilled technical labour that simply may not exist in many countries. The aim of local content provisions is, of course, to foster the development of such a pool. This can best be achieved if local content requirements are introduced gradually, with quotas being raised over time. The development of local expertise, local companies and local finance will make them easier to meet.

Another approach, which has been used in many European countries, is to promote the use of regional content. This is obviously particularly appropriate in Africa, with its many shared cultural values. Promoting the use of regional content has two clear advantages:

- It increases the pool of available high-quality programming that will be culturally familiar to the audience.
- It fosters the export of local programming to neighbouring countries, giving local broadcasters greater exposure and earning money.

## 4.5. Hate speech and post-conflict situations

One of the most difficult and sensitive issues about regulation of content is the issue of “hate speech” – that is, inflammatory speech that is likely to incite people to violence.

It is important to remember that the responsibilities of broadcasters (and limits on what they may say) are no different from those that apply to the rest of the population. The right to freedom of expression can be limited to protect against incitement to violence, but this limitation applies across the board. The law is not different for broadcasters.

However, the potentially disastrous impact of “hate radio” is only too well known. The most notorious example comes from Rwanda in the months leading up to the April 1994 genocide. The private radio station Radio Television Libre des Mille Collines broadcast a stream of hatred, inciting Hutu to take up arms against their Tutsi neighbours. Once the genocide had started, the station actually directed the slaughter, telling the Hutu militias where fugitives from the genocide were hiding and broadcasting their car number plates. Directors and broadcasters from RTL (and other Rwandan journalists) have been found guilty of genocide by the International Criminal Tribunal for Rwanda in Arusha.

Rwanda is only the best known and most extreme example. Inflammatory broadcasts played an important part in provoking the wars in the Balkans in the 1990s. Hate radio has been seen at different times in the DRC and Burundi. Elsewhere, as in Zimbabwe, government-controlled broadcasters have demonized opposition supporters, making them targets for attacks by ruling party militias.

The problem is clearly a widespread one.

## DISCUSSION POINT

How do you think broadcasting regulators should approach the problem of hate broadcasting?

Before thinking about what steps broadcasting regulators can take in practice, it might help to go back to first principles:

- Everyone has a right to freedom of expression.
- This right is limited by the prohibition on incitement to hatred.

So, freedom of expression is not an absolute right. It has limits. But one of the essential features of the right to freedom of expression is that it applies to views that most people would regard as obnoxious – not just those that we agree with. It is based on the assumption that disagreements are best sorted out by talking about them freely, not by suppressing views that we do not want to hear.

There is also a related practical point. Banning the expression of obnoxious views will not make them go away. It may actually make them more dangerous in a number of ways. It may give those who are expressing them a sense of martyrdom and therefore attract sympathy. It may make it more difficult to tell who is expressing these views.

On the other hand...

The danger with allowing free expression of views promoting hatred is that it makes them sound normal and acceptable. This has happened in recent years in many rich countries with the use of xenophobic language about foreigners in general and refugees in particular. The repeated portrayal of the “threat” posed by immigrants, who come to steal the wealth of the host country, or the denunciation of supposedly bogus claims by asylum seekers have made racist and xenophobic language an acceptable aspect of political debate.

Of course, language alone does not incite violence (although it may promote hatred, by sparking fear and by dehumanizing whole groups of the population). The issue of what constitutes incitement has been the subject of much debate.

Some people argue that incitement is something very immediate – that it refers specifically to the actions that the audience may take on hearing inflammatory words. In the context of broadcasting, this interpretation would mean that very little is actually likely to constitute incitement. Broadcasting the car number plates of people to be murdered would clearly be incitement – but preaching general hostility to an ethnic group would not be. This is because of the nature of broadcasting. People are generally on their own, or in very small groups, when they hear inflammatory messages. A radio or television broadcast is not the same as a speech at a political rally, which may provoke the audience to commit immediate acts of violence.

The alternative view is that incitement is rather broader. Broadcasting can incite because, over a period of time, it plants the idea that a particular group is a threat to the community, is unpatriotic, is subhuman, and that action needs to be taken to deal with it. This sort of message incites hatred against a particular section of the community. This, in time, makes violence a possibility.

The following are some suggested guidelines for how a broadcasting regulator can deal with these issues.

- **Hate speech is most effectively combated by allowing many voices to be heard**

It is often forgotten that one of the reasons why RTLM was so effective in Rwanda was the absence of alternative voices on the airwaves. The only other serious broadcaster was the government-controlled Radio Rwanda, which was broadcasting very similar messages.

Pluralism in media ownership and diversity in voices are effective ways of pre-empting the potentially inflammatory nature of broadcasting.

Regulators can give priority to issuing licences to broadcasters that actively promote dialogue.

- **Pre-publication censorship is dangerous and counter-productive**

The cure of pre-publication censorship is worse than the disease it is meant to treat. Subjecting broadcasts to advance scrutiny – or proscribing certain individuals or groups – opens the door to much greater infringements of freedom of expression. It will create martyrs and drive the advocates of hatred underground.

- **There should be an effective complaints mechanism and a right of reply**

Regulators should offer the clear opportunity for a quick response to inaccurate and inflammatory broadcasts, attempting to make diversity of voices a reality and provide rapid antidotes to inaccurate information and messages that incite.

- **There is a clear distinction between uttering inflammatory messages and reporting them**

While regulators should attempt not to give a broadcasting platform to advocates of hatred, this is a quite different matter from sober and accurate reporting of hate messages. Broadcasters should never be penalised for accurate reporting – indeed this should be actively encouraged. Balanced news reports covering inflammatory speech – including factual context and contradictory viewpoints – simultaneously defuses the impact of hate messages and undermines any claim that these messages are being censored.

The aim, of course, is to handle the issue of hate broadcasting in such a way as to avoid any violent consequences. Often, however, regulators will be confronted with the problem of rebuilding broadcasting in a post-conflict situation, where political and communal hatreds have already led to violence. In such a situation, all the guidelines above will apply. There is seldom any useful purpose in suppressing truth and discussion about the past conflict. Broadcasters may take responsibility for conducting specific investigations into the causes

of the conflict and into human rights issues arising out of it. Regulators can encourage reconciliation by licensing broadcasters that have a specific agenda of promoting dialogue and understanding between communities that have been on different sides of the conflict.

## 4.6. Protection of minors and obscenity

The regulation of broadcasting in the matter of obscenity and sexual morality is notoriously difficult and very dangerous. As with all forms of content regulation, there is always a serious danger that excessive interference will turn into censorship and do more harm than good.

Protection of public morals is a legitimate ground for limiting the right to freedom of expression in international law.

However, the question of obscenity – or that which offends public morals – is a difficult one for two reasons. One is that different societies have rather different views of such matters – and different people within each society may have widely divergent views. The other is connected: views of what is obscene or offensive are constantly shifting. Definitive rules stating what may not be broadcast might become out of date in a very short time.

It is, however, easier to achieve some agreement on the need to protect children from the broadcast of harmful material – not only sexual matters, but things relating to issues such as dangerous drugs. Many broadcasting codes also protect children against broadcast material that they may find inordinately frightening.

The device that is often used is the so-called “watershed.” This is the time of the evening after which it is assumed that children will not be watching television. There are different guidelines on what can be shown before and after the watershed. There may also be guidelines limiting what may or may not be broadcast (including on radio) at particular times when children are likely to be viewing or listening – such as breakfast time or early evening.

The following is a summary of some of the guidelines issued by the British broadcasting regulator Ofcom. They are given as an example of the types of regulation that are possible.

It is important to remember that such guidelines should be voluntary. Broadcasting licensees will be asked to subscribe to the guidelines. Breaches of the guidelines may be the subject of complaints by members of the public. Persistent breaches of guidelines (on this or other matters) may even be a reason for refusing to renew a licence. But they do not have the force of law and they can certainly never be enforced by pre-broadcast censorship.

