



# MEMORANDUM

on

## The Draft Thai Public Service Broadcasting Agency Act

July 2007

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## About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: <http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us at the address listed on the front cover or by e-mail to [law@article19.org](mailto:law@article19.org).

## SUMMARY OF KEY RECOMMENDATIONS

### **Key Recommendations:**

- Consideration should be given to adding a new section to the law setting out its overall objectives or purposes and to explicitly stating that Board members and the Director are responsible for ensuring compliance by the Agency with its objectives.
- Consideration should be given to whether or not it is appropriate to require the Agency to carry programming from community broadcasters and whether it would not make more sense to set the level of programming from independent producers as a percentage of overall programming, rather than overall funds.
- The composition of the Selection Committee should be reconsidered and, in particular, to reducing the number of media and official representatives, and to increasing the number of members representing the overall public interest.
- The independence of the Agency and of the Board should be explicitly guaranteed.
- The role of the Prime Minister in appointing members of the Board should be clarified.
- Membership of the Board overall should be required to be representative of society as a whole and consideration should be given to making the rules regarding expertise of members more flexible.
- The power structure envisaged in the draft Act should be substantially revised to ensure that the Director has the power to manage the Agency on a day-to-day basis and that editorial independence is guaranteed.
- Consideration should be given to removing the cap on funds that the Agency may raise from the additional tax on liquor and tobacco. If the cap is retained, a representative body rather than the Minister of Finance should have the power to set it.
- The Agency should have the power to raise funds through advertising, albeit with strict conditions placed on this power.
- Consideration should be given to enhancing the complaints system by putting it under the control of a quasi-independent body established by the Agency rather than the Board, by broadening the range of issues covered by the code of ethics to include, among other things, methods of gathering information, and by providing for a wider range of possible remedial measures.

## 1. INTRODUCTION

This Memorandum provides an analysis of ARTICLE 19's main concerns with the draft Thai Public Service Broadcasting Agency Act (draft Act) currently being prepared by the Thai authorities.<sup>1</sup> We understand that the draft Act will be presented shortly to the National Legislative Assembly for its consideration. The purpose of the law is to transform Thailand Independent Television (TITV), formerly iTV and currently being run by the Office of the Permanent Secretary of the Office of the Prime Minister, into a public service broadcaster.

ITV was Thailand's only private television station, but it had its licence cancelled in March 2007, ostensibly due to a failure to pay outstanding concession fees and fines. Many observers, both in Thailand and internationally, expressed serious concern about the cancellation of the licence, which had been closely associated with former Prime Minister Thaksin. Subject to these concerns, ARTICLE 19 endorses in principle the idea of a providing for a true public service broadcaster (PSB) for Thailand. Where the independence of a PSB is properly protected and it is given sufficient funding, it can make a very important contribution to broadcasting diversity and a free flow of information to the public.

The comments and recommendations in this Memorandum are based on established international law and international best practice regarding freedom of expression, as well as specific standards relating to PSB. The analysis draws on two key ARTICLE 19 publications, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (ARTICLE 19 Principles),<sup>2</sup> which summarises international law and practice on broadcast regulation, and *A Model Public Service Broadcasting Law* (ARTICLE 19 Model Law),<sup>3</sup> which translates international standards relating to PSB into specific legal form.

The Memorandum is intended as input to the process of drafting a PSB law for Thailand which, while consistent with international and constitutional guarantees of freedom of expression, also takes into account the specific Thai political and socio-economic context. It contains our analysis of some provisions in the draft Act, along with recommendations for reform.

We note at the outset that the draft Act contains a large a number of positive features. It provides for strong guarantees for the independence of the new broadcaster, along with effective accountability mechanisms. And it envisages an innovative funding mechanism which is likely to be largely insulated against political interference. At the same time, we believe further improvements could be introduced to the draft both to bring it more fully into line with international best practice and to make it more effective.

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<sup>1</sup> Our analysis is based on an unofficial translation of the draft Act provided to us in May 2007, which is available online at <http://www.article19.org/pdfs/laws/thailand.psb.07.doc>. We take no responsibility for errors based on translation.

<sup>2</sup> Available at: <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

<sup>3</sup> Available at: <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>.

## **2. ANALYSIS OF THE DRAFT**

### **2.1. Purpose/Objectives**

#### Overview

The draft Act does not contain a specific section on its purpose. Section 7 states that an objective of the Thai Public Service Broadcasting Agency (Agency), the public service broadcaster established by the law, is to produce high-quality programmes for the benefit of the people, emphasising participation and learning. The same section provides that the Agency is non-profit and independent, and that it shall adhere to ethical standards. Section 8 sets out various powers and duties of the Agency. These include to provide television and radio, and to cooperate with foreign communication bodies (presumably both powers), and a number of duties, such as producing news, information and entertainment, promoting people's participation, promoting programme production by other entities (independent and community producers). Section 9 provides for a number of other, more technical, powers, such as holding property and borrowing money. The first paragraph of section 42 provides that programming shall conform to the objectives of section 7, including through providing accurate, timely and sufficient news, balanced programmes promoting people's participation, educational programming, programmes that promote cultural diversity and social harmonization, and creative entertainment or other programmes that promote positive social attitudes and/or develop aesthetic values. Section 43 provides, among other things, that 10% of the ongoing revenue of the Agency shall be used to procure programmes from independent and community programme producers.

#### Analysis

There are a number of ways in which these provisions could be improved. First, they are cast in terms of specific responsibilities of the Agency as such. It might be useful to add to this a section on the purposes of the law, which could provide useful guidance on the overall interpretation of the law. It could, for example, serve to inform the interpretation of provisions which do not fall under the control of the Agency (for example, the role of the Selection Committee in selecting the Board of Directors under section 11 and following, or the power of the Minister of Finance in relation to the funds allocated to the Agency under section 44). The ARTICLE 19 Model Law, for example, sets out as general purposes of the law providing high-quality programming, guaranteeing independence and ensuring financial stability (section 2).

Second, it might be useful to link the objectives/programming duties to the Board and Director. The ARTICLE 19 Model Law, for example, makes it quite clear that the governing board has an obligation to promote the guiding principles it sets out for public broadcasting (sections 7(2) and 10(1)) and failure to respect the guiding principles are also a grounds for removing the director (section 12(3)). This is an important means of promoting implementation of the objectives, as well as a more general accountability mechanism

Third, the objectives might be reviewed to ensure that they cover reasonably comprehensively and in a sufficiently clear manner what the Thai people would wish to see their PSB achieve. Some possible objectives that are either missing or not very clearly set out include building a sense of national identity; providing specialised programming to cater to different interests, as well as different ethnic/language groups; covering key decision-making bodies; providing innovative programming and comprehensive news; and ensuring the dissemination of key public announcements.

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Fourth, while the draft Act is welcome inasmuch as it promotes independent and community programme production, further thought might be given to this issue. It is not necessarily the role of a public broadcaster to disseminate community programming and this may, indeed, fit poorly with its overall mandate to serve the whole population, given the often very small audiences that community broadcasters target. In addition, consideration should be given to whether or not to allocate a fixed percentage of revenue or time to independent productions. 10% of revenue will represent a significantly higher percentage of time, given that the cost of independent production is normally much lower for various reasons (news programming is relatively expensive to produce, independent producers often have much lower overheads and they do not have to deal with costly matters such as transmission, public accountability and so on).

Fifth, we note a few technical points. Both sections 7 and 8 seem to mix duties/objectives of the Agency with other things (in section 7, the status of the Agency as an independent, non-profit body and, in section 8, the powers noted above). It might make sense to keep different aspects separate (the status of the Agency could be moved to section 5, for example, and the powers in section 8 to section 9). It might also make sense to bring sections 8 and (the relevant part of) 42 together. They already overlap considerably and, although formally directed at different things (since section 42 governs programme content), this is a formal distinction. If necessary, a clause could be included under the chapter on programming noting that programmes should conform to or deliver the objectives set out earlier.

#### **Recommendations:**

- Consideration should be given to adding a new section to the law setting out its overall objectives or purposes.
- The Board and Director should be given specific responsibility for ensuring compliance with the objectives/duties the law sets out for the Agency.
- The objectives should be reviewed to ensure that they do cover reasonably comprehensively and in a sufficiently clear manner the goals for PSB in Thailand.
- Consideration should be given to whether or not it is appropriate for a PSB to be required to carry community programming and to whether the percentage of independent production should be linked to revenue or instead be set as a percentage of programming.
- Certain technical amendments, along the lines of what is suggested above, should be considered.