- *Material that might seriously impair the physical, mental or moral development of people under eighteen must not be broadcast.*
- *For television programmes broadcast before the watershed, or for radio programmes broadcast when children are particularly likely to be listening, clear information about content that may distress some children should be given, if appropriate, to the audience (taking into account the context).*
- *The use of illegal drugs, smoking, solvent abuse and misuse of alcohol should only be broadcast in limited circumstances and should never be glamorized.*
- *Violence should be limited in programmes that may be seen by children. Violence that could be imitated by children should not be shown in programmes made for children.*
- *Offensive language should generally only be broadcast after the watershed.*
- *Representations of sexual intercourse should not be shown before the watershed except for educational purposes.*
- *Nudity before the watershed must be justified by the context.*
- *Due care and attention should be paid to the involvement of people under 18 in programmes.*

## 4.7. Elections

Elections are a period when regulation of broadcasting content is likely to be a bigger issue than at any other time. As far as the media are concerned, elections represent an intersection between two important rights:

- The right to freedom of expression
- The right to participate in the government of the country through electing representatives.

Elections can only be free and fair if parties and candidates are able to articulate their policies and the media are able to subject these to critical scrutiny. The electorate have a right to accurate information that tells them not only about the parties and candidates on offer, but also about technical and practical aspects of the election: how to register, where to vote, the powers of those being elected, and so on.

These interlocking elements can be summarized like this:

- The right of parties and candidates to communicate their views.
- The right of the media to report the elections freely.
- The right of the electors to all the information that they need to participate in the elections and make an informed choice.

Clearly, if any of these three elements is taken out of the mix, the whole thing will not work. Ultimately, if the candidates cannot communicate or the media cannot report freely, then the electors will not have the information that they need. It is not just freedom of expression that will suffer, but the whole democratic process.

It might be argued that if a free and pluralistic media are in place, then all these rights will be realized automatically. The complicating factor, however, is that parties and candidates are usually understood to have a right to put their views to the electorate in a direct, unmediated fashion. In other



words, there will be some sort of direct access broadcasting that is over and above normal news and current affairs coverage. Depending on the system in force, this may consist of paid political advertising or it may be free broadcasting slots.

Election coverage in the media is conventionally divided into four main types:

- News coverage (sometimes known as “editorial coverage” because it is under the direct editorial control of the media rather than the political parties).
- Direct access: this may be paid advertising or free slots. Either way it is under the editorial control of the parties or candidates, not the media.
- Voter education: this is politically neutral material that informs people of what the election is about and how to register and vote, as well as containing other messages such as the secrecy of the ballot. This is usually generated by the electoral management body, but it may also be produced by non-governmental organisations, or by the media themselves.
- Special election programmes: these may include programmes such as debates between the candidates of different parties.

There are likely to be several regulation issues involved here:

- **Will reporting by publicly-funded broadcasters be politically impartial?**

There should be a specific requirement that publicly-funded broadcasters be politically impartial in their reporting. This is a general requirement, but it is of particular importance during election periods.

If a particular party – almost invariably the ruling party – takes advantage of this public resource to broadcast propaganda under the guise of independent news reporting, this is an abuse of public property equivalent to (but more serious

than) the use of other government resources such as transport for election campaigning. The regulatory body will need to keep a close eye on this.

The public broadcaster may not take an editorial position in favour of any political party. The situation is likely to vary for other broadcasters. They may, depending on the terms of their licence, be permitted to take a politically partisan editorial position. However, there will still be an expectation that news will be reported in a professional and impartial manner. If a broadcaster fails to do this, then the regulator will presumably take this into account when the licence comes up for renewal.

- **How will direct access coverage be allocated between the parties?**

This is one of the more complex regulatory questions during elections. The first issue to be decided is whether direct access coverage in broadcasting will consist of paid political advertising, free slots, or a combination of the two. The reasons for the choice are likely to be largely determined by the country’s own political and broadcasting history. There is a strong argument in favour of free slots – it gives greater opportunities to political parties that are poorer and less favoured. However, some argue that the right to buy advertising helps ensure the right to political expression. There can be no hard and fast answer to this.

If political advertising is chosen, it will need to be decided whether there will be any limit on the amount of advertising that parties can buy. Will that limit be determined by the time available or by campaign spending laws? Will time slots for advertising be distributed fairly and will advertising slots be offered to all parties at the same rates? The appropriate authority will probably wish to develop regulations on these issues.

If free direct access slots are chosen, the fundamental question is how these are to be allocated. Will it be a system of equality, where all parties have the same time or the same number of slots? Or will it be a system of equity (or fairness) where slots are allocated according to a variety of

factors, including past support for that party among the electorate and the number of candidates the party is fielding?

The argument in favour of a system of equality is that it gives all parties a chance to get their message across. The argument against is that it may give too much time to insignificant parties with little chance of winning (which tends to favour the ruling party). A system of equity gives prominence to the strong parties with a real chance of winning – but the disadvantage is that this may make it more difficult for new parties to break through.

### DISCUSSION POINT

Equality or equity? Which is the most suitable way of allocating direct access slots in elections in your country? List the arguments in favour and against each option.

- **Voter education must be politically impartial**

This point may seem self-evident, but it is far from universally true. Anyone can broadcast voter education material, from a variety of different sources. But it is essential that broadcasts giving the electorate information on how to exercise their rights do not tell the voter to choose a particular party or candidate. So, examples showing how to complete a ballot paper should not show a mark being made alongside a particular candidate.

- **Candidate debates should be organised fairly**

In countries where candidate debates are broadcast, these tend to be the focus of a considerable amount of discussion. Which candidates should participate – all, or just the most prominent? Who should moderate the debate? Who should ask the questions? Who should answer first? Who gets to sum up last? Should the debates be broadcast live or in an edited form?

As with the discussions about direct access, there are no right or wrong answers to these questions, which will tend to be determined by tradition in each country. The important thing is that clear rules are set out, which are then followed scrupulously. It is important too that the candidates themselves accept the conditions for the debate in advance.

Finally, who is responsible for broadcasting regulation during elections?

The answer to this question is by no means clear. As with many issues, it will depend in part on past practices and tradition. It may, of course, be the sole responsibility of a statutory broadcasting regulator. Or it may be the sole responsibility of the electoral management body. There may be a role for voluntary self-regulation, or a voluntary committee of political parties to deal with direct access. Or a combination of any or all of these systems.

In any case, it is likely that some role will fall upon broadcasting regulators, who will need to have a full understanding of regulatory issues in elections.

It will be especially important that there is thorough monitoring of all election-related output of the broadcast media. This can be carried out by the broadcasting regulator, by the election administration or by an outside body (such as an NGO or academic institution) contracted for the purpose. And there will need to be a swift and effective complaints mechanism. If corrections need to be issued during an election campaign, this will normally need to take place rapidly.

## 4.8. Protection of reputations

Protecting reputations is one of the legitimate limitations on freedom of expression allowed under international law. Most countries have laws that put this into practice, giving individuals the right to sue for defamation in the civil courts, or for the authorities to prosecute for criminal defamation. (The latter, although it is beyond the scope of this manual, is an unwarranted interference with freedom of expression with extremely dangerous consequences.)



Broadcasters will be subject to whatever general law is in force covering defamation and protection of reputation. However, in their role as recipients of complaints, broadcasting regulators may have a role to play. Many of the complaints a regulator receives are about alleged inaccuracies that are said to damage the reputation of an individual (or an institution).

### DISCUSSION POINT

As a broadcasting regulator, you receive two identical complaints:

A television station has broadcast an item alleging that the complainant, a married man, regularly slips away from his workplace at lunchtime to meet a woman who is not his wife. The two usually go to a hotel, where they stay for some two or three hours.

In one instance the complainant is a junior clerk working for a private company – someone whose name was not otherwise known to the public. In the other instance the complainant was a government Minister.

Neither complainant denies the truth of the report, but says that it was an intrusion into their privacy.