## 2.2. Independence

### Overview

A number of provisions potentially have some bearing on the independence of the Agency. Section 4 states that the Prime Minister and Minister of Finance are responsible for the execution of the law, although this is probably a legal formality more than anything else.

The system for appointing the nine members of the Board of Directors, a key independence feature, is based on a 9-member Selection Committee comprised of the director or another representative from 4 media bodies (the National Press Council, the Thai Broadcast Journalists Association, the Federation of Broadcast Associations and the Council of Mass Media Institutions), from 3 other NGOs (the NGO Co-ordination Committee, the Federation

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of Consumers Organizations and the Council of Child and Youth Development Organizations), and from two official bodies (the Office of the Permanent Secretary of the Office of the Prime Minister and the Ministry of Finance) (section 11). This body forwards precisely nine names, indicating who shall be the chair, to the Prime Minister who formally appoints them (section 13).

A number of conditions are placed on who may be nominated for Board membership. Of the nine members, two shall have experience in the field of the mass media, three in the area of organisational management and four in various social fields (such as promoting democracy, working with children or the disabled, and community development) (section 10). Section 12 sets out a number of conditions on members, including being a Thai national, being at least 35 years old, not being a bankrupt or incompetent, not having been convicted of a serious offence and not having been fired or removed from office for dishonest performance or a crime of dishonesty. Section 14 further bars from appointment various people, including civil servants and government officers, political incumbents, board members of State enterprises, and partners and staff of broadcasting enterprises, although individuals are given a 15-day window to resign, to clear the way for their appointment to the Board. Section 16 further provides for removal upon death, resignation, reaching 70 years of age, conviction to a term of imprisonment or falling foul of either section 12 or section 14.

Members hold office for four years and may be reappointed for up to two consecutive terms. If the number of members falls below five, another appointments process is mandated (section 15). Members are remunerated as stipulated by Royal Decree (section 23).

Few rules of procedure are prescribed in the draft Act. The Office of the Permanent Secretary of the Office of the Prime Minister acts as secretariat for the appointment of the Selection Committee, but this would appear to be a technical role, with the bodies choosing their own representatives (section 11). Quorum for the Board is set at 'not less than one-half of the members' and voting is by simple majority, with the Chair having a deciding vote in case of a tie. Members with interests in a matter under consideration shall not take part in the discussion (sections 17-19).

The Board appoints the Director and also an Executive Committee comprised of the Director, who is *ex officio* the Chair, and not more than six full-time members, including one staff representative (section 22). Sections 12 and 14 apply to the Director, who must also be less than 60 years old and have various expertises (section 24). He or she may not be given a contract for longer than four years, but may be reappointed (section 28). The Director shall vacate office, in addition to expiry or termination of his or her contract, upon death, resignation, falling foul of either section 12 or 14, being removed due to failing a performance evaluation, being removed for reason by a two-thirds vote of the Board, or being convicted to a term of imprisonment (section 29). The Director, with Board approval, appoints Deputy Directors (section 26). The Director and Deputy Directors must all be able to work full time, and shall be remunerated in line with those in similar positions in the private sector.

The draft Act also sets out detailed rules relating to staff. There are three categories of staff: employees, specialists under contract and officials under secondment (section 35). Employees may not be civil servants or other officials, officials or members of political parties, a stakeholder in a transaction with the Agency, or persons who have been sentenced to imprisonment (section 36). They vacate office upon death, resignation, falling under the prohibitions in section 12 or being removed for failing a performance review.

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#### Analysis

Overall, this system is well designed to promote the independence of the Agency. As a general comment, it may be noted that a number of the provisions are excessively prescriptive, leading either to rules which lack the flexibility which may be required in practice or which are simply unreasonable. For example, the allocation of expertises among board members – two from the media, three from organizational management and four from various social fields – is too rigid and omits certain key areas of expertise. It would not appear to provide for the appointment of a lawyer, an engineer or an accountant who had relevant expertise but had not worked directly for the mass media, or an artist, academic or other personality of leading social standing who happened not to fall into any of the categories. Furthermore, it seems unreasonable to require the exact number from each sector to be appointed, if excellent people were identified which did not happen to meet this rule. Furthermore, there is no requirement that membership as a whole is representative of Thai society.