How do you react to each complaint?

an affair? Was he behaving properly if he used his working hours for a private dalliance?

Of course, at a moral level exactly the same questions could be asked of the lowly clerk. But the difference is that he is not in a position of public trust. His behaviour is a matter between himself, his wife and his employer (and perhaps the other woman). There is no public interest in this report. (Think back to Chapter 1 for what the “public interest” means.)

In this particular example there is no right or wrong answer. However, regulators should bear the following points in mind.

- When ordinary members of the public are misrepresented or defamed or have their privacy invaded by the media, they very often have no effective recourse. Defamation law favours the rich, who can choose lengthy litigation and may be handsomely rewarded for it. Even when ordinary citizens succeed in winning defamation cases, they often do not benefit from this. So, a broadcasting complaints procedure will often be the only real opportunity they have to protect their reputation or privacy.
- International law increasingly says that public figures should have less protection against scrutiny and critical reporting in the media than ordinary citizens. This is because such scrutiny is in the public interest - even when it is not entirely accurate, provided that it is conducted in good faith. Hence the big men – politicians and business leaders – should not be allowed to use the broadcasting regulatory system to muffle or silence critical reporting.

The fundamental question here is whether the same standard is applied for the public figure and the private individual.

You might decide that the report was an intrusion on privacy in each case. But the broadcaster could claim, in the case of the Minister, that this was a matter of genuine public interest. It went to the trustworthiness and credibility of a prominent public figure. Could he be believed if he lied about



5

# Complaints and Sanctions

# 5

## COMPLAINTS AND SANCTIONS

### 5.1. Complaints process

In Chapter 4 we looked at the ways in which a broadcasting regulator might have responsibility for regulation of the content of broadcasting.

When a regulator has this responsibility there is also a strong likelihood that it will operate a complaints procedure. This would allow members of the public to raise any matters where they feel that a broadcaster has breached the terms of its licence or of any code of conduct that has been broadly agreed. In some situations, the code of conduct may be a voluntary one under the aegis of a non-statutory body, such as a media council. In that case it is likely that that will be the body responsible for receiving complaints.

#### BRAINSTORM

What is the purpose of a broadcasting complaints procedure?

The answer to this question might seem obvious: it is to make sure that broadcasters behave themselves. But actually it needs a little more consideration.

The purpose of a complaints procedure is not to “police” or punish broadcasters. It is merely an extension of the central aim of the broadcasting regulator: to facilitate diverse and quality broadcasting. This has implications for the way in which the procedure works and the sorts of sanctions that the complaints body will apply.

The other point to bear in mind is that a complaints procedure relates only to those standards that the broadcasters themselves have agreed to abide by. It cannot deal with anything and everything that a member of the public might object to.

Apart from anything else, this relates to a fundamental principle of natural justice. Any “offence” committed by a broadcaster must be something that is clearly foreseeable, because it constitutes a breach of standards that the broadcasters have subscribed to.

Most usually, a complaints procedure will be able to address only a breach of licence conditions. These will consist of two elements, in most cases:

- Terms that are explicitly written in the licence itself.
- Other standards, such as a broadcasting code of conduct that the broadcaster signs up to, implicitly or explicitly, by virtue of applying for a licence.

So, the way a complaints procedure will work is that a member of the public will submit a complaint. The complaints body will then determine whether the complaint relates to an issue that is covered by the terms of the licence or by any other standards that govern the broadcaster's behaviour. If it does, then the body will look at the substance of the complaint.

For members of the public, one of the purposes of having a complaints procedure is that it allows them to raise matters without the time and expense of a judicial process. If a person has been misrepresented or their reputation damaged, this mechanism should be a quick way of their achieving some form of redress – in the form of a correction. (A complaints procedure will not in any way supplant the legal rights that they may have anyway to take a matter to court.) Hence, the aim will be to have a procedure that is quick, clear and easily accessible to members of the public.

Another important issue that will need to be addressed in advance is the question of evidence. How will the complaints body be able to determine

what was actually broadcast (which might be a matter of dispute)?

Occasionally, broadcasting regulators are able to contract media monitors (academic or NGO) to monitor the output of broadcasters, but with the massive amount that is broadcast this is seldom a practical possibility. As an alternative, broadcasters are usually required to keep a taped record of all that they broadcast. These tapes should be kept for a considerable period – long enough to be available for any complaints that arise, which probably means some months.

Here are some examples of decisions on complaints heard by the Broadcasting Complaints Commission of South Africa:

## CASE STUDY 1

Case No: 2006/17 SAfm - Vuyo Mbuli Show - Balance

A Allen (Complainant)

vs

SAFM (Respondent)

Tribunal: Prof Henning Viljoen (Acting Chair), Ms Refiloe Mokoena-Msiza - (Co-Opted) and Prof Ravi Nayagar

For Complainant: The Complainant in person accompanied by Ms Tina van der Maas

For Respondent: Mr Fakir Hassen, Manager Broadcast and Compliance, Policy and Regulatory Affairs of the SABC assisted by Will Bernard and Mike Roberts (Executive Producers at SAFM).

A complaint was lodged that the Vuyo Mbuli Talk Show on HIV and AIDS was one-sided. There was one guest on this phone-in programme, representing the National Institute for Communicable Diseases. During this programme the public was invited to volunteer for vaccine testing. Clause 36 of the Code requires that there should be balance in programmes in which controversial issues

of public importance are discussed. It is the Tribunal's view that balance cannot be assessed with mathematical precision. What is important is that "unjustified opinion should rather be left for the market place of ideas to counter it". A talk show or phone-in programme is such a market place of ideas. Even though a talk show usually has only one guest at a time, the fact that listeners may phone in to air their views, is sufficient to prepare the table for balanced discussion. Although a broadcaster has no control over the viewpoints expressed by callers, this does not detract from the principle that the attainment of balance is inherent in this type of programme. However, the broadcaster must ensure that guests with different viewpoints are invited. No contravention was found in this case and the complaint is dismissed.

## JUDGMENT

PROF HPVILJOEN

[1] During the Vuyo Mbuli Talk Show on SAfm at about 10:00 on 23 March 2006 the presenter had as his guest for about one hour Dr Clive Gray who represented the National Institute for Communicable Diseases. This body is a partner in a research programme together with the Centre for HIV/AIDS Vaccine Immunology (CHAVI). As is usual with such talk shows, the telephone lines were opened and listeners were invited to air their views, which a few did. During the discussions the public was invited to volunteer for vaccine testing with which the Centre was involved. The way in which the programme was presented, created the impression with the Complainant that the show was one-sided and she lodged a complaint with the BCCSA. At the hearing it was agreed between all the parties that there is no need for the Tribunal to listen to the programme as it was common cause that Dr Gray was the only guest on the show. It was agreed that the matter of balance in presenting the programme would be argued and that the Tribunal would give judgment on this matter only.

[2] The complaint reads as follows:

First complaint: "Complaint against Vuyo Mbuli Show, SABC Safm 10am-1am – 23 March 2006. I wish to lay a formal complaint against the above radio talk show, regarding the one hour exposure given to the Centre of HIV/AIDS Vaccine Immunology (CHAVI) on the basis that it was one-sided, no attempt was made to present alternate opinion; as a result inaccurate, misleading and false facts including false scientific facts were presented as cast in stone and were left unchallenged by the presenter. I request that the radio station be instructed to present a programme of similar duration representing alternate scientific views."

Second complaint: "Complaint against Vuyo Mbuli Show, SABC SAFM 10am-11am. 23 March 2006.

I wish to append an additional complaint to the one above as follows:

Complaint against SABC –editor-in-chief for non-compliance with the SABC code in matter pertaining to microbiology.

There is abundant evident that the editorial board of the SABC is not applying its code. I restrict

myself to matters relating to HIV/AIDS. However, the field in which it is embedded – microbiology, impacts so many spheres of our existence that the SABC deficiency in the HIV/AIDS field is merely a symptom of far wider problem.

Unless it is resolved we will meet the challenges facing us not just in microbiology but genetic engineering of all kinds including vaccines; bird flu; pollution; global warming; lions dying in Kruger Park – the list is endless.

Either the SABC has some board which possess judge, jury and adjudicating powers over HIV/AIDS science and microbiology in which it is embedded, or it gives equal time to all views. Had Galileo lived, today, the SABC would have censored him.

In this connection, I wish to bring to your attention that I have previously corresponded with SABC manager: broadcast policy compliance. Faqir Hassen. His e-mail of 2 November 2005, convinced me that it was pointless pursuing this matter, especially as my telephone records will show, Mr Hassen steadfastly refused to answer all my queries left with his secretary.

Mr Hassen claims his organisation is in compliance with the Broadcasting Code of Conduct administered by yourselves. I wish to test that claim and once and for all get a clear ruling on what the code require of programming relating to HIV/AIDS, which allows SABC –sponsored advertisements in which the sacred word Love is now jingled to HIV and sex – and no one raises an objection. I await further contact on this matter.”

[3] The SABC responded as follows:

In respect of the above complaint, I enclose a copy of the programme segment on CD. Our comments are as follows.

The complainant is a well known AIDS dissident who, to our understanding, usually challenges the portrayal of any conventional and generally accepted scientific evidence.

The discussion on The Vuyo Mbul! Show was not intended to be a debate on the issues of differing scientific viewpoints regarding HIV/AIDS. It was, rather, a discussion on a joint International Research Initiative that involves as one of the partners in the initiative the Centre for HIV/AIDS Vaccine Immunology (CHAV1).

The guest in the studio, Dr Clive Gray was representing the National Institute for Communicable Diseases, which is also involved in the research initiative.

The suggestion that this was a “one-sided” show with “no attempt to present alternate opinion” is rejected on the basis that from the outset of the programme the lines were open for listeners to call in and contribute to the discussion. In fact some nine callers were taken on air and they posed questions and made comments.

The facility was clearly there for anyone with a dissenting opinion, including the complainant, to phone in and contribute to the programme with their views.

[4] I shall start with the Complainant’s second complaint, the one headed “Complaint against SABC –editor-in-chief for non-compliance with the SABC code in matter pertaining to microbiology”. It is not within the jurisdiction of the BCCSA to adjudicate on complaints like non-compliance with the SABC code. We do not apply the SABC code, only the Code of Conduct signed by the majority of broadcasters in South Africa, including the SABC. The complaint apparently flowed out of the

first one, which is a complaint against a specific programme. This falls within our jurisdiction and I shall deal with it next.

[5] The clause in the Code of Conduct, applicable to the facts of this case, is 36 which determines the following:

In presenting a programme in which controversial issues of public importance are discussed, a licensee shall make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.

There is no doubt that the whole matter of HIV and AIDS is a controversial issue of public importance. There is still debate on whether AIDS is caused by the HIV virus and what the best treatment for the syndrome is. There are various opposing views, politically, scientifically, socio-economically, etc. on this matter that have resulted in acrimonious debate and even litigation. There is definitely no agreement in our society on the most effective and efficient way in which the disease should be treated.

[6] The programme complained of is not the first and will surely not be the final one on which this topic is discussed. The Respondent has presented this topic on different kinds of programmes too. The present one is labeled a talk show. Mostly, in this type of programme, one guest is invited to the studio. The guest is allowed to put forward his or her viewpoints and then the opportunity is given to the listening public to phone in and to agree or disagree with the guest and give their own viewpoints. In programmes like this one, the Tribunal of the BCCSA has in the past made its conviction very clear. One example is the judgment in the case of N Dinur, D Mankowitz and EMTSA v MNet, Case No: 11/2002 where the Tribunal said:

“Our reaction is, accordingly, to tread with utter care when opinion is expressed - even opinion which is based on erroneous assumption or error. The well-known approach of Holmes J in *Abrams v The United States* 250 US 616(1919) that unjustified opinion should rather be left for the market place of ideas to counter it, also carries special weight in the opinion of the Commission. ... the nature of freedom of expression is that we should not, and cannot, stop people from disseminating their ideas, how unacceptable it may be. Let it be tested in the market place of ideas and let the listeners decide for themselves. There are limits to the freedom of expression where the expression amounts to propaganda for war, advocacy of hatred based on race, religion, etcetera, but the limits to this freedom have not been transgressed in this instance.” (See section 16(3) of the Constitution of the Republic of South Africa).

The same can be said of the programme in question. The applicability of section 16 of the Constitution was not debated because the Complainant did not aver that what was said on the programme amounted to hate speech, and rightly so.

[7] It is conceded that the “market place of ideas” consists, inter alia, of radio and television. This is where the debate should rage. The Respondent says it does; the Complainant says, as far as HIV and AIDS are concerned, not enough and not in a balanced way. The Complainant, in one of her communications to the representative of the Respondent dated 8 September 2005, says: It was one of the no more than 10 occasions where a person skeptical of the HIV causes AIDS

paradigm has been accorded time at the SABC since October 1999 when Thabo Mbeki first raised his concerns.

It has often been said in this Tribunal that it is not possible to determine with mathematical precision how many times for and how many times against a viewpoint the broadcaster should allow participants to air their views.

[8] Many of the broadcasters have talk shows or phone-in programmes. The usual format is to invite a guest to present one perspective. A discussion follows and then the listeners are invited to phone in and to engage in debate with the guest. This is an excellent opportunity to get down to the gist of things and also an example where “unjustified opinion” is left for “the market place of ideas” to counter it.

[9] We realise that, due to the nature of talk shows or phone-in programmes and the time constraints on these programmes, it is not always possible for broadcasters to have two guests with opposing views on the same programme. I think there is inherent balance in the programme due to the fact that the listening public can phone in. This is part of the “market place of ideas”. Anyone is free to phone in and to challenge what the guest or another listener has said. We were assured at the hearing that the Respondent does not keep a list of “banned listeners” whose calls are blocked on such occasions, as was averred. The problem, of course, is that the broadcaster has no control over the viewpoints of those listeners who do phone in. If all callers agree with the guest’s opinion, one can easily come to the conclusion that there was no balance. This, in our view, is not the answer to the question whether clause 36 has been contravened. The overriding principle is that a “market place of ideas” has been created by the broadcaster where everyone is free to air his or her opinion. If, in a particular programme of this nature, it appears that balance was not obtained because of the reaction, or lack thereof, of the callers, the principle of the “market place of ideas” still remains and the broadcaster cannot be censured for this.

[10] We have been assured by the representative of the Respondent that the broadcaster has invited people of different viewpoints on HIV and AIDS to air their views on this and other programmes in the past. We have no reason not to believe him. This, coupled with the fact that talk shows or phone-in programmes are inherently programmes where balance could be obtained, brings us to the conclusion that the Respondent did not contravene clause 36 of the Code.

The complaint is therefore not upheld.

PROF HP VILJOEN

Commissioner Nayagar and co-opted member Mokoena-Msiza concurred



## CASE STUDY 2

Case No: 2006/16 RSG - Lyrics - Harmful to children

J PERKINS (Complainant)

vs

RSG (Respondent)

Tribunal: Prof Henning Viljoen (Acting Chairperson), Prof Ravi Nayagar, Ms Refiloe Mokoena-Msiza (Co-Opted)

For Complainant: The Complainant did not attend

For Respondent: Respondent: Mr Fakir Hassen, Manager Broadcast and Compliance, Policy and Regulatory Affairs of the SABC assisted by RSG - Johan Botha (Presenter) and Magdaleen Kruger (Station Manager).