The rules requiring the Director and Deputy Director to be able to work full time and to be paid private sector market rates are similarly unduly prescriptive, particularly to be included in primary legislation. The Board should be given the flexibility to hire the best person for the job of Director, at a rate they deem appropriate. Even more flexibility is warranted in relation to the Deputy Directors. The rules become even more inflexible, and indeed unfair, at the level of staff. There is no justification, for example, for prohibiting all staff, which includes all manner of technical, administrative and even cleaning personnel, from being a member of a political party or from having been a bankrupt, as the application of section 12 to all staff would effectively do. Some credence must be given in these matters to the ability of the Director to run the organisation effectively.

It may be noted that the membership of the Selection Committee is rather heavily oriented towards the media, with four members, whereas all other social interests (other than as represented by officials) only have three representatives, mostly with a specific protective mandate (for consumers and children). Looked at differently, it is clear that the Committee represents only a very small range of interests and those which are represented mostly appear to have vested interests in the way in which the Agency will work which could undermine their ability to represent the larger public interest. Other sectors which might be considered would be academics, the legal community and/or the religious community. Similarly, we note that politically connected individuals are not allowed to be nominated for Board membership. We suggest that consideration also be given to applying this rule to the Selection Committee, or at least to reducing the number of official members from two to one.

The draft Act provides that the Selection Committee shall “submit to the Prime Minister for appointment” the names of Board members and that the Prime Minister shall publish those names in the Official Gazette. It is not clear why the Prime Minister is involved but presumably this is because of his or her formal power of appointment. It is similarly unclear whether or not the Prime Minister retains any discretion to refuse to appoint the members nominated by the Selection Committee, or some of them. It would be odd for the Prime Minister to have no discretion to refuse to exercise a general power that he or she holds. Experience in other countries shows that such lack of clarity can lead to a breakdown of the system envisaged in the law.

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The draft Act provides that those with an interest in a matter before the Board shall not take part in any decision on that matter. While that is a welcome provision, a stronger form of conflict of interest rule found in many laws is to prohibit altogether those who have significant vested interests in broadcasting from sitting on the Board. Someone with a major stake in a private broadcaster, for example, will have an inherent bias when it comes to decisions for the public broadcasters and should not, as a result, sit on the Board of the latter. The rules in the draft Act prohibit staff and partners, but not necessarily owners, from being appointed as members.

Remuneration of Board members is set by Royal Decree. It would be preferable to link this to a pre-existing system of remuneration, for example for other senior representative posts, such as membership of other boards. This would avoid any chance of it being used for political purposes.

Section 16 sets out the circumstances in which a member of the Board is deemed to have vacated that office. While it is important that the list of reasons be short, at the same time it may be necessary to remove a member where he or she either cannot or does not perform his or her duties as a member. The ARTICLE 19 Model Law, for example, provides for removal of a member where he or she fails without valid excuse to attend meetings for more than six months or becomes unable to perform his or her duties. While the latter, at least, may be abused, at the same time it is highly undesirable to have a non-functioning member of the Board. With appropriate safeguards, the possibility of abuse can be minimised. For example, removal could be effected in these cases by a two-thirds vote of all members or a similar vote by some other body, such as a parliamentary sub-committee.

A number of technical matters should also be considered. The draft Act requires the Selection Committee to select new members when the number of sitting members falls to less than five. This is an extremely small number, and could result in a situation where just 3 members constituted quorum and just two affirmative votes could decide an important matter. The rules of procedure set out in the draft Act are extremely brief and do not even address the very important question of holding meetings.

Finally, consideration should be given to including a strong statement of the independence of the Agency as a whole, as well as of the Board and its members. Section 7 does contain a statement to the effect that the Agency is independent, somewhat buried along with a number of other matters. A much stronger statement would be preferable. The ARTICLE 19 Model Law, for example, states:

[The Public Service Broadcasting Corporation] shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies, and no person or entity shall seek to influence the members or staff of [the Public Service Broadcasting Corporation] in the discharge of their duties, or to interfere with the activities of [the Public Service Broadcasting Corporation], except as specifically provided for by law. This autonomy shall be respected at all times. (Article 3(2))

A similar statement could be added for Board members. Again, the ARTICLE 19 Model Law, as an example, states:

All members of the Board shall be independent and impartial in the exercise of their functions and shall, at all times, seek to promote the Guiding Principles set out in section 4. (Article 7(1))

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In many countries, the law requires Board members to swear an oath, often included as an annex or schedule to the law, committing, among other things, to exercise their powers in an impartial manner, in the best interests of the public broadcaster.