Complaint about the use of the word “naai” in an Afrikaans song, which was a broadcast of a live recording. Only very naïve persons would not realize that the word is used in its secondary meaning which is the equivalent of the English “f” word. The song was broadcast at about 22:50 and the Tribunal considered that this is a time when large numbers of children (i.e. 16 years and younger) cannot be expected to be part of the audience (clause 18.1). Progressively less suitable material may be broadcast as the period after the watershed proceeds (clause 23 of the Code). The programme was not specially designed for children (clause 26). A warning was broadcast earlier in the evening to inform listeners as to the nature of the programme. The right to freedom of expression entails that what may be broadcast is not only material that is favourably received but also that which “offends, shocks or disturbs”. Such are the demands of democracy, which expects tolerance for the views of others. No contravention of the Code was found. The complaint was not upheld.

### JUDGMENT

PROF HPVILJOEN

[1] On 3 April 2006 at about 22:50 on RSG a song was broadcast in the programme “Tempo” that caused offence to some and the following complaint was lodged with the BCCSA.

[2] “Radio Station: RSG, Programme: Tempo, 3 April 2006 at 21H50 - 22H00

“During this programme a music group was aired by the name of “Rokkeloos”. The lyrics of the songs that were played on this specific date on the mentioned time above was extremely fowl. Especially the last song that had explicit Afrikaans words incorporated in the lyrics, : “ Ek hou van melkert, breiwerk, skaapbraai en hard.....etc. “ with the explicit words to be filled in on the dots, too fowl for me to mention in this letter. In my opinion this type of lyrics condones to free and open sex, especially to our youth. In a country where HIV is a growing problem. The government are currently launching a campaign against t-shirts and posters with alcoholic slogans on them. This to try and prevent our children in starting to drink on an early age. I wonder what effect this type of lyrics will have on our youth when sex and drinking alcohol are promoted freely

over the sound waves of South Africa. I truly hope that the radio station RSG will be reprimanded and prevented from broadcasting this type of lyrics again.”

[3] The SABC responded as follows:

“The Afrikaans word *naai* was used in the lyrics of one of the songs sung by the female Afrikaans band *Rokkeloos*. As the band’s name *Rokkeloos* suggests, they sang about things that women do - *melktert bak, breiwerk doen, skaapvleis braai en hard naai*, the last word having a double meaning – stitching in English, and a four-letter word in a colloquial sense that could be offensive to some. The interpretation of the lyrics is left to the mind of the listener, admittedly through deliberate and calculated use thereof by the band. It should also be noted that it was a live performance from the KKNK arts festival in Oudtshoorn, broadcast after 21:30 and aimed at a specialist listener audience. We do not believe there has been any breach of the Code.”

[4] To this response the Complainant replied the following:

“With regards to the report rendered as possible explanation by the Manager: Broadcast Compliance (Fakir Hassen) dated 5 April 2006: The second comment made by person Hassen refers to the bands name, namely *Rokkeloos* and about the things women like to do. With all respect to person Hassen, words like “*bak*” and “*doen*” have been conveniently been inserted into the report. Another flaw in the argument submitted is that “*melktert*” and “*skaapvleis braai*” is things enjoyed by women, however these are things equally enjoyed by men. My interpretation of the group’s name “*Rokkeloos*” rather suggest to me a group of females renouncing their sexuality (the word translated directly meaning “without dresses”). I don’t see them with aprons behind the stove baking “*melktert*”. Referring to the double meaning of the word, during the performance the lead singer mentioned the word *condom* on more than one occasion. This immediately deletes the better meaning of the mentioned word. I for one would like to see how stitching is performed with a condom. Point three in the report mentioned the following: “The interpretation of the lyrics is left to the mind of the listener...” When listening in how the words were pronounced and screamed no imagination is needed to interpret the real meaning. Point four seems to be using the fact that because it was a “live performance” that this makes it all okay. If I interpret their statement correctly we can go and rape and pillage as much as we like as long as it is a live performance. Looking at the time this music was aired, maybe our babies and toddlers were already in bed, my concern is our teenagers that are still awake at 21H50.”

[5] We were informed during the hearing that the broadcast was a live recording of the performance of an all female band by the name of “*Rokkeloos*” at the Klein Karoo Nasionale Kunstefees (KKNK) in Oudtshoorn. On a point of information: The name “*Rokkeloos*” can be translated as “Dress less”, suggesting that the all female band have abandoned the traditional attire of women and are now practicing an alternative lifestyle. In the song, the following words are repeated endlessly: “*Ons hou van melktert, breiwerk, skaapbraai en hard naai*” with the emphasis every time on the last word. It is this last word that caused the offence, giving rise to the complaint. According to the *Pharos Groot Woordeboek/Major Dictionary* the Afrikaans word “*naai*” means “stitch, sew; having sexual intercourse (taboo)”. It is significant that the word “taboo” was inserted by the editor after the last (secondary) meaning of the word. It would take a very naïve person not to realize that the secondary meaning of the word was intended. At the hearing, the producer of the programme described the band as “punk”, “alternative” and “in your face”. It could thus be expected of such a band that they would have little deference for taboos.

[6] The programme during which the song was broadcast, is aimed at that part of the Afrikaans youth who like to listen to alternative music. In the words of the producer: “It is generation specific and aimed at this sub-culture”. We were assured that this particular song was broadcast at about 22:50 in the evening. We were also informed that when the programme schedule was announced on the radio earlier in the evening, listeners were warned about the crude nature of the songs that would be broadcast in this particular programme.

[7] Two clauses of the Broadcasting Code might be applicable in this case. The first one is clause 18.1 which reads:

Broadcasters shall not broadcast material unsuitable for children at times when large numbers of children may be expected to be part of the audience.

The second is clause 26 that deals with the use of language in the following way:

Offensive language, including profanity, blasphemy and other religiously insensitive material shall not be used in programmes specially designed for children.

As for these two clauses, one must keep in mind that “children” are defined in the Broadcasting Code as persons below 16 years. I do not think that large numbers of children could be expected to be part of the audience at 22:50 in the evening. Clause 18.1 can therefore not be applicable. As for clause 26, the programme “Tempo” is not designed for under 16 year olds and this clause is thus also not applicable.

The late hour at which this song was broadcast, i.e. long after the watershed beginning at 21:00, eliminates clause 27, and in clause 23 of the Code it is stated that progressively less suitable material may be broadcast later in the evening.

[8] As in most of the cases that we have to decide, we have to weigh the right of the broadcaster to freedom of expression against the right of the listeners not to be offended by what they hear on public radio broadcasts. We have a Constitution that protects not only freedom of speech but also all the other basic rights accepted universally as those rights that are indispensable to a democracy. The view of our Constitutional Court regarding freedom of expression is contained, inter alia, in the judgment of the case of *Islamic Unity Convention v IBA and Others* 2002(4) SA 294 (CC) where the following was said at p 307, paragraph [28]:

“... freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights. South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as ‘...one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members ...’ (Sieghart *The International Law of Human Rights* (1983) at 330). As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom* ((1976) 1 EHRR 737 at 754) the European Court of Human Rights pointed out that this approach to the right to freedom of expression 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 . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’ .”

[9] This view of the Constitutional Court is legal authority in our law that we have to obey. We realize that the word complained of did “offend, shock or disturb” the Complainant, and probably other listeners too. (I hasten to add that this is the only complaint that we received regarding this broadcast.) Many others might think it was in extremely bad taste. But this is not the test that we have to apply. The test is whether the South African society in general can tolerate the use of such a word. Although not used as frequently as its English counterpart (the “f” word), we should treat the use of the word in the same manner as we do with the English word. In this regard the Tribunal of the BCCSA said in the matter of HB Gunning v e-tv, case no. 10/2003 “... although the ‘f’ word was frequently used and may have been offensive to certain viewers, one cannot categorise the utilization of the ‘f’ word as beyond contemporary South African standards of mores insofar that the word could not be tolerated by the vast majority of South African viewers.”

[10] The target audience is also an important factor to consider. The producer referred to the “sub-culture of Afrikaans alternative music listeners”. It would be hypocritical to allow the “f” word in English songs but to censure broadcasters for broadcasting the Afrikaans equivalent. Coupled with this is the fact that listeners were forewarned as to the crude nature of the programme.

[11] Finally, I have to correct one perception of the Complainant. In the final paragraph of his letter of complaint, he states that hopes that we will prevent RSG from broadcasting this type of lyrics again. Just to set the record straight: We cannot prevent any broadcaster from broadcasting material that offends. We can only react when a complaint has been lodged by finding the broadcaster guilty or not guilty of contravening the Code and, in the former case, by imposing a sanction.

It should be stressed that the word “naai” should not, as a result of this judgment, be regarded as generally acceptable in broadcasts. The particularly late time slot of the broadcast and the context saved it.

In the result no contravention of the Code is found and the complaint can therefore not be upheld

PROF HP VILJOEN

Commissioner Nayagar and Co-Opted member Mokoena-Msiza concurred

## 5.1.2. Complaints in elections

During election periods the need for a speedy resolution of complaints becomes especially important. The reason is that if seriously inaccurate information has been broadcast – or if there have been criticisms of a particular party or candidate, without the possibility of reply – these may have an influence on how people vote. There is little point in having a lengthy procedure that produces a correction or reply only after the election has taken place.

In elections, speedy corrections are especially important for another reason. These are usually times of heightened political tension. Inaccuracies or inflammatory reports may create extra tensions between different political forces or between communities.

During election periods there will be a particular need for an accurate record of what is broadcast. During elections, it has become particularly common for regulators to engage independent media monitors, who can keep a record of election-related output. (This task is somewhat less onerous than monitoring the entire output of all broadcasters.)

The purpose of media monitoring in elections goes beyond the mere gathering of material to hear complaints. This sort of media monitoring is proactive, so that the regulator can identify breaches of electoral regulations that might need to be rectified. For example, it may be that a broadcaster has failed to allocate direct access time correctly to the different political parties. A rapid intervention would be needed to make sure that this did no serious harm.

The complete record of election coverage may also be important evidence if there is a later challenge to the fairness of the elections. Media coverage is understood to be a significant part of the environment in which elections take place. Seriously unbalanced broadcasting of the election could be an important factor contributing to the conclusion that an election was not free and fair.

Bear in mind that the role of the broadcasting regulator in election-related complaints will vary enormously from country to country. As discussed in Chapter 4, the broadcasting regulator may have the primary responsibility for overseeing election coverage, but in many countries this responsibility falls to another body, most obviously the electoral management body. If the latter is the case, then the likelihood is that some special election media complaints body will be constituted, separate from the normal broadcasting complaints procedure.

## 5.2. Sanctions

### BRAINSTORM

What would be reasonable sanctions or punishments for broadcasters who breach their licence conditions or the code of conduct?

It was noted above that the purpose of a complaints procedure was not to police or punish the broadcasters, but to make sure that there was diverse and accurate material broadcast. It follows that the sort of sanctions imposed should be directed towards this aim.

Where the offence complained about involves misrepresentation or a serious error of fact, then the obvious sanction is a correction of the mistake.

It should, in any case, be normal practice for the complaints body to make all its decisions public. Publicizing criticisms of the broadcasters is itself part of sanction, and also maintains transparency and public confidence in the whole process.

The principle underlying all sanctions imposed by a complaints body is one of proportionality. This means that the punishment should be strictly proportional to the offence.

### 5.2.1. Proportionality

One important way in which sanctions should be proportionate to the offence is that they should be graduated.

This means that if this is the first time a broadcaster has offended the normal sanction will be nothing more than a warning. This will state the nature of the breach and tell the broadcaster not to repeat it.

More serious sanctions would, in order, be a fine, suspension of a broadcasting licence and revocation of a licence.

Fines should only be imposed after lesser sanctions have failed to address the problem. Suspending or withdrawing a licence would only take place for gross and repeated breaches of the licence conditions.

### 5.3. Appeal

Whenever a serious sanction is imposed – not a correction or warning, but anything more serious, such as a fine – broadcaster should have the right of appeal to the courts. Courts will review the decisions of the complaints body in the same fashion that they will review the decision of a broadcasting regulator on licence allocation (see Chapter 3).



# Further Resources

# FURTHER RESOURCES

The following are some of the most important web-based resources consulted during the preparation of this manual. Trainers and workshop participants are encouraged to use these websites to gather information, ideas and experience.

## General information

ARTICLE 19: [www.article19.org](http://www.article19.org)

ACE Project (media and elections): <http://www.aceproject.org/main/english/me/me.htm>

Commonwealth Broadcasting Association: <http://www.cba.org.uk/>

International Telecommunications Union: <http://www.itu.int>

UNESCO, Public Service Broadcasting. A Best Practices Source Book:  
[http://portal.unesco.org/ci/en/ev.phpURL\\_ID=20394&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.phpURL_ID=20394&URL_DO=DO_TOPIC&URL_SECTION=201.html)

World Summit on the Information Society: <http://www.itu.int/wsis/>

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## National and regional regulators websites

**Asia-Pacific:** [http://www.abu.org.my/public/dsp\\_page.cfm?pageid=247](http://www.abu.org.my/public/dsp_page.cfm?pageid=247)

**Austria:** [http://www.rtr.at/web.nsf/englisch/Rundfunk\\_Regulierung](http://www.rtr.at/web.nsf/englisch/Rundfunk_Regulierung)

**Bosnia-Herzegovina:** <http://www.cra.ba/>

**Canada:** <http://www.crtc.gc.ca/eng/welcome.htm>

**Caribbean:** <http://caribunion.com/>

**Czech Republic:** <http://www.rrtv.cz/en/>



**Denmark:** <http://www.mediesekretariatet.dk/mediasecretariat.htm>

**Estonia:** [http://www.rhn.ee/e\\_main.htm](http://www.rhn.ee/e_main.htm)

**Europe:** <http://www.epra.org/content/english/index2.html>

**Europe:** <http://www.ebu.ch/en/index.php>

**Ireland:** <http://www.bci.ie/>

**Jamaica:** <http://www.broadcastingcommission.org/>

**Kenya:** <http://www.cck.go.ke/home/index.asp>

**Kosovo:** <http://www.imc-ko.org/index.php?lang=en&pag=home>

**Nigeria:** <http://www.nbc-nig.org/about.asp>

**North America:** <http://www.nabanet.com/>

**South Africa:** <http://www.icasa.org.za/Default.aspx?Page=2>

**United Kingdom:** <http://www.ofcom.org.uk/>

## **National Broadcasting Complaints Bodies**

**Canada:** <http://cbsc.ca>

**New Zealand:** <http://www.bsa.gov.nz>

**South Africa:** <http://www.bccsa.co.za>

# appendix 1

## AFRICA CHARTER ON BROADCASTING

The African Charter on Broadcasting serves as a modern blueprint for policies and laws determining the future of broadcasting and information technology in Africa.

### Why the charter was developed

- Africa was the birthplace of the Windhoek Declaration on Promoting an Independent and Pluralistic African Press in 1991. Despite this, the region remains an international focal point of media freedom violations.
- The right to communicate is almost non-existent for the majority population.
- Since the adoption of the Declaration, though, there have been gains in media freedom in Africa.
- In some nation states, the media has begun to take up its role as a cornerstone of democracy and source of balanced information



The logo represents the symbol li (eye) and yu (to hear) that are used by the Bamum people of Cameroon

### African Charter on Broadcasting

*Acknowledging* the enduring relevance and importance of the Windhoek Declaration to the protection and promotion of freedom of expression and of the media;

**Noting** that freedom of expression includes the right to communicate and access to means of communication;

*Mindful* of the fact that the Windhoek Declaration focuses on the print media and recalling Paragraph 17 of the Windhoek Declaration, which recommended that a similar seminar be convened to address the need for independence and pluralism in radio and television broadcasting;

*Recognising* that the political, economic and technological environment in which the Windhoek Declaration was adopted has changed significantly and that there is a need to

complement and expand upon the original Declaration;

**Aware** of the existence of serious barriers to free, independent and pluralistic broadcasting and to the right to communicate through broadcasting in Africa;

*Cognisant* of the fact that for the vast majority of the peoples of Africa, the broadcast media remains the main source of public communication and information;

*Recalling* the fact that the frequency spectrum is a public resource which must be managed in the public interest;

We the participants of Windhoek + 10 declare that:

## **PART I: GENERAL REGULATORY ISSUES**

1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.
2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.
3. Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrum is allocated to broadcasting uses. The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting.
4. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.
5. Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.
6. The development of appropriate technology for the reception of broadcasting signals should be promoted.