#### **Recommendations:**

- Consideration should be given to amending the rules criticised above as being too prescriptive.
- Consideration should be given to requiring membership of the Board overall to be representative of Thai society.
- It is important that the Selection Committee serve the public interest and, to this end, the proposed membership should be reviewed with a view to reducing the number of media representatives, to broadening representation of the wider public and to reducing the number of official representatives.
- The question of the precise powers of the Prime Minister in relation to appointments to the Board should be clarified in the law.
- A rule prohibiting all of those with significant vested interests in broadcasting from sitting on the Board should be added to section 14.
- Consideration should be given to linking remuneration for the members of the Board to a pre-existing payment system.
- Consideration should be given to providing for removal of members of the Board who are unable or unwilling to perform effectively.
- A number of technical matters should be addressed. Replacement of members should take place before the number of members falls below five. More detail regarding procedures for the Board, at least concerning the holding of meetings, should be added to the law.
- Specific guarantees of independence of the Agency as a whole and specifically of Board members should be added to the law.

### 2.3. Role of the Board and Executive Committee

Section 20 of the draft Act sets out the powers and duties of the Board. These are very significant and give the Board a direct role in overseeing the detailed work of the Agency. Among other things, the Board determines the organisational structure and scope of powers of each division, approves the programme schedule, which must be submitted for such approval every three months (see section 42), and prescribes a code of conduct for itself, administrators and staff members. The Board also prescribes a code of ethics governing programmes (section 21), and considers complaints from the public regarding this code.

The draft Act also provides for the Board to appoint an Executive Committee comprised of up to seven members, including the Director, who shall be the chair. This body effectively controls the management structure for the Agency, overseeing the plan of operation, budgetary plans, management of personnel matters, the formulation of a Master Plan for network development, the programme schedule, the formulation of the code of ethics (which the Board apparently just approves – see above) and the rules governing hiring of staff (section 22). The Director, for his or her part, has responsibility for the efficient and effective administration of the Agency, as well as management of staff (section 24).

In a modern, highly competitive broadcasting environment, it is of the greatest importance that the director of a broadcasting enterprise be given the power, mandate and flexibility to manage without undue external constraints. It is, of course, also very important that the Board

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of a public broadcaster be given the power to ensure that the body is accountable and serves the public interest. The balance struck in the draft Act, however, gives far too much power to the Board and correspondingly little to the Director. The Board effectively controls the programme schedule and prescribes the team which the Director must work with to determine the management structure.

In the ARTICLE 19 Model Law, in contrast, the Board “has overall responsibility for the determination of internal policy, for ensuring compliance with all policies and the Guiding Principles ... for ensuring that SBC meets the highest standards of probity and value for money, for appointment of senior staff, including the Managing Director, and for setting the overall strategy of SBC.” At the same time, “The Board shall not interfere with the day-to-day management of SBC or with the editorial independence of the Managing Director and his or her staff” (section 10).

It may be noted that protecting the Director’s editorial independence is not only important for basic functionality but also serves to further bolster independence, which should be a key role of the Board. Ensuring a layer of decision-making independence between the Board and Director enables the Board to stand up for the Director, and defend him or her against external attempts at influence.

The role of the Board in relation to complaints should also be revisited. It may be appropriate for the Board to approve the Code but it should not be its role to decide upon complaints. This involves it in judging the day-to-day work of the Agency, which would undermine editorial independence, and is also impractical, particularly if there are a lot of complaints. A better model would be to require the Agency to establish a quasi-independent body to hear complaints.

#### **Recommendations:**

- The envisaged power structure in the draft Act should be substantially reconsidered and far more power given to the Director, and far less to the Board. In particular, the Director should have effective editorial independence to make decisions regarding programme content and the day-to-day running of the Agency.
- Consideration should be given to requiring the Agency to establish a quasi-independent body to decide upon complaints, rather than giving this role to the Board.

## 2.4. Funding

### Overview

Section 43 of the draft Act sets out the sources of funding for the Agency, which includes initial capital and property provided by the government (including the property of the existing TITV), a subscription (see below), service charges, donations, sponsorship and income, but not advertising revenue. The subscription comprises a 1.5% surcharge on the taxes required to be collected on liquor and tobacco. It is capped at two billion baht, although the Minister of Finance has the power to adjust it every three years. The subscription shall be collected by the Excise Department and the Customs Department, which shall deduct 5% of the sums collected to cover their costs.

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#### Analysis

The question of how to fund public service broadcasting is always a complex one and there are pros and cons associated with every system. The system in some countries, whereby viewers and listeners pay a direct subscription, has significant benefits, but it is almost impossible to impose in places where it did not exist previously, as in Thailand.

The idea of linking revenues to a commercial source of income, such as sales of liquor and tobacco, has certain advantages, namely a probability of growing roughly in line with inflation and the overall economy. While there are certain disadvantages to funding public broadcasting out of 'sin' taxes, such as these, this is very linked to underlying social attitudes and may not be a serious problem in the Thai context. More problematical is the one-way risk/benefit established by the draft Act, whereby the revenue is capped but no minimum revenue guarantee is provided. In other words, the Agency cannot take in more than the maximum but it does not correspondingly benefit from a guarantee of a minimum income. Even more problematical is the fact that the Minister of Finance, a political appointee, has the power to adjust the limit. Indeed, this has the potential to largely undermine the main driver for this funding approach, which is that it is independent of government.

It would be preferable either for the cap to be removed or for such power to be placed in the hands of a multi-party body, such as a committee of parliament. Furthermore, the system as envisaged would appear to accommodate inflation only every three years. It would be preferable for the limit to vary automatically in line with inflation, and separately to be varied every three years to ensure that the Agency can fulfil its mandate. It may be noted that growth in the broadcasting sector around the world has very significantly exceeded inflation in recent years, so that a dual system of increments makes sense.

Another concern with the proposed funding model is that the Agency is prohibited from raising funds through advertising. It may be noted that very few public service broadcasters around the world are under an absolute advertising prohibition and those that are tend to be the larger, more established broadcasters, who have significant public support and strong and stable established funding bases. Allowing some access to advertising is not only an important source of income but it also situates the broadcaster in its natural market. In the system proposed under the draft Act, for example, the Agency could be in serious trouble should liquor/tobacco revenues fall while broadcast advertising revenues soared, a not entirely improbable scenario.

In many countries, so as to prevent the public service broadcaster from becoming unduly beholden to audience share, and thus starting to resemble commercial broadcasters, special rules placing limits on advertising are imposed. These may limit overall access to advertising (either on a per-hour basis or as a share of overall revenues) and/or preclude advertising during certain programmes (for example children's or news programmes, or during films). Introducing similar rules may be considered here.

#### **Recommendations:**

- Consideration should be given either to removing the cap on revenue from the subscription or to providing for a minimum level of revenue, perhaps by averaging revenue from this source over a number of years. The maximum should also be increased annually, in line with inflation, subject to periodic alterations in its level.
- The power of the Minister of Finance to vary the level of funding should be transferred to a body which is more open and representative, such as parliament.

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Alternatively, this power could be given to a specially established body of citizens.

- The Agency should have the power to raise some revenue from advertising, although this source of funding should be subject to strict limits.

## 2.5. Accountability Mechanisms

The draft Act establishes a number of important accountability mechanisms, in addition to those that are inherent in the structures described above, including funding. The Board serves as a general accountability structure, providing oversight and a link to the public interest. It also oversees, as noted above, the development of a code of ethics which binds the Agency in its programme work. Finally, the Board is empowered to receive and consider complaints from the public, a form of direct accountability (see comments above). It shall establish a sub-committee for this purpose and complaints shall be assessed against the code of ethics (sections 20-21, 53).