## **PART II: PUBLIC SERVICE BROADCASTING**

1. All state and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.
2. Public service broadcasters should, like broadcasting and telecommunications regulators, be governed by bodies which are protected against interference.
3. The public service mandate of public service broadcasters should be clearly defined.
4. The editorial independence of public service broadcasters should be guaranteed.
5. Public service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.
6. Without detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers.
7. The transmission infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms.

## **PART III: COMMUNITY BROADCASTING**

1. Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit.
2. There should be a clear recognition, including by the international community, of the difference between decentralised public broadcasting and community broadcasting.
3. The right of community broadcasters to have access to the Internet, for the benefit of their respective communities, should be promoted.

## **PART IV: TELECOMMUNICATIONS AND CONVERGENCE**

1. The right to communicate includes access to telephones, email, Internet and other telecommunications systems, including through the promotion of community-controlled

information communication technology centres.

2. Telecommunications law and policy should promote the goal of universal service and access, including through access clauses in privatisation and liberalisation processes, and proactive measures by the state.
3. The international community and African governments should mobilise resources for funding research to keep abreast of the rapidly changing media and technology landscape in Africa. African governments should promote the development of online media and African content, including through the formulation of non-restrictive policies on new information and communications technologies.
4. Training of media practitioners in electronic communication, research and publishing skills needs to be supported and expanded, in order to promote access to, and dissemination of, global information.

## **PART V: IMPLEMENTATION**

1. UNESCO should distribute the African Charter on Broadcasting as broadly as possible, including to stakeholders and the general public, both in Africa and worldwide.
2. Media organizations and civil society in Africa are encouraged to use the Charter as a lobbying tool and as their starting point in the development of national and regional broadcasting policies. To this end media organizations and civil society are encouraged to initiate public awareness campaigns, to form coalitions on broadcasting reform, to formulate broadcasting policies, to develop specific models for regulatory bodies and public service broadcasting, and to lobby relevant official actors.
3. All debates about broad casting should take into account the needs of the commercial broadcasting sector.
4. UNESCO should undertake an audit of the Charter every five years, given the pace of development in the broadcasting field.
5. UNESCO should raise with member governments the importance of broadcast productions being given special status and recognised as cultural goods under the World Trade Organization rules.
6. UNESCO should take measures to promote the inclusion of the theme of media, communications and development in an appropriate manner during the UN Summit on the Information Society in 2003

# appendix 2

AFRICAN UNION

الاتحاد الأفريقي

African Commission on  
Human & Peoples' Rights



UNION AFRICAINE

UNIÃO AFRICANA

Commission Africaine des Droits de  
'Homme & des Peuples

## DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA

Preamble

Reaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

Reaffirming Article 9 of the African Charter on Human and Peoples' Rights;

Desiring to promote the free flow of information and ideas and greater respect for freedom of expression;

Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;

Convinced that laws and customs that repress freedom of expression are a disservice to society;

Recalling that freedom of expression is a fundamental human right guaranteed by the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international documents and national constitutions;

Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy;

Aware of the particular importance of the broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its

ability to overcome barriers of illiteracy;

Noting that oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting;

Noting the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies;

Mindful of the evolving human rights and human development environment in Africa, especially in light of the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, the principles of the Constitutive Act of the African Union, 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa's Development (NEPAD); and

Recognising the need to ensure the right to freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:

#### I

##### The Guarantee of Freedom of Expression

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

#### II

##### Interference with Freedom of Expression

1. No one shall be subject to arbitrary interference with his or her freedom of expression.
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

#### III

##### Diversity

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things:-

- availability and promotion of a range of information and ideas to the public;
- pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;
- the promotion and protection of African voices, including through media in local languages; and

- the promotion of the use of local languages in public affairs, including in the courts.

#### IV

##### Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - everyone has the right to access information held by public bodies;
  - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
  - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
  - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
  - secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

#### V

##### Private Broadcasting

1. States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.
2. The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:
  - there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;
  - an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;
  - licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and
  - community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

#### VI

##### Public Broadcasting

State and government controlled broadcasters should be transformed into public service



broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;
- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;
- public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
- the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

## VII

### Regulatory Bodies for Broadcast and Telecommunications

1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

## VIII

### Print Media

1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.
2. Any print media published by a public authority should be protected adequately against undue political interference.
3. Efforts should be made to increase the scope of circulation of the print media, particularly to rural communities.
4. Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.

## IX

### Complaints

1. A public complaints system for print or broadcasting should be available in accordance with the following principles:
  - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and

- the complaints system shall be widely accessible.
2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
  3. Effective self-regulation is the best system for promoting high standards in the media.

## X

### Promoting Professionalism

1. Media practitioners shall be free to organise themselves into unions and associations.
2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.

## XI

### Attacks on Media Practitioners

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.
3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

## XII

### Protecting Reputations

1. States should ensure that their laws relating to defamation conform to the following standards:
  - no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
  - public figures shall be required to tolerate a greater degree of criticism; and
  - sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
2. Privacy laws shall not inhibit the dissemination of information of public interest.

## XIII

### Criminal Measures

1. States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.
2. Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close

causal link between the risk of harm and the expression.

#### XIV

##### Economic Measures

1. States shall promote a general economic environment in which the media can flourish.
2. States shall not use their power over the placement of public advertising as a means to interfere with media content.
3. States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

#### XV

##### Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing.

#### XVI

##### Implementation

States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles.

Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002



# Notes For Trainers

# NOTES FOR TRAINERS

As explained in the introduction, this manual can be used in three possible ways:

- as a teaching guide for trainers running courses for broadcasting regulators.
- as a learning tool by such officials – in other words they can work through the manual on their own.
- as a reference tool by regulators and staff who have already gone through a training course.

We suggested that, ideally, regulators should have a chance to work through the manual before attending a workshop. This would minimise the amount of information that the trainer has to convey. It would allow the workshop to focus instead on any points where there was disagreement or lack of clarity, as well as on developing and practising the skills required for carrying out their job.

## How adults learn

There are many different theories about how people – in this case adults – learn. The conclusion of many of them, perhaps none too helpfully, is that people learn in many different ways.

However, it is possible to be rather more precise than that. Most adult learning approaches are participatory. That is, they assume that people are most likely to learn by doing, rather than simply reading, listening or watching.

Here is one interpretation of how much information people retain using different learning methods:

- |                        |     |
|------------------------|-----|
| • Reading only         | 10% |
| • Hearing only         | 20% |
| • Seeing               | 30% |
| • Seeing and hearing   | 50% |
| • Saying and repeating | 80% |
| • Saying and doing     | 90% |

The exact percentages may be difficult to prove, but there is a general consensus among adult trainers that people will remember very much more of what they learn if they are active in the learning process.

Hence it is essential that this manual be used as an aid for preparing participatory learning workshops.

There are various other elements that are common to different pedagogical theories, which it is important to bear in mind when preparing a workshop<sup>2</sup>:

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<sup>2</sup> Project (Building Resources in Democracy This list of headings is drawn from the Facilitator’s Information Booklet accompanying the BRIDGE, Governance and Elections), produced by International IDEA, the Australian Electoral Commission and the United Nations.

**Motivation:** learners increase their effort if they have a need or desire to learn. You can help this by making sure that the content of the workshop is relevant to the learners' day-to-day practice.