The draft Act imposes a number of specific accountability structures on the Agency. It is required to have its accounts audited annually by an authorised auditor and in line with international standards (sections 49-50). A Council of Audience must be appointed by the Board, with not more than 50 members representing diverse groups from around the country, and with the role of providing comments and suggestions on programmes (section 51). The Board shall also require an external body to conduct an annual performance appraisal looking, at a minimum, at audience size and satisfaction, and donations made (section 52). The Board is required to report annually to the Cabinet and Parliament on the activities and performance of the Agency and a detailed list of items to be included in such report is listed in the law (section 54).

Section 21 sets out the key issues which the code of ethics shall consider. Consideration should be given to extending this list to include other matters, such as religion and methods of gathering information (including such matters as protection of children and victims of sexual crimes where relevant, using subterfuge to get information, attribution of material, harassing people to get information, covert recording, the conduct of interviews, etc.). The remedies identified in the draft Act for breach of the code include corrections, a right of reply and an apology. Consideration should be given to extending this list to include mediation and a change in existing practices.

The Council of Audience and Annual Performance Appraisal are useful ideas. Both are linked to the Board, however, and involve only a very limited number of public participants, probably rarely ordinary Thais except in a statistical sense. Consideration should be given to requiring the Agency to take its own measures to ensure it is responding to the audience, for example through audience surveys, townhall-type meetings (real or virtual), etc. Article 25 of the ARTICLE 19 Model Law, for example, states:

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

### **Recommendations:**

- Consideration should be given to widening the scope of the code of ethics in line with the suggestions above.

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- A wider range of sanctions should be available for breach of the code, including mediation and ordering the Agency to change its practices.
- Consideration should be given to placing a direct obligation on the Agency to conduct public reviews of its performance.

### 2.6. Licensing

Section 40 provides that the Agency shall provide a nationwide radio and television service and that it may provide other services, upon obtaining a licence from the National Broadcasting Commission. Section 67, on the other hand, states that the Agency shall be exempted from applying for a broadcast licence, although it is possible that this section applies only where no National Broadcasting Commission is in place.

These provisions are unclear. It is assumed that the intention is that the Agency may operate one national radio and one national television service without a license but that other services may be offered only with a licence. Regardless, this needs to be clarified.

#### **Recommendation:**

- The need or otherwise for the Agency to obtain a licence to operate needs to be clarified in the law.

## 3. RELEVANT INTERNATIONAL STANDARDS

### 3.1. Guarantee and Importance of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR)<sup>4</sup> is the flagship statement of the right to freedom of expression under international law:

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

As a resolution of the UN General Assembly, the UDHR is not directly binding on States, but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.<sup>5</sup> Moreover, Thailand is a party to the *International Covenant on Civil and Political Rights* (ICCPR),<sup>6</sup> a binding treaty based on the UDHR which contains a very similar guarantee of freedom of expression, again in Article 19.

Freedom of expression is often characterised as the cornerstone of the rights guaranteed by the ICCPR and other international human rights treaties, both because of its centrality to the democratic form of government and because of its contribution to securing other human

<sup>4</sup> UN General Assembly Resolution 217A (III), adopted 10 December 1948.

<sup>5</sup> For judicial opinions on human rights guarantees in customary international law, see, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.

<sup>6</sup> UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976. Thailand accessed to the ICCPR on 29 October 1996.

rights. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated, “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”<sup>7</sup> The European Court of Human Rights has stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.<sup>8</sup>

As the main conduit for public discussion on any and all matters, the guarantee of freedom of expression is of particular importance to the mass media, including public service broadcasters. The Inter-American Court of Human Rights, for example, has stated: “It is the mass media that make the exercise of freedom of expression a reality.”<sup>9</sup> The UN Human Rights Committee, the body that interprets and oversees the implementation of the ICCPR, has similarly stressed the importance of free media for the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>10</sup>

## 3.2. Freedom of Expression and Public Service Broadcasting

### 3.2.1. *Pluralism and public service broadcasting*

The free speech guarantees of the UDHR and ICCPR stress that freedom of expression includes the right of every person to *seek and receive* information and ideas *through any media*. At the outset, this means that States must refrain from placing unjustified restrictions on individuals’ ability to access the statements and opinions of others, irrespective of the medium used for their transmission. Pursuant to Article 2 of the ICCPR, however, the obligation of governments goes further: they must “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.”