**Individual differences:** people learn at different rates and in different ways. Teaching methods should take account of this. We recognise the difficulty of doing so in a short workshop, but the use of individual and small group work in the suggested agenda is aimed at meeting this need.

**Learning objectives:** learners have a better chance of success when they are clear about what it is they are trying to learn. We have set out some general learning objectives in the Introduction to this manual. Trainers should always seek learners' views about what they expect to get out of the workshop at the very beginning.

**Organisation of content:** learning is easier when what is to be learned is organised into meaningful sequences. We have tried to do this with the organisation of this manual, which is roughly the same as the sequence that workshops will follow. Be prepared to adjust the sequence if that would be helpful for learners in your country.

**Emotions:** learning involves the emotion as well as the intellect. Emotional attitudes can interfere with learning or increase motivation. A moderate amount of anxiety or challenges will motivate most learners. Excessive anxiety interferes with learning. Try to ensure that learning takes place in a comfortable and supportive environment.

**Participation:** as we have seen, learners are more likely to retain information if they are active while they learn.

**Feedback and reinforcement:** learning is increased when individuals are periodically informed of their progress. Learning is motivated by success.

**Practice, repetition and application:** it is rare for anything to be learned properly with only one exposure. There is complete understanding on the part of the learner only when they are able to apply or transfer what has been learned to a new problem

or situation. Sufficient time should be allowed to work through each new skill or concept, applying it to different examples or situations.

## Using the manual to run a workshop

Throughout the manual there are boxes containing issues for discussion. These are labelled either Brainstorm or Point for discussion. The difference between the two is that Brainstorm points are intended as entry points for discussion of new issues, using the participants' own experience before the trainer introduces any new information. This will make the learning process more interactive and participatory; since the group will often discover that much of the information that needs to be conveyed can be drawn from the trainees' own experience, rather than having to be presented by the trainer in a lecture format.

Someone working through this manual could brainstorm simply by writing a list of answers to each question. In a workshop this is what the whole group does. The trainer can ask the group to contribute randomly, calling out their answers, or by going round the room in turn. The advantage of the latter is that it encourages everyone to participate, but it may be less spontaneous than people just shouting out their ideas.

- The aim of brainstorming is to get as many ideas as possible.
- Someone (preferably not the trainer) needs to write these on a flipchart or whiteboard.
- All ideas are recorded – all are of equal worth.
- Keep the tempo fast.

Once the ideas have been recorded they can then be classified, prioritised, discussed or put aside for future discussion.

The other Points for discussion are intended to consolidate understanding of information presented by the trainer and to offer trainees the chance to clarify any issues that they have not fully understood.

Some of the points for discussion are presented as case studies (some from real life, some fictitious). You as the trainer may wish to extend the number of case studies referred to by drawing on experience from your country. You can also offer the workshop participants to offer cases from their own experience for discussion. You could act out some of the case studies included in the manual as role plays.

It is clear that in the time available to regulators may be limited. Ideally you would need five days to cover all the sections in the manual. We however suggest that training is broken into more manageable two day workshops. During a two-day workshop, not all the discussion points are likely to be covered. It will be for the trainer to decide what are the most important issues to cover.

Some discussion points can be covered in small group discussions and reported back to the plenary. This will be a useful way of extending the ground that the whole group covers, as well as being a useful way of maintaining interest and active participation throughout the two days.

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Small group discussions have several advantages:

- They create variety, including a change of physical position, which will help to stimulate concentration.
- They allow greater participation, since there will be less waiting in turn to speak.
- They encourage reluctant participants who may be nervous about speaking to the whole workshop.
- They allow several different tasks to be completed at the same time.

Groups can be picked randomly. The commonest method is for participants to call out a number. All the 1s go together, all the 2s together and so on. There are a variety of other random methods from matching hair colour to matching the dates on coins in their pockets or purses.

Alternatively, the trainer may feel that it is useful for groups to incorporate different characteristics or experiences (for example, not having all-male or all-female groups). Groups could be selected randomly and then adjusted, or simply chosen by the trainer.

Try to vary the group composition for the different small group activities over the two days.

Set a time for completion of small group work, but do not be afraid to stop earlier if everyone seems to have finished. The trainer should visit each group to make sure that they have all understood the task required. Spend time with the groups if it appears that this will be helpful.

Make sure that each groups has a rapporteur – someone who will report its conclusions back to the whole workshop. There must be a full discussion of the groups' reports, so that no one is disadvantaged by not having taken part in a particular small group discussion.

## Preparation

The manual is generic in nature. That is to say, it seeks to introduce workshop participants to the general principles of broadcasting regulation and the best practices in the field internationally.

However, to be of practical assistance to regulators in carrying out their duties, the workshop training will have to be customised to reflect the realities in the country. In particular, it will have to incorporate a detailed presentation of the national broadcasting law, at least so far as it relates to the handling of regulation.

This will require considerable preparation on the part of trainers. It will not be possible to run a workshop simply using this manual and the draft agenda, without ensuring that the training team has the knowledge and expertise to address all relevant national issues.

## Getting started

As we have indicated, there are trainers' notes on each session at the end of each chapter. These elaborate on the agenda, as well as highlighting any particular issues of difficulty.

The introductory session is of particular importance, since it sets the learning objectives for the whole workshop. It is an opportunity for participants to set out their expectations and for them to get to know each other. The trainer should give particular thought to how to structure this opening session, even though it will probably not last more than half an hour.

This is a suggested way of organising the opening session:

expression (you can draw a real line on the floor or wall). They then each introduce themselves and say what experience they have.

For training of trainers you can repeat the exercise for training expertise and/or knowledge of the broadcasting regulation.

This exercise is good because it relates directly to the subject matter. There are many others than can be used simply to break the ice. For example, participants can be divided into pairs, have a brief discussion and then introduce each other to the group. Or each person can have a piece of card stuck to their back. Others must write their first impressions of the individual on the card.

### EXERCISE

#### Welcome: Ice-breaking exercise

Mapping experience and knowledge of participants

- i) How much do you know about Freedom of Expression?
- ii) How much experience do you have of training?
- iii) How much knowledge of or direct experience do you have of broadcasting regulation?

#### Review of participants' expectations

Participants write down on small cards/post it notes what they expect to gain from the training and stick these up on the wall to return to at the end.

#### Introduction of day's agenda and ground rules

How the manual will be used in this training

We will all try to stick to good time

Switch off mobile phones etc

Ice-breaking exercises are important. The one we suggest involves everyone standing in line, arranging themselves at an imaginary point on a spectrum from zero to infinity, depending on how much experience they have of freedom of

None of these exercises is intended to be serious. A good ice-breaker gets everyone relaxed and laughing.



Throughout the workshop it is also useful to have “energisers” – exercises that renew flagging energy at low points such as early afternoon. One suggested exercise is this: The trainer gives one participant a simple outline drawing (a house, tree or cat – something simple and conventional). The participant must not show the others. All participants stand in a line, the one with the drawing at the back. S/he “draws” the picture with a finger on the back of the participant just in front of him or her. The next participant does the same to the next one and so on down the line. The person at the front must draw the picture on a flip chart. Usually it bears no relation to the original. The learning point is the way in which information becomes distorted in transmission, but the main point of the exercise is relaxation and energising.

Reviewing participants’ expectations is important for the reasons that we have already identified. Learners will be motivated and encouraged if they are clear about what they are trying to learn. The trainer can tailor the workshop to the expectations of participants. All expectations should be reviewed at the end to see if they have been fulfilled.

Finally, it is important to set out some ground rules for the workshop. These should come from the participants themselves – they are more likely to be observed that way. The trainer may wish to submit some others for the group’s agreement. Important ground rules would include: not interrupting and respecting others’ points of view, keeping good time and switching off mobile phones.

WHAT IS BROADCASTING REGULATION FOR?

REGULATORY BODIES

LICENSING

REGULATION OF CONTENT

COMPLAINTS AND SANCTIONS

RESOURCES

NOTES FOR TRAINERS