In relation to the right to freedom of expression and the broadcast media, this means that governments must take active steps to promote the right of every member of society to receive information from a variety of broadcast sources. The broadcasting landscape a State creates should adequately reflect and serve all the different groups and strata of society. In other words, States are under an obligation to promote pluralism within, and to ensure equal access of all to, the media.<sup>11</sup>

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<sup>7</sup> 14 December 1946. The term ‘freedom of information’ is used in its wide sense, as the free circulation of information and ideas.

<sup>8</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

<sup>9</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

<sup>10</sup> UN Human Rights Committee General Comment 25, issued 12 July 1996.

<sup>11</sup> For elaboration and justification of this principle, see the European Court of Human Rights’ judgment in *Informationsverein Lentia and others v. Austria*, 28 October 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.

Public service broadcasting – a form of broadcasting that serves the entirety of society, including minorities, and is accountable to it for providing high quality and editorially independent news, information and other output – can make a significant contribution to media pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to realising the right to freedom of expression.<sup>12</sup>

### *3.2.2. Independence of public service broadcasters*

In order to be able to fulfil their mandate to broadcast ‘in the public interest’, it is of paramount importance that public service broadcasters (PSBs) are not aligned with any particular political, commercial or other interest but are to the greatest possible degree independent.

This implies, in the first place, that the body governing of the PSB must itself be independent. This principle has been explicitly endorsed in a number of international instruments, both global and regional in nature. The UN Special Rapporteur on Freedom of Expression, for example, has adopted a Declaration stating that,

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.<sup>13</sup>

The Special Rapporteur has also stressed the importance of independence in relation to PSBs in several of his annual reports.<sup>14</sup>

A number of national courts have similarly ruled that the right to freedom of expression and the public’s right to a pluralistic and free media require that a public service broadcaster’s governing body be independent. The Supreme Court of Sri Lanka, for example, held that a draft broadcasting bill which gave a government minister substantial power over appointments to the Board of Directors of the regulatory authority was incompatible with the constitutional guarantee of freedom of expression. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”<sup>15</sup>

Independence of the governing body is an important precondition for independence of the PSB, but not sufficient by itself. A number of further measures are necessary to prevent interference in or influencing of the broadcaster’s work.

First, the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. Neither the government nor any other outside entity should be entitled to interfere in the day-to-day decision-making of the PSB, particularly in relation to broadcast

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<sup>12</sup> See, in particular, the 2003 Bangkok Communiqué by the Asia Pacific Ministers of Broadcasting and Information, Bangkok, 27-28 May 2003; UNESCO’s Declaration of Alma Ata on Promoting Independent and Pluralistic Asian Media, endorsed by UNESCO’s General Conference in 1995; UNESCO’s Declaration of Sana’a, 11 January 1996, endorsed by UNESCO’s General Conference in 1997.

<sup>13</sup> Joint Declaration by the UN Special Rapporteur on freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, 18 December 2003.

<sup>14</sup> See, for example, his 1998 Annual Report, UN Doc. E/CN.4/1999/64, par. 5; 1997 Annual Report, UN Doc. E/CN.4/1998/40, par. 22.

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

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content. Accountability of the PSB for the observance of its mandate should be achieved through periodic reviews of its work by a body which represents the people, such as parliament; a right to interfere *ad hoc* would expose the PSB to a serious risk of political meddling and thereby undermine its independence.

Similarly, true independence is only possible if funding for the PSB is sufficient, stable and secure from arbitrary government control. Principle 36 of the ARTICLE 19 Principles states: “Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets.” The importance of well-designed funding rules has been recognised at the international level. Articles 17-19 of Recommendation No. R (96) 10 of the Council of Europe,<sup>16</sup> for example, note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public broadcasters susceptible to interference, for example with editorial independence or institutional autonomy. At the domestic level, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to ensure that sufficient resources are available to enable the public broadcaster to discharge its functions.<sup>17</sup>

Article 35.1 of the ARTICLE 19 Principles summarises the discussion above, recommending that the independence of a PSB be protected in the following ways:

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

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<sup>16</sup> Recommendation No. R (96) 10 of the Committee of Ministers to Member States on the Guarantee of the Independence of Public Service Broadcasting, adopted 11 September 1996.

<sup>17</sup> Decision 826/1998 [1998] Guir. cost. 3893.